Federal Court of Australia

Ford Motor Company of Australia Pty Ltd v Capic [2023] FCAFC 179

SUMMARY

In accordance with the practice of the Federal Court in cases of public interest, importance or complexity, the following summary has been prepared to accompany the Orders made today. This summary is intended to assist in understanding the outcome of this proceeding and is not a complete statement of the conclusions reached by the Court. The only authoritative statement of the Court’s reasons is that contained in the published reasons for judgment which will be available on the internet at [www.fedcourt.gov.au](http://www.fedcourt.gov.au/) together with this summary.

Ms Biljana Capic brought proceedings in the Federal Court as a representative proceeding under Part IVA of the *Federal Court of Australia Act 1976* (Cth) on behalf of herself and the group whom she represents, against Ford Motor Company of Australia Pty Ltd (**Ford Australia**). The initial trial of the matter took place over six weeks between 15 June 2020 and 24 July 2020. Judgment was delivered on 29 June 2021: *Capic v Ford Motor Company of Australia Pty Ltd* [2021] FCA 715. Answers to the common questions were formulated: *Capic v Ford Motor Company of Australia Pty Ltd (Revised Common Questions)* [2021] FCA 1320.

An appeal from these decisions was heard by the Full Court over six days between 20–24 and 28 March 2023.

The case relates to various problems alleged to exist with certain vehicles which were manufactured by Ford Motor Company between July 2010 and December 2016 and imported into Australia by Ford Australia and which contained a type of transmission called the DPS6 (**Affected Vehicles**). The Affected Vehicles were manufactured under three model lines: Focus, Fiesta and EcoSport.

Relevantly to the appeal, Ms Capic brought a claim under s 271(1) of the Australian Consumer Law (**ACL**) for damages under s 272(1) on the basis that the Affected Vehicles were not of acceptable quality when supplied to consumers contrary to the guarantee in s 54 of the ACL (**Acceptable Quality Claim**).

The Acceptable Quality Claim comprised allegations that the Affected Vehicles as supplied suffered from two sets of deficiencies:

1. a real risk that four components of the transmission would fail (the **Component Deficiencies**); and
2. so-called ‘architectural’ features which created risks of failure because they meant that the DPS6 inadequately managed the torsional vibrations and heat generated by the engine (the **Architecture Deficiencies**).

It was alleged that the Component Deficiencies and Architecture Deficiencies meant that the Affected Vehicles had a propensity to exhibit a range of undesirable behaviours including shudder, jerking, sudden deceleration and loss of power, difficulty changing gears and gear rattling (among others).

Ms Capic was largely successful before the primary judge in proving that the Affected Vehicles supplied with the relevant original components were not of acceptable quality within the meaning of s 54 of the ACL.

Ford Australia appealed from the decision of the primary judge, and Ms Capic cross-appealed.

On the appeal, Ford Australia contended that the primary judge’s findings that the Affected Vehicles failed to comply with the statutory guarantee were infected with errors associated with the primary judge’s incorrect construction, and misapplication, of s 54 of the ACL. Those aspects of its appeal failed.

In the cross-appeal, Ms Capic contended that the primary judge ought to have found that the characteristics of firm gear shifting and a slight shunting sensation were a consequence of inadequate arrangements for damping of torsional vibrations. Ms Capic also contended that the primary judge ought to have found that the Affected Vehicles were not of acceptable quality because they had an unusual propensity for servicing, repair and/or replacement of the dual clutch assembly (or components thereof); and because of the risk of solder cracking associated with one of the Component Deficiencies (the ATIC 106 chip). Those aspects of the cross-appeal failed.

However, Ms Capic succeeded in contending that the primary judge ought to have found that the alleged Architecture Deficiencies gave rise to a superadded propensity for Affected Vehicles to experience troubling vehicle behaviours.

Insofar as her individual claim was concerned, Ms Capic was awarded damages by the primary judge under s 272(1) of the ACL. On the appeal, Ford Australia challenged the primary judge’s construction of s 272(1). During the hearing of the appeal, a decision of a differently constituted Full Court was delivered which addressed the same issue of statutory construction: *Toyota Motor Corporation v Williams* (2023) 296 FCR 514; [2023] FCAFC 50.

This Court followed the decision of *Toyota* with the result that this Court determined that:

1. the primary judge ought to have held that subsequent events were capable of bearing on the proper assessment of reduction in value damages;
2. when assessing the damages payable to Ms Capic, the primary judge ought to have taken into account the facts known at the time of trial (being the repairs) and the use by Ms Capic of her vehicle up until the time of trial;
3. evidence as to the value of the vehicle at the time of trial was relevant information which would have enabled the primary judge to ensure that Ms Capic was not over-compensated.

On the appeal, Ford Australia contended that the primary judge had misconstrued s 271(6) of the ACL because it is not engaged where the manufacturer remedies the non-compliance but does not do so within a reasonable time. That aspect of its appeal failed.

In the cross-appeal, Ms Capic challenged the primary judge’s finding that, for each risk which was found to have been established, Ms Capic had a separate cause of action under s 271 of the ACL. That challenge was successful, with the result that the primary judge ought to have found that, where an Affected Vehicle was affected at the time of the relevant supply by one or more deficiencies, that circumstance gave rise to a single failure to comply with the guarantee of acceptable quality in s 54(1) of the ACL. That conclusion was consistent with the reasoning of *Toyota*.

In addition, Ms Capic ought to have been, but was not, awarded pre-judgment interest on the damages awarded for excess amounts of GST, stamp duty and financing costs.

The question of Ms Capic’s damages will be remitted for re-determination on the basis of evidence already before the primary judge.

**Justices Yates, Beach and Downes**

**14 November 2023**

**Sydney**