

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

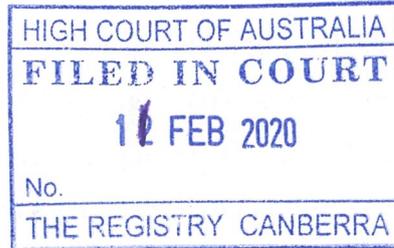
No. S285 of 2019

BETWEEN:

DAVID MOORE
Appellant

and

SCENIC TOURS PTY LTD
Respondent



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APPELLANT'S OUTLINE OF ORAL ARGUMENT

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Part I: Certification

1. This outline of oral argument is in a form suitable for publication on the internet.

Part II: Propositions to be advanced in oral argument

Summary of core issues

2. Moore acquired from Scenic a “luxury five-star all inclusive river cruise” (PJ [393]). Scenic’s brochure said: “From the moment you step on board ... you will enjoy a level of inclusive luxury and service that is unsurpassed on the waterways of Europe” (PJ [320]). It invited passengers to “relax and watch the beautiful landscapes ... pass by” (PJ [750]). Scenic failed to comply with the consumer guarantees in ss 61(1)-(2) ACL in providing Moore’s cruise.
10 Moore brought an action under s 267(4) ACL, contending that he suffered disappointment and distress because this experience did not eventuate. He did not claim to have suffered any physical injury or psychiatric illness. Garling J awarded \$2000 in damages under s 267(4) ACL. The NSWCA overturned that award, invoking s 16 CLA as picked up by s 275 ACL.
3. All three grounds address, in different ways, the same question: does s 16 CLA apply to direct the NSW Supreme Court that it cannot award Moore the \$2000 in damages for disappointment and distress otherwise available to him under s 267(4)? The answer is “no”. That is due to the scope of federal law: the *nature of the laws picked up under s 275 ACL* (Ground 1). Alternatively, it arises from the proper construction of the State law given the *character of Moore’s damages claim* (Ground 3) or the *territorial limits governing s 16 CLA* (Ground 2).
20 **“Liability” laws picked up by s 275 ACL (Ground 1: AS [18]-[33]; Reply [3]-[7])**
4. Section 267(4) ACL: This provision: (i) creates a cause of action for a supplier’s breach of the consumer guarantees; and (ii) creates an entitlement to damages for certain *heads of loss* (all losses arising from the failure, within the limits of reasonable foreseeability) quantified by reference to a *particular measure* (damages for “any loss or damage suffered ...”).
5. Laws captured by s 275 ACL: “Liability” in s 275 means legal responsibility for a wrong and the concomitant entitlement to a remedy. The State and Territory laws to which s 275 attaches are those which take as their premise a breach of contract and then preclude (ie deny altogether) or limit (ie place a monetary or other cap on) liability in that sense – including by preventing recovery of a remedy that would ordinarily flow from the liability as a matter of law.
- 30 6. Section 275 does not pick up State and Territory laws regulating the heads of loss, or the quantification of damages, that apply when courts assesses the remedy for a proven liability.

7. This is supported by a close analysis of the following features of the legislative history.
 8. Origins in s 74(2A) TPA: (i) pre-2004, the implied warranty in s 74(1) TPA (2/JBA tab 6); (ii) *Treasury Legislation Amendment (Professional Standards) Act 2004* (Cth) (2/JBA tab 10); (iii) *Professional Standards Act 1994* (NSW) (2/JBA tab 15); and (iv) *Wallis v Downard-Pickford (North Queensland) Pty Ltd* (4/JBA tab 27).
 9. Concurrent amendments in 2004: *Trade Practices Amendment (Personal Injuries and Death) Act (No 2) 2004* (Cth) (2/JBA tab 9), inserting damages caps (Pt VIB) into the TPA.
 10. 2010 legislative history: In enacting the CCA, Parliament created a new statutory cause of action for consumers against suppliers of services (s 267(4) ACL); provided in the same provision for a broad measure of damages; left s 74(2A) TPA, with its language of “liability” etc, materially unchanged in its new form as s 275 ACL; and inserted old Pt VIB into the CCA without applying it to claims against suppliers of services under the consumer guarantees. Current ss 64A, 276A, 281 and 285 ACL operate consistently with s 275.
 11. Section 16 CLA: Section 16 assumes the existence of a liability sounding in an entitlement to damages, and directs a court as to the quantum of damages that may be awarded for one particular head (non-economic loss) and the manner of assessing those damages. It is *not* a law that limits or precludes “liability” and “recovery of any liability” within s 275 ACL.
- Damages under s 267(4) ACL for disappointment and distress (Ground 3: AS [47]-[58])**
12. The damages claimed by Moore were analogous to common law damages for loss of expectation of relaxation or enjoyment: *Baltic Shipping Co v Dillon* (3/JBA tab 17). The loss he suffered was the failure to receive the pleasure and comfort that were the intended purpose and result of the cruise, manifesting in feelings of disappointment and distress.
 13. Key CLA provisions: Section 16 CLA only applies to Moore’s damages award if (i) his claim is for “personal injury damages” (ss 11A and 11 CLA); *and* (ii) the loss for which the damages are awarded is “non-economic loss” (s 3 CLA).
 14. Personal injury damages: These damages do not “relate to” any personal injury (ss 11A and 11 CLA). They “relate to” Moore’s lost expectations.
 15. Moore’s claim for damages is not related to any “impairment” of his “mental condition”. Moore has suffered no “injury”, “impairment” or “harm” (see ss 11, 27, 31 CLA). There is nothing wrong with his “mental condition”. His feelings of disappointment and distress flow

directly from Scenic’s breach of the consumer guarantees, and are nothing more than a healthy reaction to an unfulfilled promise.

16. Non-economic loss: The damages are not awarded for “non-economic loss” (s 3 CLA). Neither “pain and suffering” nor “loss of amenities of life” captures disappointment and distress arising where a plaintiff has not received a promised or guaranteed benefit.
 17. Baltic Shipping Co v Dillon (3/JBA tab 17): Mason CJ’s analysis at 359-360, 362-3 and 365, relevantly describing damages for disappointment and distress “caused by the breach of a contract ... the object of the contract being to provide pleasure or relaxation” (at 363), aptly captures the conceptual nature of Moore’s claim. See also other judgments at 371, 381, 405.
 - 10 18. NSW v Williamson (4/JBA tab 25): *Williamson* at [34] emphasises the need to characterise the damages sought by reference to the nature of the interest protected by the claim.
 19. Insight Vacations Pty Ltd v Young (CA) (5/JBA tab 30): In contrast to *Baltic* and this case, the claimant in *Insight Vacations* suffered disappointment and distress arising from personal injury: at [129], [155], [173]. Only Basten JA (at [124]-[125]) squarely considered whether *Baltic* damages (ie awarded in the absence of injury) were awards for “non-economic loss” within the CLA. It was not necessary for his Honour to do so, and his reasons were erroneous. Personal injury under the CLA is conceptually different from lost expectations: contra [125].
- Territorial limitations governing s 16 CLA (Ground 2: AS [34]-[41], [44]-[46]; Reply [8]-[12])**
20. Section 12(1)(b) Interpretation Act: A provision may, on its proper construction, include references to more than one “matter or thing” with a geographical connection to NSW. Whilst s 16 CLA applies only to a NSW court/ tribunal (CA [388]), that is not the end of the matter.
 21. Lex causae: Section 11A CLA directs a court to apply s 16 CLA to certain “claim[s]” for damages. Applying s 12(1)(b), such “claims” must be for wrongs which, viewed as torts, are governed by NSW law. This is consistent with the CLA’s enactment as a comprehensive tort law reform, and with the territorial focus of the public liability crisis to which Pt 2 was directed.
 22. Place of death/ injury: Alternatively, the additional “matter or thing” connected to NSW is the “death of or injury to a person” (s 11 CLA) which grounds the claim for damages. In most personal injury cases, these two limitations would lead to the same result.
 23. Application to facts: Section 16 CLA does not apply to Moore’s claim because Scenic’s wrong, and Moore’s injury, occurred outside Australia: PJ [910], [943]; CA [379], [345](vi), [348].