HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **AHYA-UD-DIN ARSALAN**
Appellant (S35 of 2021)

and

ALEX RIXON
Respondent (S35 of 2021)

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: These submissions are in a form suitable for publication on the internet.

Part II: Outline of Oral Propositions

Identification of the Interest Infringed

1. Any analysis of the "use" of a chattel should recognise that it is the use of a *particular thing* that a plaintiff has been deprived of. In these appeals, Mr. Cassim and Mr. Rixon drove a BMW and Audi respectively. When those vehicles were rendered unusable by the appellants, the interest that was infringed was the ability to continue to make use of those cars (RS [9]-[12], [28]).
2. To speak of the interest infringed as some abstraction separate from this, or to suggest that the conception of that interest involves, in cases such as these, normative judgments, is to introduce unwarranted complexity into the law at the expense of obscuring that which was lost to the plaintiff – namely, use of a specific chattel (RS [13]-[14]).
3. It is telling that the appellants have referred to the importance of normative judgments without exposing precisely the normative judgments that underpin their approach – namely, a form of sumptuary thinking at odds with the compensatory principle. It is no answer to this to say that the appellants are dealing with an issue separate from, and anterior to, the application of the compensatory principle, namely, identification of a compensable loss. By treating the chattel, use of which is lost to

the plaintiff, as a mere bundle of functions and purposes capable of being served by a wide range of substitutes, the appellants are approaching the task of identifying the plaintiff's loss as an instrument to defeat the compensatory principle. In this way, the plaintiff could never be placed in the position in which he or she would have been but for the commission of the relevant tort (RS [19] – [26]).

4. The appellants' approach would also see the attributes of the damaged chattel treated in drastically different ways for the purpose of assessing damages depending upon whether a replacement was hired or not. In addition, it would give rise to an unnecessary asymmetry in principle between the task of compensating for loss of the use of a chattel compared to the destruction or damage of the very same article (RS [13]-[14]).

'Need' and choice of car

5. It does not follow that because the respondents were required to show a 'need' to hire *a* replacement vehicle, that they had to match their forecasted needs to the model of vehicle hired (cf AS [35]). The requirement to prove a need to replace the damaged vehicle is properly directed at establishing that it was reasonable to incur the cost of hiring any replacement (RS [19]-[20]). Questions about the model of replacement hired should thus be answered within the familiar framework of reasonable expenditure (RS [24]-[25]).

6. Whether the hire charges in these cases represent a form of expenditure incurred in mitigation or reasonably foreseeable expenditure (cf AS [41]), both approaches will converge on an analysis of whether a plaintiff has demonstrated that the expenditure was reasonably incurred (RS [39]-42]). That is as it should be.

7. There is accordingly no occasion to resort, by analogy to *Griffiths v Kerkemeyer* (1977) 139 CLR 161, to a novel "conceptual approach" to damages in cases such as these, not least because that proceeds, incorrectly and without any principled justification, upon treating the plaintiff's loss as some "need" created by the defendant's tort rather than use of a specific chattel (RS [33] – [34]). Moreover, the questions of non-compensable benefits and the placement of the onus of proving the reasonableness or unreasonableness of the hire charges incurred did not arise in these cases. Any difficulties arising out of those questions do not now justify adoption of a conceptual approach. (RS [37] – [38]).

No errors in majority

8. There were no great doctrinal gulfs in the majority in the Court of Appeal. Both White JA and Emmett AJA clearly rejected the notion that damages for loss of use of a particular chattel were confined to compensating for "practical inconvenience." (RS [43]).

9. Emmett AJA's reasons focused upon the reality of the interest that had been interfered with. That is, what Mr. Rixon was deprived of was the use of his [2014 Audi A3. Emmett AJA's focus on the "make model and year" of an equivalent replacement vehicle did not represent a controlling matter of principle (cf AS [43], [51]). It was merely a recognition of how *restitutio in integrum* could be achieved with regard to the fact that the chattel in question was a motor vehicle.

10. White JA's reasons were to similar effect. There was no point of divergence on the question of onus (cf AS [44]). Both White JA and Emmett AJA necessarily agreed it would be *prima facie* reasonable to hire a 'like for like' vehicle if a replacement were needed. However, the majority accepted that conclusion could be displaced on the facts. That is self-evidently so by their Honour's agreement on the outcome of the cognate *Souaid* matter (RS [45]-[51]).

Dated: 7 September 2021

Bret Walker SC