

**Scenic Tours Pty Ltd v Moore
(2017/292822)**

Scenic's submissions on Mr Moore's application to vary cost order

A. Introduction

1. There should be no variation to Order 13 given Scenic enjoyed a large degree of success on the appeal.

B. Principles

2. In *Avopiling Pty Ltd v Bosevski* [2018] NSWCA 146, Payne JA at [172] said (underlining added):

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.

3. In *Cellarit Pty Ltd v Cawarra Holding Pty Ltd (No 2)* [2018] NSWCA 266, McColl JA at [14] said (underlining added):

"Where there is a mixed outcome in proceedings, the question of apportionment of costs between issues on which the party who has overall been successful, and those on which that party has failed, is very much a matter of discretion, and mathematical precision is illusory."

C. Findings and Argument

4. At [396], Sackville AJA summarised the Court's conclusions in Mr Moore's case as follows:

(i) the primary Judge's finding that Scenic breached the Care Guarantee in relation to Cruise 8 cannot be sustained;

(ii) the primary Judge's finding that Scenic breached the Purpose and Result Guarantees in relation to Cruise 8 should not be disturbed;

(iii) the primary Judge's award of \$10,990 in respect of Mr Moore's claim for compensation pursuant to s 267(3)(b) of the ACL for Scenic's breach of the Purpose and Result Guarantees was affected by an error of law and must be set aside;

(iv) Mr Moore's claim for compensation pursuant to s 267(3)(b) of the ACL should be remitted to the primary Judge for determination in conformity with this judgment;

(v) Mr Moore is 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; and

(vi) accordingly, the award of damages in Mr Moore's favour of \$2,000 pursuant to s 267(4) of the ACL must be set aside and his claim for damages dismissed.

5. It can be seen that Scenic was successful on all issues save in respect of issue (ii) which involves a short question of construction.

6. At [397] Sackville AJA summarised the Court's conclusions in the Group Members' case as follows:

(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;

(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.

7. It can be seen that Scenic was successful save in respect of issues (ii) and (iii); the former being the identical question of construction in respect of which Mr Moore enjoyed success.
8. In relation to the Group Members' claims, Sackville AJA at [400] said:

"Because of the conclusions I have reached many of the Answers cannot remain in place."
9. To some extent, this was a consequence of the formulation of common questions and answers (by Mr Moore over Scenic's objection).
10. The Court's findings resulted in Agreed Common Questions and Answers being filed on 7 November 2018 which contained, in the result, a number of answers favourable to Scenic: see for example answers 3(a), 7, 10, 11, 15 and 17.
11. A number of the other answers which are favourable to the Group Members were not controversial.
12. One plank in Mr Moore's submission is founded upon the proposition that the Court did not make findings in relation to Scenic's knowledge prior to the embarkation of cruises 1 – 9 and 11¹. It was not necessary for the Court to do so because Scenic succeeded on the question as to whether the "services" it supplied extended to the

¹ Respondent's submissions, paragraph 9.

supply of information to Group Members before the embarkation of their respective cruises: [197] – [202]. That success is not a matter which should tell against Scenic.

13. In substance, the only success which Mr Moore enjoyed was in upholding the finding that the services supplied by Scenic were not co-extensive with or limited by the terms and conditions by which the Group Members were contractually bound. As stated above, that involves a short question of construction.
14. Further, unnecessary time was taken by Mr Moore in disputing that Scenic is entitled to rely upon the defence provided by s61(3) of the ACL. At [83] Sackville AJA said:

Scenic pleaded s 61(3) of the ACL as a defence to the claims by Mr Moore and Group Members founded on Scenic's contravention of the Purpose Guarantee. Scenic submitted in this Court that although the primary Judge addressed the s 61(3) defence when determining Mr Moore's individual claim, his Honour expressly reserved Scenic's right to rely on s 61(3) as a defence to the claims made on behalf of Group Members.
15. Notwithstanding the absence of controversy about the matters summarised at [83], Mr Moore challenged Scenic's entitlement to rely upon the s61(3) ACL. There was no reasonable basis for Mr Moore's opposition to the question of Scenic's entitlement to rely on s61(3) ACL.
16. There should be no variation to order 13 and Scenic should have its costs of this application.

29 November 2018

David S Weinberger
Tel: 8815 9255
Email: david.weinberger@ninemewentworth.com.au