



## HIGH COURT OF AUSTRALIA

24 April 2020

### MOORE v SCENIC TOURS PTY LTD [2020] HCA 17

Today the High Court unanimously allowed an appeal from a judgment of the Court of Appeal of the Supreme Court of New South Wales concerning damages for disappointment and distress caused by a breach of consumer guarantees in the *Australian Consumer Law* ("the ACL"). The High Court held that although s 275 of the ACL picked up and applied s 16 of the *Civil Liability Act 2002* (NSW) ("the CLA") to proceedings in federal jurisdiction, s 16(1) of the CLA did not apply to preclude the recovery of damages for disappointment and distress not consequential upon physical or psychiatric injury.

The appellant, Mr Moore, booked a holiday cruise tour in Europe for himself and his wife, supplied by the respondent, Scenic Tours Pty Ltd ("Scenic"). The tour was severely disrupted by adverse weather conditions. Representative proceedings were commenced in the Supreme Court of New South Wales against Scenic by Mr Moore on his behalf and that of approximately 1,500 passengers of 13 Scenic cruises. The primary judge held that Scenic had failed to comply with the consumer guarantees in s 60 and s 61(1) and (2) of the ACL. Mr Moore claimed damages in respect of loss suffered by him as a result of Scenic's breaches. The alleged loss included disappointment and distress for breach of a contract to provide a pleasant and relaxed holiday. No physical injury or psychiatric illness was alleged to have resulted from the breach.

Section 275 of the ACL provides that where there is a failure to comply with a consumer guarantee that applies to a supply of services and the law of a State or Territory is the proper law of the contract, "that law applies to limit or preclude liability for the failure, and recovery of that liability (if any), in the same way as it applies to limit or preclude liability, and recovery of any liability, for a breach of a term of the contract for the supply of the services". The proper law of the contract between Mr Moore and Scenic was the law of New South Wales ("NSW"), which includes the CLA. Accordingly, if applicable, s 16(1) of the CLA precludes, in relation to personal injury, the awarding of damages for non-economic loss, unless the severity of the non-economic loss is at least 15% of a most extreme case, a threshold not met by Mr Moore's claim.

The primary judge awarded Mr Moore damages for disappointment and distress. His Honour held that s 275 of the ACL picks up and applies s 16(1) of the CLA to proceedings in federal jurisdiction and that a claim for damages for disappointment and distress relates to personal injury. His Honour held, however, that s 16 of the CLA has no application to loss suffered outside of NSW, and so Mr Moore's claim for damages for disappointment and distress was unaffected. On appeal, the Court of Appeal upheld the primary judge's conclusions that s 275 picked up and applied s 16 and that the claim related to personal injury. However, the Court of Appeal held that s 16 applies to loss sustained outside of NSW, and therefore precluded Mr Moore's claim for damages of that kind.

By grant of special leave, Mr Moore appealed to the High Court. The Court held that s 275 of the ACL picks up and applies s 16 of the CLA. However, the Court further held that loss consisting of disappointment and distress for breach of a contract to provide a pleasurable and relaxing

experience, where not consequential upon physical or psychiatric injury, does not relate to personal injury. Section 16 of the CLA therefore did not apply to preclude Mr Moore from recovering damages for loss of that kind. Given this conclusion, the Court found it unnecessary to decide whether s 16 applies to loss suffered outside of NSW.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*