HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: Biljana Capic
Appellant

and

Ford Motor Company of Australia Pty Ltd ACN 004 116 223
Respondent

APPELLANT'S REPLY

Part I: Certification

1. This reply is in a form suitable for publication on the internet.

Part II: Reply

2. This appeal concerns when, and if so how, events after supply may be taken into account in assessing reduction in value damages under s 272(1)(a) of the ACL. The Respondent says its position, that of the Full Court below, and the Full Court in *Toyota* are the same, and not too dissimilar from that of the New South Wales Court of Appeal in *Dwyer*: RS [19]-[20]. Respectfully, that submission misdescribes the three different approaches taken by those intermediate appellate courts. The approach of the Full Court below and in *Toyota* are not the same.[1] Nor did the Full Court in *Toyota* incorporate the "true value" approach used in *Dwyer*.[2] The Respondent's position at RS [19] is in truth something of an amalgam of all three distinct approaches.[3] RS [21] also misstates Ms Capic's position.[4]

Compensation and over-compensation

3. The Respondent argues its approach is preferable because Ms Capic's approach may lead to "over- or under-compensation" or a "windfall" for the claimant (RS [21], [31], [39],

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[1] The approach below cannot be reconciled with the "objective" approach described in *Toyota* [165]: see AS [40]; *cf* RS [73]. The manifestation of the defect depends on the claimant's actual use of the vehicle: see, eg, RS [7]. Repairs undertaken also depend on the claimant's conduct: *cf* FC [315(2)] (CAB370) with the "availability" of repairs in *Toyota* [317]-[318]. RS [73] elides the revealing difference between the "use to which the goods were put" (FC [308(4)] (CAB 469)) and the "use to which the goods may be put" (*Toyota* [127]).

[2] Contra RS [19(c)] the Full Court in *Toyota* did not hold that "'the value of the goods' refers to the real or true value of the goods". The kind of analysis undertaken in *Dwyer* at [241]-[242] was not undertaken in *Toyota*. Below, the Full Court described the *Dwyer* analysis as "consistent" with its own approach: FC [309] (CAB469).

[3] See also the second sentence of RS [67] which uses "objective" in a different sense to *Toyota* [165], and describes a different test (cf *Toyota* [284]).

[4] Ms Capic does not say all subsequent events are to be disregarded: see AS [32] and [7] below.

[51], [52], [60]). That contention assumes, without analysing, what counts as "compensation" and therefore what exceeds or falls short of it. The introduction of non-statutory concepts such as "real reduction in value" or "real value" (RS [26], [49], [51], [53], [55]) and "actual loss" (RS [62]) further compounds the problem. What counts as compensation depends on the interest being compensated.[5] The interest in this case is the goods' compliance, at the time of supply, with the guarantee of acceptable quality in s 54. If the consumer does not receive compliant goods at the time of supply, she is entitled to damages representing, in money terms, the difference between what she received and what she was entitled to receive, when she was entitled to receive it.[6] If a manufacturer later chooses to defray what would otherwise be a liability under s 272(1)(b) by providing a free repair of the goods, that does not mean the consumer has been overcompensated.

4. A particular nuance in this case (and in *Toyota*) is that the interest was infringed by the presence of a risk. The risk was the "failure to comply, to which the action relates". It follows that the reduction in value resulting from the risk is what must be compensated. The Respondent contends that this too leads to under- or over-compensation, unless damages are assessed after the time of supply, according to how the risk turns out. It makes this contention using a hypothetical about a horse: RS [49]. The hypothetical assumes failure to comply with s 54. If there is a failure to comply, then a court has judged the disease itself to be unacceptable. There is no anomaly then in finding a reduction in value by reason of the disease. If the horse survives, the buyer has run a risk laid by the seller and which the law treats as unacceptable. The good fortune in outcome does not alter the injury (supply of a horse which was not of acceptable quality) nor the reduction in value on supply resulting from that risk ($5,000). If the horse dies, the value on supply was the same as if it had lived, but in that scenario, damages may not be the buyer's best remedy. She may reject the horse and claim a refund or replacement: ss 259(3)(a), 263(4).

The scheme of the ACL

5. The Respondent contends that if Ms Capic's argument is accepted, this will "disincentivise manufacturers from repairing goods": RS [41], [57]. It is not the first manufacturer to claim that an entitlement to compensation for the possibility of failure will lead to even worse outcomes for consumers in future.[7] The claim ignores the many

[5] *Clark v Macourt*, [11]. Likewise what the claimant has "lost" (RS [31]) must be determined by reference to the position in which the claimant was entitled by law to be placed.
[6] *Clark v Macourt*, [109].
[7] *Courtney v Medtel Pty Ltd* (2003) 126 FCR 219, [178].

other incentives which exist for manufacturers to repair goods, including reducing exposure to claims for consequential loss, such as third party repair costs (s 272(1)(b)), reducing exposure to suppliers' claims for indemnity for repaired, replaced or refunded goods (ss 259(2)-(3), 261, 274(2)), and preserving brand integrity and reputation. This last point in particular is hardly a small one. "*Our cars may or may not work, but if they don't, you can sue for damages*" is not a winning slogan.

6. Further, the Respondent's construction would cut down other statutory incentives reflected in the ACL. The ACL could have rendered the manufacturer's warranty a thing of the past, given the comprehensive suite of statutory remedies the ACL offers. Yet Parliament intended the ACL to complement, not replace, express warranties: see ss 29(1)(m), 59, 102 and 192. Their continued relevance is ensured by s 271(6), which provides special protection to a manufacturer who grants an express warranty and honours it in a timely fashion. There is no anomaly in requiring regard to be had to post-supply events for the purposes of s 271(6) in accordance with its express terms, but excluding such events from s 272(1)(a), which neither expressly nor implicitly directs attention to the application of repairs or their timeliness: *cf* RS [42]. If – as the Respondent would have it – s 272(1)(a) were to be construed such that late repairs or those not pursuant to a warranty avoided reduction in value damages without satisfaction of s 271(6), then s 271(6) would not achieve its purpose.

7. Finally, and as to the coherence of s 272(1)(a) with the broader statutory scheme: at RS [44] the Respondent contends that "it would be anomalous if events after supply could be considered in relation to questions of liability but then had to be ignored in relation to the question of damages". That would indeed be anomalous, but it is not the case on Ms Capic's approach. Some events after supply may (and in this case, did) show the nature of the failure to comply at supply and are thus brought into the s 54(2) analysis. By the cross-reference in s 272(1)(a) to the "failure to comply", they are brought into the damages analysis.[8] *Contra* RS [66], this does not conflate liability and damages; it reflects the mandated interrelationship between liability and damages in s 272(1)(a).[9] By contrast, the Respondent's approach *alters* the character of that which is being assessed, from the

[8] Because the non-compliance happens at supply, the later development of a remedy is irrelevant to the failure to comply: ***Medtel*** *Pty Ltd v Courtney* (2003) 130 FCR 182, [69]-[70]; FC [62] (CAB412) (from which no appeal is brought).

[9] RS [66] also makes a submission based on *Medtel* [73]. The reference to "loss and damage" in that passage must be understood in a context where reduction in value damages were not sought: see RS [66] fn 34.

"failure to comply" found at the liability stage, to the value of the goods not referable to the failure to comply but "knowing, with the benefit of hindsight, how they will perform" (RS [67]) and having been altered by the application of a repair (RS [71]).

The existing law

8. The Respondent leans heavily on *Potts v Miller*, *HTW* and *Kizbeau* concerning the concepts of "real value" or "true value": RS [47]-[51]. The "accumulation of valuable insight and experience" (RS [47], [70]) in those cases does not require concepts of "true" or "real" value to be lifted and dropped into s 272(1)(a). Rather, it shows how the measure of damages prescribed affects the information taken into account. See AS [32], [44]-[47].

9. By contrast, the Respondent appears to contend that the word "value" in s 272(1)(a) *ipso facto* imports the concept of "real value" or "true value" discussed in *HTW* and *Kizbeau*, because those cases establish a universal approach to assessing value in a damages context: see RS [47]. They do not. In *HTW* (at [39]) it was observed that "in many" – not all – "fields of law, assessments of compensation or value at one date are commonly made taking account of all matters known by the later date when the court's assessment is being carried out". Of the many examples the High Court gave in that passage, the sale of goods is conspicuously absent.[10] Similarly, in *Bwllfa & Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co* [1903] AC 426, one of the seminal cases on preferring "accomplished fact" to "conjecture" (quoted in *Kizbeau* 293-295; *HTW* [39]), the House of Lords expressly distinguished the type of claim in that case from a sale of property.[11] Section 272(1)(a) refers to the "value of the goods", not their "true value" or "real value" as that term is used in a body of law belonging to a different category of civil claim. It was the law on the sale of goods that formed the model for s 272: AS [27] fn 8, [29].

10. As to RS [63]: the explanation of the older sale of goods cases has been keenly debated, particularly in England.[12] Various rationales may be found within the decisions themselves. In Australia, the law is clear: damages in this context represent the performance to which the claimant was entitled in the first place (*Clark v Macourt* [9]-

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[10] In *Kizbeau* 291 fn 28 one sale of goods case is cited, and it supports Ms Capic. In *Roper v Johnson* (1873) LR 8 CP 167, difference in value was assessed not at the date of trial but at each of the several dates for performance.

[11] See in particular 428-429; see also 431, 432.

[12] See, eg, A Kramer, *The Law of Contract Damages* (Hart, 2nd ed, 2017), [4-99]-[4-101]; A Burrows, *Remedies for Torts, Breach of Contract and Equitable Wrongs* (Oxford, 4th ed, 2019), 193-194; *cf* R Stevens, 'Damages and the Right to Performance: A Golden Victory or Not?' in JW Neyers et al. (eds), *Exploring Contract Law* (Hart, 2009) 171, 179-184; D Winterton, *Money Awards in Contract Law* (Hart, 2015), 73-75.

[11]; [25], [28], [38]; [107]-[109]). Absent betterment (*eg.*, if the repairs had given Ms Capic a *superior* car to that promised), subsequent benefits are not brought to account: *Clark v Macourt* [14]-[22]; [30]; [128]-[129], [142]-[143]. In any event, even if principles of mitigation are relevant, which is denied, the manifestation of the defect is not mitigation, nor is Ms Capic's use of the defective vehicle after supply, nor (classically, in the sale of goods cases) is any improvement in its value by the time of trial. Partial repairs, provided many years after supply, are not mitigation either, or alternatively, hardly any: see *Gardner v Marsh & Parsons* [1997] 1 WLR 489, 503B-H (Hirst LJ), 514D-F (Pill LJ) (a negligent failure to warn case).

Anomalous consequences

11. The Respondent hypothesises four scenarios, which it says show Ms Capic's construction leads to anomalies: RS [55]-[58]. It does not. The *first* scenario depends on the application of s 271(6), as Parliament intended. The *third* scenario is addressed in [6] above. The *fourth* can be dealt with on ordinary principles preventing double satisfaction.[13]

12. The *second* scenario raises an important question of construction: how or where is a claim for reduction in value distributed along a chain of title? The question does not need to be resolved on this appeal, because Ms Capic never sold her car. However it is resolved, it will not lead to anomalies: s 272(1)(a) applies to a *good* not a person. Ms Capic accepts that the same reduction in value cannot be claimed more than once (cf *Dwyer* [236]).

Respondent's Cross-Appeal and Notice of Contention[14]

13. The reference to the "performance of [Ms Capic's] car" in the Notice of Cross-Appeal and Notice of Contention appears merely to be another way of saying that s 272(1)(a) requires regard, in a propensity case, to be had to how the good has actually "performed" (with the benefit of hindsight), in the sense of manifestation of the risk, and use of the vehicle: *cf* RS [67] and [73] with [75]. For the reasons already given, including in chief at AS [33]-[40], the contention should be rejected.

Fiona Roughley
T: (02) 9376 0652
E: fiona.roughley@banco.net.au

Sam Gerber
T: (02) 8210 5030
E: gerber@elevenwentworth.com

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[13] *Leeks v FXC Corp* (2002) 118 FCR 299, [12]-[17]; *Body Corporate No DPS 91535 v 3A Composites GMBH* [2023] NZCA 647, [69]; *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635, [39], [46].

[14] There is no objection to leave being granted to the Respondent to file the Notice of Cross-Appeal out of time.