IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No. S285 of 2019

BETWEEN:

David Moore

Appellant

and

Scenic Tours Pty Ltd

Respondent

RESPONDENT'S OUTLINE OF ORAL ARGUMENT

Part I:

1. This outline is in a form suitable for publication on the internet.
2. The Outline uses the terms defined in the parties' written submissions.

Part II: Ground 1 – s 275 ACL picks up and applies s 16 CLA

3. Section 16 of the CLA is a law that "applies to" limit or preclude liability (and recovery of that liability) for the failure to comply with the ACL consumer guarantees. It does so by command to the court: ss 11A(3), 16(1),(2),(3); **RS [26]**.
4. That conclusion follows from the ordinary meaning of the language in s 275, particularly "liability": see **AS [18] and fn 3**, **RS [12]**.
5. It is supported contextually by other provisions in the ACL and CCA containing limitation of liability provisions: ACL ss 64A(1),(2), 276A, 281, 285(2); CCA s 137 **[JBA 1/3/258, 336, 340, 343, 172]**; see also the Schemes at RS fn 8: **RS [14]-[17]**.
6. It is supported by the legislative history **[see CAB 2/405-7]**, in particular, of s 74(2A) TPA, introduced in 2004 by the TLA(PS) **[JBA 2/10]**. This reveals that the concern was that the statutory or contractual actions could be used as an alternative to negligence claims, thereby avoiding the intent of the Professional Standards legislation (to allow professionals to access caps on liability): **RS [18]-[24]**.
7. The TLA(PS) was intended to overcome the effect of *Wallis*, but not in the way suggested at **AS [23]-[24]**: see *Insight CA* at [145] **[JBA 5/30/1606]**. Section 74(2A) TPA was intended to make the claim generated from the s 74 TPA implied terms subject to State limitations on liability in the sense used in *Wallis*: **RS [19]-[20]**.
8. Section 275 ACL followed closely the language of s 74(2A) TPA. The EM identified a focus on legislation on limiting the liability of providers of recreational services **[JBA 6/41/1835]**; **RS [23]**.
9. The context and legislative history do not support the Appellant's attempts to read

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into s 275 a dichotomy between liability (in terms of legal responsibility) and liability for damages: cf **AS [18]-[22]**. Even if such a dichotomy was to be discerned in the section, it does not answer the phrases "recovery of that [or any] liability". "Recovery" bespeaks remedy, such as of damages under s 267(4) ACL: **RS [13]**.

Part II: Ground 2 – No additional geographic limitation upon s 16 CLA

(1) No warrant for multiple territorial limitations

10. The Appellant accepts that s 12(1)(b) IA **[JBA 2/11/753]** does not require every aspect of a provision to be territorially limited: **AS [34]**.
11. The Appellant does not challenge CA [388] **[CAB 2/419]** that the matter or thing in and of NSW for the purposes of s 12(1)(b) IA is the awarding of damages in NSW by a court or tribunal: **RS [28]**.
12. Once one territorial nexus is established, there is no warrant as a matter of statutory construction to imply additional territorial limitations: ss 31, 5(2) IA **[JBA 2/11/764, 752]**, *O'Connor* **[5/34/1699];** Pearce & Geddes [6.37] **[6/54/1938]**; **RS [28]-[29].**
13. Nor is a further territorial limitation required as a matter of principle or authority: *Insight HCA* **[JBA 3/21]**; *Old UGC* **[3/23]**; *Chubb* **[5/29]**; *O'Connor* **[5/34]**: **RS [30]-[31]**.
14. Policy and practical considerations militate against multiple central conceptions/ hinges that would further limit the scope of the statute: **RS [32]-[34].**

(2) Text, context and legislative history

15. The Appellant's reliance on one of the possible "unstated assumptions" in [16] of *Insight HCA* is misplaced. Part 2 of the CLA has a different concern and sphere of operation to Pt 1A. Accordingly, the Appellant's two territorial limitations, drawn from negligence, are inappropriate: **RS [36].**
16. *Text & context*: Section 16 and 11A CLA make it clear that the reach of Pt 2 extends beyond negligence and tort **[JBA 1/41/370, 364]**. Unlike some other Parts, its field of operation is not confined to negligence or quasi-negligence: see particularly, Pt 1A, s 5A **[1/357]**; Pt 3, s 28 **[389]**; Pt 4, s 34 **[391]**; Pt 5, s 40 **[394]**; see also Pt 12, s 72 **[407]**; Pt 2A, s 26B **[375]**. Other Parts, like Pt 2, extend to civil liability, irrespective of the cause of action. The Court's comments in *Insight HCA* as to Pt 1A's central focus **[3/21/1253]**, should be understood as being limited to that Part: **RS [38]-[39]**.
17. *Legislative history*: The CLA as originally enacted **[JBA 2/12]** only included Pts 1 and 2 and was largely restricted to personal injury damages. It was enacted before the Ipp Report. The legislature's intention was to mitigate the public liability crisis

facing defendants in NSW courts **[6/50/1907]**. The concern of Pt 2 is therefore courts, and defendants in those courts, not the location of the damage: **RS [40]-[43]**.

(3) Policy arguments

18. Policy considerations militate against the Appellant's construction: **RS [44]-[47]**.

Part II: Ground 3 – *Baltic Shipping* type damages fall within Part 2 CLA

19. Despite not being consequent on a physical or psychological injury, *Baltic Shipping* type damages are capable of satisfying the definitions of "personal injury damages" in s 11 and "non-economic loss" in s 3 CLA: **RS [59]**.
20. That follows as a matter of statutory construction (ss 3, 11, 11A cf Pt 3 particularly s 27) and authority: *Baltic Shipping*, *Corby, Insight CA*, *Ibbett*: **JBA 3/17 and 5/30, 36, 37; RS [56]**.
21. It is the nature of the loss or damage (i.e. distress and disappointment) to which the statutory definitions are directed. Part 2 CLA is not concerned with the cause of action pursuant to which they are claimed (s 11A(2)) or otherwise the mechanism by which the damages was sustained: **RS [60]-[62], [66].**
22. Damages for distress and disappointment (which have been labelled in holiday and other cases "expectation damages") fall within the definitions of both personal injury and non-economic loss: *Baltic Shipping*, *Ibbett*, *Corby*, *Insight CA*, *McLennan v Meyer Vandenberg* [2020] ACTCA 7: **RS [56]-[62], [68]-[69].**
23. In holiday cases, the state of mind before the holiday is to be contrasted with that during and/or after it: *Baltic Shipping* at 371, 399 **[JBA 3/17/932, 960]**.
24. In each case, the holidaymaker starts off with a heightened sense of expectation and excitement. When that is dashed, it is apt to be described as an impairment of mind, or at least personal injury. It falls comfortably within that which common law would regard as pain and suffering or loss of amenities of life: **RS [65]**.
25. To describe the disappointment and distress as a "healthy reaction of a natural mind to the expectation that was not fulfilled" **[AS [53]]** does not gainsay that injury has been sustained. The effect on the mind has been palpable and adverse: **RS [61]**.
26. The Respondent's construction of Pt 2 CLA is consistent with its legislative purpose and history. There is no reason why the legislature would choose to exclude or limit other small damage recoveries but permit those for *Baltic Shipping* type damages. Small claims against tourism operators based on the principles in *Baltic Shipping* are a paradigm example of mischief to which Pt 2 was directed: **RS [65]**.

11 February 2020

David L Williams **David Weinberger** **Alicia Lyons**