

## NOTICE OF MOTION

### COURT DETAILS

|             |                                  |
|-------------|----------------------------------|
| Court       | Supreme Court of New South Wales |
| Division    | Common Law                       |
| List        | Civil                            |
| Registry    | Sydney                           |
| Case number | 2014/223271                      |

### TITLE OF PROCEEDINGS

|           |                             |
|-----------|-----------------------------|
| Plaintiff | <b>David Moore</b>          |
| Defendant | <b>Scenic Tours Pty Ltd</b> |

### FILING DETAILS

|                                |                                              |
|--------------------------------|----------------------------------------------|
| Person seeking orders          | <b>David Moore</b> , the plaintiff           |
| Filed in relation to           | Plaintiff's claim                            |
| Legal representative           | Benjamin James Hemsworth<br>Somerville Legal |
| Legal representative reference | CG:23951                                     |
| Contact name and telephone     | Cameron Graham, (02) 9923 2321               |
| Contact email                  | cgraham@somervillelegal.com.au               |

### PERSON AFFECTED BY ORDERS SOUGHT

**Scenic Tours Pty Ltd**, the defendant

### HEARING DETAILS

This motion is listed at 2pm, 25 October 2019, before his Honour Justice Garling, in accordance with the orders made 18 September 2019.

## **ORDERS SOUGHT**

### **Section 61(3) defence**

- 1 The defendant have leave to file and serve an amended defence in respect of paragraphs 13(c) and 14(c) of the Defence to the Third Further Amended Statement of Claim, on or before 8 November 2019.
- 2 The defendant serve any evidence on which it intends to rely in relation to its defence under s 61(3) of the *Australian Consumer Law*, on or before 15 November 2019.
- 3 The parties confer as to any common questions arising from the amended defence and the evidence served by the defendant on or before 29 November 2019.
- 4 Any proposed agreed common questions, or if not agreed, any proposed common questions be filed and served on or before 6 December 2019.
- 5 Further directions be made on the next return date including as to the determination of the common questions to be determined and the hearing of the trial in respect of those questions.

### **Damages**

- 6 An order pursuant to sections 168, 177(1)(a)-(b), and/or 183 of the *Civil Procedure Act 2005* (NSW) and/or rule 28.2 of the *Uniform Civil Procedure Rules 2005* (NSW) that the Court determines separately:
  - a. the plaintiff's claim for compensation under s 267(3)(b) of the *Australian Consumer Law*; and
  - b. the reduction in the value of the services below the price paid, in accordance with s 267(3)(b) of the *Australian Consumer Law*, for Cruises 1, 2, 3, 4, 5, 6, 7, 8, 9, and 11 (as defined in the judgment of the Court dated 31 August 2017); and
  - c. consequential loss pursuant to s 267(4) of the *Australian Consumer Law* suffered by any passenger in respect of any airfares paid other than as part of the price of the cruise for the purposes of joining and/or returning from any cruise.
- 7 Directions to be made in relation to such separate determination.

### **Common fund order**

- 8 An order pursuant to section 183 of the *Civil Procedure Act 2005* (NSW) and/or the Court's inherent jurisdiction, that the plaintiff and group members are bound by the Funding Terms set out at **Annexure A** to this motion.

**Identity of group members (to be deferred until after the determination of the International Passengers Motion)**

- 9 Following the determination of the motion filed 13 November 2017 as amended on 17 October 2019, an order pursuant to section 183 of the *Civil Procedure Act 2005* (NSW) that:
- a. within 4 weeks of determination of that motion, the defendant provide to the plaintiff's solicitors a list of all passengers on the affected cruises, identifying which of those passengers the defendant considers are group members in the proceedings.
  - b. within 3 weeks after provision of the list in (a), the plaintiff provide to the defendant's solicitors a list of:
    - i. any additional passengers which the plaintiff considers are group members in the proceedings.
    - ii. any passengers identified by the defendant as group members, who are considered by the plaintiff not to be group members in the proceedings;
  - c. any agreed list of group members or, if not agreed, any competing lists of group members be filed and served within 2 weeks of the list provided by the plaintiff in (b).

- 10 An order pursuant to sections 177 and/or 183 of the *Civil Procedure Act 2005* (NSW) and/or a declaration pursuant to the Court's inherent jurisdiction identifying the specific persons who are the group members in the proceedings.

**Mediation (to be deferred until after determination of the appeal to the High Court of Australia)**

- 11 An order pursuant to sections 26 and/or 183 of the *Civil Procedure Act 2005* (NSW) that the parties attend a mediation undertaken by a mediator agreed to by the parties, within 2 months of the High Court of Australia delivering judgment in Proceedings No. S285/2019 (David Moore -v- Scenic Tours Pty Ltd).

**Aggregated damages order (to be deferred until after determination of the appeal to the High Court of Australia)**

- 12 An order pursuant to section 177(1)(f) of the *Civil Procedure Act 2005* (NSW) for an award of aggregate damages in such sum as the Court determines ("the Damages").
- 13 An order pursuant to section 178(1)(b) of the *Civil Procedure Act 2005* (NSW) that the defendant pay the Damages into a fund constituted and administered in accordance with such fund distribution scheme as the Court may approve ("the Fund").
- 14 An order pursuant to section 177(2) of the *Civil Procedure Act 2005* (NSW) that payment of the Damages be made to group members from the Fund as the Court may direct.
- 15 An order pursuant to section 177(4) of the *Civil Procedure Act 2005* (NSW) that group members may make a claim for payment from the Fund as the Court may direct.
- 16 An order pursuant to sections 176(2) and/or 178(3) of the *Civil Procedure Act 2005* (NSW) that a notice ("the Notice") be given to group members of:
- a. The award of the Damages;
  - b. The constitution of the Fund; and
  - c. Group members' right to make a claim for payment from the Fund.
- 17 An order pursuant to section 176(1) of the *Civil Procedure Act 2005* (NSW) that the Court approve the form and content of the Notice.
- 18 An order pursuant to section 178(2) of the *Civil Procedure Act 2005* (NSW) that the costs of the administration of the Fund be borne by the defendant.

**General**

- 19 The proceedings be listed for further directions.
- 20 Costs.
- 21 Such other orders as the Court thinks fit.

**SIGNATURE**

Signature of legal representative



Capacity

Solicitor

Date of signature

17.10.19

**NOTICE TO PERSON AFFECTED BY ORDERS SOUGHT**

If you do not attend, the court may hear the motion and make orders, including orders for costs, in your absence.

**REGISTRY ADDRESS**

Street address

Supreme Court of New South Wales  
Law Courts Building, Queens Square  
184 Phillip Street  
SYDNEY NSW 2000

Postal address

GPO Box 3  
SYDNEY NSW 2001

Telephone

1300 679 272

'A'

# **Litigation Funding Agreement**

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**Legal Justice Pty Limited**  
**ACN 162 351 055**

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**THIS AGREEMENT** is made on the Agreement Date referred to in this agreement

**BETWEEN**

**LEGAL JUSTICE PTY LTD ACN 162 351 055**, a company duly incorporated according to the laws of Australia and carrying on business at 316 Pacific Highway, Lane Cove in the State of New South Wales (“Litigation Lender”)

**AND**

**THE CLAIMANT** referred to in this agreement.

**Introduction**

- A. The Claimant was booked to be a passenger on a Cruise arranged by the Defendant on rivers in Europe during 2013.
- B. Although the Claimant booked and paid for a Cruise on the basis that it would be a luxury river cruise, the Defendant did not provide a luxury river cruise, but provided in lieu an itinerary primarily consisting of transportation by bus. The Defendant engaged in deceptive conduct, inter-alia, by failing to inform the Claimant in a timely manner of its inability to provide the luxury river cruise which the Claimant had booked.
- C. The Claimant is entitled to pursue the Claim against the Defendant as a Representative Proceeding.
- D. The Litigation Lender has agreed to provide financial assistance to the Claimant by way of paying the Claim Costs in accordance with the terms of this agreement.
- E. The Claimant agrees to make certain payments to the Litigation Lender in accordance with this agreement, based on money the Claimant recovers from the Claim.
- F. The Claimant has been advised to obtain independent legal advice in respect of this agreement, and has either obtained that advice, or had a reasonable opportunity to do so.
- G. The Claimant has read and understood the terms of this agreement.

## 1. Interpretation

### 1.1. Definitions

In this agreement, whether the context permits:

**Agreement Date** means:

- the date appearing in the Schedule to this agreement, if the Claimant signs a paper copy of this agreement; or otherwise
- the date on which the Claimant accepts the agreement by clicking the button labelled “I accept” on the Website.

**Claim** means any legal proceeding against the Defendant in relation to the Cruises in which the Claimant is a party, or is a member of a class referred to in such legal proceedings and includes any appeal from any such legal proceedings.

**Claim Costs** means the costs and expenses reasonably incurred in relation to the Claim, before or after the date of this agreement, including:

- a) Professional fees and disbursements of solicitors conducting the Claim;
- b) Professional fees and disbursements of barristers conducting the Claim;
- c) Court filing fees and all other court fees;
- d) Experts’ fees and expenses; and
- e) Witnesses’ fees and expenses.

**Claimant** mean the person whose name was provided electronically as the Claimant prior to that person clicking the button labelled “I accept” on the Website.

**Court** means the Supreme Court of New South Wales.

**Cruise** means the arrangements made by the Defendant which were marketed as being “cruises” on European rivers between but including May 2013 to July 2013.

**Business Day** means a Business Day that is not a Saturday, Sunday or Public holiday in the State of New South Wales.

**Defendant** means Scenic Tours Pty Limited ABN 85 002 715 602 trading as “Scenic Tours” and “Evergreen Tours”.

**Defendant Costs** has the meaning specified in clause 7.



**Lead Claimant** means the Claimant who issues the Claim as the representative party for all of the Claimants.

**Other Claimant** means any person other than the Claimant who is a member of the class referred to in the Representative Proceeding.

**Personal Information** has the meaning given to it by the Privacy Act.

**Proceeds of the Claim** means any money, goods, services, benefits or other consideration received by the Claimant in respect of the Claim whether provided as a result of a judgment, or settlement, and includes interest. However, Proceeds of the Claim shall not include any money ordered by any Court to be paid to the Claimant by the Defendant by way of legal costs. Proceeds of Claim shall also not include any money or other benefit provided to the Claimant prior to 1 April 2014.

**Privacy Act** means *Privacy Act 1988* (Cth).

**Representative Proceeding** means proceedings commenced under Part 10 of the Civil Procedure Act 2005 of New South Wales by the Lead Claimant on behalf of the Claimant and the Other Claimants in relation to the Claim.

**Solicitors** means such firm of solicitors as is retained to prosecute the Claims.

**Website** means the page appearing at the Internet address <http://www.somervillelegal.com.au/page16858/Scenic-Tours-Class-Action.aspx>, and the pages which are linked to that page.

## **2. LITIGATION FUNDING**

- 2.1. The Litigation Lender shall pay:
  - 2.1.1. all of the Claim Costs on behalf of the Claimant; and
  - 2.1.2. any liability of the Claimant in respect of any Defendant Costs.
- 2.2. The obligations of the Litigation Lender to make payments in accordance with clause 2.1 of this agreement apply only for so long as the Claimant is not in breach of any of the Claimant's obligations under this agreement.

## **3. PAYMENTS TO THE LITIGATION LENDER**

- 3.1. Upon the Claimant receiving any of the Proceeds of the Claim, the Claimant shall pay to the Litigation Lender:
  - 3.1.1. The Claimant's share of the Claim Costs and of any Defendant Costs; and
  - 3.1.2. 15 percent of the Proceeds of the Claim paid or provided by the Defendant; and
  - 3.1.3. 18 percent of the Proceeds of the Claim paid or provided by the Defendant on or after 30 November 2014, in addition to the 15 percent thereof referred to in clause 3.1.2.
- 3.2. For the purposes of the calculation required by clause 3.1:
  - 3.2.1. the value of any part of the Proceeds of the Claim which does not consist of Australian dollars shall be converted to Australian dollars on such reasonable basis as the Litigation Lender determines; and
  - 3.2.2. subject to the approval of the Court, the Claimant's share of the Claim Costs and of any Defendant Costs shall be calculated by the Litigation Lender based on sharing those costs between the Claimants in the same ratio as the ratio between them of the Proceeds of the Claim to which they are respectively entitled.
- 3.3. The Claimant shall not be entitled to assign or grant any security over the Claimant's actual or potential entitlements to the Proceeds of the Claim.

#### **4. ASSISTANCE TO THE LITIGATION LENDER**

- 4.1. The Claimant shall provide all assistance reasonably required by the Litigation Lender or by the Solicitors in relation to the Claim and shall provide any relevant documents which the Litigation Lender or the Solicitors may reasonably request.
- 4.2. In all of the Claimant's dealings with the Litigation Lender and with the Solicitors, the Claimant will act with honesty and with the utmost good faith.
- 4.3. The Claimant acknowledges that, if it provides any false or misleading information to the Litigation Lender, to the Solicitors, or to the Court, this may adversely affect the Claim. The Claimant shall indemnify the Litigation Lender for any breach by the Claimant of the obligations under clause 4.2.

#### **5. REPORTING BY THE LITIGATION LENDER**

- 5.1. The Litigation Lender shall provide to the Claimant regular, accurate reports as to the progress of the Claim.
- 5.2. The Litigation Lender shall provide to the Claimant any further information as the Claimant may reasonably request in relation to the Claim.

#### **6. SETTLEMENT**

- 6.1. No settlement of the Claim pursued as a Representative Proceeding, can take place until the settlement is approved by the Court after it conducts a hearing to determine whether the settlement is fair and reasonable and adequate. The Litigation Lender shall notify the Claimant of any proposed settlement and of the Claimant's right to object to the Court in relation to any proposed settlement. The Claimant will be bound by an order of the Court made in the Representative Proceeding approving a settlement of the Claim.
- 6.2. The Claimant may not make or accept an offer of settlement in the Claim or have any negotiations or other communications with any representative of the Defendant in regard to settlement, whether directly or through lawyers or other intermediaries (other than the Solicitors), without the prior written agreement of the Litigation Lender.

#### **7. OTHER PARTY COSTS AND INDEMNITY**

- 7.1. The Claimant acknowledges that the Claimant may have contingent liability for costs incurred in the Claim by the Defendant should the Claim not be successful.
- 7.2. The Litigation Lender agrees to pay the Defendant Costs, and indemnifies the Claimant against Defendant Costs in respect of the Claim. However, the Litigation Lender shall not be liable to pay the Defendant Costs, or indemnify the Claimant to the extent that liability for the Defendant Costs arises out of any dishonesty of the Claimant, or other breach by the Claimant of this agreement.

## **8. COVENANTS BY THE CLAIMANTS**

- 8.1. The Claimant shall not take any proceedings other than the Claim in any court or tribunal against the Defendant relating to the same or similar facts upon which the Claim is based, or take any other steps as a result of which the Proceeds of the Claim may be reduced.

## **9. DISCLOSURES TO THE CLAIMANT**

- 9.1. The Litigation Lender may have already entered, and may in the future enter into agreements with Other Claimants, and the Claimant shall have no rights in respect of any such other agreements.
- 9.2. The Litigation Lender has disclosed that its director and shareholder is a relative of the founding partner of the Solicitors, who is also a Claimant, and that the Solicitors act on behalf of the Litigation Lender.

## **10. DISPUTES**

- 10.1. Any dispute between the parties to this agreement in relation to any mathematical calculation required for the purposes of this agreement shall be referred for determination to an independent accountant, who shall act as an expert and not as an arbitrator. Such independent accountant shall be appointed by agreement between the parties or, failing such agreement, by the President of the Institute of Chartered Accountants Australia.
- 10.2. Any dispute between the parties to this agreement in relation to whether any offer of settlement should be made or accepted shall be referred for determination to an independent barrister of at least five years' standing, who shall act as an expert and not as an arbitrator. Such independent barrister shall be appointed by agreement between the parties or, failing such agreement, by the Solicitors.
- 10.3. Any other dispute between the parties to this agreement shall be referred for mediation by a mediator appointed by LEADR. However, such mediation shall not prevent a party from instituting legal proceedings.

## **11. PRIVACY AND PERSONAL INFORMATION**

- 11.1. In the course of the conduct of the Claim, the Litigation Lender may collect Personal Information concerning the Claimant.
- 11.2. The Litigation Lender shall use such Personal Information only for the purposes of the Claim. This use may extend to advertising in order to make contact with Other Claimants.
- 11.3. Otherwise, the Litigation Lender shall protect the Personal Information of the Claimant as required by the Privacy Act.

**12. ASSIGNMENT**

- 12.1. The Claimant cannot assign any of the Claimant's rights hereunder without the Litigation Lender's prior written consent.
- 12.2. The Litigation Lender shall not be entitled to assign and novate any of the benefits or obligations on its part to be enjoyed or performed herein.

**13. LEGAL RELATIONSHIP**

- 13.1. This agreement is not intended to create a partnership, joint venture, agency or employment contract.

**14. CONFIDENTIALITY**

- 14.1. The parties must keep confidential all information obtained in investigations or negotiations leading to this agreement and also the terms of this agreement and all information exchanged between the parties pursuant to the terms of this agreement.

**15. PRIVILEGE**

- 15.1. The Claimant does not waive any legal professional privilege in any material disclosed to the Litigation Lender all of which such disclosures are only for the purposes of the Claim contemplated in this agreement.

**16. NOTICES**

- 16.1. Any notice required or permitted to be given under this agreement shall be in writing.
- 16.2. Any such notice may be served on the Litigation Lender at the address shown in this agreement, and any such notice may be served on the Claimant at the address for the claimant provided to the Solicitors.
- 16.3. Any such notice shall be delivered personally, or sent by prepaid mail or sent by email, provided that no notice is received by the sender indicating a failure to deliver such email.
- 16.4. Any party may change its address for service by notice served upon the other parties to this agreement.

## **17. SEVERANCE**

17.1. The invalidity or unenforceability of any one or more of the provisions or subclauses of this agreement will not invalidate or render unenforceable the remaining provisions of this agreement. Any legal or invalid provision in this agreement shall be severable and all other provisions will remain in full force and effect.

## **18. FORMATION OF CONTRACT**

18.1. A legally binding contract in terms of this agreement shall be formed between the Parties upon:

- the Claimant providing an executed copy of this agreement to the Litigation Lender or to the Solicitors, if the Claimant signs a paper copy of this agreement; or otherwise
- the Claimant clicking the button labelled “I accept” on the Website.

## **22. APPLICABLE LAW AND JURISDICTION**

22.1 This agreement shall be governed by the laws of New South Wales, Australia.

22.2 The parties submit to the jurisdiction of the Courts of New South Wales in relation to any dispute arising under this agreement.

## **23. INTERPRETATION**

23.1 In this agreement, unless the context otherwise requires:-

23.1.1 Expressions indicating the singular number shall be capable of indicating the plural number and vice versa.

23.1.2 Expressions indicating natural persons shall also be capable of indicating bodies corporate and vice versa.

23.1.3 Headings shall not form part of this agreement and shall not be relevant to the construction hereof.

23.1.4 In the event that any of the provisions of this agreement is unenforceable, then the other provisions of this agreement shall remain of full force and effect.

23.1.5 In the event of any ambiguity in the construction of this agreement, the ambiguity shall not be construed against any party on the basis of that party being responsible for the preparation of this agreement or for the inclusion of any clause in this agreement.

23.1.6 A reference to the Claimant includes a reference to their successors, heirs and assigns to the intent that all such successors, heirs and assigns are bound by the terms of this agreement.