HIGH COURT OF AUSTRALIA

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Details of Filing

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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

RESPONDENT'S SUBMISSIONS

PART I CERTIFICATION

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

PART II ISSUES

2. Consumers who buy goods that fail to meet statutory quality guarantees are entitled to damages for the reduction in the value of the goods. Ms Capic purchased—and for many years used—a car that had an unacceptable performance risk. Should her reduction in value damages be assessed as at the purchase date? Whatever the assessment date, can post-purchase events relevant to value be considered? What evidence may be considered to avoid over- or under-compensation?

PART III SECTION 78B NOTICE

3. No s 78B notice is necessary.

PART IV FACTS

Liability

4. The proceeding is a representative proceeding brought pursuant to Pt IVA of the *Federal Court of Australia Act 1976* (Cth). It concerns 73,451 Focus, Fiesta and EcoSport motor vehicles, manufactured by Ford with a dry, dual-clutch transmission, known as "DPS6",

and sold as new to consumers between 22 September 2010 and 29 December 2017 (**Affected Vehicles**): PJ [17] (CAB 24); FC [6] (CAB 397). These vehicles were "economical entry-level vehicles": PJ [615] (CAB 204).

5. Ms Capic acquired a new Focus vehicle on 24 December 2012: PJ [2] (CAB 20-21). The group members are "persons who purchased [an Affected Vehicle] new together with subsequent second hand purchasers between 1 January 2011 and 29 November 2018": PJ [17] (CAB 24); FC [7] (CAB 397). Ms Capic's estimate at trial was that each Affected Vehicle had been owned on average by 2.5 persons during the period: PJ [17] (CAB 24).

6. The Affected Vehicles were supplied in breach of s 54 of the ACL because they were manufactured with at least one of three **Component Deficiencies** and two **Architecture Deficiencies**: PJ [19], [23], [29], [35] (CAB 25-28).

7. The Component Deficiencies refer to three components of the DPS6—the input shaft seals, clutch lining and transmission control module (**TCM**)—that gave rise to a "propensity" for or "real risk" of the Affected Vehicles experiencing certain behaviours, such as shuddering, lack or loss of power and harsh gear shifts: PJ [230], [323], [368] (CAB 85, 115, 129). The primary judge found that where the risk manifested, the behaviours associated with the input shaft seals were "intermittent": PJ [638] (CAB 211), and the behaviours associated with the TCM were "progressive" and "depended on how long the vehicle continued to be driven" after less serious symptoms first appeared: PJ [347], [368] (CAB 122, 129).

8. The Architecture Deficiencies exacerbated the risk or propensity of the componentry issues: PJ [235], [415], [501], [532]-[534] (CAB 87, 143, 171-172, 180); FC [222]-[223], [227]-[229] (CAB 449-450). One Architecture Deficiency also generated an independent risk of "a slight vibration or shudder … at slow speeds or during a coast down as the transmission upshifts or downshifts" and "a slight audible rattle, particularly when operated within an enclosed area such as a carpark": PJ [13], [35], [38], [521], [528]-[530] (CAB 23, 28-29, 177, 179). The primary judge observed that had the Affected Vehicles not been marketed as having "smooth gear changes", this risk may not have constituted a breach of s 54 at all: PJ [635], [670] (CAB 211, 218). The other Architecture Deficiency generated no independent risk of problems.

9. Ms Capic's vehicle was supplied in breach of the acceptable quality guarantee by reason of being manufactured with each of the Deficiencies: PJ [5], [13], [674], [887] (CAB

21, 23, 219, 279); FC [228]-[229] (CAB 450). In Ms Capic's case, the risks had in fact manifested in her vehicle: PJ [5]-[6] (CAB 21-22). As to group members, while every Affected Vehicle was manufactured with a *propensity* to display one or more undesirable behaviours, the behaviours need not necessarily have manifested.

10. Ford progressively introduced free, effective repairs for all Affected Vehicles for the Deficiencies related to the input shaft seal (PJ [216], [220], [226], [231]-[232] (CAB 82-83, 85-86)) and TCM: PJ [376], [379], [381], [384], [387]-[390] (CAB 131-136). As to the clutch lining Component Deficiency, the primary judge held that Ford's repair for Fiesta vehicles was effective, but Ford had not proven that its repair in Focus and EcoSport vehicles was effective: PJ [309], [313]-[315], [324]-[325] (CAB 110-112, 115). Where effective repairs were applied the Component Deficiencies were eliminated, and all that remained were the "slight" behaviours arising from the inadequate torsional damping referred to at paragraph 8 above.

11. There was no evidence that any vehicle had become undriveable. The unchallenged warranty data evidence at trial showed that many vehicles had zero or one transmission-related warranty claim, where such claims could include a software update performed during a regular service: Respondent's Book of Further Materials (**RFM**) 1.9 at [19]; RFM 2.15 at [130]; RFM 3.19 at [109]. For vehicles that had one repair event, the average mileage of the vehicle at the time of the repair was 36,456 kilometres: RFM 3.21 at [112]. In Ms Capic's case, the evidence at trial was that she had driven her vehicle 136,000 kilometres over seven and a half years (Appellant's Chronology (**AC**) at [90]) and was still driving her car at the date of trial: RFM 4.55 at T320:38; RFM 4.57 at T322:36; RFM 4.58 at T323:10; RFM 4.59 at T324.3 and T324.43. Her vehicle had two relevant unscheduled services in that seven and a half years (15 services in total, including nine regular services and two services for unrelated problems): PJ [535] (CAB 181-182; AC at [18], [22], [26], [27], [32], [38], [39], [44], [46], [54], [58], [63], [78], [81], [83]. While Ford accepts that Ms Capic's experience with her vehicle was unsatisfactory, she received an effective repair for the input shaft seal and TCM Component Deficiency at no cost: PJ [858]-[860] (CAB 270-271). There was no effective repair to Ms Capic's vehicle in respect of the clutch lining Component Deficiency or Architecture Deficiencies.

Primary judge's approach to assessing damages under s 272(1)(a) of the ACL

12. The primary judge's approach to assessing damages under s 272(1)(a) is extracted in FC [298] (CAB 464-466). There are two aspects to the primary judge's approach that bear consideration.

13. *First*, the primary judge held that reduction in value was to be assessed by reference to the value of the vehicle "[nine] years in the past when the defects it suffered from are risks not actualities", without regard to whether the risks had come to pass or whether the components had been successfully repaired (PJ [884]-[886] (CAB 278)) because "[i]f it were otherwise the value at the date of acquisition would be conceptually tied to contingent future events and hence theoretically unknowable": PJ [884] (CAB 278).

14. *Second*, Ford's evidence (from Mr Cuthbert) valued the vehicle at the time of trial, but the primary judge considered that evidence "irrelevant because his assumptions [did] not match the facts and because he was asked the wrong question": PJ [881] (CAB 277). Ms Capic's valuation evidence (from Mr Vasilakis) purported to value the vehicle at the time of supply, but his Honour held it was also based on incorrect assumptions and could not be "recalibrate[d]" to match the facts: PJ [869]-[870] (CAB 276-277). As a result, there was "no useful evidence" about the value of the vehicle at the time of supply: PJ [880]-[882] (CAB 277). The primary judge nevertheless held that, at the time of supply, Ms Capic's vehicle was worth 30% less than the purchase price: PJ [882]-[884], [887]-[890] (CAB 277-279).

Full Court's approach to assessing damages under s 272(1)(a) of the ACL

15. The Full Court applied what it regarded as the construction of s 272 adopted in ***Toyota*** *Motor Corporation Australia Ltd v Williams*,[1] which it summarised at FC [307]-[308] (CAB 467-469). In particular, the Full Court held that subsequent events are relevant to assessing "the price that would have been paid if the consumer had known of the defect when purchasing the goods" (FC [307(8)], [308] (CAB 468-469)), and that this was consistent with ***Dwyer*** *v Volkswagen Group Australia Pty Ltd*:[2] FC [309] (CAB 469).

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1 (2023) 296 FCR 514.
2 [2023] NSWCA 211.

16. Accordingly, the Full Court held that:

(a) the primary judge "ought to have held that subsequent events were capable of bearing on the proper assessment of reduction in value damages" under s 272(1)(a);

(b) the primary judge ought to have taken into account "the facts known at the time of trial (being the repairs) and the use by Ms Capic of her vehicle up until the time of trial"; and

(c) "evidence as to the value of the vehicle at the time of trial was relevant information which would have enabled the primary judge to ensure that Ms Capic was not over-compensated": FC [315] (CAB 470-471).

17. The Full Court ordered the question of Ms Capic's damages to be remitted to the primary judge for re-determination on the basis of the evidence already before his Honour: FC [316] (CAB 471); order 7 made 13 December 2023 (CAB 473-474).

PART V ARGUMENT — APPEAL

Summary of possible approaches to s 272(1)(a)

18. The decisions of the Full Court of the Federal Court in *Toyota*, the New South Wales Court of Appeal in *Dwyer* and the Full Court of the Federal Court in this appeal, together with the parties' submissions in this appeal, reveal three main approaches to s 272(1)(a).

19. *First*, there is Ford's position on the appeal, which defends the Full Federal Court's decision in this appeal, applying *Toyota*, and is as follows:

(a) Section 272(1)(a) requires the court to determine the amount of any reduction in the value of the goods resulting from the failure to comply with a relevant statutory guarantee.

(b) To determine that amount, the court must compare: (1) the lower of "the price paid or payable by the consumer for the goods" and "the average retail price of the goods at the time of supply", and (2) the "value of the goods".

(c) The "value of the goods" refers to the real or true value of the goods.

(d) In most cases, the real value of the goods is assessed at the date of supply, taking into account events that illuminate that value (whenever they occur).

(e) The overarching consideration when assessing damages is that the amount of any compensation be just. That may require a departure from assessment at the

date of supply or (irrespective of the date) an adjustment based on post-acquisition information to avoid over- or under-compensation.

20. *Second*, there is the approach in *Dwyer*, which is the same as the first approach, save that it does not contemplate departure from assessment at the date of supply or any adjustment to avoid over- or under-compensation.

21. *Third*, there is Ms Capic's approach, which argues that when determining the extent of any reduction in value the court must only conduct the assessment at the time of supply, disregarding subsequent events. There should thus be no adjustments to avoid over- or under-compensation. In this case, it means assessing damages for each group member's car without considering its actual post-supply performance or the possibility of fixing defects.

22. If either the first or second approach is correct, it follows that the primary judge erred in his assessment of damages, and either the appeal to this Court should be dismissed (if this Court fully endorses the reasons of the Full Court of the Federal Court in *Toyota* and this appeal) or order 7(a) of the Full Court's orders made on 13 December 2023 should be varied such that the question of damages is remitted for re-determination in accordance with this Court's reasons.

Assessing "reduction in value" requires identifying the real value of the goods

23. Under s 272(1)(a), an affected person is entitled to damages for "any reduction in the value of the goods, resulting from the failure to comply with" the relevant guarantee. Central to this appeal is how one identifies the value of goods as affected by the failure to comply with the relevant guarantee. That is a question of statutory construction.

24. The ordinary meaning of "reduction", in this context, is the amount by which something is reduced.[3] Section 272(1)(a) is concerned with any reduction "resulting from"—that is, caused by—the failure to comply with the relevant guarantee.

25. The starting value is provided by s 272(1)(a): it is the lower of (i) the price paid or payable by the consumer for the goods and (ii) the average retail price of the goods at the time of supply. This is a proxy for the value of the goods as promised.[4]

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3 See *Macquarie Dictionary*, 9th ed (2023), vol 2 at 1292, "reduction", sense 3.

4 See *Moore v Scenic Tours Pty Ltd* (2020) 268 CLR 326 at 348-349 [64]-[65]; Edelman, *McGregor on Damages*, 21st ed (2021) at 822-823 [25-063].

26. The second value must be the value of the goods as affected by the failure to comply. Section 272(1)(a) refers to "value", not "market value". Further, the term "value" is used in distinction to "price" (in sub-para (i)) and "average retail price" (in sub-para (ii)), indicating that the section is concerned with the "real" value of the goods. That value may differ from the market value, particularly where the market is mistaken or does not have access to information that bears on the real value of the goods.[5]

27. In other words, s 272(1)(a) requires an assessment of damages by subtracting value from price. That is consistent with the *Potts v Miller* approach, which requires a comparison between the price paid and the "real" value of what was acquired.[6]

10 28. It may be accepted that the two limbs of s 272(1) resemble the two components of compensatory damages available at common law for breach of contract, being compensation for the performance interest and compensation for consequential losses.[7] But general law concepts of the "performance interest", however that phrase is understood,[8] cannot control the interpretation of s 272(1)(a). In any event, there is no tension between the concept that s 272(1)(a) protects the "performance interest"—by awarding damages for any reduction in value below the value of what was promised, as represented by the price paid by the consumer or the average retail price—and giving effect to the words of the provision, which require the reduction to be measured by reference to the real value of what was received.

20 **The text, context and purpose of s 272(1)(a) are consistent with the "real value" approach**

29. (**Text**) The starting point for the construction of s 272(1)(a) is the text of the section.[9]

30. Section 272(1) provides that, in an action for damages under Div 2 of Pt 5-4, an "affected person" is "entitled to recover damages for: (a) any reduction in the value of the goods, resulting from the failure to comply with the guarantee to which the action relates". Two points may be made about this text.

31. *First*, the express language of ss 271(1) and 272(1) provides that an affected person is entitled to "damages". In its ordinary legal meaning, that term connotes compensation[10]

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5 See *Potts v Miller* (1940) 64 CLR 282 at 299.
6 See *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640 at 657 [36].
7 PJ [891] (CAB 280); *Moore v Scenic Tours Pty Ltd* (2020) 268 CLR 326 at 348-349 [63]-[67]; cf AS [26]-[27].
8 Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs*, 4th ed (2019) at 189-190.
9 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47]; *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39].
10 See *Johnson v Perez* (1988) 166 CLR 351 at 355.

and therefore imports the compensatory principle that a person injured by a wrong should receive compensation that will put her in the position she would have been in if the wrong had not been committed but cannot recover more than she has lost.[11]

32. *Second*, the prices referred to in s 272(1)(a)(i) and (ii) suggest that the starting point, at least, for assessing value is that value should be assessed at the date of supply, so that like is compared with like. But it is perfectly consistent with that observation to permit subsequent events to inform an assessment of real value at the date of supply, and there is nothing in s 272 that suggests that the court must shut its eyes to subsequent events. Further, there is no textual indication that s 272(1) establishes an inflexible rule that would be inconsistent with the use of the "damages" in the chapeau and the nature of s 271(1) as an action for "damages".

33. (**Statutory context**) Section 272(1)(a) is properly construed in its statutory context, which includes the guarantees relating to the supply of goods in Pt 3-2, Div 1, Subdiv A and the range of remedies contained in Pt 5-4.

34. Subdivision A of Pt 3-2, Div 1 contains eight guarantees relating to the supply of goods to a consumer. Relevantly to manufacturers, the guarantees, which cannot be excluded (s 64), include that goods are of acceptable quality (s 54), that goods sold by description correspond with their description (s 56), that spare parts and repair facilities are reasonably available (s 58) and that the manufacturer will comply with any express warranty given or made (s 59(1)). A broader range of guarantees applies to suppliers.

35. Part 5-4 contains three divisions. Division 1 concerns actions against suppliers of goods (Subdiv A) and services (Subdiv B). Subdivision A relevantly provides that a consumer may take action against a supplier if the supplier fails to comply with a guarantee.[12] If the failure can be remedied and is not a major failure, the consumer may require the supplier to remedy the failure (s 259(2)). If the failure cannot be remedied or is a major failure, the consumer may either reject the goods (s 259(3)(a)) and claim a refund or replacement (s 263) or "recover compensation for any reduction in the value of the goods below the price paid or payable by the consumer for the goods" (s 259(3)(b)). In either event, the consumer may recover damages for any reasonably foreseeable consequential loss or damage (s 259(4)).

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11 *Haines v Bendall* (1991) 172 CLR 60 at 63; *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635 at 659 [57].

12 In relation to goods, s 259(1) applies to guarantees under Pt 3-2, Div 1, Subdiv A, excluding guarantees in relation to spare parts and repairs (s 58) and manufacturer's warranties (s 59(1)).

36. Division 2 of Pt 5-4 concerns actions against manufacturers. Section 271(1) relevantly provides that if the guarantee of acceptable quality applies and is not complied with, "an affected person … may, by action against the manufacturer of the goods, recover damages from the manufacturer". This is subject to an exception if the guarantee is not complied with only because of certain matters outside the manufacturer's control.[13] Similar rights of recovery are conferred in relation to the other relevant guarantees (ss 271(3) and (5)).

37. Each right of recovery under s 271 is subject to s 271(6). It provides that if an affected person has, in accordance with an express warranty given or made by the manufacturer of the goods, required the manufacturer to remedy the failure to comply with a relevant guarantee by repairing or replacing the goods, then the affected person is not entitled to commence an action under s 271 to recover damages under s 272(1)(a) unless the manufacturer has refused or failed to remedy the failure, or has failed to remedy the failure within a reasonable time. Section 272(1) provides that, in an action for damages under Pt 5-4, Div 2, an affected person may recover damages for reduction in value (para (a)) as well as any reasonably foreseeable consequential loss (para (b)).

38. Six points may be made about the statutory context. The points deal specifically with consumers, as it is not in dispute that Ms Capic is a consumer.[14]

39. *First*, s 271(1) provides that the consumer's remedy, where a manufacturer has failed to comply with the guarantee that goods are of an acceptable quality, is that the consumer may "recover damages from the manufacturer". This reinforces the importance of the word "damages" in s 272(1). Section 272(1) provides more detail about what "damages" are recoverable, but, fundamentally, an action for recovery of the reduction in value of goods is an action for damages.

40. *Second*, there is an obvious symmetry between s 259(3)(b), which provides that, by action against a supplier, a consumer may "recover *compensation* for any reduction in the value of the goods", and s 272(1)(a), which provides that, by action against a manufacturer, a consumer may "recover *damages* for … any reduction in the value of

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13 Being (a) an act, default or omission of, or any representation made by, any person other than the manufacturer or the manufacturer's employee or agent; (b) a cause independent of human control that occurred after the goods left the control of the manufacturer; or (c) the fact that the price charged by the supplier was higher than the manufacturer's recommended retail price, or the average retail price, for the goods: s 271(2).

14 The expression "affected person" includes not only a consumer but also "a person who acquires the goods from the consumer (other than for the purposes of re-supply)" and "a person who derives title to the goods through or under the consumer": s 2(1) (definition of "affected person").

the goods". Of course, in some circumstances, the use of different language can suggest that a different meaning is intended. But the more natural conclusion in the present case is that the reduction in value is assessed the same way in an action against the supplier as in an action against a manufacturer—there is nothing in the context or purpose of ss 259(3)(b) and 272(1)(a) to suggest that the outcome for a consumer should differ depending on whether she brings an action against the supplier or the manufacturer. This reinforces the conclusion that damages under ss 271(1) and 272(1) are compensatory.[15]

41. *Third*, the broader statutory context reveals a regime that is intended to protect the interests of consumers by applying a range of statutory guarantees to consumer goods and granting a range of practical remedies, most of which do not require consumers to commence court proceedings. In particular, the regime incentivises repairs. Where a manufacturer repairs goods in accordance with an express warranty within a reasonable time, it gains the benefit of a bar on any action for reduction in value damages under s 272(1)(a). It would be inconsistent with the broader regime to construe s 272(1)(a) so as to disincentivise manufacturers from repairing goods once the window of opportunity provided by s 271(6) has closed, or from performing repairs at all in the absence of an express warranty. Repairs are better late than never, particularly when consequential loss for delay is available under s 272(1)(b).

42. *Fourth*, and related to the previous point, the fact that s 271(6) is concerned with repairs, which must necessarily occur after the goods are supplied, is consistent with post-supply events being relevant to s 272(1)(a). It would be anomalous if a court were required to consider post-supply events under s 271(6) but to ignore the same or similar events under s 272(1)(a).

43. *Fifth*, it is apparent from the broader statutory context that Parliament struck a careful balance between the interests of consumers and manufacturers. This is apparent from the exception to liability under s 271(1) in s 271(2), the exception to liability under s 272(1)(a) where a manufacturer has repaired goods under s 271(6), and the limitation in s 272(1)(b), which provides that manufacturers are liable for consequential loss only if it is reasonably foreseeable. It is inconsistent with that context to construe s 272(1)(a)

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[15] See also Australia, House of Representatives, *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010*, Explanatory Memorandum at 205 [7.122], which states that the approach of calculating reduction in value of goods below the lower of the price paid or the average retail price "ensures that manufacturers are not required to provide excessive compensation to consumers if suppliers charge high prices for goods".

so that a manufacturer that has repaired goods in the absence of an express warranty (or too late to take advantage of s 271(6)) is required to pay damages for reduction in value ignoring the fact of the repairs.

44. *Sixth*, Ms Capic does not challenge the Full Court's finding that "the question under s 54 is to be determined taking into account the relevant information known at the time of trial, including 'after-acquired' knowledge" (CAB 411 [57]). Again, 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.

45. (**Broader context**) Section 272(1) is also to be considered in its broader context, including its statutory analogues and the state of the law before its enactment.

46. (Statutory analogue) Section 272(1) of the ACL is closely modelled on s 27(1) of the *Consumer Guarantees Act 1993* (NZ).[16] The decisions on s 27(1) broadly support the approach advanced by Ford, although they do not contain detailed reasons on the issues in the appeal and Ford does not submit that they are a weighty consideration.[17]

47. (Existing law) It is unhelpful, in construing s 272(1) to start by drawing analogies with the common law or similar statutory provisions.[18] But that does not mean that the common law is irrelevant. On the contrary, this Court's decisions "represent an accumulation of valuable insight and experience which may well be useful" in applying s 272(1)(a).[19] The cases demonstrate broad acceptance of the proposition that the real value of goods on a particular date may be assessed with the benefit of hindsight, considering subsequent events.

48. In *Kizbeau Pty Ltd v WG & B Pty Ltd*,[20] this Court unanimously held that, in considering the real value of a motel business and lease at the date of contract, it was appropriate to have regard to the company's actual use of the premises as well as the subsequent amendments to the planning permit. Similarly, in *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd*,[21] this Court unanimously held that the real value of what the

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16 Commonwealth, Parliamentary Debates, House of Representatives, 17 March 2010 at 2722.

17 See *Reference No MVD 51/10* [2010] NZMVDT 65; *Cameron v Ram Commercials Ltd* [2010] NZMVDT 166; *Woodrow v Carbase Ltd* [2012] NZMVDT 16; *O'Brien v Basset Enterprises Ltd* [2016] NZMVDT 86; *Jenkins v Ford Motor Company of New Zealand Ltd* [2021] NZMVDT 217.

18 *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 507 [32], 510 [38]; *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at 135 [84]; *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388 at 407 [44].

19 *Henville v Walker* (2001) 206 CLR 459 at 470 [18]; see also 501 [130].

20 (1995) 184 CLR 281.

21 (2004) 217 CLR 640 at 661 [45].

purchasers of a shopping arcade received was to be ascertained with the benefit of hindsight—that is, taking into account how the risks relating to tenancy levels at the date of contract "evolved into certainties at dates after the date on which the comparison of price and true value was being made".

49. A significant benefit of the "real value" approach endorsed in *Kizbeau* and *HTW Valuers* is that it avoids the artificiality of preferring historical prophecies to known facts and it conforms to the compensatory principle by ensuring that injured parties are neither over- nor under-compensated. This may be illustrated by an example adapted from *Twycross v Grant*.[22] Assume that a horse is sold for $10,000. It suffers from a latent disease, which carries a 50 per cent chance of death and a 50 per cent chance of symptomless recovery. Assume that a willing but not anxious buyer knowing of disease, but not its outcome, would pay $5,000 for the horse. On the "real value" approach, if the horse dies, the owner can recover the full value of the horse, whereas if it recovers, having suffered no symptoms, the owner has suffered no direct loss and is confined to damages for any consequential loss. Conversely, if a court assessing damages shuts its eyes to the known facts, having regard only to contingencies at the date of supply, the owner will receive $5,000 whatever happens to the horse—on the one hand, a windfall; on the other, an uncompensated loss.

50. Importantly, "independent", "extrinsic", "supervening" or "accidental" events are disregarded.[23] Any loss or gain resulting from such an event is not a consequence of the wrong. This is consistent with the language of s 272(1)(a), which calls for identification of the reduction in value "resulting from" the failure to comply with the relevant guarantee. Whether a subsequent event is intrinsic, and therefore relevant to the causal inquiry, or extrinsic, and therefore to be disregarded, will depend on the nature of the good and the nature of the defect. In a case where the question of value arises under statute, it will also depend on the statutory context, because that context may demonstrate a legislative intention that some subsequent events (such as repairs) be taken into account but others (such as appreciation in a rising market) be disregarded.

51. The relevance of the existing law for the construction of s 272(1)(a) is twofold. First, it reveals the insight of the law in developing principles for identifying the "real" reduction in value of goods resulting from an actionable wrong, so that, consistently

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22 (1877) 2 CPD 469 at 544-545.

23 *Potts v Miller* (1940) 64 CLR 282 at 298, quoted in *HTW Valuers* (2004) 217 CLR 640 at 659 [40].

with the compensatory principle, injured parties are neither over- nor under-compensated. Second, it is part of the context in which s 272(1)(a) was enacted. Parliament must be taken to have known that this Court had endorsed the "real value" approach to assessing value at a particular date in actions for damages under s 82 of the *Trade Practices Act 1974* in *Kizbeau* and *HTW Valuers*. In that context, clear words would be needed in s 272 for this Court to find that, contrary to the approach endorsed in *Kizbeau* and *HTW Valuers*, Parliament intended courts to prefer prophecies to known facts and risk leaving consumers with either a windfall or an uncompensated loss.

52. (**Purpose**) As emerges from the above, the objective purpose of s 272(1)(a), which is derived from the text and context of the section,[24] is to ensure that consumers are compensated—but not over- or under-compensated—for any reduction in value resulting from a manufacturer's failure to comply with a relevant guarantee. The ordinary meaning of the word "damages" is consistent with that purpose whereas a non-standard usage of that word would risk undermining the statutory purpose.[25]

53. That purpose is served by:

(a) assessing the real value of the goods received by consumers, having regard to subsequent events; and

(b) where necessary to avoid over- or under-compensation, leaving open the possibility of departing from assessment at the time of supply or adjusting the damages to which a consumer is entitled.

54. Ms Capic's construction cannot be reconciled with that purpose. Four anomalous consequences of Ms Capic's construction demonstrate why that is so.

55. **(Anomalous consequences)** *First*, assume that, on the same day, two consumers each buy a car suffering from different but equally serious defects. A year later, the manufacturer develops a fix for one of the defects but reaches the conclusion that the other defect cannot be remedied. Both consumers seek damages for reduction in value. On Ms Capic's construction, it is irrelevant to the "value" of the goods that one of the cars can be fixed and the other cannot. By contrast, Ford's approach allows the court to differentiate between the real values of the cars.

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24 *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 592 [44]; *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 390 [26].

25 cf *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 368 [14].

56. *Second*, assume that a consumer buys a car that, by reason of a latent defect, has a propensity to break down. The car never actually breaks down, the latent defect is never discovered, and the consumer sells the car on the second-hand market for as much as she would have received had the car not suffered from the latent defect.[26] On Ms Capic's construction, the consumer is entitled to damages for reduction in value despite having received the benefit of a car that performed as well as expected and despite having received full value from the sale. Indeed, she will receive the same "damages" as a person whose car did break down. Such an award cannot accurately be described as "compensatory". By contrast, Ford's approach allows the court to assess the real value of the car as one that in fact suffered from no problems and retained its on-sale value.

57. *Third*, assume that a consumer buys a good without an express warranty, such that s 271(6) does not apply. On Ms Capic's construction the manufacturer has little incentive to fix the defect because even a total repair will have no effect on the manufacturer's liability to pay damages for reduction in value. By contrast, on Ford's construction, the manufacturer can reduce its liability by fixing the defect, without disturbing the consumer's entitlement to damages for any direct or consequential loss attributable to the period when the good was defective.

58. *Fourth*, assume that a consumer, having purchased a car that suffers from a defect, recovers damages for reduction in value from the supplier. On Ms Capic's construction, which would impose an inflexible rule to disregard all post-supply events, it is not clear how the court can prevent double recovery if the same consumer also seeks damages from the manufacturer. By contrast, on Ford's approach, it is open to the court to find that any award of damages should be assessed having regard to the amount already paid, to prevent the consumer being compensated twice for the same damage.

Ground 1: time of assessment and "adjustment"

59. Ground 1 of the appeal challenges the Full Court's conclusion that s 272(1)(a) of the ACL permits departure from assessment at the time of supply or adjustment to avoid over-compensation. If ground 1 alone is upheld, that should not lead to the primary judge's orders being restored. For the reasons set out above, even if s 272(1)(a) requires an assessment of reduction in value as at the date of supply, without any scope for adjustment, the real value of goods at the date of supply should be assessed having regard to events after the date of supply. That is not the approach that the primary judge

[26] See *Dwyer v Volkswagen Group Australia Pty Ltd* [2023] NSWCA 211 at [236].

took. The appropriate order would, therefore, be for the question of damages to be remitted for determination by the primary judge in accordance with this Court's reasons. But in any event, ground 1 of the appeal should be dismissed for three reasons.

60. *First*, for the reasons set out above, the fact that an action for reduction in value is an action for "damages" discloses a legislative intention that damages should be assessed in accordance with the compensatory principle that an injured party should receive compensation for loss but cannot recover more than she has lost. This is supported by the context of ss 271 and 272, which reveals a nuanced regime that is intended to provide consumers with appropriate redress where there has been non-compliance with a consumer guarantee but nowhere discloses an intention that consumers should receive a windfall (cf AS [30]).[27] The Full Court in *Toyota* was right to hold that the reference in s 272(1)(a) to "the price paid or payable by the consumer" and "the average retail price … at the time of supply" "indicate that, at least generally, the point in time for assessing damages for any reduction in the value of the goods is the time of supply" (at [98]). It was also right to hold that these matters are incapable of supporting a rigid rule to which courts must adhere in the face of the compensatory principle (at [99]) (cf AS [22]).

61. The same is true of the proposition that the measure of damages provided by s 272(1)(a) resembles direct loss compensable at common law, while the measure of damages provided by s 272(1)(b) resembles consequential loss (cf AS [23]-[24]). It is not in dispute that, at general law and under the sale-of-goods legislation, the direct measure of damages in relation to sale of defective goods was generally assessed at the date of supply (AS [26(b)]). That resemblance provides some support for the proposition (which the Full Court in *Toyota* rightly accepted) that, under s 272(1)(a), reduction in value should generally be assessed at the time supply. It rises no higher than that.

62. *Second*, again for the reasons set out above, the objective purpose of the statutory regime is that consumers have access to a range of remedies that are designed to put them in the position they would have been in but for the failure to comply with a consumer guarantee. Ms Capic seeks support for her construction in an a priori assumption about the desirable operation of the ACL which seeks to avoid the need "to undertake the difficult and potentially costly exercise of separating the result of the failure to comply [with a consumer guarantee] from other factors which may affect the goods over time"

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[27] And there are indications to the contrary: see, eg, fn 15 above.

(AS [25]). She ignores the fact that s 272(1)(a) expressly requires identification of the reduction in value "resulting from" the failure to comply. Further, it is incongruous to suggest that, while questions of liability may require complex expert evidence, the legislature intended that, in the interests of simplicity, remedies should be divorced from actual loss (cf AS [28]).

63. *Third*, Ms Capic acknowledges statements of principle from this Court to the effect that assessment of damages at the date of breach "must give way in particular cases to solutions best adapted to giving an injured plaintiff that amount in damages which will most fairly compensate him for the wrong he has suffered",[28] but she seeks to distinguish "the many sale of goods cases in which claimants have been awarded reduction in value damages despite suffering no financial loss due to events after supply" (AS [31]). The cases she relies on do not assist her. Five of the six cases concern profitable sales on a rising market;[29] their explanation is that the innocent party's decision to sell is "an independent transaction and not one taken into account in mitigation of loss".[30] The sixth case, *Clark v Macourt*,[31] arose from unusual facts but should similarly be understood on the basis that the purchaser's recoupment from her patients of the cost of procuring replacement sperm was an independent transaction.

Ground 2: use of evidence

64. Ms Capic contends that, in circumstances where the failure to comply with a consumer guarantee arose from a propensity of the good to behave unacceptably, the Full Court erred in finding that s 272(1)(a) requires that regard be had to:

(a) whether the risk in fact came to pass;

(b) whether repairs were applied to the good at no cost to the claimant;

(c) the claimant's use of the vehicle; and

(d) the value of the good at the time of trial.

65. The Full Court did not err in finding that regard should be had to these matters. They are relevant to the real value of goods at the date of supply or, alternatively, because they bear on the application of the overarching compensatory principle. Ms Capic's

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28 *Johnson* (1988) 166 CLR 351 at 355-356. See also *Henville* (2001) 206 CLR 459 at 470 [18].

29 *Jones v Just* (1868) LR 3 QB 197; *Williams Brothers v Ed T Agius Ltd* [1914] AC 510; *Jamal v Moolla Dawood Sons & Co* [1916] 1 AC 175; *Slater v Hoyle & Smith Ltd* [1920] 2 KB 11; *Bainton v John Hallam Ltd* (1920) 60 SCR 325. See Edelman, *McGregor on Damages*, 21st ed (2021) at 290 [9-133]-[9-134].

30 Edelman, *McGregor on Damages*, 21st ed (2021) at 291 [9-135].

31 (2013) 253 CLR 1.

further submissions in respect of the items above should be rejected for the following reasons.

66. (**Whether the risk came to pass**) Ms Capic submits that in a propensity case, where it is alleged that goods are of unacceptable quality because they carry a *risk* of unacceptable performance, it is irrelevant whether risk comes to pass (AS [39]). Her submission conflates liability and damages. In *Medtel Pty Ltd v Courtney*,[32] in which four models of pacemakers were found to carry a risk of premature failure, the Full Court of the Federal Court of Australia held that a particular pacemaker that was functioning at the time of trial was not of merchantable quality precisely because the test of merchantable quality did not require loss or damage. The same is true of the guarantee of acceptable quality under the ACL.[33] There is nothing anomalous about a finding that goods were not of acceptable quality, because they carried a risk of unacceptable performance, but at the same time there was no reduction in value, because the risk did not come to pass. That is particularly so given that a consumer who purchases such a good can still claim damages for consequential losses.[34]

67. Ms Capic also submits that whether the risk comes to pass must be ignored because the approach to valuation is objective (AS [40]). The approach is objective in that it asks what a reasonable consumer would pay for the goods knowing, with the benefit of hindsight, how they will perform. For the reasons given above, it does not mean that a court must prefer prophecies to known facts, such that a consumer receives the same damages whether or not her goods perform unacceptably.

68. (**Whether repairs were applied**) Ms Capic's submissions travel beyond her notice of appeal. By her notice of appeal, she contends that the Full Court erred in finding that it was relevant to an assessment of damages whether repairs were *applied*. In her submissions, she also contends that the Full Court erred in finding that it was relevant to an assessment of damages whether repairs were *available*. Ford notes this but does not object. The submissions should be rejected on their merits.

69. Ms Capic's first submission is that it is incorrect to "transfer" "the principles decided in *Kizbeau* and *HTW*" to s 272(1)(a) (AS [47]). That seems to be on the basis that:

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32 (2003) 130 FCR 182 at 207 [73].

33 *Vautin v BY Winddown Inc (Formerly Bertram Yachts) (No 4)* (2018) 362 ALR 702 at 734 [149].

34 In *Medtel*, the applicant was awarded damages for economic loss, stress and anxiety, pain and suffering, compensable services provided by his wife, and interest: *Courtney v Medtel Pty Ltd* (2003) 126 FCR 219 at 276-280 [243]-[259].

(a) *Kizbeau* and *HTW Valuers* were concerned with compensation for loss or damages suffered as a result of misleading or deceptive conduct, rather than reduction in value (AS [45]);

(b) s 272(1)(a) does not permit the assessment of damages "by reference to the consequences for the affected person" (AS [47]); and

(c) at general law, in cases concerning sale of goods, "the principles in *Kizbeau and HTW* are not applied" (AS [47]).

70. Ms Capic's first submission misapprehends the approach adopted by the court below and supported by Ford in this appeal. As to the first point, the relevance of *Kizbeau* and *HTW Valuers* is not that they are to be "transferred" or "applied" to s 272(1)(a); it is that *Kizbeau* and *HTW Valuers* contain an "accumulation of valuable insight" which may be of assistance in approaching the statutory task of identifying reduction in value. As to the second point, it is not in dispute that s 272(1)(a) is concerned with reduction in value, rather than consequential loss; the ascertainment of real value having regard to subsequent events is not an assessment of consequential loss, which remains the subject of s 272(1)(b). As to the third point, the sale-of-goods cases to which Ms Capic refers do not support her construction of s 272(1)(a); they are simply examples of extrinsic or supervening subsequent events being disregarded (see [63] above).

71. In the alternative, Ms Capic submits that, if the real value of a car at the date of supply may be assessed having regard to subsequent events, the events to which regard may be had do not include repairs, because "a repair is not inherent in the nature of the good" (AS [48]). This should be rejected. In *Dwyer*,[35] the New South Wales Court of Appeal correctly held that, because "a vehicle should remain safe for use, it is inherent in the nature of a vehicle that upon recognising a latent defect, the defective part will be repaired or replaced as necessary". Further, the conclusion that regard should be had to repairs is consistent with the statutory scheme, which incentivises manufacturers to repair goods (cf AS [49]).

72. As to the capacity for repair, Ms Capic submits that it would be cold comfort to a consumer to learn that defects are in principle capable of being repaired, when it is not known whether they will actually be repaired, and if so when and at what cost (AS [50]). That begs the question of whether regard can be had to the fact of subsequent repairs in

[35] [2023] NSWCA 211 at [241].

assessing the real value of a car at the date of supply. For the reasons given above, regard can be had to that fact. That the history of repairs may, in a given case, be complex is beside the point (cf AS [51]). The court remains able to make an impressionistic assessment of value having regard to that history.

73. (**Use of the vehicle**) So far as the use of her vehicle is concerned, Ms Capic misconstrues the Full Court's reasons for judgment. In *Toyota*, the Full Court said that, where consumer goods suffer from a defect, the correct approach to s 272(1) "requires regard to any use to which the goods may be put despite the defect" (at [127]). That should be uncontroversial. The use to which goods may be put is simply a reflection of how serious the defect is, which is clearly relevant to the real value of the goods. The court below cited this passage from the Full Court's reasons in *Toyota* when it said that, "[i]n reaching a conclusion as to the reduction in value, the court should … have regard to any use to which the goods were put despite the defect" (CAB 469 [308(4)]; see also 470 [315(2)]). In saying this, the court below did not err. The use to which goods are put is relevant because it will show, at least in part, the use to which the goods are capable of being put. The court below should not be understood to have held that the real value of a car may differ depending on whether it is left in a garage or driven regularly (cf AS [36]).

74. (**Value at time of trial**) Ms Capic submits that the value of her car at the time of trial was not "directly relevant" to the assessment of damages under s 272(1)(a) because reduction in value is to be assessed at the time of supply and the court is unable to adjust damages to avoid over-compensation (AS [53]). That should be rejected for the reasons given above. Further, as Ms Capic seems to accept (AS [54]), the value of her car at the time of trial was relevant because it was capable of casting light on the true value of the car at the date of supply. Ms Capic submits that the court below failed to engage with the reasons why the primary judge held that the evidence of a particular expert, Mr Cuthbert, was irrelevant. But the primary judge's approach to that evidence was infected by his incorrect approach to subsequent events (holding that Mr Cuthbert was "asked the wrong question": PJ [881] (CAB 277)) and was therefore erroneous (cf AS [54]). The effect of the orders of the court below, should they stand, is that the primary judge will need to reconsider the relevance of Mr Cuthbert's evidence.

PART VI ARGUMENT — NOTICE OF CONTENTION AND CROSS-APPEAL

75. By its notice of contention, Ford puts in issue the relevance to the assessment of Ms Capic's damages of the performance of her car.[36] As noted above, the court below affirmed the relevance of Ms Capic's use of her car to the assessment of her damages. The better view is that performance is an aspect of use, such that the court below implicitly affirmed the relevance of performance. If that is not the correct interpretation of the court's reasons, the ultimate conclusion of the court below that the primary judge erred should be affirmed on the additional basis that, in assessing damages for reduction in the value of goods, regard should be had to the performance of the goods. That would, however, mean that order 7(a) of the orders made by the court below on 13 December 2023 should be varied, so that the question of damages is remitted to the primary judge for determination in accordance with the reasons of this Court, rather than the court below. Ford seeks an order to that effect in its notice of cross-appeal, which it has sought leave to file pursuant to an application dated 19 March 2024.[37]

PART VII ESTIMATE

76. Ford estimates that it will need 2 hours for its oral argument.

Dated: 22 March 2024

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36 The reference in the notice of contention to s 271(1)(a) is intended to be a reference to s 272(1)(a).
37 The form of Ford's proposed notice of cross-appeal is set out in Exhibit BHT-1 to the affidavit of Belinda Heather Thompson sworn on 19 March 2024.

ANNEXURE

List of statutes and provisions referred to in the Respondent's submissions

1. *Competition and Consumer Act 2010* (Cth) Sch 2, ss 2, 54, 56, 58, 59, 64, 259, 271, 272 (as at 29 June 2021)
2. *Federal Court of Australia Act 1976* (Cth) Pt IVA (current version)
3. *Trade Practices Act 1974* (Cth) s 82 (as at 30 June 2010)
4. *Consumer Guarantees Act 1993* (NZ) s 27 (current version)