HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

Proceeding S155/2023
BETWEEN:

TOYOTA MOTOR CORPORATION AUSTRALIA LIMITED (ACN 009 686 097)
Appellant

-and-

KENNETH JOHN WILLIAMS
First Respondent

and

DIRECT CLAIM SERVICES QLD PTY LTD (ACN 167 519 968)
Second Respondent

AND

Proceeding S157/2023
BETWEEN:

KENNETH JOHN WILLIAMS
First Appellant

and

DIRECT CLAIM SERVICES QLD PTY LTD (ACN 167 519 968)
Second Appellant

-and-

TOYOTA MOTOR CORPORATION AUSTRALIA LIMITED (ACN 009 686 097)
Respondent

TOYOTA'S SUBMISSIONS IN REPLY

PART I FORM OF SUBMISSIONS

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

PART II REPLY SUBMISSIONS

2. These submissions reply to the Williams appellants' submissions in reply dated 8 March 2024 (**WRS**).

3. The parties agree that the method of reasoning adopted in ***Dwyer*** *v Volkswagen Group Australia Pty Ltd* [2023] NSWCA 211 (insofar as it recognised that subsequent events are capable of illuminating the reduction in value at the time of supply) is correct: WRS [6]. However, the parties disagree that, on the facts of the present case, the availability of the 2020 field fix was a subsequent event capable of revealing the reduction in value of the relevant vehicles at the time of supply.

4. Contrary to WRS at [5]-[6], the availability of the 2020 field fix was such a subsequent event, and it arose from the intrinsic nature of the relevant goods. To understand the nature of the 2020 field fix, one starts with the components of the relevant vehicles which were affected by the core defect. Those components included:

   a. the diesel exhaust after-treatment system (**DPF System**) which, as described in the statement of agreed facts (**SOAF**) at [43] (WBFM 107) comprised a number of components, including most relevantly the diesel oxidation catalyst (**DOC**) and the fifth fuel injector (**Additional Injector**);

   b. an engine control module (**ECM)** which is a computer system that contributed to the operation of the DPF System as described in the SOAF at [50(a)] (WBFM 108-109).

5. The 2020 field fix involved modifications and replacement of those components. As described in the SOAF at [171] (WBFM 135) it involved a replacement DOC (which contained a modified substrate with a different distribution of precious metals); a modified Additional Injector housing assembly; and programmed changes to the ECM which removed the cooling pulse and added a "soot blow" which cleared the front of the DOC prior to Regeneration (the oxidation of particulate matter captured in the DPF). As the referee (Mr Garrett) noted in the First Reference Report at [51] (WBFM 21), "the core defect was caused by a combination of the ECM software and calibrations, the design of the DPF Assembly, and the Additional Injector Housing assembly." In short, the 2020 field fix involved modification and replacement of certain components of the relevant vehicles, which components caused the core defect. They are modifications and replacements that arose from the intrinsic or inherent factors in the nature of the vehicle.

6. At WRS [5]-[6], the Williams appellants seek to distinguish the present case from *Dwyer* (where it was accepted that the replacement of the airbag in that case did arise from the

intrinsic nature of the relevant goods) on the basis that the repair there involved a "simple act of replacement" of the airbag, whereas in the present case the defect was "mechanically complex", and it took Toyota's engineers some time to figure out the fix. This submission ought not be accepted. It is wrong to suggest that the issues with the propellant in the airbags in *Dwyer* that led to their recall and replacement were not technically and scientifically complex; in fact, those issues were the subject of much disputation: see *Dwyer* at [56]-[73]. Further and in any event, the fact that the defect which rendered the relevant vehicles of unacceptable quality was "mechanically complex" does not detract from the obvious proposition that "it is inherent in the nature of a vehicle that upon recognising a latent defect [no matter how mechanically complex], the defective part will be repaired or replaced as necessary": *Dwyer* at [241].[1] This is what occurred in this case. By the time of the initial trial, the 2020 field fix was available. While it might have taken some time and effort to develop the solution (in accordance with the reasonable expectation that the manufacturer find the solution), critically, by the time of the initial trial, it was an accomplished fact that the defect could be entirely remedied by the modifications and replacements described in [5] above, free of charge. Moreover, the experts agreed that in this case that fact meant that there was no ongoing reduction in the value of the relevant vehicles resulting from the defect: FC [123], [218] (JCAB 291-292, 309). Consistent with general principles and the authorities referred to in Toyota's submissions in chief of 26 February 2024 (**TS**) at [30]-[33], that fact should be taken into account when assessing damages under s 272(1)(a) of the ACL. Contrary to the WRS [5]-[6], where this fact is known, it is preferrable to prophesising as to the "predictability" or "expectation" of a repair at the time of supply. As Latham CJ observed in *Willis v Commonwealth* (1946) 73 CLR 105 at 109 "where actual facts are known, speculation as to the probability of these facts occurring is surely an unnecessary second-best".

7. It is that unnecessary second-best act of speculation which the Williams appellants invoke at WRS [7]. The submission at WRS [7] that there was on the evidence no "expectation that a repair for any defect would be found" at the time of supply is to introduce a probabilistic assessment of whether the defect would be remedied at the time of supply (a case which was run by neither party below). In any event, the submission misunderstands Toyota's point. As in *Dwyer* at [243], the premise of the submission is that the relevant vehicles were not of acceptable quality at the time of supply because of

[1] This is consistent with the finding by the trial judge in that case, in the context of assessing whether the vehicles were of acceptable quality, that reasonable consumers are "acquainted with the fact that motor vehicles are complicated pieces of machinery that may develop problems, even problems going to the safety of the vehicle, that may require rectification by the manufacturer during the vehicle's lifetime": *Dwyer v Volkswagen Group Australia Pty Ltd t/as Volkswagen Australia* [2021] NSWSC 715 at [156]-[158] (Stevenson J), as set out in *Dwyer* at [79].

the hidden defect. Toyota's submission points to the rectification of the assumed hidden defect in a manner consistent with a reasonable consumer's ordinary expectations, given the nature of the goods, as a subsequent event which illuminates the value of the relevant vehicles at the time of supply. The complexity of the defect, or of the fix, does not change the relevant expectation arising out of the inherent nature of the goods – namely an expectation at the time of supply that, given that a vehicle should remain fit and safe for use in normal driving conditions, the hidden defect (which substantially interfered with the normal use and operation of the vehicles (J[80], [81] (JCAB 38); FC [1], [13], [53] (JCAB 264, 266, 275)) once discovered would in due course be rectified. And critically, by the time of the initial trial, it could in fact be rectified[2] so there was no ongoing reduction in value of the relevant vehicles.

8. It is that critical fact – that the 2020 field fix was available by the time of the initial trial with the effect that there was no ongoing reduction in value of the relevant vehicles – which is the particular factual circumstance which allows the repair to be taken into account as a subsequent event which illuminates, indicates or reflects the true value of the goods, at the time of supply. In the present case, the expert evidence was not only that the 2020 field fix itself would prospectively restore the value of the vehicle, but that the availability of the 2020 field fix would have that prospective effect: see transcript of Mr Cuthbert's evidence at T123.41-45 (WBFM 216).

9. That factual conclusion is unsurprising. There will be cases where even a repair, let alone the availability of a repair, will not necessarily fully restore the value of the vehicle (where, for example, the original defect results in 'blight' or a perception of a reduction in value that is never fully restored even by a complete repair[3]). Similarly, the availability of a repair will not always fully restore the value of a vehicle. The extent to which this is so will depend upon the nature of the defect and the repair. In this case, where the defect gave rise to a risk of specific consequences that manifested, or risked manifesting, in normal driving conditions, the availability of a particular repair (the modifications and replacements described in [4] above) free of charge was found to fully restore the value of the vehicle otherwise attributable to the defect on a prospective basis. Thus, contrary to WRS [8], Toyota's argument does not "depend 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". Rather, Toyota's argument is that, on the proper construction of s 272(1)(a) of the ACL, in an appropriate

[2] Indeed, by the time of the initial trial, the 2020 field fix already had been applied to 30,875 vehicles: see SOAF at [180]-[185] (WBFM 137).
[3] See A Kramer, *The Law of Contract Damages* (3rd ed, 2022) at [4-214] at the authorities cited in footnote 384.

case (as is the present) damages for reduction in value are to be assessed taking into account the fact that the reduction in value is attributable to the defect at the time of supply has been fully restored by the availability of a repair developed and made free of charge by the manufacturer. This is a result which is entirely in keeping with the ordinary and reasonable expectations of consumers at the time of supply.

10. It is because the availability of the repair fully restored the value of the relevant vehicles that, applying the Williams appellants' construction of s 272(1)(a) of the ACL, the Williams appellants and the group members within the relevant cohort would be overcompensated. While it may be accepted, as observed in WRS [12], that the contractual notion of compensation based on performance interest "appears as a 'loss' only by reference to an unstated *ought*"[4], that does not mean that, under s 272(1)(a), members of the relevant cohort are entitled to damages for not getting what was promised, including taking on risks hidden from the consumer at the point of supply, if by the time of the initial trial any reduction in value flowing from what was not promised has been restored by the availability of a repair free of charge. As observed in TS [29], some caution is required in applying contractual analogies, particularly in the context of these statutory provisions which address the liability of the manufacturer, not the supplier, and where the measure of damages departs from the contractual measure (difference between value as delivered and price paid, as distinct from the difference between value delivered and value promised).[5] But in any event, the assertion underpinning WRS [12]-[13] – that the statute has identified the performance interest to be compensated with no adjustment being permitted, despite the availability of the repair entirely restoring the value of the relevant goods by the time of the initial trial – should not be accepted. *Moore* at [64], and *Dwyer* at [229] (on which the Williams appellants rely) do not say that, in construing s 272(1)(a), a Court is to ignore the universal compensatory principle that a plaintiff cannot recover more than he or she has lost.[6] And the Court in *Dwyer* expressly rejected the proposition that, in the context of s 272(1)(a), post-acquisition events could be disregarded on the basis that it was inconsistent with that universal rule[7].

11. To ignore that rule in the present case would result in members of the relevant cohort being awarded damages under s 272(1)(a) where they purchased and used the relevant

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[4] Fuller and Perdue, "The Reliance Interest in Contract Damages: 1" (1936) 46 *Yale Law Journal* 52 at 53 (emphasis in original). See *Clark v Macourt* (2013) 253 CLR 1 at [11] (Hayne J), [61] (Gageler J), [107] (Keane J); ***Moore*** *v Scenic Tours Pty Ltd* (2020) 268 CLR 326 at [64] (Edelman J); *Lewis v Australian Capital Territory* (2020) 271 CLR 192 at [143] (Edelman J).

[5] In this respect, the Williams appellants' attempt to distinguish *Kizbeau Pty Ltd v WG & B Pty Ltd* (1995) 184 CLR 281 as a case protecting a "reliance interest" is misconceived, given that the approach taken in that case and in *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640 at [34]-[35] is consistent with the approach under s 272(1)(a) (difference in price and value).

[6] *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635 at [57] (Gummow and Hayne JJ).

[7] *Dwyer* at [237]-[239] (Gleeson JA, Leeming and White JJA agreeing).

vehicles in normal driving conditions (in many, innumerable, instances without incident); by the time of the initial trial they could have had the core defect rectified at no cost to them and in the manner that a reasonable consumer at the time of purchase would have expected to occur; and where, by the time of the initial trial, the vehicles were worth as much as if the defect did not exist, with the evidence showing that they had suffered less depreciation in value relative to comparable vehicles before the initial trial (FC [230] (JCAB 311)). Further, the Williams appellants fail to address the decidedly "odd" (*Dwyer* at [236]) and "anomalous" (J[430] (JCAB 129-130)) results that would flow from their approach in the case of vehicles sold by group members (and in many cases repurchased by another group member) before the defect was discovered. In determining the proper approach as a matter of principle, those results cannot simply be ignored.

12. The submission at WRS [14] that the legislature's intention was, by s 272(1)(a), to compensate "disappointment of the interest in performance" (emphasis added) is to conflate damages for reduction in value recoverable under that subsection with the distinct interest which is compensated under s 272(1)(b) of the ACL. If consumers who are members of the relevant cohort are to be compensated for any disappointment associated with the utility or performance of the relevant vehicles arising from the hidden defect at the time of supply, or for risks thereof "foisted upon them" at the time of supply (WRS [11]), such compensation is properly recoverable (if at all) as a consequential loss under s 272(1)(b).

13. The submission at WRS [15] with respect to ground 2 of the Williams appeal proceeds on the false premise that the criticisms of Mr Cuthbert's evidence were the only basis on which the Full Court relied in departing from the trial judge's assessment of a 17.5% reduction in value. The Full Court also placed weight on Toyota's submissions to the effect that much of the utility of the vehicle was unaffected by the defect and its consequences (FC[314] (JCAB 327)).

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