

MOORE v SCENIC TOURS PTY LTD (S285/2019)

Court appealed from: New South Wales Court of Appeal
[2018] NSWCA 238

Date of judgment: 24 October 2018

Special leave granted: 13 September 2019

Mr David Moore booked a two week European river cruise with Scenic Tours Pty Ltd (“Scenic”) which was scheduled to leave Amsterdam on 3 June 2013. Mr Moore’s cruise however was seriously affected by high water levels on the Rhine and Main Rivers. As a result, bus travel replaced luxury boat travel for parts of that overall journey. Similar problems also affected a number of Scenic’s other European river cruises around that time. Mr Moore later commenced representative proceedings on behalf of both himself and others (“the Group Members”) who had booked on those other river cruises.

The main issues at trial were whether Scenic had supplied services to Mr Moore (and each other Group Member) without due care and skill. This was said to be in contravention of s 60 of the Australian Consumer Law (“ACL”) (“the Care Guarantee”). It was also submitted that those services were not fit for the purpose for which Mr Moore and each Group Member acquired them. This was said to be in contravention of s 61(1) of the ACL (“the Purpose Guarantee”). It was further alleged that the services were not of a nature and quality as could reasonably be expected. This was said to be in contravention of s 61(2) of the ACL (“the Result Guarantee”). Collectively these guarantees are known as the Consumer Guarantees.

Justice Garling found in favour of Mr Moore, holding that Scenic had failed to comply with the Consumer Guarantees. A judgment of \$16,539.85, inclusive of interest, was then awarded.

On 24 October 2018 the Court of Appeal (Sackville & Barrett AJJA, Payne JA) allowed Scenic’s appeal in part. Their Honours held that Justice Garling had erred in finding that the services to be provided by Scenic included informing Mr Moore *before the commencement of a cruise* of events that might have an adverse impact on the scheduled itinerary. The Court of Appeal however found that Justice Garling had correctly held that Scenic had failed to comply with the Purpose Guarantee. This was because the services it provided to Mr Moore were not reasonably fit for the particular purpose for which he acquired them, namely experiencing a cruise in accordance with the itinerary published in Scenic’s brochure.

The Court of Appeal also held that Justice Garling had erred in awarding damages under s 267(4) of the ACL due to Scenic’s failure to comply with the Purpose and Result Guarantees. This was because s 275 of the ACL picked up and applied s 16 of the *Civil Liability Act 2002* (NSW) (“Civil Liability Act”) as a surrogate federal law. The Court of Appeal found that s 16 of the Civil Liability Act applied notwithstanding that Scenic’s contraventions of the Purpose and Result Guarantees occurred outside Australia. Their Honours found that there

was a sufficient geographic connection with New South Wales because s 16 applied to a claim for damages in a New South Wales court.

The Appellant has filed a Notice of Constitutional Matter, while the Attorney-General of the Commonwealth filed a Notice of Intervention.

In this matter, the grounds of appeal include:

- While correctly finding that s 79 of the *Judiciary Act 1903* (Cth) cannot pick up and apply s 16 of the Civil Liability Act as a Commonwealth law directing a court exercising federal jurisdiction in how it is to fix damages under s 267(4) of the ACL for breach of the statutory guarantees in ss 60 and 61 of the ACL (CA [359]), the Court of Appeal erred in finding that s 275 of the ACL operates to apply s 16 of the CLA as a Commonwealth law to achieve that same result (CA [388]-[391]).