



Retainer Agreement

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REF: TDS:AC:23951

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

BETWEEN

SOMERVILLE LEGAL PTY LTD ABN 45 117 159 172, a company duly incorporated according to the laws of Australia and carrying on business at level 2, 65 Berry Street North Sydney in the State of New South Wales (“Solicitors”)

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 has agreed to engage the Solicitors to pursue the Claim against the Defendant as a Class Action.
- D. The Litigation Lender has agreed to provide financial assistance to the Claimant by way of paying the legal costs of the Claim.
- E. 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.
- F. 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 clicks the button labelled “I accept” on the Website.

Claim means the 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.

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

Class Action 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 Other Claimants in relation to the Claim.

Costs means the legal professional costs and disbursements incurred by the Solicitors including court filing fees, fees payable to experts and witnesses’ expenses.

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 and July 2013.

Business Day means a 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” or “Evergreen Tours”.

Defendant Costs has the meaning specified in clause 8.

Lead Claimant means the person who issues the Claim as the representative party for all of the Claimant and the Other Claimants.

Litigation Funding Agreement means the agreement between the Claimant and the Litigation Lender in relation to the Claim.

Litigation Lender means Legal Justice Pty Ltd ACN 162 351 055.

Other Claimant means any person other than the Claimant who is a member of the class referred to in the Class Action.

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 include any money or other benefit provided to the Claimant prior to 1 May 2014.

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

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. RETAINER

- 2.1. The Claimant hereby retains the Solicitors to the exclusion of all others to represent the Claimant in relation to the Claim.
- 2.2. The Costs payable to the Solicitors shall be calculated in accordance with the Disclosure Document available on the Website.

3. CLASS ACTION FUNDING

- 3.1. The costs of the solicitors in relation to the Class Action including the costs of acting for the claimant and all Other Claimants will be paid by the Litigation Lender, subject to the Litigation Funding Agreement and the other provisions of this agreement.

4. PROCEEDS OF THE CLAIM

- 4.1. The Claimant hereby irrevocably authorises and instructs the Solicitors to collect on the Claimant's behalf so much of Proceeds of the Claim, as shall consist of money and to deal with it as follows.
- 4.2. The Proceeds of the Claim shall be paid into the trust account of the Solicitors and dealt with as follows:
 - 4.2.1. to pay to the Litigation Lender the part of the Proceeds of the Claim to which they are entitled pursuant to the Litigation Funding Agreement, subject to any order of the Court; and
 - 4.2.2. to pay the balance to the Claimant or as the Claimant may direct in writing.
- 4.3. 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.

5. ASSISTANCE TO THE SOLICITORS

- 5.1. The Claimant shall provide all assistance reasonably required by the Solicitors in relation to the Claim and shall provide any relevant documents which the Solicitors may reasonably request.
- 5.2. In all of the Claimant's dealings with the Solicitors, the Claimant shall act with honesty and with the utmost good faith.
- 5.3. The Claimant acknowledges that, if it provides any false or misleading information to the Solicitors, , or to the Court, this may adversely affect a Claim.

6. REPORTING BY THE SOLICITORS

- 6.1. The Solicitors shall provide to the Claimant regular, accurate reports as to the progress of the Claimant's Claim, and shall provide to the claimant any further information as the Claimant may reasonably request in relation to the Claim.

7. SETTLEMENT

- 7.1. No settlement of the Claim pursued as a Class Action, 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 Solicitors 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 Class Action approving a settlement of the Class Action.

8. OTHER PARTY COSTS AND INDEMNITY

- 8.1. The Claimant acknowledges that the Claimant may have to a contingent liability for costs incurred in the Claim by the Defendant contingent upon the Claim not being successful.
- 8.2. The Litigation Lender has agreed to pay the Defendant Costs, and to indemnify the Claimant against Defendant Costs in respect of the Claim subject to the terms of the Litigation Funding Agreement.

9. DISPUTES

- 9.1. Subject to the Legal Profession Act, 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 agreed between the parties or, failing such agreement, by the President of the Institute of Chartered Accountants Australia.
- 9.2. 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.
- 9.3. Subject to Legal Profession Act, any other dispute between the parties to this agreement shall be referred for mediation by a mediator appointed LEADR. However, such mediation shall not prevent a party from instituting legal proceedings.

10. PRIVACY AND PERSONAL INFORMATION

- 10.1. In the course of the conduct of the claim, the Solicitors may collect Personal Information concerning the Claimant.
- 10.2. The Solicitors 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.
- 10.3. Otherwise, the Solicitors shall protect the Personal Information of the Applicant as required by the Privacy Act.

11. CONFIDENTIALITY

- 11.1. 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.

12. NOTICES

- 12.1. Any notice required or permitted to be given under this agreement shall be in writing.
- 12.2. Any such notice may be served on the Solicitors 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.
- 12.3. 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. Click me
- 12.4. Any party may change its address for service by notice served upon the other parties to this agreement.

13. COSTS

- 13.1. A party must pay its own costs of the negotiation, preparation and execution of this Agreement and any amendment to all concerned, waiver or release of or under this Agreement.

14. STAMP DUTY

- 14.1. If required by law, the claimant must admit this agreement to the Commissioner for the purposes of stamping. Stamp duty on this Agreement is a claim Cost.

15. SEVERANCE

- 15.1. 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 will be severable and all other provisions will remain in full force and effect.

16. FORMATION OF CONTRACT

- 16.1. 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.

17. APPLICABLE LAW AND JURISDICTION

- 17.1 This agreement shall be governed by the laws of New South Wales, Australia.
- 17.2 The parties submit to the jurisdiction of the Courts of New South Wales in relation to any dispute arising under this agreement.

18. INTERPRETATION

- 18.1 In this agreement, unless the context otherwise requires:-
- 18.1.1 Expressions indicating the singular number shall be capable of indicating the plural number and vice versa.
- 18.1.2 Expressions indicating natural persons shall also be capable of indicating bodies corporate and vice versa.
- 18.1.3 Headings shall not form part of this agreement and shall not be relevant to the construction hereof.
- 18.1.4 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.
- 18.1.5 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.
- 18.1.6 A reference to 'Claimants' includes a reference to their successors, heirs and assigns to the intent that all such successes, heirs and assigns are bound by the terms of this Agreement.