HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN:

S25/2024

Biljana Capic

Appellant

and

Ford Motor Company of Australia Pty Ltd ACN 004 116 223

Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE APPELLANT

Part I: Certification

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

Part II: Propositions to be advanced in oral argument

2. **On its proper construction**, section 272(1)(a) requires identification, at the time of supply, of any reduction in the value of a good below the statutory reference price "resulting from the failure to comply" with the relevant guarantee.

3. Regard may be had to relevant subsequent events if they show the "failure to comply" at supply in accordance with s 54: FC [56]-[64]; **AS [32]**; **ASR [7]**. Having ascertained the relevant failure, the s 272(1)(a) analysis of any "reduction" proceeds having regard to that failure and all other objective circumstances at the time of supply which could have been known to the hypothetical reasonable consumer. To adopt and adapt what was said in *Marks v GIO* at [49], the inquiry is: "what price freely contracting, fully informed parties would have offered and accepted for" the good, knowing of the failure, knowing that the purchaser wanted acceptability, and making informed judgments as to price for the allocation of contractual benefit/risk.

4. Save in the sense indicated, the construct of the "real circumstances at the time of purchase" or the "underlying reality of earlier times" (*HTW* at [47]) does not import later events involving the claimant's (i) subjective or objective experience of the failure to comply (**Ground 2(a)**), (ii) the claimant's use of the good post-supply (**Ground 2b)**, (iii) the post-supply application of repairs and the cost of them to the claimant (also **Ground 2(b)**), or (iv) the "performance of the good after supply" (**NOC [1]**, to the extent any different to (i)-(iii)).

5. On the other hand, evidence of value post-supply may be relevant as a proxy for or as some useful data point for estimating value at supply, but only if probative in the inquiry stated above (**Ground 2c**).

6. **Considerations of mischief and purpose** support this construction. Mischiefs addressed: (i) lack of clarity in legislation; (ii) lack of awareness of the law on the part of consumers; (iii) difficulties experienced by consumers who seek to enforce their rights. All of which "combine to reduce incentives for suppliers to comply with the law" and enable systematic breach of consumer rights. The purpose of reform was to make consumer rights effective by making them clear, inexpensive and consistent to enforce, thereby removing disincentives of suppliers to supply non-

compliant goods or obfuscate/delay/avoid the remedial consequences. In short: "ensuring that consumers are getting what they are paying for and are able to seek redress when they encounter problems" as well as protecting consumers from unfair business practices. This is far beyond the interest in a repair served by an express warranty. **AS [25], [28]; AR [5]-[7]**.

7. **Textual and contextual considerations** reveal that Part 3-2 and Part 5-4 created a charter of rights and remedies, modelled on the common law of contract and antecedent legislation applicable to sales of goods, but modified and adapted having regard to the consumer context, the remedial purpose of the regime, and the particular mischiefs identified. It continues to provide expectation damages for injury to the performance interest and consequential loss, but the regime is confined in its application, its remedies are clearer and more prescriptive, and the arrangement prioritises efficiency in cost and process: **AS [25], [28], [49], AR [5]-[12].** Thus:

   (a) s 3: application only to consumer transactions.

   (b) s 271, 7(e): rights against "manufacturer"; extends to importers.

   (c) s 272(1)-(3): identification of the interest protected/injuries compensable.

   (d) s 272: prescription of the measure of compensation, capping (1)(a) exposure. See also, as to goods as components: s 2 "goods", "price" and s 3 (4), (5), (11).

   (e) s 259, 260, 261, s 271(6), 274(2): the intersection of (i) supplier/manufacturer acts of repair with (ii) the availability of statutory damages for reduction in value and/or consequential loss. See also, as to repair incentives and express warranties generally: ss 29(1)(m), 59, 102 and 192.

   (f) s 259(3)(b), 272(1)(b): prescription of limiting rules on relief.

   (g) ***Cf*** *Baltic Shipping Company v Dillon; Jones v Just; Sale of Goods Act* 1893 (UK); *Marks v GIO*; *Moore v Scenic Tours*; *Clark v Macourt*; *HTW*.

8. **The facts of Ms Capic's case: AS [7]-[12];** appellant's chronology.

9. **The primary judge's** approach at PJ [877]-[890] reflects the proper construction: **AS [13]-[15].** Alternatively, to the extent post-supply repair data is relevant to reduction in value, that would not make any difference here: **AS [50]**.

10. **The Full Court's** conclusion that "damages" in s 272(1)(a) invokes "general principles regarding the assessment of damages" such that the application of the

provision "may require, depending on the circumstances, a departure from the time of supply or an adjustment to avoid over-compensation" reads too much into the word "damages", and too little into the careful prescription by Parliament as to that which constitutes damage for failure to comply with s 54, and the approach required for their quantification: FC [99], [101], [102]; **AS [20]-[32];** [7(g)] above.

(a) The identification of the appropriate quantum of s 272(1)(a) damages as "the component of the price actually paid that could be said to be attributable to the loss in utility arising from the defect" (FC [307(8)]) is predicated on an incomplete understanding of consumers' interest in compliance with the s 54 promise ("getting what they paid for"), and imposes an inappropriate constraint (ie., actual loss) on compensation for injury to that interest: FC [306]-[309] and [315]; **AS [16]-[19], [24], [26], [30]-[31]; AR [3]-[4]**.

(b) The methodology at [308] and [315(1)[1], (2)] prices in the defect at supply without also pricing in the absence of the benefit **and** the presence of unbargained for risks: **AS [41]-[47]**. *Potts v Miller, HTW* and *Kizbeau* were cases concerned with consequential loss in different areas of law for different injuries: see *Bwllfa*; cf *Dwyer* and FC [309]: **AS [32], [44]-[47]; AR [8]**.

11. **Further,** insofar as the FC requires regard to be had to the claimant's actual use of the good and manifestation of the defect, the reasoning is inconsistent with *Toyota* FC [127], [165], [312]: **AS [33]-[40]**. It does, however, reveal that post-supply defect information may not be in small compass (see **AS [12])** and there is a vast gulf between (i) consumer outcomes in practice on the Toyota FC methodology, all predicated on doing that which is "appropriate", achieving just outcomes, and avoiding "under" or "over" compensation" with (ii) avoiding non-compliance in the first place, addressing information asymmetries, and empowering consumers to enforce, in a timely, low-cost, straightforward fashion, their statutory remedies and ensure consistent consumer outcomes where they have been burdened with non-compliant goods despite promises to the contrary: **AS [25], [28], [51]**.

12. ***Fourth,*** Mr Cuthbert's valuation evidence was not relevant because it did not satisfy [5] above: FC [315(3)]; **AS [14], [52]-[54]**.

11 April 2024 **Fiona Roughley**

[1] Concerning ground 5 of the appeal to the Full Court (**CAB 361**) and a challenge to PJ [884].