HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

Proceeding S155/2023

BETWEEN: **Toyota Motor Corporation Australia Limited (ACN 009 686 097)**
Appellant

-and-

Kenneth John Williams
First Respondent

Direct Claim Services Qld Pty Ltd (ACN 167 519 968)
Second Respondent

AND

Proceeding S157/2023

BETWEEN: **Kenneth John Williams**
First Appellant

Direct Claim Services Qld Pty Ltd (ACN 167 519 968)
Second Appellant

-and-

Toyota Motor Corporation Australia Limited (ACN 009 686 097)
Respondent

WILLIAMS APPELLANTS' OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

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

Part II: Outline of argument

2. **Context for this appeal:** It is now uncontroversial that each Relevant Vehicle supplied to a consumer in Australia failed to comply with the guarantee of acceptable quality under s 54 by reason of the (hidden) Core Defect, namely a poorly designed exhaust system carrying an unacceptable propensity to exhibit troubling Defect Consequences under normal driving conditions. Relevant to the breach of s 54, as at the date of supply:

   (a) there was no known, effective, readily and freely available (at no cost) fix for the defect; and

   (b) there could be no certainty or even reasonable expectation of whether, when or on what terms such a fix might become available in the future: **WS [9]-[16], [39]-[45]**.

3. **Williams' approach:** Section 272, in drawing on general law concepts of damages from contract and sale of goods, reflects a series of deliberate legislative choices. The consumer (and other privies) has two entitlements against the manufacturer to damages:

   (a) Section 272(1)(a) – which is concerned with the *goods* themselves – protects the performance interest of the consumer, at the time of supply, in receiving ownership and control of a vehicle which is of the statutorily guaranteed quality. The protection is provided by damages for the difference, at the time of supply, between the guaranteed value (measured as the lower of the contract price and the average retail price) and the value of the goods as supplied, that is the value as reduced by reason of the breach of the guarantee;

   (b) Section 272(1)(b) – which is concerned with the *consumer* – protects the consumer from consequential losses that may flow, at any time after supply, from the breach of the guarantee, within the limits of reasonable foreseeability: **WS [39]-[47].**

4. The trial judge correctly found that the reduced value which forms one limb of the s 272(1)(a) assessment takes into account *each and all* of the features of the s 54 breach. It takes into account the *propensity* to exhibit the troubling Defect Consequences (but not whether the particular vehicle subsequently exhibited them in fact or if so when and to what extent). Equally, it takes into account the *inability* of the consumer to know whether,

when or on what terms the defect might be fixed (but not whether, when or on what terms a fix later emerged *in fact*): **WS [42]-[45], Reply [5]-[8].**

5. Events post supply can be taken into account, under s 54 and s 272(1)(a), so far as they truly illuminate the *propensity* which constitutes the breach or the *reduced value* resulting from that propensity in the circumstances existing at supply. They cannot be taken into account as subsequent facts which (purportedly), in whole or part, reverse the reduction in value which has already occurred on supply: **WS [42]-[43].**

6. If the emergence in fact of the 2020 field fix, up to 4 ½ years after breach, is to be taken into account, so too must all of the failed attempts that preceded it, leaving the notional consumer with no confidence of whether, when or on what terms the defect might be fixed. The discount that the notional consumer would have demanded on supply in view of the defect is in no way diminished by the emergence in fact of that fix: **Reply [8]-[14]**.

7. **Toyota's approach:** To argue that the subsequent discovery of the 2020 field fix *retrospectively eliminates* the reduction in value sustained at the time of supply, is factually unsound: **WS [67]-[68]**.

8. More importantly, Toyota's approach is erroneous in law (**WS [58]-[66]; Reply [5]-[8]**):

   (a) the subsequent discovery of the 2020 field fix was not an event capable of revealing, retrospectively, that there was no reduction in value at the time of supply;

   (b) repair of the defect was not inherent in, or instrinsic to, the Relevant Vehicles at the time of supply, and nothing in the *obiter* in *Dwyer v Volkswagen Group Australia Pty Ltd* [2023] NSWCA 211 (**JBA Tab 18**) is to the contrary;

   (c) *Kizbeau Pty Ltd v W G & B Pty Ltd* (1995) 184 CLR 281 (**JBA Tab 10**) does not assist TMCA: *legally*, because the loss for which Kizbeau sought redress was the reliance interest, not the performance interest; *factually*, because the value of the asset in issue in that case lay solely in its capacity to generate future income, and the subsequent event was a "reconsideration" of "the nature of the business" which altered that capacity (296), whereas a consumer good's value cannot be reduced to future revenue returns and the application of the 2020 field fix did not involve a "reconsideration" of the nature of the vehicles but rather a *reconstitution* of them.

9. **Full Federal Court's approach:** Contra FFC [95]-[107], s 272(1)(a) does not give the court a discretion to decide whether to assess the reduction of value at some point in time after supply if the courts thinks "appropriate"; nor allow the court to have regard to

circumstances relating to the utility of the good to the particular consumer known by the time of trial but not known or knowable at the time of supply; nor permit a search beyond the diminution in value at the time of supply for the "actual damage" which has resulted for the particular consumer from the value differential arising on supply. The Full Court's formula, whether applied strictly or loosely, does not match s 272(1)(a): **WS [44]-[47]**.

10. Contra FFC [108]-[119], the suppositions of the Full Court as to where value lies in "most" consumer goods, or "most" motor vehicles, are not reflected in s 272(1)(a). The value which s 272(1)(a) is designed to protect lies in the ownership and control of goods which meet the guaranteed standard and thereby provide consumers with a *minimum expected utility* over the life of the goods. The protected value is not reducible to a "life-of-use value" ascertained as if on the revenue account. It protects the possibility of consumer surplus. General law authorities assessing loss in supply of defective assets are not irrelevant; nor are prices obtainable on resale of motor vehicle. What is irrelevant is whether value lost at the time of supply was somehow "restored" by later events.

11. Contra FFC [120]-[136], s 272(1)(a) does not permit the court to replace the expectations of the reasonable consumer on supply, based upon the facts then known or knowable, with an enquiry into *one aspect* of the future world, namely whether at some point in the life cycle of the goods value was restored prospectively. *A fortiori* in a propensity case with no enquiry into the Defect Consequences in fact: **WS [48]-[56]**.

12. **Ground 2:** If Ground 1 succeeds, the primary basis upon which the Full Court interfered with the primary judge's 17.5% diminution assessment disappears. No other appellable error in the evaluative assessment was established. The primary judge took into account the whole of the lay and expert evidence in reaching his own conclusions on the reduction in value. The evidence of Mr Cuthbert was only one part of the evidence and was given limited but appropriate weight. In any event, the Full Court misinterpreted that evidence and the use which the primary judge made of it: **WS [71]-[74]; Reply [15]**.

13. Even if Ground 1 fails, there was no error in the 17.5% component of the assessment. It forms integer 'a' of the assessment. The only task remaining on remittal is to identify the 'b' and 'c' integers under FFC [134], [135] and [319].

10 April 2024

Justin Gleeson

Justin Gleeson SC