HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

Proceeding S155/2023

BETWEEN: **Toyota Motor Corporation Australia Limited (ACN 009 686 097)**
Appellant
-and-
Kenneth John Williams
First Respondent
Direct Claim Services Qld Pty Ltd (ACN 167 519 968)
Second Respondent

AND

Proceeding S157/2023

BETWEEN: **Kenneth John Williams**
First Appellant
Direct Claim Services Qld Pty Ltd (ACN 167 519 968)
Second Appellant
-and-
Toyota Motor Corporation Australia Limited (ACN 009 686 097)
Respondent

WILLIAMS APPELLANTS' REPLY SUBMISSIONS

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Part I: Certification

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

Part II: Reply Submissions

2. The issues between the parties appear to have narrowed. TMCA accepts that "reduction in value" in s 272(1)(a) is a reference to the reduced value of the goods *at the time of supply* (TS [27]). The "critical qualification" to that proposition suggested by TMCA (TS [27]) is in truth no qualification at all. It is simply the orthodox proposition, accepted by the Williams Appellants, that information about post-supply events may be brought to account so far as those events "illuminate the value of the thing as at that date": ***Kizbeau*** *Pty Ltd v WG & B Pty Ltd* (1995) 184 CLR 218, 291; WS [42]; TS [29]-[31].[1] Contrary to TS [12], [38] and [40], the Williams Appellants do not suggest that this concept applies only to post-supply information, and not post-supply events. The exercise remains one of determining the true value as at the time of supply. No party seeks to defend the Full Court's willingness to depart from the time of supply as the relevant point of reference where "appropriate" or "fair" (FC [99], [133] (JCAB 286, 293); cf TS [27]-[32]).

3. It is uncontroversial that the purported "availability" of the 2020 field fix is a post-supply event (TS [31]). The fix was not developed until after *all* Relevant Vehicles had been supplied (and after many years of failed attempts). TMCA apparently also accepts that any increase in value arising from the purported availability of the fix, which forms the factual cornerstone of its appeal, operates prospectively, rather than retrospectively: TS [30], [44]-[51], cf [40].

4. It follows that TMCA's appeal (and its answer to ground 1 in the Williams Appeal) must fail unless it can show that the post-supply event constituted by the 2020 field fix somehow bears upon the value of the relevant vehicles *at the time of supply*. Subsequent events can never "reduce" the damages an affected person is entitled to recover; they can only inform their proper assessment at the time of supply (cf TS [27])[2].

[1] TS [29] mischaracterises the Williams Appellants' position. The Williams Appellants do not submit that post-supply events are to be ignored in assessing compensation for performance interest: WS [42].

[2] TS [27], [31] and [32] place considerable reliance on *Kizbeau.* But note that *Kizbeau* was protecting a reliance interest, not the expectation interest; the valuation process required an assessment of the future revenues of the business (296) and the real damage did not become "manifest" until 30 months after the purchase (297). *Kizbeau* affirms that one must look to all of the circumstances to ascertain whether a subsequent event gives a reliable indication of the earlier suffered loss (296); but it does not support either the TCMA or Full Court's approach.

Field fix cannot illuminate value of vehicles at time of supply

5. TMCA does not advance any cogent explanation of how the eventual discovery of the 2020 field fix (not in fact applied to any of the vehicles the subject of the award) illuminates the value of the affected vehicles at the time of supply. Contrary to TS [30], the advent of the fix did not "ar[i]se from the instrinsic nature of the relevant goods". TMCA offers no reasoning or evidence in support of this conclusory assertion. ***Dwyer*** *v Volkswagen Group Australia Pty Ltd* [2023] NSWCA 211 does not assist it. The obiter observations in *Dwyer* arose in the context of a purported defect in an airbag inflator which did not render the vehicles of unacceptable quality and was rectified by a simple act of replacement, years before the notional defect could (on any view) have impacted on the operation of the vehicle: *Dwyer*, [155]. This was found to be what a reasonable consumer would have always expected, given the nature of the goods and the nature of the alleged defect: *Dwyer*, [242]–[243]. That underpins the conclusion that the eventual occurrence of that event properly "illuminate[d] or reflect[ed] or indicate[d] the value of the appellant's vehicle at the time of supply": *Dwyer,* [243].

6. The *method* of reasoning adopted in *Dwyer* (insofar as it recognised subsequent events as capable of illuminating the reduction in value at the time of supply) was correct. Whether it was sound *in fact* does not arise. But the stark difference in the fact findings as to the predictability of future events at the time of supply can be noted. Here, the defect which rendered the Relevant Vehicles unacceptable in quality was mechanically complex. Notwithstanding that Toyota identified the root cause of the defect as early as June 2016, developing an effective engineering solution to the defect was elusive to the point of being near-intractable. Regular maintenance did not remedy the problem, and (until 2020) Toyota's engineers *could not* fix it despite years of trying.[3]

7. Contrary to TS [30], there was on the evidence no "expectation that a repair for any defect would be found", at the time of supply. Indeed, a reasonable consumer fully acquainted with the hidden defect at the time of supply (as postulated by s 54), would have understood that it was presently *incapable of repair.* The primary judge, while correctly acknowledging that it was possible that repair might later become available (J [170] (JCAB 60)), found that "the repair was not *expected* at the time of acquisition": J [328] (JCAB 104) (emphasis added). The Full Court put the position as follows: there was "a *risk* that

[3] Williams Appellants' Chronology rows 3-4, 6-7, 10-11, 14, 16-18, 21-22, 29, 31, 36, 43, 45; J[16], [21(2)], [44], [46], [64], [109(3)] (JCAB 21, 22, 28, 34, 46); AF [125]-[132], [135]-[137], [140], [143]-[145], [148], [151], [153], [156], [158]-[159], [161], [163]-[165] (WBFM 126-134).

the defect *would not* be able to be repaired"; there was "a *possibility* that there would be a fix although there would be a delay of uncertain duration in finding the fix"; "*[i]f a fix was found* it would likely be available at no cost, but it *might take some time before it was made available* to a particular consumer": FC [122] (JCAB 291).

8. The eventual discovery of the 2020 field fix did nothing to change that erstwhile possibility at the time of supply into a probability or certainty. Hence the significance of the point that the occurrence of a probabilistic event does not retroactively alter its *ex ante* chances of occurring. Against this TMCA does not point to any particular factual circumstances that reveal that future repair was a characteristic intrinsic to these vehicles. TMCA's argument must depend instead on a universal assumption that new but defective motor vehicles will always be subject to effective future repairs at the hands of manufacturers, such that the actuality of a free effective repair (if and when it materialises) should be treated as an inherent quality of all such goods. This is neither factually sound nor, when it comes to s 272(1)(a), compatible with the consumer protection objectives of the ACL.

No overcompensation on Williams Appellants' approach

9. Lacking any cogent explanation of how the identification of the 2020 field fix was or could be seen as "a consequence of intrinsic factor[s] in the nature of the vehicle" (TS [40]), TMCA nevertheless contends that the Full Court correctly identified a "problem of over-compensation" in the Williams Appellants' approach, albeit one that it should have resolved by awarding no damages at all. Properly analysed, however, there is no such problem: an award of damages for the reduction in value at the time of supply, notwithstanding the later advent of an engineering solution capable of remedying the defect and increasing the vehicle's resale value prospectively, does not lead to overcompensation. What TMCA identifies as a "problem" is simply a consequence of applying orthodox principles to a scenario where it was not intrinsic to the value of the defective goods at the time of supply that they would be fixed at some point in the future at no cost.

10. The notional consumer, knowing of the defect and the possibility of repair, would factor into the price the risk of a repair *not* materialising (or not materialising during the effective life of the goods). The Williams Appellants and group members, to whom non-compliance with the statutory guarantee was not revealed, could not factor such risk into the pricing at the time of supply. They overpaid, in comparison to what they were promised. Upon the provision of a repair, the notional informed consumer who paid the adjusted price (ie. discounted for the risk that no fix would be found) receives no windfall gain. The

manufacturer's success or failure in its quest for a fix following supply does not alter the risk profile that informed the price of the goods at the time of supply. By comparison, the consumer who has paid full price rather than a price adjusted for the risk that the vehicle would not be able to be repaired is not made whole by the fix. The eventual repair does not compensate for the overpayment at the time of supply.

11. Under the Williams Appellants' construction, reduction in value damages compensate the relevant cohort belatedly but appropriately for not getting what was promised, including taking on risks hidden from them at the point of supply. Under TMCA's construction, the relevant cohort receive no recompense at all for having had those risks unknowingly foisted upon them and thus having overpaid for the vehicles they were supplied with.

12. It is not essential that overpayment in the sense described be characterised as loss (cf TS [33]). Compensation based on performance interest need not bear that characterisation. The performance interest component of any award "is not concerned with loss in any real or factual sense. The compensation for the performance interest, 'by the value of the promised performance', appears 'as a "loss" only by reference to an unstated *ought*'."[4] The value to be paid is assessed at the time of supply, not as a matter of discretion, but as an integral aspect of the principle, which is concerned to give the purchaser the economic value of the performance of the contract at the time that performance was promised. This measure of damages captures for the purchaser the benefit of the bargain and so compensates the purchaser for the loss of that benefit.[5]

13. Contrary to TS [29], the fact that s 272 empowers consumers to hold manufacturers to guarantees instead of relying on contracts with third-party suppliers is more not less reason to hold the statute in line with general law principles of compensation for loss of the performance interest. The implied warranties actionable against manufacturers were inserted into the consumer law specifically to overcome the lack of contractual nexus between consumers and manufacturers.[6]

14. The possibility of compensation for consequential loss under s 271(1)(b) does not alter the position (*cf* TS [45]). The legislature has recognised the distinct interests which are the

[4] *Moore v Scenic Tours Pty Ltd* (2020) 268 CLR 326 at 348 [64]; *Dwyer*, [229].
[5] *Clark v Macourt* (2013) 235 CLR 1 at 7[11], 19 [61], 30 [107], 31-2 [109]-[110].
[6] Trade Practices Act 1974 Review Committee, *Report to the Minister for Business and Consumer Affairs* (Parliamentary Paper No 228, August 1976) [9.122]; Commonwealth, *Official Hansard No 15, 1978*, House of Representatives, 13 April 1978, 1506 (Second Reading Speech for the Trade Practices Amendment Bill 1978).

subject of compensation by stipulating in s 272(3) that consequential losses are separable from reduction in value damages. The intention is clear that disappointment of the interest in performance is to be compensated under s 272(1)(a). Indeed, a consumer who acquired the goods, overpaid for them and suffered loss as a result, may not suffer *any* personal consequential loss that is compensable under s 272(1)(b). The parent who purchases a car for the use of a child overpays, but does not suffer any of the consequential loss arising from driving the defective vehicle. Conversely, the child does not overpay but does suffer from the adverse driving experience; and yet, not being an affected person according to the definition in s 2 of the ACL, has no claim under s 272(1)(b). On TMCA's approach, the parent has no basis to claim compensation under s 272(1)(a), despite having overpaid for the vehicle. This is so notwithstanding that the legislature intended that such an affected person is "*entitled to* recover damages for … any reduction in the value of the goods" resulting from the failure to comply with the statutory guarantee of acceptable quality.

Williams Appeal – Ground 2

15. TS [56] submits that if the primary judge had drawn the same conclusions from Mr Cuthbert's evidence as the Full Court drew, his Honour "would have regarded Mr Cuthbert's figure as even more excessive and that may well have changed the ultimate reduction of 17.5% that his Honour settled upon". That submission should be rejected for the reasons advanced at WS [74]-[77]. In any event, acceptance of the submission did not justify appellate intervention. A finding that *if* the primary judge had taken a dimmer view of Mr Cuthbert's evidence than his Honour in fact did *then* that perception "may well have changed" the reduction in value figure fixed by the primary judge could yield no more than "a slight preference for" a lesser reduction in value than the primary judge allowed and would not constitute any "definite preponderance of one view" (of the question what was the appropriate reduction) "over the other": *Warren v Coombes* (1979) 142 CLR 531 at 547.

Dated: 8 March 2024

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