



Court of Appeal
Supreme Court

New South Wales

Case Name: Scenic Tours Pty Ltd v Moore (No 2)

Medium Neutral Citation: [2018] NSWCA 300

Hearing Date(s): On the papers

Decision Date: 7 December 2018

Before: Payne JA, Sackville AJA, Barrett AJA

Decision: The following additional order is made:

14. The Court answers the Agreed Common Questions in the manner set out in the document entitled “Agreed Common Questions and Answers”, being Annexure A to the Court’s reasons for judgment in Scenic Tours Pty Ltd v Moore (No 2)

Catchwords: Representative proceedings – answers to common questions – costs orders

Legislation Cited: Civil Procedure Act 2005 (NSW)

Cases Cited: Avopiling Pty Ltd v Bosevski [2018] NSWCA 146
Scenic Tours Pty Ltd v Moore [2018] NSWCA 238

Category: Procedural and other rulings

Parties: Scenic Tours Pty Ltd (Appellant)
David Moore (Respondent)

Representation: Solicitors:
SWS Lawyers (Appellant)
Somerville Legal (Respondent)

File Number(s): 2017/282822

Decision under appeal:

Court or Tribunal: Supreme Court of New South Wales
Jurisdiction: Common Law
Citation: [2017] NSWSC 733
Date of Decision: 31 August 2017
Before: Garling J
File Number(s): 2014/223271

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

JUDGMENT

- 1 **THE COURT:** The Court delivered judgment in this matter on 24 October 2018.¹ This judgment deals with outstanding matters. It assumes familiarity with the Principal Judgment, including abbreviations.
- 2 The Court made orders in the Principal Judgment dismissing Mr Moore's claim for damages pursuant to s 267(4) of the ACL for disappointment and distress. Mr Moore's claim pursuant to s 267(3)(b) of the ACL for reduction in the value of the services remains to be determined by the primary Judge.²
- 3 The Court reached the following conclusions in the representation proceeding brought on behalf of Group Members:³
 - “(i) the primary Judge's findings that Scenic breached the Care Guarantee by reason of its pre-embarkation conduct in relation to Cruises 1, 4, 5, 6, 7, 8, 9 and 11 cannot stand;
 - (ii) the primary Judge's findings that Scenic breached the Care Guarantee by reason of its post-embarkation conduct in relation to Cruises 4, 5, 6 and 7 should not be disturbed;

¹ Scenic Tours Pty Ltd v Moore [2018] NSWCA 238 (Principal Judgment).

² Principal Judgment at [396], [399].

³ Principal Judgment at [397].

- (iii) the findings that Scenic breached the Purpose and Result Guarantees in relation to Cruises 1, 2, 3, 4, 5, 6, 7, 8, 9 and 11 should not be disturbed;
- (iv) the Group Members are precluded by s 275 of the ACL and s 16 of the *Civil Liability Act* from establishing that Scenic is liable pursuant to s 267(4) of the ACL to pay damages for distress and disappointment by reason of Scenic's breach of the Purpose and Result Guarantees;
- (v) the Group Members' claims for compensation for reduced value pursuant to s 267(3)(b) of the ACL by reason of Scenic's breach of the Care Guarantee in relation to Cruises 4, 5, 6 and 7 remain to be determined by the primary Judge;
- (vi) the Group Members' claims for compensation for reduced value pursuant to s 267(3)(b) of the ACL by reason of Scenic's breach of the Purpose and Result Guarantees in relation to Cruises 1, 2, 3, 4, 5, 6, 7, 8, 9 and 11 remain to be determined by the primary Judge; and
- (vii) the Group Members' claims referred to in (vi) are subject to Scenic's pleaded defence under s 61(3) of the ACL which also remains to be determined by the primary Judge."

Orders

- 4 The Court explained the orders to be made in the Group Members' case as follows:⁴

"400 Order 2 made by the primary Judge on 15 November 2017 provided that the common issues stated for determination be answered in the form of the Answers in the document described as "Answers to Common Issues Stated for Determination". Because of the conclusions ... reached many of the Answers cannot remain in place. More importantly, because of the difficulties with the form of this document, it would be neither appropriate nor helpful to attempt to reformulate the "Answers to the Common Issues" to give effect to these reasons for judgment. Instead the parties should be directed to agree on reformulated questions and answers that give effect to these reasons for judgment.

401 The following orders should therefore be made:

- 7. Set aside Order 2 made by the primary Judge on 15 November 2017.
- 8. The Group Members' claims for damages for disappointment and distress pursuant to s 267(4) of the ACL be dismissed.
- 9. Direct the parties to file within fourteen days agreed Common Questions and Answers thereto that give effect to these reasons for judgment, insofar as they address the claims of Group Members to compensation and damages by reason of Scenic's breaches and alleged breaches of the Consumer Guarantees.
- 10. In the absence of agreement, direct that
 - (a) Scenic file within 14 days its proposed Common Questions and Answers thereto, together with written submissions in support not exceeding five pages in length; and

⁴ Principle Judgment at [400]-[401].

(b) Mr Moore file within a further 14 days his proposed Common Questions and Answers thereto, together with written submissions in support not exceeding five pages in length.”

- 5 The parties have agreed on reformulated “Agreed Common Questions and Answers” (**Agreed Questions**). The document is Annexure A to this judgment.
- 6 The Agreed Questions accurately reflect the conclusions reached in the Principal Judgment. Although the Agreed Questions include some matters not in issue on the appeal, they are not now in dispute and it is convenient that they be included in a consolidated document. It is therefore appropriate that the Court order that the Common Questions be answered in the manner set out in Annexure A.

Costs

- 7 The Principal Judgment dealt with the costs of the proceedings as follows:⁵

“402 The primary Judge made an order in the Primary Judgment that Scenic pay Mr Moore’s costs of “the claim” on a party and party basis. My present view as to costs is as follows:

- (i) the costs of the proceedings in the Common Law Division should be determined by the primary Judge in the light of the outcome of the proceedings; and
- (ii) having regard to the fact that Scenic’s appeal has succeeded, but only in part, Mr Moore should be ordered to pay 50 per cent of Scenic’s costs of the application for leave to appeal and of the appeal.

403 On this basis, the following orders as to costs should be made:

- 11. Set aside Order 2 made by the primary Judge on 31 August 2017.
- 12. Order that the costs of the proceedings in the Common Law Division be determined by the primary Judge.
- 13. Order that Mr Moore pay 50 per cent of Scenic’s costs of the application for leave to appeal and of the appeal.”

The parties were given the opportunity to file further written submissions if they wished to argue for different costs orders.

- 8 Mr Moore filed written submissions seeking a variation to the costs order. He submitted that the parties should bear their own costs of the appeal for the following reasons:

⁵ Principal Judgment at [402],[403].

“(a) The issues on appeal reflect the reality that the proceeding was a hybrid of proceedings concerning Mr Moore's *personal* claim and his *representative* claim on behalf of passengers on 10 cruises;

(b) The appellant's success against Mr Moore in respect to the latter's *personal* claim did not involve any features peculiar to Mr Moore's position but, rather, reflected success on damages issues generally applicable to the representative claim. This means that the costs outcome should abide the result of the appeal concerning the representative claim;

(c) The great preponderance of expense in this appeal concerned (common) issues on the representative claim and, in that regard, many grounds of appeal were either not determined at all; or, to the extent that they were determined, the parties enjoyed mixed success.” (Emphasis in original)

- 9 The principles relevant to the costs of proceedings in which there has been a “mixed outcome” were recently restated in *Avopiling Pty Ltd v Bosevski*.⁶

“Section 98 of the *Civil Procedure Act 2005* (NSW) confers on the Court a wide discretion with respect to costs. Under rule 42.1 of the Uniform Civil Procedure Rules 2005 (NSW) the general rule is that the Court is to order that costs follow the event. The “event” may be characterised in more than one way. Generally the “event” refers to the result of the claim or counterclaim, as the case may be, and may be understood as referring to the practical result of a particular claim: *Doppstadt Australia Pty Ltd v Lovick & Sons Developments Pty Ltd (No 2)* [2014] NSWCA 219 at [15] per Ward, Emmett and Gleeson JJA. Where there has been a mixed outcome in the proceedings, and it is appropriate to entertain the process of apportioning costs as between different issues in the proceedings, in general such an exercise will be carried out on a relatively broad brush basis, and largely as a matter of impression and evaluation by the Court: *Doppstadt* at [19]; *James v Surf Road Nominees Pty Ltd (No 2)* [2005] NSWCA 296 at [36]; *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd (No 3)* (1998) 30 ACSR 20 at 22.”

- 10 Mr Moore's written submissions in substance concede that Scenic enjoyed a significant degree of success in relation both to Mr Moore's individual claim and the claims made on behalf of the Group Members. Mr Moore contends, however, that the issues on which Scenic succeeded were essentially questions of law while Scenic failed on factual issues. Accordingly, so Mr Moore argues, more time was spent on the issues on which Scenic failed than on the issues in respect of which it succeeded.
- 11 These submissions do not fairly reflect either the way in which the appeal was conducted or the outcome. A major part of Mr Moore's case at trial (both his personal claim and the claims brought on behalf of Group Members) rested on allegations as to Scenic's knowledge of river conditions and the adequacy of its response prior to embarkation of each cruise. Many of these allegations were

⁶ [2018] NSWCA 146 at [172] (Payne JA, McColl and White JJA agreeing).

introduced by way of late amendments to the pleadings.⁷ Scenic succeeded in setting aside the bulk of the primary Judge's findings on these allegations. Because of Scenic's success on these issues some of the factual questions explored at trial turned out to be either irrelevant to the appeal or unnecessary to decide. This was so notwithstanding that the parties devoted considerable attention in their submissions to the factual questions.

- 12 A good deal of time at the trial was also devoted to considering the consequences of the parties' failure to identify clearly the common issues of law and fact arising in the proceedings. This failure must largely be attributed to the manner in which Mr Moore presented the claims. It was primarily his responsibility to ensure that the representative proceedings were constituted and pursued in accordance with the requirements of the *Civil Procedure Act 2005* (NSW).⁸ The failure to do so created difficulties not only at the trial but on the appeal. Among other things, the parties were at odds as to precisely what had been decided and whether Scenic had been denied procedural fairness by the primary Judge making certain findings in the Group Members' case. The arguments on these matters were largely the consequence of the failure to structure the litigation around common questions of law and fact.
- 13 It is true that not all Scenic's challenges to the findings and conclusions of the primary Judge succeeded. In particular Scenic's attack on the primary Judge's characterisation of the "services" Scenic provided to customers was rejected. Had that attack succeeded it would have been fatal to Mr Moore's case and that of the Group Members. Mr Moore's success on this challenge must be taken into account in determining the appropriate costs order.
- 14 It would be quite inappropriate to attempt to assess costs in this case on an issue by issue basis. Many of the issues overlapped or were inter-related, while others were generated by the failure to identify satisfactorily common issues of law or fact. It is therefore necessary to adopt a "relatively broad brush approach". Having regard to the parties' respective successes and failures on the appeal and Mr Moore's particular responsibility for increasing the

⁷ Principal Judgment at [65].

⁸ See Principal Judgment at [69]-[77].

complexity and cost of the appeal, the orders made in the Principal Judgment should stand.

Orders

15 The following additional order should be made:

14. The Court answers the Agreed Common Questions in the manner set out in the document entitled “Agreed Common Questions and Answers”, being Annexure A to the Court’s reasons for judgment in *Scenic Tours Pty Ltd v Moore (No 2)*

Annexure A

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07 NOV 2018



Form 101 (version 3)

AGREED COMMON QUESTIONS AND ANSWERS

COURT DETAILS

Court	Supreme Court of New South Wales, Court of Appeal
Registry	Sydney
Case number	2017/292822

TITLE OF PROCEEDINGS

Appellant	Scenic Tours Pty Ltd ACN 002 715 602
Respondent	David Moore

PROCEEDINGS IN THE COURT BELOW

Title below	David Moore v Scenic Tours Pty Ltd (No. 2)
Court below	Supreme Court of New South Wales
Case number below	2014/223271

FILING DETAILS

Filed for	David Moore , respondent
Legal representative	Benjamin Hemsworth, Somerville Legal
Legal representative reference	CG:23951
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AGREED COMMON QUESTIONS AND ANSWERS

Q1: How are the 'services' supplied, or to be supplied, by Scenic to group members to be characterised, for the purposes of their claims under the Australian Consumer Law?

A1: The services to be provided by Scenic to group members were the benefits and facilities of each cruise tour they booked and paid for (or had booked and paid for on their behalf), as described in Scenic's Tour Brochure.¹

Q2: Were the said services merely co-extensive with or limited by the Terms and Conditions by which group members were contractually bound?

A2: No.²

Q3: Did the 'services' extend to the supply of information to group members:

(a) before the embarkation of their respective cruises; and/or

(b) after the embarkation of their respective cruises?

A3: (a) No.³

(b) Yes. The services extended to the provision of timely information about substantial disruptions to the respective itineraries known to Scenic or of which it ought to have known.⁴

Q4: Were the services to be performed wholly or partly outside Australia and, if so, do the provisions of the Australian Consumer Law apply to such services?

A4: The services were to be partly performed outside Australia. The provisions of the Australian Consumer Law apply to services performed outside Australia.⁵

Q5: What was the 'particular purpose' made known to Scenic by group members?

¹ [190].

² [144]-[184].

³ [197]-[202].

⁴ [203]-[205].

⁵ Q4 & A4 combine the questions and answers 3 & 4 made at first instance (White Folder 350).

A5: The group members impliedly made known to Scenic that they wished to enjoy an all-inclusive five star luxury river cruise experience with the additional services promised by Scenic.⁶

No determination has presently been made as to any additional purpose expressly made known to Scenic by any group members.⁷

Q6: *What was the 'result' that group members wished to receive from the services that was made known to Scenic?*

A6: The group members impliedly made known that the result which they wished to receive was the services which Scenic assured them that they would receive in the Tour Brochure.⁸

Q7: *Was there a breach of the 'Purpose' guarantee (s 61(1)) in respect to any cruise?*

A7: Subject to any s 61(3) defence made out in respect to any group members, there was a breach of the Purpose guarantee in respect to cruises 1, 2, 3, 4, 5, 6, 7, 8, 9 & 11.⁹

Q8: *Was there a breach of the 'Result' guarantee (s 61(2)) in respect to any cruise?*

A8: Subject to any s 61(3) defence made out in respect to any group members, there was a breach of the Result guarantee on cruises in respect to cruises 1, 2, 3, 4, 5, 6, 7, 8, 9 & 11.¹⁰

Q9: *Was Scenic's failure to comply with the purpose and result guarantees on the subject cruises due solely to causes occurring after it had supplied services to group members?*¹¹

⁶ [238]-[250].

⁷ *Moore v Scenic Tours (No.2)* [2017] NSWSC 733 at [398].

⁸ [281].

⁹ [85], [261]-[267].

¹⁰ [85], [282]-[283].

A9: No.¹²

Q10: Was Scenic under any obligation to provide information to group members about the prospect of significant disruption to their respective cruises before they embarked upon their cruises?

A10: No.¹³

Q11: Did any knowledge of Scenic (which it knew or ought to have known) that a cruise, once embarked, was likely to experience significant disruption to the itinerary, necessarily oblige Scenic to cancel the cruise?

A11: No.¹⁴

Q12: Was there a breach of the 'Care' guarantee (s 60) in respect to any cruise?

A12: The Care guarantee was breached in respect to cruises 4, 5, 6 & 7. In the case of each of these cruises, the breach was established by Scenic's failure to inform passengers on those cruises of the prospect of significant interruption to their scheduled itineraries.¹⁵

The Care guarantee was also breached in respect to cruises 10 & 13, although group members on those cruises did not suffer compensable loss.¹⁶ In the case of each of these cruises, the breach was established by Scenic's failure to inform passengers on those cruises of the prospect of significant interruption to their scheduled itineraries.

¹¹ *Moore v Scenic Tours (No.2)* [2017] NSWSC 733 at [447]-[451]; Question 9 identified in the Amended Statement of Issues (Appendix C to the Court's reasons for judgment); and Ground 8B of Scenic's Amended Notice of Appeal (White Folder, p 376).

¹² [307]-[309].

¹³ [290].

¹⁴ [298], [301].

¹⁵ [297]-[298] (cruise 4); [299]-[301] (cruise 5); [303] (cruise 6); [304] (cruise 7).

¹⁶ [15]. Findings of the breach made by the primary judge appear in *Moore v Scenic Tours (No.2)* [2017] NSWSC 733 at [694]-[696] (cruise 10) and [741]-[744] (cruise 13).

There was no breach of the care guarantee in respect to cruises 1, 8, 9, 11 or 12 for any failure to inform group members on those cruises, prior to embarkation, of any likely disruptions, or any failure to cancel a cruise.¹⁷

No asserted breach of the care guarantee was pursued in respect to cruises 2 & 3.¹⁸

Q13: Whether it is a defence for Scenic that it relied upon the advice(s) of its service providers, or 'nautical' partners, referred to in its Defence?

A13: No.

Q14: Whether the defendant's service providers were the entity or entities responsible for damage suffered by the group members?¹⁹

A14: No.

Q15: What heads of damage are recoverable for a claim for compensation under s 267 of the *Australian Consumer Law*?

A15: Subject to any s 61(3) defence made out, group members on cruises 1, 2, 3, 4, 5, 6, 7, 8, 9 & 11 were entitled to receive compensation under s 267(3)(b) for any reduction in the value of services received below the price they paid, arising from Scenic's non-compliance with ss 61(1) and (2) of the *Australian Consumer Law*.

Group members on cruises 4, 5, 6 & 7 were also entitled to receive compensation under s 267(3)(b) for any reduction in the value of services received below the price they paid, arising from Scenic's non-compliance with s 60 of the *Australian Consumer Law*.

The award of compensation under s 267(3)(b) is to be assessed by reference to objective criteria.²⁰

¹⁷ [286]-[291] (cruise 8); [293] (cruise 1); [294] (cruise 9); [296] (cruise 11). Cruise 12 was not considered on appeal. The finding of no breach of the Care guarantee in respect to that cruise appears in *Moore v Scenic Tours (No.2)* [2017] NSWSC 733 at [724].

¹⁸ *Moore v Scenic Tours (No.2)* [2017] NSWSC 733 at [496], [523].

¹⁹ Questions 13 & 14 were considered and answered at first instance, and were not put in issue on appeal.

²⁰ [331]-[335].

Group members are also entitled to damages under s 267(4) for any loss or damage suffered because of a failure to comply with the guarantees if such loss or damage was reasonably foreseeable as a result of such failure, however, there is no entitlement under that provision to any damages for distress or disappointment.

Q16: Is any award for compensation under s 267(3)(b) to be reduced on account of any payment received by a group member pursuant to a travel insurance policy?

A16: No.²¹

Q17: In circumstances where New South Wales was the proper law of the contract and the non-compliance with the consumer guarantees occurred outside New South Wales, does s 275 (by picking up and applying s 16 of the *Civil Liability Act 2002 (NSW)* as a surrogate federal law) operate to preclude Scenic being liable to passengers for damages under s 267(4) for distress and disappointment?

A17: Yes.²²

Q18: Whether any or all of clauses 2.10(h), 2.12 and 2.13 of the standard terms and conditions of the contract applied to exclude or limit Scenic's liability²³.

A18: No.

Q19: Did each of cll 2.6(d) and 2.10 of the standard terms have the effect pleaded in paragraph 17J of the Third Further Amended Statement of Claim?

A19: Not necessary to answer.

Q20: In respect of each of cll 2.6(d) and 2.10 of the standard terms:

²¹ [339]-[341]. There was an additional reason in the case of Mr Moore which may or may not apply to other group members, depending upon the terms of any applicable policy and the reasons for payment.

²² [351]-[391].

²³ Question 18 was considered and answered at first instance, and was not considered on appeal.

- 20.1 did either or both cause a significant imbalance in the rights or obligations arising under each contract?
- 20.2 was either or both reasonably necessary to protect the defendant's legitimate interests?
- 20.3 would either of them cause detriment to the plaintiff or group members if applied or relied upon by the defendant?²⁴

A20: Not necessary to answer.

Q21: With respect to Questions 1-20 inclusive, are the answers common to all group members, some group members and, if so, which ones, or no group members.

A21: Save to the extent indicated in the answers to the said questions, all of the answers are common to the claims of group members who resided in Australia and Vanuatu, and who contracted with Scenic. A determination has not presently been made as to whether all of the answers are common to other passengers on the cruises who resided outside Australia and Vanuatu.

SIGNATURE

Signature of legal representative



Capacity

Solicitor

Date of signature

7/11/18

²⁴ Questions 19 & 20 were considered and answered in this way at first instance and were partly raised in Mr Moore's draft Notice of Contention (White folder 371-372). That Notice of Contention ultimately was not considered: [305].

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