HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **DYLAN NGUYEN**
Appellant
and
AZAD CASSIM
Respondent

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APPELLANTS' SUBMISSIONS IN REPLY

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Argument

2. **Mischaracterisation of the appellants' argument:** The appellants do not contend that the respondents' loss is limited to the "loss of certain functionality associated with 'a car'" or that the respondents are only entitled to "the bare minimum of what is required for a mode of transportation" (RS [11], [18]). A claimant is entitled to
20 recover the cost of temporarily obtaining a substitute chattel that reasonably restores the functional use of the damaged one. The appellants have acknowledged that a luxury or prestige replacement may be reasonably necessary depending upon the use of the vehicle during the period of repair (AS [31]). However, a luxury vehicle was not reasonably necessary for Mr Rixon to travel to work and his general errands or for Mr Cassim's domestic purposes and home business which sometimes involved carrying around toilet seat covers (AS [9]-[10]; cf RS [8(b)]).

3. Meagher JA's approach and the appellants' argument do not functionally equate a campfire to an oven or public transport to a private motor vehicle (RS [15], [24]). The issue of functional equivalence is one on which common sense and the
30 common law should go hand in hand. Moreover, the respondents exaggerate the difficulty faced by a claimant and court in determining what will be the likely use of a vehicle during a period of repair (RS [27], [53]). As is the case for the respondents themselves, in most instances the use of a vehicle will be the same

from day to day *i.e.* to travel to work, to collect and drop off family members and for general errands. These are not difficult facts to ascertain, unlike the questions of 'equivalence' and 'comparability' raised by the respondents' submissions (RS [19], [43], [51]-[52]), which entail comparisons not only between the age, make and model of the damaged and replacement vehicles but also their respective physical condition, mechanical condition and mileage.

4. **A claimant's need to establish reasonableness and the relevance of the claimant's subjective desires:** The respondents accept that they are required to establish that it was reasonably necessary for them to incur the cost of hiring the luxury vehicles that they procured (RS [17], [20]). What is said to make the respondents' hire of luxury vehicles reasonable where that of the plaintiff in *Souaid v Nahas* was not is that Mr Cassim wanted "a nice, luxury car" and Mr Rixon subjectively perceived safety advantages, whereas Mr Souaid, despite ordinarily driving a luxury car, was temporarily content with any kind of replacement vehicle (RS [10], [45]). The subjective perceptions and idiosyncratic desires of a claimant cannot be the measure of what is reasonable in the circumstances. As illustrated by *Watson Norie Ltd v Shaw* [1967] Lloyd's Rep 515 (***Watson Norie***), the standard of reasonableness must be applied by reference to the need of the claimant – in that case for a company car for its managing director's use – which is to be ascertained by an objective standard that is not necessarily reflected in the claimant's subjective choice of damaged or replacement vehicle.

5. It is incorrect that the appellants called no specific evidence to demonstrate that the chosen replacements were unreasonable or that the existence of alternative substitutes at significantly lower cost "overstates matters" (RS [5], [20]). There are uncontested findings that alternative vehicles would have satisfied the respondents' need for a temporary replacement at a cost of less than one third of Mr Rixon's hire costs and less than half of Mr Cassim's hire costs (AS [9]-[10]; RS [8]).

6. **Supposed incongruities:** The respondents contend that Meagher JA's approach gives rise to two incongruities. The first incongruity is said to be that if no replacement is hired then a claim for general damages will often be assessed by reference to the capital value of the damaged vehicle whereas on the appellants' submissions a claim for recovering the costs of a replacement vehicle would not

have regard to the damaged vehicle's capital value (RS [13]). However, where no replacement is hired the compensation payable for the loss of the use of a non-income producing chattel in a non-commercial context is for the non-pecuniary loss that consists of the inconvenience of not having access to a motor vehicle (AS [48]). Any assessment of those damages by reference to the capital value of the damaged chattel is only for want of a better alternative and the principled nature of that approach has been doubted in the very authority upon which the respondents rely (AS [46]-[47]). In any event, what Emmett AJA below held to be decisive – equivalence in terms of make, model and year (CA [121]) – implies no necessary correspondence between the capital value of the damaged and replacement vehicles, which will also be affected by matters such as physical condition, mechanical condition and mileage.

7. The second incongruity is said to be an asymmetry between the approaches to compensation for the loss of use of a chattel compared with the cost of repair as in respect of the latter "it could never be suggested that restoring a plaintiff to their original position should be moderated by an examination of what *other* kinds of less expensive chattel might achieve the same purposes" (RS [14]). But the suggested asymmetry is illusory because the law is compensating two different kinds of loss. The diminution in the capital value of the claimant's damaged chattel *is* the claimant's direct loss, which is restored to the claimant as a discrete head of damages, together with an award of interest that compensates the *temporary* deprivation of the full capital value of the chattel (as distinct from its value in use). On a proper analysis, the respondents' complaint concerning supposed 'asymmetry' is really a demand for a form of double-counting.

8. **"Need" cannot be equated with a reason to use:** "Need" is not properly understood in *Lagden v O'Connor* [2004] 1 AC 1067 at [27] to be a "shorthand for 'reason to use'" (RS [22]). A claimant who had a reason to use their damaged vehicle during the period of repair may (though not necessarily would[1]) have needed to incur, and may therefore be entitled to recover, the costs of hiring *a* replacement. It does not follow, however, that because the claimant had a reason to use the damaged vehicle during the period of repair that they are entitled to recover the costs of *the* replacement (SC2 at [48], [53]).

[1] See *Singh v Yaqubi* [2013] Lloyds Rep IR 398 at 401-403 [29]-[33], [42], [43].

9. **Other common law jurisdictions:** The respondents incorrectly contend that no other common law jurisdiction has conceived of the interest infringed as the claimant's interest in the functional use of the chattel (RS [16]). The authorities cited by the respondents in footnote 22 did not consider the issue that is now before the court. The only authority that is directly on point is the English Court of Appeal's decision in *Watson Norie*, which is consistent with the appellant's submissions (AS [32]-[34]) and the decisions of Meagher JA and Basten J, and which is not considered, or even referred to, by the respondents. Nor do the cases cited by the respondents show that "a cursory examination of recent authorities shows that the approach taken by the English courts primarily focuses on the equivalency of the replacement vehicle" (RS [48]).

10. **The conceptual approach:** Adopting the conventional distinction between special and general damages, expenditure incurred to hire a replacement vehicle is recoverable as special damages because it is expenditure that is a reasonably foreseeable consequence of the wrongdoing: *Compania Financiera Soleada SA v Hamoor Tanker Corpn Inc* [1981] 1 All ER 856 at 861A, 862H and 864G. Whilst the respondents suggest that difficulties may arise from such a characterization, none are identified (RS [41]). In any event, a conceptual approach avoids the complexities that may arise in the adoption of a conventional distinction between special and general damages in this context. Moreover, the principles to be laid down by this Court will frequently fall to be applied to claims arising out of credit hire arrangements. In such cases, the claimant will be a person who has never had to pay out of pocket any part of the sum that is said to quantify their compensable loss, and the valuable consideration supplied in return for the claimant's agreement to incur a formal liability to pay that sum will not have been limited to use of a substitute chattel. For each of those reasons, any basis that might otherwise exist for a *presumption* that the sum claimed does not exceed the sum that would have been reasonably expended to make good only the claimant's *compensable* loss, is lacking in credit hire cases, on grounds of commercial common sense that appellate judges have readily intuited: *Dimond v Lovell* [2002] 1 AC 384 at 393A-B, 401E-H, 402F-H, 407C; *Dimond v Lovell* [2000] 1 QB 216 at 240E; CA [87]. The implausibility of such a presumption argues against an approach that would award a claimant any sum of credit hire charges actually incurred provided only that it did

not exceed the very highest sum for which the claimant *might* have hired on non-credit hire terms *any* vehicle considered "comparable" to the claimant's own and available for hire at the material time (RS [38]). That approach – which is substantially the one that the magistrate adopted in *Nguyen* (LC2 [56]; SC2 [17]) – has been rejected under the conventional approach as applied in the United Kingdom: *Stevens v Equity Syndicate Management Ltd* [2015] 4 All ER 458 (***Stevens***) at 468J [36]. Adopting the common sense assumption that a reasonable claimant would expend no more than was necessary to make good their temporary loss, the English Court of Appeal has repeatedly held that the recoverable portion of credit hire charges will ordinarily be capped at the lowest rate for which a suitable substitute vehicle would have been available for hire by the claimant in the relevant market, rather than the highest one: *Stevens* at 468F-469C [35]-[37]; *McBride v UK Insurance Limited* [2017] EWCA Civ 144 at [53]-[54].

11. The conceptual approach to assessment of loss of use damages offers a more direct path to the same result and, in Australia, recourse to it in credit hire cases is not precluded by authority (AS [37]-[38]). None of the cases cited in footnote 42 of RS is authority against the conceptual approach. All of them concerned ships, and were decided before *Donnelly v Joyce* [1974] QB 454 and at a time prior to the emergence of contemporary credit hire enterprises.

12. **Differences within the majority:** The respondents glide lightly over the substantial differences in principle between Emmett AJA and White JA (RS [43]-[44], [46]-[54]; cf AS [14]-[15]). In truth, those differences are stark. The two majority approaches cannot both be correct. Indeed, for the reasons given in AS, both are in error (AS [42]-[51]).

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