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: **AHYA-UD-DIN ARSALAN**
Appellant
and
ALEX RIXON
Respondent

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APPELLANT'S SUBMISSIONS

Part I: Certification

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

Part II: Issue on appeal

2. The issue on appeal is whether, in a case of negligent damage to a non-income producing chattel for which the claimant needs a temporary replacement, the damages that the claimant is entitled to recover are to be assessed, presumptively or at all, by reference to the cost of temporarily obtaining a substitute chattel that is
20 equivalent to the damaged one, or as similar to it as possible, in specification and performance, if the uses for which the damaged chattel was capable of being, and likely to have been, put by the claimant could have been adequately satisfied by a substitute that was available at a significantly lower cost.

Part III: Section 78B Notice

3. Notice under s 78B of the *Judiciary Act 1903* (Cth) is not required.

Part IV: Citations of the decisions below

4. The decision of the Local Court of New South Wales in S35 of 2021 is *Rixon v Arsalan* (Local Court of New South Wales, J Keogh LCM, 22 November 2018) (**LC1**) (S35 of 2021 AFM at 5-21).

30 5. The decision of the Supreme Court of New South Wales in S35 of 2021 is *Rixon v Arsalan* (2019) 89 MVR 370; [2019] NSWSC 1136 (**SC1**) (S35 of 2021 CAB at 6-12).

6. The decision of the Local Court of New South Wales in S36 of 2021 is *Cassim v Nguyen* (Local Court of New South Wales, Farnan LCM, 6 December 2018) (**LC2**) (S36 of 2021 AFM at 5-20).

7. The decision of the Supreme Court of New South Wales in S36 of 2021 is *Nguyen v Cassim* (2019) 89 MVR 347; [2019] NSWSC 1130 (**SC2**) (S36 of 2021 CAB at 6-30).

8. The decision of the New South Wales Court of Appeal appealed from is *Lee v Strelnicks; Souaid v Nahas; Cassim v Nguyen; Rixon v Arsalan* (2020) 92 MVR 366; [2020] NSWCA 115 (**CA**) (S35 of 2021 CAB at 26-81; S36 of 2021 CAB at 44-99).

Part V: Relevant facts

9. On 8 August 2017, Mr Alex Rixon's Audi A3 sedan was damaged in a collision with a motor vehicle negligently driven by Mr Ahya-Ud-Din Arsalan (CA [101]). While Mr Rixon's vehicle was being repaired he was provided with a temporary replacement vehicle pursuant to a credit hire contract (LC1 [4]). Under that contract Right2Drive Pty Ltd (**R2D**) provided him with an Audi A3 for 69 days at a cost of $12,829.91 (CA [85]-[86], [101]). Mr Rixon needed a replacement vehicle to travel to work and for general errands but did not need a replacement vehicle of any particular size or type such as a four-wheel drive to travel over certain terrain or a luxury vehicle to collect clients and represent his business (LC1 [41], [44]). His need for a replacement vehicle would have been satisfied by a Toyota Corolla instead of a luxury vehicle such as an Audi A3 (LC1 [58]-[59]). A Toyota Corolla would have cost $4,226.25, instead of $12,829.91, for the period of hire (LC1 [63]-[64]).

10. Mr Azad Cassim's 2012 BMW 535i sedan was damaged on 1 April 2017 when it collided with a vehicle negligently driven by Mr Dylan Nguyen (LC2 [1]). Mr Cassim was unable to use his car from 1 April to 22 August 2017 (CA [94]). Mr Cassim initially went without a car but then hired a Toyota RAV4 from 3 to 8 April 2017 at a cost of $1,038 (LC2 [2]). Mr Cassim then shared his wife's car and travelled overseas (LC2 [2]). From 30 May 2017, he hired an Infiniti Q50 pursuant to a credit hire contract with R2D for 84 days at a total cost of $17,158.02 (LC2 [3]). The Infiniti Q50 was of a slightly lower Redbook value than

Mr Cassim's BMW and its features were similar to or less than those of the BMW (LC2 [17]). Mr Cassim needed a replacement vehicle to carry sample toilet seat covers as part of his business (although the case was approached in the basis that his vehicle was a non-income producing chattel (SC2 [11])) as well as for ordinary domestic purposes (LC2 [14]). He expressed a preference for a "nice, luxury car" but conceded that any vehicle "that had five seats" would most likely have been feasible (LC2 [16]). A Toyota Corolla would have satisfied Mr Cassim's needs while his car was being repaired at a cost of $89 a day or $7,476 for the period during which the Infiniti Q50 was hired (LC2 [57]).

11. Mr Rixon and Mr Cassim each commenced proceedings in the Local Court of New South Wales claiming damages in sums that corresponded to the costs of their credit hire contracts with R2D (SC1 [2], SC2 [13]-[14]). The magistrate in Mr Rixon's case found that the cost of Mr Rixon's credit hire contract included costs of non-compensable benefits additional to the use of the replacement Audi A3 (LC1 [62], SC1 [10]). The magistrate held that, as he had not established the need for an Audi A3 or similar replacement vehicle, Mr Rixon's damages were limited to the cost of hiring a Toyota Corolla that would have satisfied his needs while his car was being repaired (LC1 [58]-[64]). The magistrate in Mr Cassim's case awarded as damages the entire amount that Mr Cassim claimed. This was on the basis of (i) an implicit finding that the cost of his credit hire contract for the Infiniti Q50 fell "within the range of hire costs of vehicles of equivalent value" to his BMW sedan (SC2 [17], LC2 [56]) and (ii) the magistrate's view that Mr Cassim was entitled to the market rate of hiring a vehicle of equivalent value to his BMW notwithstanding that the evidence established that his needs would have been met by hiring a Toyota Corolla (LC2 [51], [56]-[57]).

12. Mr Rixon and Mr Nguyen each appealed to the Supreme Court of New South Wales. Mr Rixon's appeal pursuant to s 39(1) of the *Local Court Act 2007* (NSW) was limited to questions of law. Mr Nguyen's appeal pursuant to ss 39(1) and 40(1) of the same Act was limited to questions of law unless leave to appeal on grounds involving a question of mixed law and fact were found necessary, and were granted. Their appeals were heard and determined by Basten J at the same time as a third appeal, *Souaid v Nahas* (2019) 89 MVR 364; [2019] NSWSC 1132 (***Souaid***), which concerned the same question of principle. Basten J held that the

value or prestige of the damaged vehicle is not an essential characteristic of what is reasonably necessary in a temporary replacement vehicle (SC2 [42]). The test of reasonable necessity must be applied by reference to the need in question and is to be resolved by applying an objective standard which is not necessarily reflected in the claimant's choice of vehicle (SC2 [42]). The claimant is entitled to recover the cost of hiring a replacement vehicle to alleviate, so far as reasonably possible, the inconvenience resulting from the loss of use of the damaged vehicle by reference to past usage and an assessment of what is reasonably necessary to satisfy that need; not to replace the claimant's vehicle with the temporary use of another vehicle of equivalent prestige or value (SC2 [53]). Accordingly, his Honour allowed Mr Nguyen's appeal and ordered that he pay Mr Cassim the amount of $7,476, being the market rate of hire for of a Toyota Corolla, and dismissed Mr Rixon's appeal (SC1 [16]; SC2 [60]).

13. Mr Rixon and Mr Cassim were granted leave to appeal, and their appeals were allowed by a majority of the New South Wales Court of Appeal. The orders disposing of Mr Rixon's appeal included remitting the matter to the Local Court for assessment of damages in accordance with the Court of Appeal's reasons (S35 of 2021 CAB at 83). Their appeals were heard with an appeal in *Souaid* and one other matter, *Lee v Strelnicks*, which raised a different but related question of principle.

14. Emmett AJA said, without reference to the relevant authorities, that the dominant rule is the principle of *restitutio in integrum* (CA [119]). If the claimant has a need for the damaged vehicle, in the sense of an intention to use the damaged vehicle had it not been damaged, this leads by inexorable logic to the conclusion that the "replacement vehicle should be equivalent to the damaged vehicle or as similar to it as is reasonably possible" (CA [120], [126]-[129]). Once need has been established, there are two further inquiries (CA [123]). First, it is necessary to inquire what vehicle is available in the market that is of the same make, model and year as the damaged vehicle, or, failing that, as close as possible in specification and performance (CA [124]). Secondly, it is necessary to determine whether the cost of hiring such a replacement vehicle is reasonable in all the circumstances (CA [125]). The hiring charge that may have to be paid in order to obtain an equivalent vehicle will have a bearing on whether it is reasonable to incur that hiring charge for the replacement (CA [125]). Emmett AJA did not specify which

party bore the onus of proof on any of those issues and considered that it "may not matter" whether the damages to be quantified are to be characterised as special or general or whether the cost of hiring a replacement vehicle is to be characterised as the cost of mitigating a loss that the claimant would otherwise have suffered (CA [130]). A central premise to the reasoning of Emmett AJA is that most motor vehicles are "fungibles" and it would only be in the case of a "unique vehicle" that it may be necessary to have regard to "the function of the particular vehicle and the particular use to which that vehicle would have been put during the period of repair" (CA [121]-[122]).

15. Although he disagreed with the description of motor vehicles as "fungibles", White JA agreed "generally" with the reasons of Emmett AJA but published "additional reasons" that articulated a divergent approach (CA [27]). His Honour held that it is not only the inconvenience caused by the temporary loss of the use of the damaged vehicle that is compensable (CA [29], [60], [69(5)]). He said (CA [60]) that "[t]here must also be an intangible benefit (to some) in owning, leasing or using a 'prestige' vehicle reflected in that word. Just as many people feel better, and feel that they are better regarded, if they wear fine rather than merely serviceable clothes, it may be taken that some people feel better, and feel that they are better regarded, if they drive a prestigious car rather than a merely serviceable car. The intangible nature of such feelings does not mean that they are unreal or uncompensable." White JA held that the reasonable cost of hiring a reasonably equivalent vehicle is properly characterised as expenditure incurred to mitigate damage (CA [39]-[42]). If a claimant establishes a reasonable need to hire a replacement vehicle, then *prima facie* it can be inferred that the claimant will have a reasonable need for a vehicle that is reasonably equivalent to the damaged vehicle because the loss to be compensated "is not merely the inconvenience of not having a vehicle to transport the plaintiff and his or her family, friends and associates, from A to B, but the loss of his or her ability to do so in a vehicle which has the safety, luxury and prestige of the damaged vehicle" (CA [69(6)]-[69(7)]). A defendant then bears the onus of establishing that the hire of the particular replacement vehicle was unreasonable (CA [69(8)]).

16. Meagher JA dissented in each of Mr Rixon's and Mr Cassim's appeals. His Honour stated that a claimant is not entitled to charge a defendant with any greater

sum than that which is reasonably necessary to be expended for the purposes of making good the loss (CA [18]). The rule is one that focuses on the compensable head of loss and what is reasonably required to be expended to remedy that loss, here being the inconvenience of being unable to use the damaged vehicle (CA [2], [18]). It follows that the compensatory principle is only engaged with respect to the uses to which the damaged vehicle was capable of being, and likely to have been, put during the period of its repair, and therefore calls only for its replacement with a vehicle which is able to satisfy those uses (CA [18], [20]). For none of the claimants did the efficacy or enjoyment of any likely use depend on the replacement vehicle having a specific, and perhaps unique, characteristic or feature, in the absence of which the claimant would have been deprived of that relevant use and as a result suffer compensable inconvenience or deprivation of some kind (CA [21]). His Honour therefore would have dismissed their appeals (CA [23], [25]).

17. While White JA and Emmett AJA allowed Mr Rixon and Mr Cassim's appeals, they did not allow the appeal of the claimant in *Souaid* to recover the costs of hiring a Lexus IS 250 sedan and BMW 318i sedan when his Lexus IS 250 F Sport Prestige sedan was unavailable for use because Mr Souaid had admitted during the course of cross-examination that he "was content with any car, just as long as he had a car there 'for my wife, for the kids and stuff'" (CA [79], [137]).

18. In the courts below, each appellant contended that the respondent's loss of use damages were properly to be assessed in accordance with a 'conceptual' approach, under which the measure of damages was the market cost of the goods and/or services that the defendant's wrong had caused the claimant to need, rather than the actual amount of credit hire charges that the claimant had incurred a liability to pay (S35 of 2021 AFM at 22-56; S36 of 2021 AFM at 21-50). In the Court of Appeal, Emmett AJA acknowledged the contention (CA [118]) but in none of the judgments below was its correctness or otherwise expressly determined, or even directly considered.

Part VI: Argument

Summary

19. The seemingly humble facts in each case raise four issues of principle: (a) What is the interest whose infringement damages for loss of use of a non-income producing chattel are awarded to compensate? (b) When a claimant seeks to recover as damages for the negligent infringement of that interest the amount of a payment made, or liability incurred, as the cost of hiring a temporary replacement, must a court approach the question of quantification of damages by reference to the conventional distinction between general and special damages, or is a 'conceptual' approach – under which the measure of damages is the market cost of the goods and/or services that the defendant's wrong has caused the claimant to need – permissible and/or to be preferred? (c) If a conventional 'special damages' approach is adopted, are charges actually incurred by a claimant in hiring a temporary replacement properly characterised as expenditure foreseeably incurred as a consequence of the defendant's tort, or as expenditure incurred in mitigation of loss? (d) Which party bears the legal onus of proof that a particular sum claimed as loss of use damages does or does not properly quantify the claimant's loss?

20. In summary, for the reasons advanced in more detail in the following submissions, the appellants advance the following seven propositions.

21. First, the Court should prefer as a matter of principle the approach to assessment of damages that was adopted by Meagher JA and Basten J to either of the approaches of White JA or Emmett AJA.

22. Secondly, the UK authorities, dealing initially with ships and more recently with motor vehicles, are of considerable assistance in identifying the correct principles. Emmett AJA was in error to make no attempt to deal with them (CA [119]-[129]).

23. Thirdly, if considered through the prism of special damages to recover an amount paid or a liability incurred, the onus falls upon a claimant: (a) to plead and prove that the expenditure or liability was a reasonably foreseeable consequence of the tort; and (b) to prove that the expenditure or liability properly quantifies their loss. White JA was in error in collapsing that analysis into a mitigation framework and placing an onus upon the defendant to establish that the hire of the chosen replacement vehicle was unreasonable (CA [42], [69(3)], [69(4)], [69(8)]).

24. Fourthly, loss of use damages may, in an appropriate case, be assessed in accordance with a 'conceptual' approach. On that approach, the distinction between general and special damages has no substantive significance. Unless Emmett AJA intended to endorse the 'conceptual' approach, his Honour was in error to say that the distinction may not matter (CA [130]).

25. Fifthly, whether a 'conventional' or 'conceptual' approach is adopted, the matter that must be established by a claimant is correctly identified by Meagher JA as identification of the substitute chattel that would adequately satisfy the uses for which the damaged chattel was capable of being, and likely to have been, used during the period of repair (CA [18]). This approach is to be preferred to either that of Emmett AJA under which *any* intended use at all for a replacement chattel is taken axiomatically to establish a need for a chattel that is 'like for like' (CA [120]); or that of White JA under which the measure of special damages is determined in two stages, with the claimant bearing the onus of proving a need for *any* replacement chattel, and the defendant then assuming the onus to rebut a *prima facie* inference that the need was for a chattel 'commensurate' with the damaged one (CA [68], [69(6)]-[69(8)]).

26. Sixthly, the approach of Meagher JA is correct in principle because it focusses squarely on the interest that has been lost, namely the use that the claimant has lost by reason of the defendant's wrong (CA [17]-[21]). By contrast, White JA was in error to say that loss of use damages compensate injuries to feelings that involve no pain or even any practical inconvenience (CA [60], [69(5)] and [69(7)]) and Emmett AJA was in error to assume, as an axiom, that loss of use damages must, if they are to serve as a compensatory remedy, suffice to provide a plaintiff with a substitute chattel that is a true 'fungible' for the damaged one (CA [120]-[129]).

27. Seventhly, once the measure of damages is correctly stated as above, Meagher JA was correct to find, at the stage of application, that there was no error in the decisions of Basten J (CA [22]-[25]).

Damages where no replacement hired

28. Where a claimant's chattel has been damaged, the basic pecuniary loss to be compensated in accordance with the compensatory principle is the diminution in the value of the chattel, which is normally measured by the reasonable cost of

repair: James Edelman, *McGregor on Damages* (21st ed, 2020) (***McGregor***) at [37-003]. A claimant who has temporarily lost the use of the chattel can also recover general damages in respect of that lost use, even if it would not have produced any income, and even if the claimant did not hire a replacement: *Owners of Steam Sand Pump Dredger, No 7 v Owners of SS Greta Holme* [1897] AC 596 (***The Greta Holme***); *Owners of the Steamship Mediana v Owners, Master and Crew of Lightship Comet (The Mediana)* [1900] AC 113 (***Mediana***) at 116.3 – 118.9. On this principle, general damages can be recovered by a private motorist for the lack of advantage and inconvenience occasioned by not having ready access to a vehicle for personal or family use: *McGregor* at [37-054]-[37-055].

29. Consistent with the compensatory principle, a claimant will not be awarded as general damages the value of a use to which the lost chattel was capable of being put, but to which the claimant had no intention of putting it: *Commissioners for Executing Office of Lord High Admiral of United Kingdom v Owners of Steamship Susquehanna (the Susquehanna)* [1926] AC 655 (***Susquehanna***) at 662.4, 663.3, 669.1. If the temporary unavailability of a chattel has occasioned that claimant no *practical* inconvenience, the damages, though they are in principle always compensatory and never nominal, may nevertheless be assessed at "a trifling amount": *Mediana* at 118.2. The fact that the capital value of a damaged chattel may be very large cannot in principle affect this application of the compensatory principle, because the diminution in the capital value of the damaged chattel is separately compensated under another head of damage.

Damages where a replacement is hired

30. Consistent with the compensatory principle, a claimant seeking to recover as special damages a sum actually expended to obtain a temporary replacement must establish a reasonable need for the chattel during the period of repair: *Giles v Thompson* [1994] 1 AC 142 (***Giles v Thompson***) at 154G, 167A-E; *Lagden v O'Connor* [2004] 1 AC 1067 (***Lagden v O'Connor***) at 1078 [27]; *Giles v Thompson* [1993] 3 All ER 321 at 337G-J; *Burdis v Livsey* [2003] QB 36 at 86F; *Pattni v First Leicester Buses Ltd* [2012] Lloyd's Rep IR 577 (***Pattni***) at 590 [73]; *Frucor Beverages Ltd v Blumberg* [2019] NZCA 547 at fn 4. Although this will not be difficult for most motorists to establish, the reasonable need for a

replacement is determined objectively by reference to the use to which the vehicle would have been put and the availability of an alternative. Lord Mustill in *Giles v Thompson* at 167C gave the example of an owner of a damaged vehicle who "may have been in hospital through the accident longer than his vehicle was off the road; or … may have been planning to go abroad for a holiday leaving his car behind". In *Beechwood Birmingham Ltd v Hoyer Group UK Ltd* [2011] QB 357 (***Beechwood***) there was no need for the hire of a replacement vehicle because the claimant motor dealer had ample capacity within its own stock of cars to absorb the loss of use without any extra expenditure or loss of profits to its business. However, the claimant had hired a replacement vehicle because it wished to test the efficacy of the credit hire agreement to which it referred its customers. The claimant was permitted to recover general damages for the loss of the use of the vehicle but was not permitted to recover special damages based on the actual cost of the credit hire agreement because there was no reasonable need to obtain a replacement vehicle. Similarly in *Singh v Yaqubi* [2013] Lloyd's Rep IR 398 the claimant partnership, which had a fleet of vehicles from which a replacement could have been provided was not permitted to recover the cost of hiring a replacement Rolls-Royce because it had failed to establish a reasonable need to hire a replacement vehicle.

31. A claimant would not be entitled to recover the additional cost of hiring a larger or more powerful vehicle if an equivalent to the damaged vehicle were available at a lower cost: *Lagden v O'Connor* at 1078 [27]. This does not mean that the converse, *viz* that the claimant is entitled to recover the cost of hiring a vehicle that is no larger and no more powerful than the damaged one, is necessarily or axiomatically true. If a claimant must, in order to recover the cost of hiring a substitute, establish objectively a reasonable need for *a* replacement vehicle, it must follow that the claimant must also establish objectively by reference to the use to which the replacement is intended to be put, *the* type or kind of replacement vehicle that was reasonably necessary. The uses for which a damaged luxury or prestige vehicle were required may in some cases be such that a claimant will without difficulty establish that an equivalent or comparable vehicle to the damaged one was reasonably needed. The magistrate in Mr Rixon's case gave, as an example, a luxury car to collect clients or represent the owner's business (SC1 [12]).

Nevertheless, a reasonable replacement is not in all cases necessarily, or even presumptively, the same as, or equivalent to the damaged vehicle that is temporarily replaced.

32. The application of this principle is illustrated in *Watson Norie Ltd v Shaw* [1967] Lloyd's Rep 515 (***Watson Norie***). There the Court of Appeal upheld the decision of the trial judge that the plaintiff had not acted reasonably in hiring prestige vehicles, initially a Rover 100 and then a Jaguar 3.8, to replace another prestige vehicle, a Jensen, which was used by the plaintiff's managing director while the damaged vehicle was being repaired. The trial judge did not award the plaintiff the cost of hiring the cheapest vehicle available, a Triumph Herald, as it was not reasonable for the plaintiff's managing director to drive a car of that size, but allowed the plaintiff to recover the cost of a Ford Zephyr Six "which might be said to be quite a substantial car" (at 516-517). Russell LJ stated at 518.1:

> "I do not think it is correct to say that the plaintiff is entitled, as an axiom, to put upon the defendants the burden of the cost of hiring a car equal or substantially equal in quality, value and prestige to the damaged car. The test is whether the hiring cost is no more than reasonably necessary to fill the time gap, having regard to the purposes for which the plaintiff company needed to hire a car."

Diplock LJ similarly held at 517.8 that "[t]he only question for the learned judge was what was a reasonable hire to pay for a car reasonably suitable for use by their managing director for the purposes of their business for seven weeks instead of the damaged Jensen."

33. On the approach taken by Diplock and Russell LJJ in *Watson Norie* the Court, when determining the reasonable measure of special damages, considers objectively what type of replacement vehicle was reasonably necessary for the claimant to hire, having regard to the use to which the replacement vehicle was intended to be put.

34. The decision in *Watson Norie* can be contrasted with the unusual facts in *H L Motorworks (Willesden) Ltd Alwahbi* [1977] RTR 276 where the Court of Appeal held that the cost of hiring a Rolls-Royce for eleven days, as a temporary replacement for a damaged Rolls-Royce was reasonably necessary. In that case,

the claimant was a car repairer. It had repaired its customer's Rolls-Royce, and taken it for a test drive where it was damaged by the defendant's negligence. The plaintiff sued as bailee of the damaged car, and claimed as damages the sum of the charges that the customer had incurred in hiring a replacement Rolls-Royce, which the plaintiff had reimbursed. *Watson Norie* was distinguished and the hire charges were held to be reasonable for the plaintiff to have incurred, in order to preserve the good will of its customer (at 280F-281C, 282F-J, 284D). Although the claimant was permitted to recover the hiring costs, Cairns LJ said at 280K that "[i]f it could be shown that the amount of use [the customer] wished to make of the car in those 11 days was very small or that some other car would have been equally suitable for his purpose, then it may well be that the plaintiff company should not have met his full claim, or, if they did, would not be entitled to pass on the claim to the defendant." However, Cairns LJ "apprehended" that these were matters for the defendant to establish.

A conceptual as opposed to conventional approach to the assessment of damages

35. Damage and damages are conceptually distinct things: *Mahony v J Kruschich (Demolition) Pty Ltd* (1985) 156 CLR 522 at 527.5. The requirement for a claimant to establish, objectively, not only that they had a reasonable need for a replacement vehicle, but also that their particular choice of replacement vehicle hired was reasonable, may be viewed as an instance of a claimant's invariable onus, not only to plead and prove that they incurred out of pocket expenditure as a not too remote consequence of the defendant's tort, but also that its quantum is the reasonable measure of special damages if the case is one in which a choice between alternative measures is necessary to be made: see *Jansen v Dewhurst* [1969] VR 421 at 426.35-427.30. A pecuniary liability actually incurred by a claimant in hiring a temporary substitute for a damaged chattel is damage that is always 'special' in the sense that fairness demands that it be pleaded and particularised: *Perestrello e Companhia Limitada v United Paint Co Ltd* [1969] 3 All ER 479 at 485I-486D. And, in order to find that the amount of such a liability is the reasonable measure of damages, a court must be satisfied that the substitute chattel that the claimant actually hired was of a kind whose cost it was reasonable to incur. This is because, on an approach that maintains the conventional distinction between general and special damages, general damages should, consistent with the compensatory

principle, not exceed the value of the lost use, and special damages should not exceed the reasonable cost of temporarily supplying the claimant with a reasonable replacement in use.

36. Claimants can however be awarded loss of use damages quantified by reference to the market cost of hiring a reasonable substitute chattel without proof that they have incurred that cost as special damage: *McAll v Brooks* [1984] RTR 99 at 101G-H, 103F-L, 105D-G*; Bee v Jenson* [2007] 4 All ER 791 at 799 [22]-[23]. Under this alternative 'conceptual' approach, the damage to be compensated is conceptualised as the temporary need for goods and/or services that a claimant suffers as a consequence of the defendant's tort. The claimant establishes the quantum of damages to which they are entitled by proving: (i) the nature of that need, and (ii) what it would reasonably have cost in the market to procure the goods and/or services that they reasonably required to satisfy it. On such an approach, the distinction between special and general damages is without substantive significance: *Griffiths v Kerkemeyer* (1977) 139 CLR 161 at 179.2; *Anthanasopoulos v Moseley* (2001) 52 NSWLR 262 (***Anthanasopoulos***) at 264 [1], 277 [84]. If a claimant has in fact procured some or all of the goods and services that they reasonably needed by expending a particular sum, that sum may serve as a potential cap on recoverable damages: *Van Gervan v Fenton* (1992) 175 CLR 327 (***Van Gervan***) at 334.6. But the amount of any liability actually incurred by the claimant is otherwise, at most, evidence of the market cost of goods or services reasonably needed: see *Grincelis v House* (2000) 201 CLR 321 at 327 [9].

37. The 'conceptual' approach avoids what may otherwise be the necessity to resolve detailed questions concerning the value of what the House of Lords, in *Dimond v Lovell* [2002] 1 AC 384 (***Dimond***) held to be the non-compensable benefits of credit hire, whose value must ordinarily be "stripped out" of the sum claimed by the claimant in order to avoid over-compensation: at 401D-401G, 402F-403B, 407.

38. In the United Kingdom, the 'conceptual' approach is precluded by the reasoning of the House of Lords in *Hunt v Severs* [1994] 2 AC 350 (***Hunt v Severs***): *Dimond* at 399A-400D. But this Court has held in *Kars v Kars* (1996) 187 CLR 354 at 380.6 that *Hunt v Severs* does not state the law of Australia. In *Anthanasopoulos* a majority of the Court of Appeal of New South Wales was of the view (*obiter* at 264

[1], 276-277 [77]-[84]) that the 'conceptual' approach could properly be applied to assessment of loss of use damages involving non-income producing chattels, and that is the approach for which each of the appellants contended below. It is the approach that the appellants submit this Court should approve as available in appropriate cases requiring assessment of damages for non-income producing chattels.

Identification of the reasonable need

39. All of the judges of the Court of Appeal correctly accepted that to recover the actual cost of obtaining a temporary replacement the claimant must objectively establish a reasonable need to use the replacement during the period of repair (CA [11], [22], [69(4)], [80], [120], [131]-[132]). If this is necessary for a claimant to recover the costs of a replacement, it follows axiomatically that the claimant must also establish objectively a reasonable need for the particular type of replacement vehicle chosen if they are to recover the cost of hiring that type of vehicle.

40. Meagher JA correctly assessed the claimants' losses by reference to "the uses to which the damaged vehicle was capable of being and likely to be put during the period of repair" (CA [15]). The approach articulated by Meagher JA, and also in the judgments of Basten J at first instance, is to be preferred to that of the majority because it focuses on what it was that the claimant lost by reason of the defendant's wrong, being the intended *use* to which the chattel would otherwise have been put during the period when it was under repair, rather than the peculiarities of the damaged chattel or expressions of subjective preference. A claimant's interest in preserving the pre-accident capital value of the damaged chattel is protected by the entitlement to the compensation that is awarded under a separate head of damages in respect of direct loss.

41. Meagher JA approached the requirement of 'reasonableness' from what his Honour assumed to be alternative but convergent perspectives of expenditure in mitigation and remoteness (CA [6]-[8]). Though it ought not to affect the outcome of these appeals in light of the findings that the respondents' need for a temporary replacement vehicle would have been met by a significantly less expensive replacement, the distinction between (i) expenditure that *is* reasonably foreseeable

damage and (ii) expenditure that is reasonably incurred to *mitigate* damage, can be of significance in particular cases when assessment is viewed through the prism of special damages; and, on a correct analysis, the basis on which the cost of hiring a temporary replacement for a damaged chattel is compensable as special damage is that it is expenditure of the first kind: *Compania Financiera Soleada SA v Hamoor Tanker Corpn Inc* [1981] 1 All ER 856 at 861A, 862H and 864G. On a 'conceptual' approach the issue does not arise because "matters which might on a different theory be dealt with on the issue of mitigation are subsumed under the issue of the reasonable value of the services needed": *Van Gervan* at 337.9-338.2.

Errors in the majority judgments

42. The correct focus of Meagher JA and Basten J on the interest that is infringed can be contrasted with the reliance in the reasons of the majority on uncertain and relative concepts of 'equivalence' and 'comparability' that reflect a preoccupation with capital value rather than value in use, and which accordingly bring to bear an intangible aspect of the damaged chattel divorced from consideration of its use; or more troublingly still, rely upon the subjective expressions of preference in the claimant's evidence. There were findings that a replacement Toyota would adequately have met the needs of Mr Rixon, Mr Cassim and Mr Souaid. Yet in the first two cases, but not the third, the majority of the Court of Appeal found that the correct approach was that the claimant was entitled to the cost of hire of a prestige vehicle. What separated these cases? It seems only that the first two claimants expressed a preference for a luxury vehicle whereas the third claimant was candid enough to admit that he "would have been okay with just a Holden sedan or a Camry … just so long as I have a car there for my wife, for the kids and stuff" (CA [106]).

43. If the underpinning principle according to Emmett AJA (CA [127]) is that the "cost of hiring a replacement vehicle that is equivalent in as many respects as possible to the damaged vehicle will be the means whereby the plaintiff is put in the position in which he, she or it would have been but for the wrongdoing", it is difficult to discern any principled reason why an admission on the part of the claimant that they did not care if they received less than complete compensation should make a difference.

44. On White JA's approach, a claimant has a *prima facie* reasonable need for an equivalent vehicle (CA [69]), the defendant bears the onus of proving the contrary, and, if the claimant has in fact hired a replacement vehicle, the defendant bears the onus of proving that the hiring of that vehicle was for that reason, or for any other reason, unreasonable (CA [69(8)]). On that approach, it is equally difficult to see how or why Mr Souaid's concession could make a difference where there were findings that a Toyota would have satisfied the reasonable needs of all three claimants. White JA's view that it is for the defendant to *dis*prove that a replacement vehicle actually hired by a claimant was of a kind that the claimant reasonably needed and whose cost therefore properly quantifies the claimant's compensable loss, rests upon his Honour's conclusion that hire charges incurred to replace a non-income producing chattel are properly characterised as expenditure incurred to mitigate loss (CA [39]-[42], [69(3)], [69(8)]). That view is contrary to the persuasive *obiter dicta* of Lord Denning MR at [41] above, and is wrong in principle. The incurring of charges for a temporary substitute chattel cannot properly be said to avoid or mitigate non-pecuniary damage that consists in inconvenience and that would otherwise be compensable by an award of general damages: *Lagden v O'Connor* at 1093-1094 [78]-[79], 1099 [101]. And in a case where the pecuniary liability for the charges is itself the only special damage that the claimant is said to have suffered, the incurring of that very liability cannot logically be characterised as a step that has been taken to avoid or reduce special damage.

45. For White JA the fact that "some people feel better, and feel that they are better regarded, if they drive a prestigious car" is central to the proper measure of damages (CA [60]). The crux of White JA's reasoning for allowing a claimant to recover as special damages the higher cost of hiring a temporary replacement vehicle that is equivalent to a claimant's damaged luxury vehicle in respects that are objectively unnecessary to ameliorate the practical inconvenience occasioned by its temporary unavailability, is a suggested "parity of reasoning" with what his Honour assumes to be the principle on which the same claimant might recover general damages assessed by applying an interest or depreciation rate to the higher capital value of the damaged luxury vehicle (CA [70]-[74]). The suggested "parity of reasoning" is illusory, and fails to recognise that the reported cases in which

appellate courts have approved assessment of general damages for loss of use by a formula that incorporates the capital value of the damaged chattel have been cases in which that formula was thought to serve as an estimate, however imperfect, of the value of the damaged chattel to its owner in use.

46. It is true that, where no replacement is hired but a standby is kept, damages are normally measured by reference to the cost of maintaining the standby as well as some amount to reflect the capital employed in it: *McGregor* at [37-058]. It is also true that, where no replacement is hired or kept, damages are generally calculated on the basis of interest on the capital value of the chattel at the time of the damage: *McGregor* at [37-057]. But these are measures that are applied *faute de mieux* and on the basis that, in the absence of any better evidence of the value in use of a chattel, it will usually be reasonable to assume that its value in use will be not less than what its owner habitually pays to have it available for use as and when required: *Mersey Docks and Harbour Board v Owners of Steamship Marpessa* [1907] AC 241 at 244.7-245.2. In *Commissioners for Executing Office of Lord High Admiral of United Kingdom v Owners of Steamship Chekiang (The Chekiang)* [1926] AC 637 (***The Chekiang***) at 647.5-649.1, Lord Sumner considered that recourse to standing charge cost as a measure of the value of a chattel in use was justifiable to the extent that the intended use of was characterised by "regularity of duty and a close analogy to commercial undertakings" but doubted whether it was a sound measure to apply in non-commercial contexts.

47. As to interest on capital value, Lord Sumner remarked that "[i]nterest is … a thing that has little to do with non-commercial transactions and, apart from cases of contract, is always a highly fictitious factor in calculations" and that, at least in a case where the damaged chattel was a naval vessel, its depreciated value was "much more appropriate to the case of a total loss than to demurrage during repair, and … the calculation must be a very uncertain test of the true daily value of the user lost": *The Chekiang* at 647.5.

48. Consistent with those views, and for the reasons that are given in *McGregor* at [37-054]-[37-055] White JA's "parity of reasoning" is misconceived in respect of Mr Rixon, whose case was determined on the basis that he used his vehicle for

entirely private convenience. The relevant passage from *McGregor* states (footnotes omitted):

> "It had already been said in *Alexander v Rolls Royce Motors*, that private cars were different from items of transport in the public service in that, where no substitute car is hired, there can be no recovery of general damages of a financial nature. This was on the basis that with the individual car owner there is no business loss that calls for compensation...
>
> At the same time *Beechwood Birmingham* confirms that the private car owners should be entitled to general damages for non-pecuniary loss. For, as it was put by the Court of Appeal, they should be entitled to compensation for:
>
> > *'… the lack of advantage and inconvenience caused by not having the use of a car ready at hand at all hours for personal and/or family use.'"*

49. White JA's "parity of reasoning" also does not explain the outcome or reasons in *Souaid* where the claimant's damages were calculated by reference to the market cost of hiring a Toyota Camry when the damaged vehicle was a luxury sedan (CA [31], [105], [107], [137]).

50. White JA also incorrectly concluded that by 2010 "the settled approach in England and Wales" appeared to have been that "once the plaintiff's need for a replacement vehicle was established … there was no principle that required the plaintiff to put up with a car that was of a different and less expensive type" (CA [61]-[62]). His Honour referred to two decisions in support of that proposition, *Bent v Highways and Utilities Construction Ltd* [2010] EWCA Civ 292 (***Bent***) and *Brain v Yorkshire Rider Ltd* [2007] Lloyd's Rep IR 564 (***Brain***). In *Bent* the defendant accepted that the claimant needed a replacement vehicle and "was entitled to hire a broadly equivalent car to his own" (at [2]). *Bent* does not represent a "settled approach". *Bent* is no more than a concession made by *a* defendant in *a* case. *Brain* was a decision in which a County Court Judge said at [11]-[12] that *Watson Norie* was "hopelessly inadequate as an authority" for the proposition that "the cost of a prestige car should not be allowed for so long as the car hire provide [sic] by the defendant is adequate for the plaintiff's needs". The decision in *Brain* was flawed for the three reasons given by Basten J (SC2 [50]-[53]). It is also inconsistent with

Watson Norie, a decision of the Court of Appeal of England and Wales which has not been overturned, expressly or otherwise.

51. Whilst subjective 'feelings' are seemingly of central importance to White JA's approach, the 'make', 'model' and 'year' of the damaged vehicle are controlling matters for Emmett AJA (CA [124]) regardless of the significance of those matters to the use to which the damaged vehicle is put or to the nature of the inconvenience suffered by reason of its temporary deprivation. That analysis says nothing of the physical condition, mechanical condition or mileage of the damaged and replacement vehicles. In the absence of a true 'fungible', the claimant is said to be entitled to be provided with a temporary vehicle that is "sufficiently similar to the damaged vehicle in terms of make, model and year" or "as close to the damaged vehicle as possible in specification and performance" (CA [124]). But, when applied to a particular motor vehicle, the expression "specification and performance" designates, in the aggregate, a multiplicity of features, some of which, but rarely all of which, will also be features of a range of vehicles that are not identical with that vehicle, or with each other, in make, model and year. For example, the available substitute vehicle that is most similar to the damaged vehicle in engine capacity and transmission may not be the one that is most similar in dimensions and bodywork. In such a case, when the *discrimen* for selection of an appropriate measure from among the range of available vehicles is "similarity" or "comparability", a court must at some point confront the task of determining the relative importance and priority of the various features by reference to which similarity or comparability might be assessed. How, otherwise than arbitrarily, is the court to do so, if, as both majority judgments insist, the extent to which each particular feature of a vehicle renders it objectively better-adapted or worse-adapted to the uses for which the claimant actually wanted to use it is an irrelevant and impermissible consideration? As Meagher JA recognised, the way of addressing this task that will best compensate the specific claimant who is before the court, is to pose the question "…similar in what proposed use by the claimant?" or "…comparable for what intended purpose of the claimant?" (CA [20]-[21]).

Proper application of principle

52. The respective Local Court Magistrates found, by reference to the uses to which Mr Rixon's and Mr Cassim's damaged vehicles were capable of being, and likely to have been, put during the periods when they were under repair, that the need that each of them had for a temporary replacement vehicle would have been satisfied by a Toyota Corolla ([9], [10] above). Accordingly, each of Mr Rixon and Mr Cassim ought to be awarded as damages the market cost of hiring a vehicle of that kind, rather than the significantly higher cost of a luxury vehicle whose cost substantially exceeded what was necessary to restore the use that each intended to make of his damaged vehicle during the temporary period in which it was under repair. In failing so to hold, the majority of the Court of Appeal erred in the manner that is specified in each of the Notices of Appeal.

Part VII: Orders sought by the appellants

53. The appellants seek the orders set out in the Notices of Appeal (S35 of 2021 CAB at 95; S36 of 2021 CAB at 113).

Part VIII: Time required for presentation of oral argument

54. The appellants estimate that they will need approximately 1 hour and 45 minutes for oral submissions in chief and 15 minutes in reply.Dated: 30 April 2021

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN: **AHYA-UD-DIN ARSALAN**

Appellant

and

ALEX RIXON

Respondent

ANNEXURE TO APPELLANT'S SUBMISSIONS
(Practice Direction No 1 of 2019 – Item 3)

LIST OF STATUTORY PROVISIONS REFERRED TO IN SUBMISSIONS

1. *Local Court Act 2007* (NSW) s 39 (as in force for 28 November 2018 to 27 February 2019)
2. *Local Court Act 2008* (NSW) s 40 (as in force for 28 November 2018 to 27 February 2019)