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Recent developments in commercial damages

The Honourable Justice Ian Pike*

Introduction

- 1 As the title of my talk suggests, I propose to delve into some recent cases on commercial damages.
- 2 I need to begin however, by defining what I include in the term “commercial damages”.
- 3 A narrow view of the term would focus on damages recoverable by a commercial entity as a result of a common law wrong, such as a breach of contract or a tort. I have not taken such a narrow view. Rather, I have sought also to look at commercial damages from the other end – namely the damages that may need to be paid by commercial organisations for wrongs they have committed.
- 4 Such an inquiry has been brought into sharper focus by the increasing prevalence of class actions or representative proceedings in Australia promoted, at least in part, by legislation, particularly in Victoria, permitting law practices to encourage contingency fees.¹
- 5 Such actions have the potential for significant damages awards against corporations.

* Justice of the Supreme Court of New South Wales – who thanks his current tipstaff, Marlow Meares, for assistance in the research for this paper.

¹ *Bogan v The Estate of Smedley* [2025] HCA 7.

- 6 Quite often these class actions focus on statutory causes of action, principally under the Australian Consumer Law (**ACL**).
- 7 Late last year the High Court had occasion to consider the proper measure of loss under the ACL in the context of defective products in *Williams*² and *Capic*.³
- 8 Such cases are, in my view, properly the subject of any review of cases on commercial damages.
- 9 Before dealing with *Williams* and *Capic*, I deal relatively briefly with an earlier High Court decision from 2024 – *Cessnock City Council v 123 259 932 Pty Ltd*⁴ (**Cessnock**), and the cases that have considered it.

Cessnock

- 10 *Cessnock* considered an aspect of the law of damages for breach of contract. In order to understand its significance, it is necessary to go back to a few fundamental principles.
- 11 The first is to remember the statement of principle by Parke B⁵ that:
- Where a party sustains a loss by reason of a breach of contract, [they are], so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract has been performed.
- 12 This has been described as the “ruling principle”: see *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd*⁶ at [13] (French CJ, Gummow, Heydon, Crennan and Kiefel JJ).
- 13 Such damages are often described as “expectation damages” as they are awarded to protect a plaintiff’s expectation of receiving the defendant’s performance – and are often contrasted with “reliance damages” which seek to

² *Williams v Toyota Motor Corporation Australia Ltd* (2024) 98 ALJR 1282; [2024] HCA 38 (**Williams**).

³ *Capic v Ford Motor Co of Australia Pty Ltd* (2024) 98 ALJR 1333; [2024] HCA 39 (**Capic**).

⁴ (2024) 98 ALJR 719; [2024] HCA 17. I apologise to those of you who attended Justice Peden’s talk last year as part of the Judge’s series which included references to *Cessnock*.

⁵ *Robinson v Harman* (1848) 1 Ex 850 at 855.

⁶ (2009) 236 CLR 272; [2009] HCA 8.

put a plaintiff back in the position the plaintiff would have been in had the contract not been entered into. Reliance damages more closely align with the measure of damages ordinarily awarded for tortious wrongs which seek to put a plaintiff back in the position the plaintiff would have been in had the wrong not been committed.⁷

- 14 The second basic principle is that a plaintiff bears the onus of establishing loss and its quantum. Thus, related to the first principle, a plaintiff seeking expectation damages bears the onus of establishing, on the balance of probabilities, that their particular expectation would have been realised, but for the breach.⁸
- 15 Notwithstanding the well settled distinction between expectation damages and reliance damages, it is not uncommon for a plaintiff to recover, as damages for breach of contract, expenditure incurred in reliance on a contract and wasted due to non-performance.
- 16 How wasted expenditure fits into traditional notions of expectation damages has not always been clear – it is perhaps more neatly described as part of reliance damages.
- 17 In the two leading High Court cases that considered the recovery of wasted expenditure for breach of contract⁹ the Court was clear that it was the defendant that bore the onus of demonstrating that the expenditure would have been wasted in any event. The reason why the defendant bore the onus was far from clear. In *Amann*, Mason CJ and Dawson J (at 87) spoke of a presumption in favour of a plaintiff of recoupment of expenditure, Gaudron J at 156 spoke of an assumption of recoupment and McHugh J at 165-166 spoke in terms of an

⁷ *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39 per Lord Blackburn; *Bridging Capital Holdings Pty Ltd v Self Directed Super Funds Pty Ltd (Trial)* [2025] FCA 314 at [172] per Stewart J.

⁸ *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64; [1991] HCA 54 at 80 (***Amann***).

⁹ *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377; [1951] HCA 79 and *Amann*.

inference. *Amann* is a case which Gunther Treitel described as notoriously complex.¹⁰

- 18 Bearing these basic principles in mind, I now turn to the decision in *Cessnock*.
- 19 *Cessnock* concerned the recovery of wasted expenditure for breach of contract. The issue on appeal to the High Court was “the method of proof for a plaintiff to establish the position that they would have been in if the contract had been performed, where the plaintiff has incurred expenditure in anticipation of, or reliance on, the performance of a defendant's contractual obligation and the defendant's breach of that obligation has the effect that the expenditure is wasted”.¹¹
- 20 The facts are, Cessnock City Council entered into an agreement with 123 259 932 Pty Ltd, the respondent, as part of an initiative to develop the Cessnock Airport. The respondent was to lease a prospective lot at the airport. The lease required subdivision of part of the Council's land. A condition of the agreement was that the Council would take all reasonable action to apply for and obtain registration of the plan of subdivision. The Council breached the condition and repudiated the agreement. The respondent never obtained a lease and spent considerable money in anticipation of the lease by constructing an aircraft hangar on the site.
- 21 The respondent commenced proceedings in the Supreme Court of New South Wales seeking the recovery of damages for its wasted expenditure in constructing the hangar. The primary judge, Adamson J (as her Honour then was), awarded the respondent only nominal damages.¹² Adamson J held that:

¹⁰ Gunther Trietel, “Damages for Breach of Contract in the High Court of Australia” (1992) 108 LQR 226.

¹¹ *Cessnock* at [60] (Edelman, Steward, Gleeson and Beech-Jones JJ).

¹² *123 259 932 Pty Ltd v Cessnock City Council* (No 2) [2021] NSWSC 1329.

- (1) A presumption of recoupment only arose if the nature of the breach rendered it “impossible” to assess damages on the usual basis. This was not such a case.
 - (2) The Council was not contractually bound to develop the airport. It was only contractually bound to take all reasonable action to register the Plan and the Instrument. Whether the airport was developed would depend on external factors.
 - (3) The Council had rebutted any presumption of recoupment. The evidence suggested that the businesses of the respondent were somewhat of a white elephant.
- 22 The respondent appealed. The Court of Appeal allowed the appeal.¹³ Brereton JA held (Macfarlan and Mitchelmore JJA agreeing):
- (1) A plaintiff who does not prove expectation damages may recover expenditure incurred in reliance on a contractual promise made by the defendant and wasted because of non-performance by the defendant (the presumption), except to the extent that the defendant proves that the plaintiff would not have recouped its expenditure had the contract been performed (the rebuttal).
 - (2) The notion of expenditure incurred in reliance on the defendant’s contractual promise is not confined to expenditure under or required by the contract, but extends to any expenditure reasonably incurred in reliance on the defendant’s contractual promise.
 - (3) The presumption of recoupment was not confined to cases of “impossibility” of proof.
 - (4) The presumption had not been rebutted by the Council.

¹³ See *123 259 932 Pty Ltd v Cessnock City Council* (2023) 110 NSWLR 464

- 23 The Council appealed. The High Court, of all seven justices, unanimously dismissed the appeal. Four separate judgments were delivered – Gageler CJ, Gordon J and Jagot J writing their own judgments. The plurality consisted of Edelman, Steward, Gleeson and Beech-Jones JJ.
- 24 The judgments contain some common ground but also some significant differences on relatively key aspects.
- 25 This is not the occasion for a deep dive into the various differences. My focus is more practical.
- 26 Each of the judgments agreed on several matters:
- (a) recovering damages for wasted expenditure requires a plaintiff to prove both that it incurred expenditure in reliance on the defendant's promise and that the expenditure was wasted because of the defendant's breach: see Gageler CJ at [3], Gordon J at [50], [52], Edelman, Steward, Gleeson and Beech-Jones J at [118] and Jagot J at [224] and [226];
 - (b) the plaintiff need not prove that the relevant expenditure was required under the contract for it to be incurred "in reliance on" the contract. A plaintiff need only prove that the expenditure was made to acquire some benefit from the contract: see Gageler CJ at [4]; Gordon J at [53]-[54]; Edelman, Steward, Gleeson and Beech-Jones JJ at [162]-[165] and Jagot J at [191 and [224];
 - (c) a plaintiff does not elect between reliance damages for wasted expenditure and expectation damages for loss of profits, since the aim of damages, however measured is to give effect to the ruling principle. Any award of contract damages that is based on expenditure in anticipation of, or reliance on performance of a contract has been described as a "proxy for", or "species of"

recovery for expectation loss: see Edelman, Steward, Gleeson and Beech-Jones JJ at [119].

- 27 The Court also agreed that in certain circumstances, a plaintiff's task in proving loss in the form of wasted expenditure will be assisted by casting onto the defendant an onus of proving that the plaintiff's expenditure would have been wasted even if the contract had not been breached: see Gageler CJ at [20]; Gordon J at [50]; Edelman, Steward, Gleeson and Beech-Jones JJ at [138] and Jagot J at [236].
- 28 The principal divergence between the respective judgments, and the most important thing to come out of the judgment, is the circumstances in which the onus will fall on the defendant.
- 29 My focus in this regard is necessarily on what was said by the plurality.
- 30 The plurality spoke of a "facilitation principle" – which applies to assist a plaintiff in discharging its legal onus of proving loss in circumstances where the defendant's wrongdoing has resulted in uncertainty regarding the quantum of loss. The principle emerges most clearly from the following extracts from the plurality judgment.
- 31 The plurality stated at [61] (emphasis added):

The legal onus to prove loss arising from a breach of contract rests on the plaintiff as the party seeking to recover damages. However, where a breach of contract has resulted in (namely, caused or increased) uncertainty about the position that the plaintiff would have been in if the contract had been performed, then the discharge of the plaintiff's legal burden of proof will be facilitated by assuming (or inferring) in their favour that, had the contract been performed, then the plaintiff would have recovered the expenditure they reasonably incurred in anticipation of, or reliance on, the performance of the contract. The strength of this assumption or inference, and thus the weight of the burden placed on the party in breach to adduce evidence to rebut the inference in whole or in part, will depend on the extent of the uncertainty that results from the breach.

- 32 Further, at [67], the plurality stated (emphasis added):

Although there was some disagreement between the parties about the effect of the decision in *The Commonwealth v Amann Aviation Pty Ltd*, the respondent's reliance on the principle that permits facilitation of its proof of the position that it would have been in if the contract had been performed is broadly consistent with the reasoning of Mason CJ and Dawson J, as well as Deane J, who spoke of the principle as a "presumption" in favour of the plaintiff, with Brennan J, who spoke of it as a "reversal of the onus", and with Toohey J and Gaudron J, who spoke of it as placing an "evidentiary onus" on a defendant. **The description "facilitation principle" emphasises that the principle is not rigid. All the circumstances must be considered and the strength with which the principle applies to facilitate a plaintiff's proof by treating reasonably incurred, but wasted, expenditure as likely to be recouped will depend upon the extent of uncertainty caused or increased by the defendant's breach.** In this case, there was considerable uncertainty as a result of the Council's breach. The principle was correctly applied by the Court of Appeal. The appeal should be dismissed with costs.

33 Further, at [139] the plurality explained (emphasis added):

In summary, the facilitation of the plaintiff's proof arises in cases **where the defendant's breach of an obligation results in uncertainty and difficulty of proof of loss for the plaintiff**, who has incurred expenditure in anticipation of, or reliance on, the performance of the obligation that was breached. The facilitation of proof that reasonably incurred expenditure would have been recovered has been described by Leggatt J as an example of courts **doing the "best they can not to allow difficulty of estimation to deprive the claimant of a remedy, particularly where that difficulty is itself the result of the defendant's wrongdoing"**. In applying the principle "reasonably ... according to the circumstances of each case", the plaintiff is given an evidential **"benefit of any relevant doubt"** that expenditure would be recouped to the extent that it was reasonable, with the practical effect of giving the plaintiff **"a fair wind" to establish loss. The strength of the wind will depend upon the extent of the uncertainty resulting from the breach by the defendant. And all of the circumstances, including any evidence led by the defendant, must be considered. The plaintiff is given a "fair wind" but not a "free ride"**.

34 The following emerges from the judgment of the plurality:

- (a) damages in the form of wasted expenditure are an evidential proxy for expectation damages based on an assumption of recoupment, i.e. that the claimant would have obtained revenue in an amount sufficient to recoup its expenditure;
- (b) where the breach of contract results in uncertainty or difficulty of proof as to what would have happened, the facilitation principle gives the plaintiff the benefit of a "fair wind" – the evidential onus falls on the defendant to displace the "assumption" that the

claimant would not have earned enough revenue to recoup the expenditure incurred. The more uncertainty the breach caused, the stronger the assumption, and the more evidence of non-recoupment will be required – a sliding scale!

- 35 To be clear, the facilitation principle is an evidential principle, not a substantive principle. The onus at all times remains on a plaintiff to prove loss.

Developments Post Cessnock

- 36 *Cessnock* has received some academic commentary¹⁴ and limited judicial treatment.
- 37 Academic commentary has, for the most part, welcomed the decision as clarifying the law in area and hopefully removing the need to revisit this aspect of the conflicting judgments in the notoriously complex *Amann*.
- 38 There does not seem to be any academic support for Gageler CJ's analysis that wasted expenditure is, without more a recognised category of compensable damage: see Barnett at 901.
- 39 The plurality's mild preference for using the phrase "assumption of recoupment" rather than the earlier phrase "presumption of recoupment", which Gordon J and Jagot J continue to use, has been criticised as unpersuasive. As Kramer KC states (at 64):

There seems no good reason to talk euphemistically about displaceable assumptions or similar, since this principle walks like a rebuttable presumption and quacks like one.

- 40 Of more significance to my mind is the following statement by Barnett (at 903):

¹⁴ See, for example: Katy Barnett "CONTRACT DAMAGES – RELIANCE DAMAGES – WASTED EXPENDITURE – "FACILITATION PRINCIPLE" (2024) 98 ALJ 899; Adam Kramer KC "The New Leading case on reliance or wasted expenditure damages in contract: *Cessnock City Council v 123 259 932 Pty Ltd* [2024] HCA 17 (2024) 39 Journal Contract Law 62; Justice Peden and Daniel Reede "Expectation, reliance and restitution: one measure of damages under multiple names" (2025) 4 Commercial Law Quarterly March-May 2025.

The plurality's references to "consequential losses" muddy the waters, and the sliding scale of proof might enmesh parties in arguments about who created the uncertainty, and the extent of the uncertainty.

- 41 It is the last part of this statement that most interests me as someone whose role now is to seek to give effect to what the High Court said. Time will tell how difficult it becomes to apply the sliding scale test formulated by the plurality.
- 42 To date there has been only limited judicial consideration of *Cessnock*. For the most part, these cases have involved impermissible attempts to invoke the principle. The only substantive application of it in New South Wales, according to my researches, is in two decisions.
- 43 First, a decision of the NSW Court of Appeal handed down on 7 May 2025, on appeal from the District Court – *Tok v Rashazar*.¹⁵ The case concerned a sale of 30 shares in a business (Fresh Cut) by the appellant to the respondent. The price was \$275,000 (payable in two tranches). Contrary to the agreement, no shares in Fresh Cut were ever transferred to Rashazar. This was not discovered for at least some years.
- 44 The primary judge found that there was a breach of the share sale agreement but, as regards damages, there was no information about the value of Fresh Cut or its profitability and what may have happened to its value or profitability if Rashazar had become a shareholder was imponderable. Accordingly, the primary judge awarded damages for breach of contract against the vendor on the basis of the expenditure reasonably incurred by Rashazar, being \$285,110.45 (reflecting the purchase price and stamp duty paid by Rashazar). In so doing, the trial judge relied on the facilitation principle.
- 45 The Court of Appeal (Stern JA, with whom Payne and Kirk JJA agreed) dismissed the appeal. At [61] and [62] Stern JA stated, having referred to the plurality in *Cessnock* at [61] and [139]:

[61] Having regard to these principles, the appellants' contention that the primary judge erred in assessing damages for breach of the share sale

¹⁵ *Tok v Rashazar* [2025] NSWCA 94.

agreement by reference to wasted expenditure should be rejected. The primary judge correctly identified that integers relevant to the assessment of damages premised upon Mr Tok's compliance with the share sale agreement were "imponderable". As I explain below, that plainly flowed from Mr Tok's breach. That, together with the obvious difficulty in obtaining reliable financial information about the financial performance of Fresh Cut, justified the primary judge facilitating the respondents' burden of proof by assuming (or inferring) in their favour that, had the contract been performed, they would have recovered the expenditure they reasonably incurred in anticipation of, or reliance on, the performance of the contract.

[62] This is so notwithstanding that, as the appellants point out, there was no evidence before the primary judge of the respondents making requests for financial information specifically for the purpose of Fresh Cut being valued. First, as already set out, there was evidence before the primary judge of the respondents seeking financial information and that information either being refused or, when provided, being seriously inaccurate. In these circumstances, it was apparent that there would be difficulties in obtaining reliable financial information. Second, in any event, such information would not have overcome the imponderables which the primary judge identified.

- 46 Second, in *Andrews & Andrews Construction Pty Ltd v Yao; Yao v Andrews & Andrews Construction Pty Ltd*¹⁶ the owners of a luxurious waterfront home sought to deploy the facilitation principle in circumstances where it alleged a builder had breached a special condition in the building contract requiring the builder to obtain and provide to the owners, two competitive quotes in relation to sub-contractor work and the owners said it was now impossible for them to determine the terms of the specific quotations the builder would have obtained.
- 47 Stevenson J refused to apply the facilitation principle – observing at [141] that the attempted deployment of the principle by the owners was beyond those referred to in any existing authority to which he had been referred. Stevenson J concluded (at [171]) that any impossibility or difficulty of proof is a product of the manner in which the owners had sought to prove their case.
- 48 A possible take out from this decision is that the party seeking to rely on the principle should consider putting forward evidence of the difficulties they have encountered in obtaining evidence to prove loss.

¹⁶ [2025] NSWSC 322.

- 49 *Cessnock* was also recently considered by the Full Court of the Federal Court¹⁷ in a decision of Murphy, Moshinsky and Button JJ, coincidentally also handed down on 7 May 2025. The decision is of some significance in that it was an attempt to involve the principle in a statutory damages claim, not a claim for wasted expenditure damages for breach of contract.
- 50 The case related to appeals from two representative proceedings that were commenced by shareholders of the Commonwealth Bank against the Bank. In each proceeding the applicants alleged that the Bank contravened its continuous disclosure obligations under s 674 of the *Corporations Act 2001* (Cth) and rule 3.1 of the Australian Stock Exchange Listing Rules by not disclosing to the market operated by the ASX (on which the Bank's shares were traded) information that was said to be material. That information related to the Bank's compliance with anti-money laundering legislation.
- 51 The applicants failed at trial at a number of levels before Yates J. Relevantly, Yates J found that even if liability had been established, the case on assessment of damages also failed.
- 52 Relevantly for present purposes, it was contended on appeal that the entire \$3.29 price drop that occurred on 3 August 2017, when an announcement was made by the Bank including its past non-compliance with AML legislation, as well as other bad news, should be attributed to the pleaded non-disclosures. It was contended that, based on *Cessnock*, the onus was cast on the Bank to establish that not all of the \$3.29 price drop was referable to the pleaded information: see [600] of the judgment.
- 53 The Full Court stated at [602]-[608]:
- 602 We should explain why the principles in *Armory* and *Cessnock* do not mean that, on the facts of this case, loss should be calculated adopting the whole \$3.29 figure.
- 603 The appellants' grounds of appeal only relied on *Cessnock* in relation to the quantification of loss. It was not relied on in the ground concerning

¹⁷ *Zonia Holdings Pty Ltd v Commonwealth Bank of Australia* [2025] FCAFC 63.

causation. Their written submissions on the appeal were consistent with this position. While oral submissions made by the appellants on the appeal sought to harness *Cessnock* on causation, we confine our discussion of that case to quantification. Accordingly, it is not necessary to determine the extent to which *Cessnock* has the effect that principles, previously understood to apply only in relation to quantification, and to operate only when causation was established, can be called in aid in establishing causation.

604 The point of principle at issue in *Cessnock* was whether the Court of Appeal of New South Wales erred in concluding that: a presumption arose that the respondent would at least have recouped its wasted expenditure if the contract had been performed; and that the presumption was not rebutted. The contract in question was an agreement to lease a lot in a proposed subdivision at an airport owned by the local council. The High Court dismissed the appeal.

605 The plurality (Edelman, Steward, Gleeson and Beech-Jones JJ) said (at [61]) that, while the legal onus to prove loss arising from a breach of contract case rests with the plaintiff, where a breach of contract has resulted in uncertainty about the position the plaintiff would have been in if the contract had been performed:

...then the discharge of the plaintiff's legal burden of proof will be facilitated by assuming (or inferring) in their favour that, had the contract been performed, then the plaintiff would have recovered the expenditure they reasonably incurred in anticipation of, or reliance on, the performance of the contract.

Their Honours went on to observe that:

The strength of this assumption or inference, and thus the weight of the burden placed on the party in breach to adduce evidence to rebut the inference in whole or in part, will depend on the extent of the uncertainty that results from the breach. Expressed in this way, this facilitation principle is tied to its rationale, namely the uncertainty in proof of loss occasioned to the plaintiff by the defendant's breach.

606 In expanding upon the "principle of facilitation", the plurality explained (at [127]) that, in some circumstances, the common law "facilitates" the discharge of the plaintiff's onus. This facilitation was said to find expression in the burden imposed on a defendant to establish a failure to mitigate loss. Their Honours also identified (at [127]) the operation of the principle in the law of torts, where "a plaintiff is assisted in proof by reasonable inferences where a defendant's breach has resulted in difficulties or impossibilities of proof of loss or damage" (emphasis added). The plurality explored the different terminology and descriptions deployed in describing the principle, but returned to confirm (at [129]) that: "Whatever the description of the principle, its essence is that it facilitates the discharge of the plaintiff's legal onus of proof of loss in circumstances where the defendant's wrongdoing has resulted in uncertainty regarding the quantum of loss" (emphasis added).

607 The facilitation principle allows for assumptions favourable to a plaintiff to be made, for example that the jury should award the plaintiff the market value of the best jewel that would fit in the setting where the defendant refused to produce the jewel actually retained for valuation, as occurred in *Armory* itself. However, and as the plurality summarised the position in *Cessnock*, a plaintiff is given a “fair wind” but not a “free ride” and the “strength of the wind” varies depending on the extent of the uncertainty resulting from the defendant’s breach: *Cessnock* at [139]. In *JLW (Vic) Pty Ltd v Tsiloglou* [1994] 1 VR 237 (*JLW*), Brooking J surveyed the authorities (at 241-246). What Brooking J’s analysis exposes is that, as we have already observed, the evidence required of a plaintiff (in this Court, an applicant) is responsive to the circumstances concerning the evidence that could be adduced, and the impact of the defendant’s wrongdoing on the capacity of the plaintiff to establish quantum. In *JLW*, Brooking J also referred to the need to have regard to whether the damages sought are of a kind that is left to the opinion of the Court, acting at large (eg in the assessment of damages for pain and suffering in personal injuries cases) or are of a kind that are capable of quantification, such as property valuation or, one might add, inflation to a share price.

608 As we have explained, we do not accept that the Bank’s breach of its continuous disclosure obligations on and from 24 April 2017 meant that the appellants were practically unable to do more, in establishing quantum, than to point to the entire abnormal return of \$3.29. As the primary judge found, the appellants had not established any “rational starting point for the valuation of the inflation”, and the principle in *Armory* (and, we would add, *Cessnock*) does not assist as the deficiencies in proof are not a problem of the Bank’s making.

54 At [614] to [616] the Full Court made the following observations in relation to how far the Court can go when assessing loss is difficult:

614 The “fair wind” principle does not invite resort to irrational bases for making adjustments. Nor does the principle that, once satisfied of causation, the Court is to adopt a “robust” approach to assessing loss and should not deprive a plaintiff of a monetary award due to the difficulty of assessing loss: *Fink v Fink* [1946] HCA 54; 74 CLR 127 at 143 per Dixon and McTiernan JJ; *Amann Aviation* at 83 per Mason CJ and Dawson J and 125 per Deane J. In this regard, the observations of Hayne J (with whom Gleeson CJ, McHugh and Kirby JJ agreed) in *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* [2003] HCA 10; 196 ALR 257 (*Placer*) at [38] remain apposite:

It may be that, in at least some cases, it is necessary or desirable to distinguish between a case where a plaintiff cannot adduce precise evidence of what has been lost and a case where, although apparently able to do so, the plaintiff has not adduced such evidence. In the former kind of case it may be that estimation, if not guesswork, may be necessary in assessing the damages to be allowed. References to mere difficulty in estimating damages not relieving a court from the responsibility of estimating them as best it can may find their

most apt application in cases of the former rather than the latter kind.

(Footnotes omitted; emphasis in original.)

Placer was not referred to by the High Court in *Cessnock*.

615 Similar observations were made by the Victorian Court of Appeal (Maxwell ACJ, Niall JA and Macaulay AJA) in *Keys Consulting Pty Ltd v CAT Enterprises Pty Ltd* [2019] VSCA 136. In that case, the Court referred (at [70]) to the “distinction to be drawn between a situation that does not permit damages to be assessed with certainty, and one in which the plaintiff has simply failed to produce evidence that was otherwise reasonably available” (emphasis in original). Their Honours elaborated on the role of the court in the two situations described (at [70]): “The plaintiff is entitled to have the court do the best it can in the former case, but not in the latter. Where a party is able to produce evidence about loss and damage, they must do so with as much certainty and particularity as is reasonable in the circumstances.”

616 Having referred to cases including *Placer*, the Victorian Court of Appeal referred (at [75]) to the summary of Chernov JA (with whom Buchanan JA agreed) in *Longden v Kenalda Nominees Pty Ltd* [2003] VSCA 128 at [33], which also emphasised that plaintiffs are to prove the fact of loss and the amount of loss and to establish both matters with “as much certainty and particularity as is reasonable in the circumstances”. The Court of Appeal also noted that Chernov JA’s statement had been cited with approval in *MA & J Tripodi Pty Ltd v Swan Hill Chemicals Pty Ltd* [2019] VSCA 46 at [73] (Kyrrou, Kaye and Emerton JJA). See also the observations of Murphy J in *Kismet International Pty Ltd v Guano Fertilizer Sales Pty Ltd* [2013] FCA 375 at [20]-[24].

55 All of this is, with respect, quite orthodox and confirms that the facilitation principle is unlikely to be of great assistance to a plaintiff.

56 More difficult cases will no doubt emerge in time.

57 In *JB Asset Management & Anor v LBA Capital Pty Ltd & Ors*¹⁸, M Osborne J of the Supreme Court of Victoria recently considered the application of the facilitation principle in the context of a breach of a facility agreement by the lender not advancing the promised funds. M Osborne J stated at [148]-[149]:

In *Cessnock*, the facilitation principle was applied in view of the significant uncertainties for a proof of loss resulting from the vendor’s breach which included uncertainties as to whether the land could be developed once the 30 year lease was granted, whether there would be an increase in business for the plaintiff’s airport business and hangar space and as to how the plaintiff

¹⁸ *JB Asset Management & Anor v LBA Capital Pty Ltd & Ors* [2025] VSC 166

would ultimately operate its business.[50] These uncertainties made the plaintiff's proof of loss exercise difficult to the point of impossible and accordingly the plaintiff benefited from a strong presumption that had the contract been performed, then the respondent would have recovered at least the expenditure they reasonably incurred in anticipation of or reliance on the performance of the contract. The vendor was not able to rebut that evidentiary presumption.

These difficulties are not applicable here. It is true that it may be difficult for a borrower to establish loss where a lender fails to provide promised funds. That difficulty however is one which arises because often there is no loss. A borrower who does not receive a promised \$100,000 loan does not suffer a loss of \$100,000. Whilst the borrower will not have received the \$100,000, this is offset by the fact that the borrower does not have a liability to repay the \$100,000. On the borrower's capital account the net position is neutral. A common form of loss sought to be recovered is where the borrower finds a replacement lender but the cost of borrowing, such as the interest rate, is higher. This will generally present little controversy and no difficulties of proof. Recovery of foreseeable consequential loss beyond loss of this nature may sometimes be more controversial because the consequential loss might not have been in the contemplation of the parties when the contract was made. The presence of clauses such as cl 10.4 cater for this situation.

58 Further, at [153] M Osborne J stated:

I do not accept therefore that the facilitation principle has any role to play and I therefore do not accept that this 'reliance type' loss serves as a proxy for the expectation losses that are ordinarily recoverable. For completion, if losses of this nature are recoverable, contrary to my view, I do not necessarily see why they need to be confined to wasted expenditure as the plaintiffs argued. Whilst that was the species of reliance loss in *Amann Aviation* and *Cessnock*, there doesn't seem to be any reason why the loss (assuming it is recoverable) should be confined to expenditure outlaid as opposed to some other form of measurable detriment. If it were, it would allow recovery of moneys that had been paid but exclude an entitlement to compensation by way of damages for some measurable liability which had not yet fallen due for payment.

Williams and Capic

59 *Williams* and *Capic* were defective product class actions.

60 I set out the relevant features of each below.

61 Those features demonstrate quite powerfully the potential substantial impact on commercial organisations. The total class damages in *Williams* have the potential to run into the billions of dollars. In *Capic*, it is at least in the hundreds of millions of dollars.

The background in Williams

- 62 Kenneth Williams and Direct Claim Services Qld Pty Ltd (**Williams**) brought representative proceedings against Toyota Motor Corporation Australia Limited (**Toyota**) on behalf of persons who, between 1 October 2015 and 23 April 2020, acquired certain motor vehicles from Toyota.
- 63 The vehicles were in the Prado, Fortuner or HiLux ranges and had been fitted with particular engines. In an endeavour to comply with national emissions standards, each of the affected Toyota vehicles was supplied with a diesel exhaust after-treatment system (DPF system) which was designed to capture and convert the pollutant emissions into carbon dioxide and water vapour.
- 64 There were 264,170 such vehicles.
- 65 The DPF system was defective. The defect was inherent in the design of the system. The consequences of the defect included the emission of excessive white smoke and foul smelling exhaust from the vehicle's exhaust, the need for increased servicing and repair and an increase in fuel consumption and decrease in fuel economy.
- 66 The defect was not known at the time of purchase.
- 67 An effective repair for the vehicles became available in May 2020 free of charge.
- 68 The primary judge, Lee J, found that at the time of supply, the vehicles did not comply with the guarantee of "acceptable quality" provided for in s 54(1) of the ACL (the wrong). Lee J found that, although not every relevant vehicle suffered from the defect consequences, because the core defect was present in all of the vehicles, they each had a propensity to experience one or more of the defect consequences and there is a high likelihood that they would do so.
- 69 Lee J then held that the assessment of damages under s 272(1)(a) was to be made at the time of supply. Relevantly, Lee J held that any information acquired

after the time of supply could only be considered if it bore upon the “true value” of the vehicle at the time of its supply. This did **not** include the knowledge of the availability of the repair in 2020.

- 70 Lee J held, in large part rejecting the “expert valuation evidence” relied on by each party, that the reduction in value by reason of the breach of the guarantee of acceptable quality was 17.5% of the average purchase price, with the individual amounts of damage to be determined having regard to the lesser of the average retail price or the price paid by each consumer.
- 71 In the case of *Williams* (and his corporate alter ego) the reduction in value damages was \$7,474.57, and the total damages awarded by Lee J in favour of the two applicants was \$18,401.76. Assuming the reduction in value in relation to *Williams* was representative of the class, reduction in value damages for the class would amount to circa \$2 billion.
- 72 As discussed briefly below, Lee J was on course to award aggregate damages across part of the class based on the 17.5% reduction in value figure.
- 73 A Full Court of the Federal Court, Moshinsky, Colvin and Stewart JJ, allowed the appeal from Lee J and held that an assessment of damages under s 272(1)(a) of the ACL is “concerned with compensation for loss or damage” and may require a departure from the time of supply assessment in order to adjust for “over-compensation”. The Full Court held that as the repair was available at the time of the trial the repairs should be considered in assessing damages. The Court was primarily concerned to ensure that an applicant was not over compensated in circumstances where although the vehicle had a defect at the time of supply, come the time of the trial the defect was able to be fixed free of charge, although, given the sheer number of vehicles, fixing the defect for all vehicles would take a considerable time.
- 74 Both *Williams* and Toyota appealed to the High Court in relation to the Full Court’s assessment of damages under s 272(1)(a) of the ACL. The High Court allowed the appeal from *Williams* and dismissed the appeal from Toyota.

The background in Capic

- 75 *Capic*¹⁹ similarly concerned the proper construction of s 272(1)(a) of the ACL. The *Capic* decision at first instance was decided before *Williams*, but the full court decision in *Williams* was heard and decided before the appeal in *Capic*. The *Capic* appeal was heard immediately after the *Williams* appeals in the High Court.
- 76 Biljana Capic brought representative proceedings against Ford Motor Company of Australia Pty Ltd (**Ford**) on behalf of all persons who, between 1 January 2011 and 29 November 2018, had purchased motor vehicles which were fitted with the “DPS6” transmissions. There were 73,451 vehicles sold. All the relevant vehicles had at least one of five defects. Two were classed as “architectural” defects being inadequate damping of torsional vibrations and inadequate heat management in the DPS6. Three were classed as “component” defects being leaking input shaft seals, inadequate materials used for the clutch lining, and a risk of solder cracking of separate integrated circuits within the transmissions control. Prior to the time of the trial, Ford replaced some of the defective parts of the vehicles.
- 77 The primary judge, Perram J,²⁰ found that the vehicles breached s 54(1) of the ACL, the same breach as in *Williams*. In assessing damages under s 272(1)(a) of the ACL, Perram J did not have regard to the replacement of defective parts after the time of supply because they were considered irrelevant factors in assessing the value “at the date of acquisition”. During the course of his lengthy judgment, Perram J observed, in relation to one aspect of the legislative scheme in relation to damages – section 271(6) – that even by the lamentable standards of Commonwealth drafting, the section lurks near the bottom of the barrel (at [726]).

¹⁹ By way of disclaimer, I appeared for the applicant in *Capic* at first instance.

²⁰ See *Capic v Ford Motor Company* [2021] 154 ACSR 235.

- 78 Perram J assessed reduction in value damages for Ms Capic as \$6,820.91. Again, his Honour essentially departed from the expert evidence and assessed reduction in value damages on an essentially impressionistic basis.
- 79 Assuming Ms Capic's reduction in value damages to be representative of the class, total reduction in value damages would be in the order of \$500 million. Ms Capic's total loss was assessed at approximately \$17,000 – equating to over \$1 billion across the class.
- 80 A Full Court of the Federal Court, Yates, Beach and Downes JJ,²¹ dismissed an appeal by Ford in relation to the breach of s 54(1) and allowed a cross-appeal by Capic. Relevantly, the Full Court held that the Perram J's assessment of damages under s 272(1)(a) of the ACL was inconsistent with the Full Court's approach in the *Williams* appeal. As a consequence, the Full Court remitted the proceeding to Perram J for redetermination.
- 81 Capic and Ford each appealed to the High Court.

The High Court Decisions

- 82 Of critical significance in both *Williams* and *Capic* was the proper approach to damages under s 272(1)(a) of the ACL in the case of the supply of a defective product in breach of the guarantee of acceptable quality under s 54(1) of ACL where:
- (a) the defect is latent, in the sense of not known at the time of supply;
 - (b) gives rise to a propensity of failure that may not manifest itself in all products by the time of trial; and
 - (c) where, come the time of trial, is able to be fixed.

²¹ [2023] FCAFC 179

83 The cases also considered who is entitled to sue – the current owner of the vehicle, former owners etc.

84 Given the nature of the underlying defects – only one in *Williams* and many in *Capic* – the class in *Williams* was likely more homogenous than the class in *Capic*. Nevertheless, a wide variety of scenarios arose, including:

- (a) a purchaser of a defective vehicle who, come the time of trial, had experienced no problems with their vehicle – the propensity had not manifested itself;
- (b) another purchaser who had experienced considerable problems – the propensity had manifested itself – and their vehicle had been fixed;
- (c) another purchaser who had experienced problems but whose vehicle had not been fixed, either because they had not yet been able to arrange for the necessary repairs to be carried out or, as was the case with Ms Capic, because some of the problems were not able to be fixed;
- (d) yet another purchaser who was so fed up with their vehicle they sold it, for what they contend was an undervalue; and
- (e) what about the purchaser of a vehicle second hand who bought the vehicle not knowing it was a “lemon”.

85 Section 272(1)(a) and (b) of the ACL provides:

272 Damages that may be recovered by action against manufacturers of goods

(1) In an action for damages under this Division, an affected person in relation to goods is entitled to recover damages for:

- (a) any reduction in the value of the goods, resulting from the failure to comply with the guarantee to which the

action relates, below whichever of the following prices is lower:

- (i) the price paid or payable by the consumer for the goods;
 - (ii) the average retail price of the goods at the time of supply; and
- (b) any loss or damage suffered by the affected person because of the failure to comply with the guarantee to which the action relates if it was reasonably foreseeable that the affected person would suffer such loss or damage as a result of such a failure.

86 Three judgments were relevantly delivered in each case.

87 First, a plurality of Gageler CJ, Gordon, Steward, Gleeson and Beech-Jones JJ. Second, a relatively brief judgment of Edelman J in each matter agreeing generally with the plurality judgment but adding some further observations on the distinction between the remedies available under s 272(1)(a) and s 272(1)(b). Jagot J dissented in each case, favouring a different view of the construction of s 272 to the plurality and essentially upholding the ultimate decision of Lee J and Perram J.

88 The lead judgments were given in *Williams*.

89 It is important to recognise at the outset that whilst the plurality judgment contains some references to general law damages notions, each case, at their heart, concern the proper construction of s 272 of the ACL. Whilst far from diminishing the importance of the two decisions – s 272 of the ACL is an important weapon in the armoury of any purchaser of a defective product – each decision is unlikely to have general law significance.

90 The key conclusions of the plurality may be summarised as follows:

- (a) the Full Court of the Federal Court was in error in determining that any ongoing reduction in value ceased when a repair became available because the vehicle's "utility" was restored. The Full Court's approach was premised on an incorrect interpretation of

the meaning of “damages” in s 272(1) and a mistaken understanding that a court can depart from an assessment at the time of supply to avoid “over compensation” by considering whether subsequent events transpired to increase or decrease the value of goods over time: see [24] and [25];

- (b) s 54(2) – which is relevantly part of the definition of “acceptable quality” posits a hypothetical inquiry as to what a reasonable consumer at the time of supply would regard as acceptable. If the reasonable consumer was fully acquainted with the state and condition of the goods, including any hidden defects. This requires attributing to a reasonable consumer, at the time of supply, later acquired knowledge of the defects that renders the good below an acceptable quality. If such knowledge is attributed to a reasonable consumer at the time of supply, there is no reason why later acquired knowledge of the capacity to repair the defect or ameliorate its consequences, including when, how and at what cost those repairs or ameliorative steps could be undertaken, should not also be attributed. Those matters are characteristics of the nature and seriousness of the defect and, in turn, the state and condition of the goods: see [33] and [34];
- (c) contrary to the contentions advanced by Toyota and Ford, and contrary to the reasoning of the Full Court, there is no textual or other support for a construction of s 272(1)(a) that imports a requirement to establish loss or damage in addition to the “reduction in the value of the goods” resulting from the failure to comply with the relevant guarantee. The statutory provisions provide their own measure of damages: see [49]-[51];
- (d) once it is appreciated that s 272(1)(a) provides its own measure of damages, then the Full Court’s concerns about avoiding “over compensation” by departing from the time of supply in assessing damages under s 272(1)(a) fall away: see [54]. Assessment

under s 272(1)(a) is at the time of supply to the consumer: see [55];

- (e) on the core issue of what later acquired knowledge is relevant to an assessment of reduction in value damages under s 272(1)(a), the plurality stated at [59]:

The resolution of this dispute flows from the conclusion that later acquired knowledge of the capacity to repair a defect (including a hidden defect) or ameliorate its consequences as well as when, how and at what cost those repairs or ameliorative steps would be undertaken cannot be divorced from any analysis of what constitutes the relevant "defect". Upon being informed that particular goods had a defect that carried a particular propensity to cause the goods to perform sub-optimally, a hypothetical reasonable consumer acquiring such goods could be expected to inquire whether the defect could be remedied and, if so, the effectiveness, cost, inconvenience and timing of a repair. If that information was known at the time of trial and not brought to account at the time of supply, then there would truly be a risk of the consumer receiving more or less than could be justified on the basis of the facts then known. A consumer would receive less if the court awarded damages on a flawed understanding that, at the time of supply, repair of such defects at a moderate cost was possible when subsequent events revealed the defects were in fact unfixable and would receive more if subsequent events demonstrated that the defects could be fixed quickly at no cost.

Further, at [61] and [62], the plurality stated:

The Full Court correctly observed that it was "appropriate to use the known information as to the availability of a fix at the time of trial to reach a conclusion as to the reduction in value". However, the Full Court was otherwise in error in departing from the time of supply as the appropriate time to assess damages and considering the loss in the utility of the vehicles over their working life until a fix became available. In assessing the reduction in value at the time of supply, it was necessary to take into account the "availability" of the 2020 Field Fix, but that analysis also required taking into account how long after the time of supply that fix would become practically available as well as the inconvenience and cost that would be occasioned to a hypothetical reasonable consumer in the meantime. Any particular cost and inconvenience occasioned to an individual consumer above and beyond that assumed by a reasonable consumer at the time of supply is potentially recoverable under s 272(1)(b). Leaving aside the circumstances in which s 271(6) is invoked, a consumer who refuses to take up an effective

repair that is practically available is in no different position to a consumer who did.

In this case, leaving aside any particular inconvenience or cost occasioned to Direct Claim Services, it seems inherently unlikely that a hypothetical reasonable consumer of its vehicle in 2016 would have paid the same purchase price as Direct Claim Services had they been informed of the existence and nature of the core defect, the likelihood of the defect consequences materialising, the likely number of attendances that might be required to obtain a fix and the fact that no effective fix would be available until at least four and a half years later. Ultimately, however, this will be a matter for the primary judge to assess. It follows that a remittal may yield different assessments for different group members, although the only factor that is likely to vary is the time between supply to an individual consumer and the practical availability of an effective repair.

- (f) on the question of the relevance of the propensity materialising by the time of trial, the plurality stated (at [64]):

The relevant defect in the present case was not the mere propensity for the defect consequences to materialise. Rather, like the yellow spool solder in *Medtel*, the core defect was the design of the DPF System itself and other related faults. In both this case and *Medtel*, the defect and risk of the relevant defect consequences materialising rendered the goods in breach of the relevant statutory guarantee. In such cases, it is irrelevant to an assessment of damages under s 272(1)(a) whether those consequences materialised beyond what subsequent events may demonstrate was the actual propensity at the time of supply. The materialisation of the risks carried by the defect does not add anything to a hypothetical reasonable consumer's knowledge of the defect or the goods at the time of supply.

- (g) on the question of who is entitled to sue for reduction in value damages under s 272 (1)(a) where a vehicle has been sold, the plurality stated at [71]:

The better view is that, within the confines of the definition of an "affected person ... in relation to goods", the right to invoke the remedy for reduction in value of the goods in s 272(1)(a) against a manufacturer runs with title or ownership of the goods but that claims for consequential loss by affected persons in s 272(1)(b) are not tied to the affected person's title or ownership of the goods. There are various textual and contextual matters that support that construction.

- (h) allied to this last point, the plurality observed at [72] that where a person no longer has title or ownership of the goods but is “an affected person in relation to the goods”, that person may be able to recover any relevant loss on resale, but that would be pursuant to s 272(1)(b) and would depend on the circumstances of the resale.

- 91 The result in each of the appeals was that the assessment of damages was remitted respectively, to Lee J and Perram J in accordance with the reasons of the High Court. Some parting observations were made, however by the plurality and Jagot J, supporting the somewhat impressionistic approach taken by each of the trial judges and first instance in assessing the relevant reduction in value.
- 92 Each of the two cases are now back before Lee J and Perram J for redetermination of the damages consistent with the decision of the High Court. Having regard to the observations made by the High Court in support of the impressionistic approach taken by each judge at first instance, it is unlikely, in my view, that the reduction in value damages for each of *Williams* and *Capic* will go down. Time will tell!²²
- 93 Of perhaps more significance is whether an award of aggregate damages is made in either case. I touch on this below.
- 94 In my view, the plurality judgment provides quite clear guidance on what are difficult issues on an important statutory provision.

The potential for aggregate damages

²² On 20 June 2025, one week after I delivered this paper, Perram J delivered judgment on the remitter to him of the question of Ms Capic’s damages: see *Capic v Ford Motor Company of Australia Pty Ltd (Remitter)* [2025] FCA 670. Applying the impressionistic approach endorsed by the High Court, his Honour held at [54] that the reduction in value should remain at 30%.

- 95 Sections 33Z(1)(e) and 33Z(1)(f) of the *Federal Court of Australia Act 1976* (Cth) provide:

33Z Judgment—powers of the Court

- (1) The Court may, in determining a matter in a representative proceeding, do any one or more of the following:

...

- (e) make an award of damages for group members, sub-group members or individual group members, being damages consisting of specified amounts or amounts worked out in such manner as the Court specifies;

- (f) award damages in an aggregate amount without specifying amounts awarded in respect of individual group members;

...

- 96 Section 33Z(3) is also relevant. It provides that (emphasis added):

Except when approving a settlement, the Court is not to make an award of damages in an aggregate amount without specifying amounts awarded in respect of individual group members **unless a reasonably accurate assessment can be made of the total amount to which group members will be entitled under the judgment.**

- 97 Aggregate damages were sought in both *Capic* and *Williams*.

- 98 In *Capic* at [844] to [847] Perram J declined to order aggregate damages – essentially because, on the evidence, he was unpersuaded that such an order should be made. One of the key reasons was because it was not known for a number of group members whether they in fact had a claim for reduction in value damages. A further reason was the number of different defects, not all of which applied to all vehicles.

- 99 In *Williams*, Lee J determined prior to the main trial that the Court had power to make an aggregate damages award for part only of the damages claimed by some or all group members in the proceeding: at [69], [73] and [76]. Paragraphs [70] to [74] were as follows:

- [70] Section 33Z(1)(f) confers power on the Court to “award damages in an aggregate amount without specifying amounts awarded in respect of individual group members”. However, it involves an important limitation: the Court must not make an award of damages under this provision “unless a reasonably accurate assessment can be made of the total amount to which group members will be entitled under the judgment”. It is not appropriate that I set out in this judgment my views as to the practical operation of s 33Z(3) except to the extent necessary. I will restrict myself to three comments (the first two of which are less significant for present purposes than the third).
- [71] First, understanding precisely what is meant by a “reasonably accurate assessment” is not without difficulty, as is illustrated by the differing approaches of O’Loughlin J in *Australian Competition and Consumer Commission v Golden Sphere International Inc* (1998) 83 FCR 424 and Victorian Court of Appeal in *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Ltd* [2000] VSCA 103; (2000) 1 VR 545; see also *Mobil Oil Australia Pty Ltd v Victoria* [2002] HCA 27; (2002) 211 CLR 1 (at 72–73 [169] per Callinan J). Secondly, given that s 33Z(1)(f) contemplates aggregate damages can be made in relation to statutory compensation (which was not in dispute before me), whatever s 33Z(3) does mean, it seems to me the provision could not be construed as somehow modifying the approach to causation as reflected in the statute allowing the award of statutory compensation.
- [72] The third matter is the textual indication within s 33Z(3) to “the total amount to which group members will be entitled under the judgment” (emphasis added) and whether this creates, as Toyota submits, an implicit limitation to the effect that there must be a judgment which deals with all the damages to which group members are entitled.
- [73] Although I was initially attracted to this argument, on close analysis, it does not have substance. In the context of s 33Z(3), the term “the judgment” means the judgment given by the Court in determining particular issues, and “the total amount” depends entirely on the nature and scope of the relevant judgment. Because there can be multiple judgments in the course of the Court’s management of a class action, there is no basis to construe the “total amount” as being the same as the total amount to which group members will be entitled in the proceeding or in the class action.
- [74] A judgment delivered at the conclusion of an initial trial that determines on a common basis some of the claims brought on behalf of group members but not others, and establishes that there is an entitlement to an award of damages to group members in respect of a head of damage that is determined on a common basis, would be a judgment of the kind described in s 33Z(1)(f) if the award of damages takes the form of an aggregate amount without specifying amounts awarded in respect of individual group members. It is of no significance that there may also remain unresolved issues, including in respect of a potential entitlement to a further award of damages in respect of an entitlement not established under that judgment.

- 100 In his substantive judgment, Lee J determined at [446] that the Court should make an award of aggregate damages for all class members save for two groups. The principal component of the aggregate damages was a 17.5% reduction in value. No order was ultimately made for aggregate damages because the appeal was filed attacking the reduction in damages figure.
- 101 It is not clear what will become of this on remitter.
- 102 The significance of an aggregate damages award should not be underestimated, particularly in circumstances where the quantum of an individual group member's loss may be such that it would be uneconomical for a group member to pursue proceedings – even with the benefit of answers to common questions on liability in their favour. The whole purpose of an aggregate damages award is to cut through such problems so as to provide claimants with an efficient means of recovery. Respondents beware!