

SUBMISSIONS
Pursuant to Order 15 made on 24 October 2018

COURT DETAILS

Court	Supreme Court of New South Wales, Court of Appeal
Registry	Sydney
Case number	2017/292822

TITLE OF PROCEEDINGS

Appellant	Scenic Tours Pty Ltd ACN 002 715 602
Respondent	David Moore

PROCEEDINGS IN THE COURT BELOW

Title below	David Moore v Scenic Tours Pty Ltd (No. 2)
Court below	Supreme Court of New South Wales
Case number below	2014/223271

FILING DETAILS

Filed for	David Moore , respondent
Legal representative	Benjamin Hemsworth, Somerville Legal
Legal representative reference	CG:23951
Contact name and telephone	Cameron Graham, (02) 9923 2321

NEW SOUTH WALES COURT OF APPEAL

PROCEEDING 2017/292822

SCENIC TOURS PTY LTD v MOORE

RESPONDENT'S APPLICATION TO VARY ORDER ON COSTS OF APPEAL PROCEEDING

A Overview

1. By this application, the respondent seeks a variation to a costs order (order 13).
2. For the reasons that follow, the parties should bear their own costs of appeal:
 - a. The issues on appeal reflect the reality that the proceeding was a hybrid of proceedings concerning Mr Moore's *personal* claim and his *representative* claim on behalf of passengers on 10 cruises;
 - b. The appellant's success against Mr Moore in respect to the latter's *personal* claim did not involve any features peculiar to Mr Moore's position but, rather, reflected success on damages issues generally applicable to the representative claim. This means that the costs outcome should abide the result of the appeal concerning the representative claim;
 - c. The great preponderance of expense in this appeal concerned (common) issues on the representative claim and, in that regard, many grounds of appeal¹ were either not determined at all; or, to the extent that they were determined, the parties enjoyed mixed success.
3. In an appeal from a representative proceeding, in the absence of a result whereby the representative party or defendant wholly succeeds or wholly fails, it may be artificial to suppose that there is a single "event" which costs should follow. Otherwise, as has occurred in this appeal, an applicant for leave to appeal has no incentive to confine the scope of an appeal from a representative action, whilst practically forcing a respondent to incur great expense in responding to what might ultimately be regarded as peripheral grounds. In this context, practical outcomes may be more appropriately viewed by broadly evaluating the parties' respective success on the outcome of the common questions. An apportionment approach broadly evaluating the issues is desirable.²
4. Generally, where the appellant is partly successful, but the costs of appeal have been significantly increased by a range of issues upon which the appellant has failed, the party who succeeded on those issues should be entitled to costs of those issues, which may be

¹ In these submissions, paragraph references are made to the Court's reasons for judgment. Further, the reference to 'Grounds' are to Grounds in Scenic's Notice of Appeal filed after Judgment was delivered with the Court's leave.

² For a recent restatement of applicable principles, see *Avopiling Pty Ltd v Bosevski* [2018] NSWCA 146 at [171]-[172] (Payne JA), approving what was said in *Bostik Australia Pty Ltd v Liddiard (No.2)* [2009] NSWCA 304 at [38]; also *Cellarit Pty Ltd v Cawarra Holdings Pty Ltd (No.2)* [2018] NSWCA 266 at [7]-[14]

capable of being set off against the general costs order in the appellant's favour.³ A broad evaluative assessment readily indicates that the costs of (a) undecided issues or (b) issues decided in Mr Moore's favour more than offset the issues upon which Scenic succeeded.

B The costs order should focus on the practical outcome of the representative claim – not Mr Moore's personal claim

5. On his personal claim, Scenic succeeded in overturning awards for damages (s 267(4) entirely) and compensation (s 267(3)(b), remitted). But there was very little determined on the appeal proceeding, as a whole, which *peculiarly* affected Mr Moore's personal claim. Those issues that concerned him at all related to his claims for compensation and damages. Save for a causation issue, the issues concerning those claims (being the correct approach to assessing a compensation claim under s 267(3)(b) and the availability of damages for disappointment and distress) were inextricably bound up with the *representative* claim. There was a further question of whether compensation could be reduced on account of a travel insurance payout (an issue upon which Scenic failed); although that too had general significance for the claims of group members as well.

6. The time and cost expended in relation to issues on appeal concerning Mr Moore's personal claim was extremely modest (no more than 5%) and would not warrant any order in relation to that claim separate to the costs on the appeal relating to the representative claim.

C Mr Moore should not have to bear a substantial costs burden relating to Grounds of Appeal which Scenic raised and which were not necessary to determine

7. The Court noted Scenic's "enthusiasm" for challenging the primary judge's reasoning and findings: [140]. Scenic raised in excess of 60 Grounds. The preponderance of Grounds 12-49 inclusive concerned dense factual challenges to the primary judge's factual findings of what Scenic knew about river conditions, whether it was in breach of the Care Guarantee in terms of omissions before and after embarkation and, in some cases, the adequacy of information Scenic says was conveyed to passengers prior to embarkation: [132] & [139]. Proof of the matters of what Scenic knew also tended to establish the actual experience of the cruises which was relevant to the issue of whether the purpose and result guarantees were complied with. These Grounds occupied a significant part (40-50%) of the appeal at the hearing and in its preparation, as it had at trial.⁴

8. For instance, Ground 8C complained of the trial judge's failure to give adequate weight to Exhibit P52. During the course of the hearing of the appeal, his Honour Justice Sackville remarked upon the work that had been undertaken by the respondent in preparing an aide-memoire in response to this Ground.⁵ Ultimately, the question of the weight to be ascribed to this Exhibit was not determined by the Court.

³ *Cracknall v Janson* (1879) 11 Ch D 1 at 23 (Jessel MR). Costs orders may be made to reflect partial success on identifiable issues: see *Nicholls v Michael Wilson & Partners (No.2)* [2013] NSWCA 141 at [13] (Sackville AJA)

⁴ See, for example, the preponderant part of Scenic's submissions at **Orange 36-61**; and Mr Moore's submissions in response at **Orange 84-102**; as well as the content of the parties' respective extensive chronologies at **Orange 146-281**.

⁵ T169:16-32.

9. The Court did not make findings in relation to the following further subject matters:
- The knowledge that Scenic had, or should have had, of river conditions before the embarkation of cruises 1-9 & 11;⁶
 - The reasonableness of Scenic's assessment of the risk that each of cruises 1-9 & 11 may be disrupted as a result of those conditions;⁷
10. These issues were severable from the issues upon which Scenic succeeded on appeal. Accordingly, much of the costs incurred by the parties were ultimately wasted. The circumstance that the Court disposed of the appeal without determining many of those Grounds suggests that the costs burden on appeal relating to those Grounds should not substantially fall on the party that did not agitate for their determination.
- D On the appeal concerning representative claim, viewing all the issues in the aggregate, there was no clear winner**
11. The balance of the costs were incurred in relation to the real issues determined on appeal, and probably occupied 45-50% of the time at hearing and preparation.
12. Viewed in its proper context, the outcome of this appeal on the representative claim was decidedly mixed. Scenic was not substantially more successful than Mr Moore such as to warrant the result that the latter should pay half of the former's costs. To the contrary, of the multitude issues raised in Scenic's Grounds which the Court actually determined, honours were shared.
13. Scenic succeeded in establishing that:
- a. damage for disappointment and distress is not compensable under s 267(4) in a New South Wales court ⁸
 - b. the valuation exercise for s 267(3)(b) is objective⁹ (a point not actually raised by Scenic in any Ground of Appeal and which, in any event, was aided by Mr Moore's concession);
 - c. Scenic's obligations under the consumer guarantees did not extend to providing information to passengers before they embarked; which, in turn, meant that certain findings of non-compliance with s 60 for cruises 1, 8, 9 & 11 could not stand;¹⁰
 - d. it should be permitted the opportunity to prove the defences in s 61(3) of the ACL against all passengers in respect to the claims of non-compliance with s 61(1) & (2);¹¹ and

⁶ Grounds 8C, 13-19 (incl), 23-24, 26, 30, 31A, 33, 34A, 36.

⁷ Grounds 14, 17, 19, 24, 27, 31, 31A, 34, 34A, 37, 42, 43A, 47.

⁸ Ground 59

⁹ This was not actually a Ground of Appeal, but was an argument that only emerged during the hearing of the appeal.

¹⁰ Grounds 5, 7, 8, 13, 36, 39, 46.

¹¹ Ground 8A.

- e. some consequential adjustments should be made to the answers to common questions to reflect the Grounds upon which it succeeded.¹²
14. All of these matters upon which Scenic succeeded wholly or substantially involved questions of law, did not require determination of the many extensive factual challenges Scenic made to the trial judge's findings. It is obvious, in retrospect, that these matters, taken together would not have occupied anything like 4 days of hearing and would vastly have reduced the print expended by the parties in their written submissions.
15. Scenic failed in its arguments that:
- a. The 'services' it was obliged to supply to all passengers were (for the purpose of the ACL) merely co-extensive with or limited by agreed terms and conditions of the contract for the supply.¹³ This was probably the dominant, or at least most significant issue, in the appeal;
 - b. the trial judge erred in making findings about non-compliance with s 61(1) and (2) in respect to cruises 1-9 & 11, on the additional bases (i.e. additional to its s 61(3) defence point) that:
 - i. Scenic was denied procedural fairness because the trial judge made findings about the 'particular purpose' made known by group members;¹⁴
 - ii. as a matter of construction, there was in fact no 'particular' purpose held by Mr Moore or any group members and made known to Scenic beyond the general purpose implicit when the services were acquired;¹⁵
 - iii. Mr Moore did not establish that the services to group members on all the subject cruises were not reasonably fit for purpose (or result);¹⁶
 - c. a defence under s 267(1)(c)(ii) was generally established;¹⁷
 - d. the trial judge should not have made findings about non-compliance with s 60 in relation to conduct occurring after embarkation, as its obligations under s 60 did not extend to the provision of information after embarkation, in relation to cruises 4-7 (incl).¹⁸
16. Some of these Grounds (referred to at sub-par 15(b)(iii) and 15(d) above) upon which Scenic failed *did* involve the Court's determination of Scenic's substantial factual

¹² Ground 61.

¹³ Grounds 1-4,

¹⁴ This argument amounted to a variation to or departure from Grounds 9 & 10, as explained at [215].

¹⁵ This was another point developed by Scenic only in argument, but was not the subject of any Ground of Appeal: T26:38.

¹⁶ Grounds 12, 20, 21, 22, 25, 29, 32, 35, 38, 45, 53.

¹⁷ Ground 8B.

¹⁸ As part of Grounds 24, 27, 31, 34.

challenges to findings of the trial judge concerning the experience of the cruises. As indicated, bound up in the proof of that experience was the question of what Scenic knew about the prospect of disruption for future cruises in the light of that experience. The cost of issues upon which Scenic succeeded were offset by the cost of issues upon which it failed.

E Miscellaneous

17. Scenic's conduct of its appeal caused Mr Moore to incur wasted costs or additional expense to Scenic for no reason attributable to Mr Moore. This occurred through Scenic's:
- a. abandonment of several original Grounds (8D (partly), 8E (partly), 9-10 (implicitly),¹⁹ 31B, 34B, 44, 50-52) only after Mr Moore had incurred expense in responding to them in his written submissions;
 - b. failed application to amend its notice of appeal to rescind the formulation or identification of many common questions to be determined, which were determined at first instance;²⁰
 - c. preparation of documentation directed to be prepared by the Court in a case management hearing,²¹ to deal with the aspects of its appeal that neither its proposed Notice of Appeal nor its submissions in chief had sufficiently elucidated.

F Summary

18. Taking into account:
- a. The (*de minimis*) number of issues peculiarly concerning Mr Moore's personal claim;
 - b. The vast number of separable issues not determined;
 - c. The parties mixed success on the issues that were determined; and
 - d. some wasted costs incurred through Scenic's conduct of the appeal

it is appropriate that each party should bear their own costs of the appeal.

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Alister Abadee

Counsel for the respondent
Ph 8227 4400

abadee@universitychambers.com.au

¹⁹ See footnote 16 above.

²⁰ [78]-[81].

²¹ 9 April 2018.