HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

Proceeding S155/2023
BETWEEN:

TOYOTA MOTOR CORPORATION AUSTRALIA LIMITED (ACN 009 686 097)
Appellant

-and-

KENNETH JOHN WILLIAMS
First Respondent

and

DIRECT CLAIM SERVICES QLD PTY LTD (ACN 167 519 968)
Second Respondent

AND

Proceeding S157/2023
BETWEEN:

KENNETH JOHN WILLIAMS
First Appellant

and

DIRECT CLAIM SERVICES QLD PTY LTD (ACN 167 519 968)
Second Appellant

-and-

TOYOTA MOTOR CORPORATION AUSTRALIA LIMITED (ACN 009 686 097)
Respondent

TOYOTA'S OUTLINE OF ORAL SUBMISSIONS

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Part I: Certification

1. This outline is in a form suitable for publication on the Internet.

Part II: Outline of propositions

2. **Summary:** Toyota makes the following overall contentions:

   a. The Williams appellants' appeal (S157/2023) should be dismissed and Toyota's appeal (S155/2023) should be allowed.

   b. The order of the Full Court remitting the matter to the primary judge for damages under s 272(1)(a) to be reassessed in accordance with the Full Court's reasons should be set aside. That is because an application of the Full Court's reasons would result in damages under s 272(1)(a) of the *Australian Consumer Law* (**ACL**) being awarded to group members within the relevant cohort, notwithstanding that by the time of the initial trial the 2020 field fix was available such that the loss of value resulting from the defect had been restored.

   c. The relief should be as is set out in Toyota's notice of appeal (**JCAB 413-414**).

3. **Facts:** Toyota emphasises uncontentious facts concerning: (i) the nature of the relevant vehicles and the defect; (ii) the nature and timing of the 2020 field fix; and (iii) that by the time of the initial trial, it was known that the 2020 field fix was available and the expert witnesses agreed that, in consequence there was no ongoing reduction in value in the relevant vehicles: **TS [7]-[10]; TSR [4]-[5]**.

4. **Williams appellants' appeal ground 1:** The rigidity of Williams appellants' construction of s 272(1)(a) is at odds with the text of the provision which permits an affected person, in an action for *damages* under s 271(1), to recover *damages* for any reduction in value of the goods, resulting from the failure to comply with a consumer guarantee. In an action for damages, it is a universal rule that an affected person may recover only that which is lost. To give credence to that universal rule, in assessing damages under s 272(1)(a), it may be necessary to have regard to subsequent events, especially where those events are capable of revealing the reduction in value of the consumer goods at the time of supply: **TS [26]-[29]**.

5. That approach to assessment of damages under s 272(1)(a) is consistent with the analysis in ***Potts v Miller*** (1940) 64 CLR 282, ***Kizbeau*** *Pty Ltd v W G & B Pty Ltd* (1995) 184 CLR 281 and ***HTW*** *Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640. Those decisions are not distinguishable on the basis that ss 272(1)(a) and (b) of the ACL resemble the two components of compensatory damages available at common law for breach of contract: (i) compensation for performance interest; and (ii) compensation for consequential losses. That submission by the Williams appellants overlooks the fact that the recovery of damages for the

difference in price and value (as in *Potts v Miller*, *Kizbeau* and *HTW Valuers*) was apart from any recovery of consequential losses: **TS [28]-[29]; TSR [10]**. The principles concerning damages for breach of contract ought to be treated with caution. In any event, those principles do not rigidly disregard subsequent events if doing so will result in overcompensation: **TS [29]**.

6. The recognition that, on its proper construction, s 272(1)(a) of the ACL does not assume an entitlement to recover damages for reduction in value of the goods, and only permits an award of damages that will not overcompensate the affected person, is consistent with the common law and statutory antecedents to s 272 of the ACL. To the extent the common law cases, such as *Jones v Just* (1868) LR 3 QB 197, and the cases under s 53 of the *Sale of Goods Act 1893* (UK), such as *Slater v Hoyle & Smith Ltd* [1920] 2 KB 11, disregarded subsequent events, that is because those subsequent events were a consequence of independent factors: **TS [34]-[37]**.

7. That is in contrast with the present case where the subsequent event – the availability of the 2020 field fix by the time of the initial trial which, on the evidence, entirely restored any reduction in value to the relevant vehicles – arose from the intrinsic nature of the vehicles. The 2020 field fix involved modification and replacement of certain components of the relevant vehicles (the diesel exhaust after-treatment system and the engine control module), which were the very components which caused the defect. They are modifications and replacements that arose from the intrinsic or inherent factors in the nature of the relevant vehicles. The analysis of the NSW Court of Appeal in *Dwyer v Volkswagen Group Australia Pty Ltd* [2023] NSWCA 211 is indistinguishable from the present case: **TS [30]-[32]**; **TSR [4]-[11]**.

8. The effect of the Williams appellants' approach, and endorsement of the primary judge's conclusion that every group member within the relevant cohort is entitled to a damages award of 17.5% of the price of their vehicle, is a substantial windfall for each of those group members. Further, there are intractable problems that arise if the Williams appellants' construction of s 272(1)(a) is applied to group members who were excluded from the relevant cohort, including group members who sold their vehicle or purchased their vehicle from another group member: **TS [38]**.

9. **Toyota's appeal:** The central proposition in Toyota's appeal, which is consistent with the foregoing analysis, is that, on the proper construction of s 272(1)(a), and on the evidence in the present case, damages for reduction in value are to be assessed taking into account the subsequent fact that the reduction in value attributable to the defect at the time of supply had been entirely restored. While the Full Court correctly found that the availability of the 2020 field fix was a factor to be taken into account in assessing damages under s 272(1)(a), it erred in the manner in which it explained how the fix was to be taken into account, reasoning that the assessment was to be conducted on the basis that some reduction in value damages will be

recoverable in respect of the time period between purchase and the repair becoming available: **TS [40]-[42]**.

10. The source of the Full Court's error lies in its equating of value with utility. A value assessment based on the utility of the vehicle over the time period between the date of purchase and the date the 2020 fix became available is disconnected with the text and context of the statutory provision and conflates damages for reduction in value recoverable under s 272(1)(a) with the distinct consequential losses which are compensable under s 272(1)(b). In the context of s 272(1)(a), and a case concerning motor vehicles, "value" is used to denote a price which the goods would fetch if they were offered for sale in ordinary market conditions. It is that concept of "value" to which the experts were referring when they concluded that upon the 2020 field fix becoming available, there was no ongoing reduction in value in the relevant vehicles. Once that is appreciated, the only conclusion is that persons within the relevant cohort should not be compensated under s 272(1)(a); there should be no compensation for a theoretical reduction in value which did not exist at the time of the initial trial: **TS [43]-[51]**.

11. **Williams appellants' appeal ground 2:** Toyota does not accept that if ground 1 of the Williams Appeal succeeds, then the basis of the Full Court's setting aside of the primary judge's assessment of the reduction in value at 17.5%, and substitution of its own 10% figure, cannot stand. This is because the Full Court's reassessment was conducted *before* taking into account the 2020 field fix: **TS [52]**.

12. Further, while it may be accepted that the primary judge did not completely accept Mr Cuthbert's range, one criticism of Mr Cuthbert's evidence which the primary judge did not accept, which the Full Court did, concerned Mr Cuthbert's anchoring of his analysis in the salvage value of the relevant vehicles. This led him to overstate the reduction in value of the vehicles. That flaw in Mr Cuthbert's evidence was separate and distinct from the "two additional conceptual reasons for concluding that Mr Cuthbert's approach overstated the reduction in value", one of which was that Mr Cuthbert's evidence "failed to grapple with the effect on an aggregate assessment of reduction in value damages of the possibility that a free fix may become available": FC [205], [207] (**JCAB 307**): **TS [53]-[55]**. Further, the difficulties with the evidence of Mr Cuthbert was not the only basis on which the Full Court departed from the trial judge's assessment. The Full Court also placed weight on Toyota's submission that much of the utility of the vehicle was unaffected by the defect and its consequences: **TSR [13]**.

Dated: 10 April 2024

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