



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
 SYDNEY REGISTRY

BETWEEN:

Biljana Capic
 Appellant

and

Ford Motor Company of Australia Pty Ltd ACN 004 116 223

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Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

PART I CERTIFICATION

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

PART II OUTLINE OF ORAL SUBMISSIONS

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2. **(Approach to the appeal)** Subject to the minor qualification in its proposed notice of cross-appeal, Ford supports the decision of the court below, which applied *Toyota Motor Corporation Australia Ltd v Williams* (2023) 296 FCR 514 [JBA Vol 6 Tab 41 p 1251] and remitted the question of damages to the primary judge for determination in accordance with its reasons. If this Court finds that neither the approach of the primary judge nor of the court below is correct, but that post-acquisition information is relevant to reduction in value damages, the appeal should be dismissed, the cross-appeal allowed and the assessment remitted for determination in accordance with this Court's reasons: **RS [75]**.

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3. **(Relevant facts)** Ms Capic's car breached s 54 because it was manufactured with three component deficiencies and two architectural deficiencies, which gave rise to a risk of undesirable behaviours. Ford ultimately introduced (and Ms Capic received) free, effective repairs for two of the component deficiencies. At trial Ford did not prove its repair for the third was effective for Focus and EcoSport vehicles. There was no repair for the architectural deficiencies: **RS [6]-[8], [10]**.

4. The group members are those who purchased new or second-hand Focus, Fiesta or EcoSport vehicles fitted with a DPS6 transmission during the Relevant Period. 73,451

cars were sold new, and the best estimate at trial was that there are 185,000 group members. Not all cars were manufactured with all component deficiencies, not all cars with component deficiencies manifested defect consequences, and many cars have had zero or one relevant repair event: **RS [4], [5], [9], [11]**.

5. **(Textual analysis)** Section 54 prescribes a guarantee of acceptable quality that is necessarily hypothetical and imputes to the “reasonable consumer” full knowledge of the goods, including knowledge of “hidden defects” that, as a matter of fact, are not known at the time of supply: **RS [44]**.
6. Section 271(1) provides that, if the guarantee of acceptable quality applies and is breached, an “affected person” may “recover damages from the manufacturer”. “Damages” connotes compensation. Its use in s 272(1)(a) reveals a legislative intent that an affected person cannot recover more than she has lost: **RS [31]**.
7. Section 272(1)(a) requires the identification of “*any* reduction in the *value* of the goods”.
 - (a) The use of the word “any” contemplates that goods may be supplied in breach of the guarantee of acceptable quality without there being any reduction in value (e.g. in a propensity case where the latent defect never manifests).
 - (b) The word “value” requires a comparison between the lower of the prices referred to in sub-paras (i) and (ii) and the “real value” of the goods received.
8. There is no express limitation in s 272(1)(a) that requires assessment of value at the date of supply or, where value *is* assessed at the date of supply, requires the court to disregard subsequent events: **RS [32]**.
9. The term “affected person” includes, but is broader than, “consumer”: **RS [38]**. In respect of any one sale of goods to which the guarantee of acceptable quality applies, there can be multiple “affected persons” (e.g. where goods are sold on the second-hand market: **RS [56]**). If the “affected person” is a second-hand purchaser who is not the “consumer”, the comparator for reduction in value remains the lower of the price paid by the *consumer* and the average *retail* price at the time of supply. This can ordinarily be expected to result in overcompensation unless, consistently with the use of the word “damages”, regard is had to the compensatory principle.
10. The text, context and purpose of s 272(1)(a) support the conclusion that regard should be had to all information that is available at the date of judgment and that sheds light on the true value of the goods, including where possibilities have evolved into certainties

(e.g. where it is known that repairs in fact became available or that goods that had a propensity to exhibit unacceptable performance characteristics in fact developed those characteristics).

11. **(The relevance of repairs)** Where a car suffers from a defect which means that the car is not of acceptable quality, at the date of judgment there may be evidence that (a) repair is impossible, (b) repair may be possible in the future, (c) repair is possible (within a reasonable time or otherwise), or (d) the car has in fact been repaired.
12. Whatever the case may be, the court takes into account the known facts at the date of judgment that shed light on the real value of the car (generally at the date of supply).
 10 There is no artificial temporal line that dictates what information is relevant; the principle is that the court proceeds on all relevant information. The availability of a repair, being the concomitant of a defect, will always be relevant.
13. The availability or fact of repairs does not necessarily mean that there is no reduction in value. The effluxion of time before repairs are available is relevant to the true value because a reasonable consumer can be expected to pay less for a car that will suffer from defects for three years than for a car that will suffer from defects for three months. Similarly, a consumer will pay less for a car that will suffer from defects for three months than for a car that will not suffer from defects.
14. **(The statute's approach is orthodox)** Assessing "true value" based on full information
 20 is the well-accepted approach in other settings and is consistent with *Kizbeau Pty Ltd* (1995) 184 CLR 281 at 296 [JBA Vol 4 Tab 17 p 644] and *HTW Valuers Central (Central Qld) Pty Ltd* (2004) 217 CLR 640 at 660-661 [44]-[46] [JBA Vol 3 Tab 14 p 485-486].
15. **(The correct approach)** The court below correctly adopted the approach of the Full Court in *Toyota*, which requires the identification of what a reasonable consumer would pay for goods knowing, among other things, how they will actually perform and whether (and, if so, when) repairs will be available. In Ms Capic's case, the primary judge should have—and, on remitter, should—answer that question having regard to the actual performance of her car, history of repairs and value of car at the time of trial.

Dated: 11 April 2024

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Steven Finch