SUPREME COURT OF QUEENSLAND

CITATION:	*Callinan v Power Equipment Pty Ltd* [2023] QCA 246
PARTIES:	**KEITH ALLEN CALLINAN** (applicant) **v** **POWER EQUIPMENT PTY LTD** ACN 005 866 642 (respondent)
FILE NO/S:	Appeal No 4156 of 2023 DC No 7 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Townsville – Unreported, 8 March 2023 (Lynham DCJ)
DELIVERED ON:	5 December 2023
DELIVERED AT:	Brisbane
HEARING DATE:	21 August 2023; further submissions received on 4 September 2023 and 6 September 2023
JUDGES:	Bond JA and Henry and Cooper JJ
ORDERS:	**1. Leave to appeal be granted.** **2. The appeal be allowed.** **3. Order 1 of the judgment delivered on 8 March 2023 be varied by deleting "$8,069.00" and substituting "$70,494 together with interest on the amount of $62,425".** **4. The respondent pay the applicant's costs of the application for leave to appeal and of the appeal.**
CATCHWORDS:	TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – ENFORCEMENT AND REMEDIES – ACTIONS FOR DAMAGES – ASSESSMENT OR AVAILABILITY OF DAMAGES – GENERALLY – where the applicant owns a recreational speedboat – where the applicant replaced the engines and sterndrives on the boat – where the replacement equipment suffered numerous performance issues including the complete failure of one of the engines and both sterndrives – where the applicant claimed $155,412.15 as damages from the respondent – where the primary judge assessed damages in the amount of $8,069 including interest – where the applicant seeks leave

pursuant to s 118(3) of the *District Court of Queensland Act 1967* (Qld) to appeal the assessment of damages – whether the primary judge erred in finding that the applicant had not proved his entitlement to recover damages under s 272(1)(a) of the *Australian Consumer Law* – whether the primary judge incorrectly interpreted the measure of damages available under s 272(1)(b) of the *Australian Consumer Law*

Competition and Consumer Act 2010 (Cth), sch 2, s 7(1)(e), s 54, s 259, s 260, s 261(c), s 263(4), s 267, s 271, s 272
District Court of Queensland Act 1967 (Qld), s 118(3)
Uniform Civil Procedure Rules 1999 (Qld), r 757

Moore v Scenic Tours Pty Ltd (2020) 268 CLR 326; [2020] HCA 17, applied
Toyota Motor Corporation Australia Ltd v Williams (2023) 296 FCR 514; [2023] FCAFC 50, considered
Vautin v By Winddown Inc (formerly Bertram Yachts) (No 4) (2018) 362 ALR 702; [2018] FCA 426, considered

COUNSEL: M T de Waard for the applicant
J P Hastie for the respondent

SOLICITORS: Macrossan & Amiet Solicitors for the applicant
Macpherson Kelley for the respondent

[1] **BOND JA:** I agree with the reasons for judgment of Cooper J and with the orders proposed by his Honour.

[2] **HENRY J:** I agree with the reasons of Cooper J and the orders proposed by his Honour.

[3] **COOPER J:** The applicant owns a recreational speedboat named Quick Fix. When the applicant purchased Quick Fix in 2006, it was fitted with two Volvo engines and accompanying Volvo sterndrives. In late 20212, the applicant replaced the Volvo engines and sterndrives with two Yanmar 8LV 370ZT engines and two accompanying Yanmar ZT370 sterndrives (**the Yanmar equipment**).

[4] The applicant purchased the Yanmar equipment from Mackay Marine Services Pty Ltd (**MMS**), an authorised dealer for the sale and servicing of Yanmar marine engines and associated equipment. The respondent imported the Yanmar equipment into Australia and, consequently, was the manufacturer of that equipment.[1]

[5] The Yanmar equipment suffered from numerous performance issues which included:

(a) the complete failure of one of the engines (that engine being replaced under warranty by the respondent);

(b) the complete failure of both sterndrives (those sterndrives being replaced by the respondent); and

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1 *Competition and Consumer Act 2010* (Cth) sch 2 (**ACL**), s 7(1)(e).

(c) the complete failure of the replacement sterndrives.

[6] The applicant claimed $155,412.15 as damages from the respondent. Of this sum, $145,068 represented the cost of replacing the Yanmar equipment with new Yanmar engines and sterndrives (**replacement equipment**). A further $4,000 represented the cost of removing the Yanmar equipment from Quick Fix and fitting the replacement equipment.[2]

[7] The applicant's claim was brought on three bases:

(a) breach of contract;

(b) under s 259 of the ACL, for failure by a supplier of goods to comply with a consumer guarantee;

(c) under s 271 of the ACL, for failure by a manufacturer of goods to comply with a consumer guarantee.

[8] The primary judge dismissed the first two causes of action. The applicant does not seek to appeal those aspects of the decision below.[3] As to the claim under s 271 of the ACL, the primary judge found that the Yanmar equipment did not comply with the consumer guarantee of acceptable quality in s 54 of the ACL.

[9] The primary judge assessed damages in the amount of $8,069 (including interest) under s 272(1)(b) of the ACL for reasonably foreseeable loss suffered by the applicant because of the failure to comply with the consumer guarantee. Those damages did not include any amount for the cost of the replacement equipment or the cost of removing the Yanmar equipment or installing the replacement equipment. The primary judge found that the applicant had not proved an entitlement to damages under s 272(1)(a) of the ACL for a reduction in the value of the Yanmar equipment resulting from the failure to comply with the consumer guarantee.

[10] The applicant seeks leave pursuant to s 118(3) of the *District Court of Queensland Act 1967* (Qld) to appeal the assessment of damages.[4] Should leave be granted, the applicant relies on two grounds.

[11] The first ground of appeal is that the primary judge erred in finding that the applicant had not proved his entitlement to recover damages under s 272(1)(a) of the ACL, because that finding:

(a) was contrary to the evidence or against the weight of the evidence;

(b) was contrary to the primary judge's obligation to assess damages on the whole of the evidence;

(c) involved a failure by the primary judge's to consider imposing on the applicant, as a condition of awarding damages, a requirement that he deliver up to the respondent the engines which remain fitted to Quick Fix.

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2 AB 95; Second Further Amended Statement of Claim, [54](e) and (f).

3 Although the applicant initially sought to appeal from one aspect of the primary judge's decision to dismiss his claim under s 259 of the ACL, that proposed ground of appeal was abandoned at the hearing of the application for leave to appeal.

4 At the hearing of the application for leave to appeal the applicant was granted an extension of time in which to file that application.

[12] The second ground of appeal, raised after the applicant was granted leave at the hearing of the application to amend his notice of appeal, is that the primary judge erred in failing to award the applicant the cost of the replacement equipment, together with the cost of removing the Yanmar equipment from Quick Fix and installing the replacement equipment because his Honour:

(a) incorrectly interpreted the measure of damages available under s 272(1)(b) of the ACL;

(b) incorrectly found that the respondent was not deemed to have admitted the cost of replacing the Yanmar equipment and of removal and reinstallation.

[13] For the following reasons, I would grant leave to appeal, allow the appeal and vary the judgment below to increase the damages awarded by the sum of $62,425 representing the reduction in the value of the Yanmar equipment resulting from the failure to comply with the guarantee of acceptable quality.

Factual background

[14] The applicant purchased each Yanmar engine and its accompanying sterndrive as a package for a single price, that being $62,425 (inclusive of GST). The total price the applicant paid for the two engine and sterndrive packages which comprised the Yanmar equipment was $124,850 (inclusive of GST).

[15] Against the total purchase price, MMS applied a credit of $50,000 (inclusive of GST) for the two Volvo engines previously installed on Quick Fix which MMS had sold on the applicant's behalf.[5]

[16] The Yanmar equipment was installed on Quick Fix in November 2012. The applicant's son, Daniel Callinan,[6] then used Quick Fix to undertake trips from Mackay Marina, where it was moored, to islands in the Whitsundays. As the primary judge found,[7] this was consistent with Quick Fix being a vessel designed to operate as a pleasure craft capable of traversing open water where the consequences of engine failure at sea would involve safety risks for the vessel and those on board. A trip from the Mackay Marina to the Whitsundays would take approximately three hours in each direction.[8]

[17] The primary judge found that the applicant had proved nine failures of the Yanmar equipment which, because of their combined effect on the safe use and enjoyment of Quick Fix, rendered the equipment not of acceptable quality.[9]

[18] Although the occurrence of those failures was not in dispute on the present application, for reasons I will come to shortly, it is necessary to set out the facts concerning: the use of Quick Fix after the Yanmar equipment was installed; the nature of the failures which occurred; and the consequences of those failures. The relevant facts are:

(a) In the period of approximately six months between the installation of the Yanmar equipment in November 2012 and the occurrence of the first failure in May 2013, Quick Fix was operated for 51 hours.

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5 AB 502–4.
6 I will refer to Daniel Callinan in these reasons as Mr Callinan.
7 AB 75; Reasons, [195].
8 AB 797.
9 AB 77–8; Reasons, [202]–[205].

(b) The first failure, which is recorded on different documents as having occurred on 20 May 2013 or 23 May 2013,[10] involved a complete failure of the starboard engine while Mr Callinan was operating Quick Fix around the Whitsundays. As a result of that failure, Mr Callinan returned to Mackay Marina using only the port engine. This return journey took approximately nine hours. Subsequent investigation revealed that the failure was due to an oil leak from a cracked oil pipe. The respondent replaced the starboard engine under warranty. A new oil pipe and seals were fitted to the port engine at the same time. Quick Fix was returned to the water on 31 May 2013.[11]

(c) The second failure occurred on 14 June 2013,[12] only two weeks after the starboard engine had been replaced. On that occasion the power steering on Quick Fix failed due to a faulty power steering ram valve body when Mr Callinan was on the way to the Whitsundays. The failure caused Mr Callinan to have to turn around and return to the Mackay Marina. The respondent replaced the power steering ram under warranty on 19 June 2013.

(d) The third failure occurred on 25 September 2013.[13] By that date, the Yanmar equipment (save for the replacement starboard engine) had been operated for 75 hours. The failure occurred as Mr Callinan was approaching the island he was travelling to that day. He noticed that one of the trim tabs, which are adjusted to keep Quick Fix level, had dropped down. Upon stopping the boat to investigate the issue he noticed an oil slick out the back of the boat emanating from one side. Mr Callinan decided not to restart the engine on the side the oil slick emanated from and returned to Mackay Marina using only one engine. Subsequent investigation revealed that the trim hoses were leaking and required replacement. The respondent replaced those trim hoses under warranty on 27 September 2013.

(e) There was then a period of a little more than a year between repair of the third failure in September 2013 and the occurrence of the fourth failure in November 2014. Mr Callinan gave evidence that during this period he had what he described as "good trips" on Quick Fix.[14] The fourth failure occurred after 150 hours operation of the Yanmar equipment.[15] This means that the Yanmar equipment in Quick Fix was operated for approximately 75 hours in the period between the third failure and the fourth failure.

(f) The fourth failure occurred on 1 November 2014.[16] It involved an oil leak in the starboard sterndrive leading to overheating. The port sterndrive also showed signs of overheating. The respondent repaired that failure under warranty on 6 November 2014.

(g) The fifth failure occurred on 21 May 2015.[17] By that date the Yanmar equipment had been operated for 180 hours, meaning that Quick Fix had been operated for approximately 30 hours in the six-month period between the

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10 AB 536-7.
11 AB 539–40.
12 AB 548–9.
13 AB 553–4.
14 AB 800.
15 AB 566.
16 AB 563.
17 AB 573.

fourth and fifth failures. The fifth failure occurred as Mr Callinan prepared to leave Mackay Marina. As he put the engines into reverse gear he heard what he described as a "gurring noise".[18] He decided not to continue with his planned trip and had the vessel inspected by a marine mechanic. Both sterndrives were removed at it was discovered that the lower pinion gear on both sterndrives had failed. The respondent replaced both sterndrives, not under warranty, but as an act of goodwill. That replacement occurred on 9 June 2015.

(h) The sixth failure involved the replacement of the "Smartstick Trim Sender" in the starboard sterndrive. The cost of that replacement was invoiced to the applicant on 4 May 2016.[19]

(i) The seventh failure occurred on or about 20 October 2016. Mr Callinan described that event as a total failure of both engines when he was cruising in the Whitsundays. The engine failure meant that he was unable to use the UHF radio on Quick Fix to request assistance. Mr Callinan had taken to towing a jet ski behind Quick Fix as a tender to use if he experienced issues with the Yanmar equipment. Following the engine failure, Mr Callinan and his wife used the jet ski to tow Quick Fix to an island where Mr Callinan thought it would be safe to anchor the vessel overnight. They then returned to Mackay Marina on the jet ski. The following day Mr Callinan travelled with marine rescue services and a marine mechanic back to where Quick Fix had been anchored. The mechanic was able to restart the engines and Mr Callinan returned to Mackay Marina on Quick Fix. Subsequent investigation showed that an exhaust V clamp had failed causing carbon monoxide to fill the engine cavity and the engines to shut down. The applicant paid for the faulty V clamp to be replaced.

(j) The next failure, referred to at the trial as the ninth failure,[20] occurred on or about 16 October 2017. This was another engine failure caused by a faulty exhaust V clamp. Based on his previous experience, Mr Callinan was able to determine which engine was affected by the issue, shut down that engine and return to Mackay Marina on only one engine. The applicant paid for the faulty V clamp to be replaced.

(k) The final failure, referred to at the trial as the tenth failure, was the total failure of the replacement sterndrives in February 2018. This was the second occasion on which the sterndrives had suffered catastrophic failure. Mr Callinan's evidence was that by the time of this final failure, the Yanmar equipment had been operated for approximately 400 hours. This means that the replacement sterndrives, which were fitted after the original sterndrives failed after 180 hours of operation, themselves failed after about 220 hours of operation.

(l) At the time of the trial, Quick Fix had not been used since the failure of the replacement sterndrives in February 2018. The vessel was stored on a hard stand in Mackay. The replacement sterndrives had been removed from the

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18 AB 50–51; Reasons [120].

19 AB 617.

20 The primary judge was not satisfied as to the occurrence of the "eighth failure" pleaded by the applicant: AB 60; Reasons, [155].

vessel, but new sterndrives had not been installed. The engines remained fitted to the vessel.

Entitlement to damages against a manufacturer of goods

[19] Section 271(1) of the ACL provides a consumer with a cause of action against the manufacturer of goods supplied to consumer where the goods do not conform to the statutory guarantee of acceptable quality.

[20] The damages which the consumer may recover from the manufacturer are then set out in s 272 of the ACL. That section provides:

> **"272 Damages that may be recovered by action against manufacturers of goods**
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> (1) In an action for damages under this Division, an affected person in relation to goods is entitled to recover damages for:
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> (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:
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> (i) the price paid or payable by the consumer for the goods;
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> (ii) the average retail price of the goods at the time of supply; and
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> (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.
>
> (2) Without limiting subsection (1)(b), the cost of inspecting and returning the goods to the manufacturer is taken to be a reasonably foreseeable loss suffered by the affected person as a result of the failure to comply with the guarantee.
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> (3) Subsection (1)(b) does not apply to loss or damage suffered through a reduction in the value of the goods."

The primary judge's reasons

[21] The primary judge found that expenses the applicant had incurred in lifting Quick Fix out of the water and in paying for repairs carried out on the Yanmar equipment were recoverable under s 272(1)(b) of the ACL as loss or damage which was a reasonably foreseeable consequence of their failure to comply with the guarantee of acceptable quality.[21] These expenses, together with interest, made up the $8,069 for which judgment was given.

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21 AB 80; Reasons, [212].

[22] As to the applicant's claim for the cost of replacing the Yanmar equipment, the primary judge identified four difficulties:

(a) the applicant had not adduced evidence which permitted a calculation of any reduction in the value of the Yanmar equipment arising from the failure to comply with the guarantee, instead calculating his damages on the basis of the cost of replacement;[22]

(b) the applicant had not adduced evidence which proved that the cost of replacing the Yanmar equipment was the amount claimed;[23]

(c) under s 272(1)(a), the reduction in the value of the goods recoverable by the applicant is to be calculated by reference to the price paid at the time of supply of the goods and not by reference to replacement value at the time of trial;[24]

(d) the calculation of the reduction of the value of the Yanmar equipment must take account of the fact—as found by the primary judge—that the engines which remain fitted to Quick Fix are still in sound mechanical order.[25]

[23] In addressing the second difficulty, the primary judge rejected the applicant's submission that he was entitled to an award of damages in the full amount he had claimed because the respondent had not challenged the quantum of that alleged loss. The primary judge concluded that, in circumstances where the respondent had pleaded an explanation for its non-admission of the quantum of loss alleged by the applicant, there was no deemed admission and the onus remained on the applicant to prove his loss.[26]

[24] In addressing the fourth difficulty, the primary judge observed that the reduction in the value of the goods would be greater if the engines and the sterndrives had failed than if only the sterndrives failed as his Honour found to be the case. His Honour stated that, because the engines and sterndrives were purchased as a package, it was not possible to ascertain their individual prices and, further, that the applicant had not adduced any evidence as to the value of the engines if the applicant was to sell them. His Honour referred to evidence that the two Volvo engines previously installed in Quick Fix had been sold and the proceeds deducted from the price MMS charged for the purchase and installation of the Yanmar equipment, but concluded that it would be speculative to suggest that the Yanmar engines which remain in Quick Fix have a similar market value.

[25] The primary judge concluded:[27]

> "The more fundamental issue in terms of calculating the [applicant's] entitlement to recover damages under s 272(1)(a) ACL is the absence of any evidence upon which the reduction in the value of the engines and sterndrives which has resulted from the [respondent's] failure to comply with the guarantee of acceptable quality of the goods under s 54 ACL can be calculated. Whilst the price of the goods paid by

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22 AB 80; Reasons, [213].
23 AB 80; Reasons, [214].
24 AB 80–81; Reasons, [214].
25 AB 81; Reasons, [215]–[216].
26 AB 81; Reasons, [217].
27 AB 82; Reasons, [218] (citation omitted).

> the [applicant] is not in contest, the age of the engines and sterndrives, how long they were installed in Quick Fix and hours of use and enjoyment the [applicant] obtained from them would presumably all be relevant considerations when assessing any reduction in the value of those goods for purposes of s 272(1)(a). As it is the reduction in the value of the goods to which the [applicant] is entitled to recover damages for, there needs to be at least some evidence as to reduction in value for that calculation can be made. Whilst in some circumstances a broad-brush approach is necessary in the assessment of damages, it is not appropriate for a court to hazard a guess as to how much particular goods have reduced in value. Here, even using as a reference point the value of the engines and sterndrives when first purchased by the [applicant], the absence of any evidence which would allow a calculation to be made as to any reduction in the value of the goods resulting from the breach of the consumer guarantee under s 54 ACL coupled with the absence of any evidence as to the value of the existing engines, both of which in my view are essential to a calculation of the damages the [applicant] is entitled to recover under s 272(1)(a) means in my view that the [applicant] has not proved this component of his claim for damages."

First ground: the entitlement to recover damages for a reduction in value under s 272(1)(a)

[26] The principles which govern the application of s 272 of the ACL were considered by the Full Court of the Federal Court in *Toyota Motor Corporation Australia Ltd v Williams*,[28] which was delivered after the primary judge delivered his decision in this case. The relevant principles which can be drawn from the decision of the Full Court can be summarised as follows:

(a) Section 272(1)(a) provides for compensation for a particular kind of loss and damage, namely a reduction in the value of the goods.[29]

(b) The text and structure of s 272(1)(a) indicate that, at least generally, the point in time for assessing damages for any reduction in the value of goods is the time of supply.[30]

(c) However, because the overarching consideration is that the amount of compensation for any reduction in value be appropriate, assessment of reduction in value damages may be undertaken by reference to the price paid at the time of supply, but taking into accounts subsequent events if considered appropriate.[31]

(d) In most cases, the intrinsic value of consumer goods to a retail buyer will lie in the utility of those goods rather than the price at which they may be on-sold. That is because such goods are purchased to be used for a period of time rather than being on-sold at the time of purchase or soon thereafter.[32]

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28 (2023) 296 FCR 514 (***Toyota***).
29 *Toyota*, 539 [97].
30 *Toyota*, 539 [98].
31 *Toyota*, 539 [99]–[100].
32 *Toyota*, 542 [111]–[112].

(e) For these reasons, the value of consumer goods at the time of purchase is indicated by the price that a consumer would pay to acquire those goods and not by the price that may be paid by a buyer to the consumer if those goods were immediately on-sold.[33] In assessing the extent to which a failure to comply with the guarantee of acceptable quality at the time of supply resulted in a reduction in value, it will usually be necessary to focus upon the price that would have been paid if the consumer had known of the relevant defect when purchasing the goods rather than on the price that may prevail on the resale of the defective goods.[34] The correct approach to assessing any reduction in value is to ascertain the component of the price actually paid that could be said to be attributable to the loss in utility arising from the relevant defect.[35]

(f) In a case where defective goods are completely useless and incapable of repair but are not replaced, the reduction in value will—unless the average retail price of the goods at the time of supply is lower than the price the consumer paid—be the whole of the purchase price less an allowance for any scrap value.[36]

(g) In other cases, where repair may not be possible but the defect will be of a kind where the goods retain diminished utility such that they should not be written-off, it may be appropriate to apply a percentage figure to the purchase price to reflect a reduction in value based on an objective comparison between the lifetime of use of the goods with and without the defect.[37]

[27] *Toyota* concerned a class action brought on behalf of owners of motor vehicles fitted with a defective diesel exhaust after-treatment system. That system was defective because it was not designed to function effectively during all reasonably expected conditions of normal operation and use of the vehicles. A key occurrence which caused the defect to manifest was the exposure of an affected vehicle to regular continuous driving at approximately 100 km per hour. When the defect did manifest the consequences included: excessive white smoke and foul smelling exhaust; system warning notifications displaying on an excessive number of occasions for an excessive period of time; if the warning notifications were ignored then the vehicle would go into limp mode which would prevent the vehicle going into fifth gear and would limit acceleration; there was a need to have the vehicle inspected serviced and repaired more often; and, there was an increase in fuel consumption and decrease in fuel economy.

[28] At first instance, it was found that the vehicles were not of acceptable quality and therefore failed to comply with the consumer guarantee in s 54 of the ACL. That failure to comply with the guarantee of acceptable quality was found to have resulted in a reduction in value of all relevant vehicles of 17.5 per cent, meaning that their true value at the time of supply was 82.5 per cent of their average retail price. This finding was based on evidence which included a report from a valuer as to the value of the affected vehicle with the defect. That value was determined by reference to the amount above salvage value that a buyer would have been willing

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33 *Toyota*, 542–3[115].
34 *Toyota*, 543 [118].
35 *Toyota*, 545 [127].
36 *Toyota*, 549 [145].
37 *Toyota*, 549 [148].

to pay, as at the date of supply, in the hope that they would be able to find someone to fix the defect at a reasonable price despite the absence of a known effective fix at that time.

[29] On appeal, the Full Court held that it was an error to rely upon the valuation based upon the notional purchaser described above, rather than upon the value that a retail purchaser would place upon the vehicle given the effect of the defect on the use of the vehicle.[38] The assessment at first instance of a reduction in value of 17.5 per cent was set aside. That left the question whether, in the absence of expert valuation evidence, there was a sufficient evidential basis for the Full Court to re-assess the reduction in value. Importantly for the purposes of this application, the Full Court concluded that, even in the absence of expert evidence, it was able to reach a view as to the extent of the reduction in value based on a consideration of the evidence as to the nature of the defect and its consequences. This was done by the Full Court forming a view as to an appropriate percentage reduction in utility as viewed by a reasonable consumer. The Full Court re-assessed the reduction in value as 10 per cent of the average retail price. That assessment reflected the fact that the defect did not threaten the safety of those in the vehicle or the roadworthiness of the vehicle itself. In circumstances where the potential consequences were additional servicing and compromised fuel efficiency together with the production of occasional foul smelling smoke, the Full Court accepted a submission by the manufacturer that much of the utility of the vehicle was unaffected by the defect and its consequence.[39]

[30] The parties also referred to *Vautin v By Winddown Inc (formerly Bertram Yachts) (No 4)*,[40] which involved a claim against both the supplier and manufacturer of a luxury yacht for failure to comply with the guarantee of acceptable quality.

[31] In the circumstances of that case, where the consumer was found to be entitled to reject the goods by returning them to the supplier and recover the whole of the purchase price,[41] there was no entitlement to recover any diminution in the value of the vessel because of the breach of the guarantee from either the supplier or the manufacturer.[42] Nevertheless, Derrington J considered the damages which would have been payable if the consumer's right to reject the vessel had been lost, including the question of the value of the vessel at the time of supply if the defects were known. Although that issue was considered in relation to the claim against the supplier, the same conclusion was reached in relation to the manufacturer.[43]

[32] Derrington J observed that the price which a potential purchaser would have paid for consumer goods were they to have been fully informed of the nature and extent of the defects was a matter for expert evidence and none was adduced. Although a broad-brush approach is necessary in the assessment of damages, his Honour did not consider it to be appropriate for the court to hazard a guess as to this value.[44] In that case, the best that could be done on the evidence adduced was to conclude that,

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38 *Toyota*, 560 [203]–[204].
39 *Toyota*, 577–80 [303]–[316].
40 (2018) 362 ALR 702 (***Vautin***).
41 ACL, ss 259(3)(a), 260 and 263(4)(a).
42 *Vautin*, [294] and [339].
43 *Vautin*, [340].
44 *Vautin*, [301]–[302].

at the date of the supply, the value of the vessel was, at most, the purchase price less to cost of undertaking the repairs required to address the relevant defect.

[33] In my view, the statements of Derrington J concerning the need for expert evidence should be understood only as the conclusion his Honour reached in the particular circumstances of that case. They should not be understood as expressing a statement of general principle that a court cannot assess the reduction in value for the purposes of s 272(1)(a) of the ACL without the assistance of expert evidence. The conclusion of the Full Court in *Toyota* suggests there is no such principle.[45]

[34] In this case the applicant relied upon the reasoning of the Full Court in *Toyota* in submitting that, due to the nature and frequency of the Yanmar equipment failures, the reduction in the value of those goods resulting from the failure to comply with the guarantee of acceptable quality was the whole of the purchase price he paid for the Yanmar equipment. This requires, as was accepted during the hearing of the appeal,[46] a conclusion that the Yanmar equipment had a value of nil at the date of supply because a fully informed consumer would regard the goods as being completely useless.

[35] I am not satisfied such a finding is open in this case. The evidence of Mr Callinan's use of Quick Fix after the installation of the Yanmar equipment, albeit interrupted by the occurrence of the various failures, means that the Yanmar equipment cannot be characterised as completely useless. The repairs to, and replacement of, the Yanmar equipment after the first eight of the failures meant that Mr Callinan was able to continue using Quick Fix prior to the final failure of the replacement sterndrives, albeit that the utility of the Yanmar equipment was diminished by the ongoing nature of the failures. That being said, the persistent nature of the failures of the Yanmar equipment, and particularly the catastrophic failure of both sterndrives on two occasions—one after 180 hours of operation, and the second after 220 hours of operation—leads to the conclusion that the failure to comply with the guarantee of acceptable quality has not been, and cannot be, remedied by repair or replacement. Based on the previous failure of two sets of sterndrives, there is no reason to think that replacing the sterndrives a second time would render the Yanmar equipment of acceptable quality.

[36] Applying the approach set out in *Toyota*, understanding the extent to which the utility of the Yanmar equipment is diminished requires a comparison between the lifetime use of that equipment with and without the failures. This court must make an objective assessment of the order of magnitude or significance of the failures and how much of the utility of the Yanmar equipment has been reduced. I am satisfied that, even in the absence of expert evidence, a consideration of the evidence relevant to those matters provides a sufficient basis to form a view as to the extent of the reduction in the value of the Yanmar equipment resulting from the failure to comply with the guarantee of acceptable quality.

[37] In my view, a reasonable consumer with knowledge of the failures would regard those failures as having a significant impact on the utility of the Yanmar equipment. I have reached that conclusion for the following reasons:

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45 See also the assessment of the reduction of value in circumstances where there was no useful evidence of the value of the defective goods at the date of supply in *Capic v Ford Motor Company of Australia Pty Ltd* (2021) 154 ACSR 235 (***Capic***), [882]–[890].

46 Transcript 1-13:22 to 1-14:27.

(a) The failures impacted the reliable operation of the Yanmar equipment. Reliability is a critical factor in the safe operation of a vessel such as Quick Fix in open waters where engine failure would involve safety risks, both for those on board and for the vessel itself. The consequences of the total engine failure (the seventh failure referred to above), where Mr Callinan and his wife had to leave Quick Fix anchored unattended overnight and return to Mackay Marina by jet ski, highlights the serious nature of these safety risks.

(b) The evidence that Quick Fix is no longer used after the Yanmar equipment has operated for 400 hours demonstrates that the failures have significantly reduced the useful life of the equipment. The period of the warranty given by the respondent for the Yanmar equipment included 2000 hours operation.[47] That gives an indication of the minimum amount of useful life the equipment could be expected to have had without the failures. The evidence as to operation of the equipment in the period before the first failure (51 hours operation in approximately six months) and in the period when Mr Callinan said he had a number of good trips on Quick Fix between the third and fourth failures (75 hours operation in approximately 12 months) suggests that, without the interruptions caused by repairs to Quick Fix, Mr Callinan would have operated the Yanmar equipment at a rate between 75 and 100 hours per year. At that rate of operation, absent the failures, the applicant would have enjoyed many more years of use of the Yanmar equipment in Quick Fix before it reached 2000 hours operation. By contrast, the catastrophic failure of both sterndrives on two separate occasions after they had achieved only about 10 per cent of the warranted hours of operation clearly demonstrates the impact on the useful life of the Yanmar equipment.

(c) A reasonable consumer would also have regard to the likelihood that the failures would increase the cost of servicing and repairing the Yanmar equipment, and the amount of time the vessel could not be used when servicing or repairs of the Yanmar equipment was carried out, but in my view this would be regarded as having less impact on the utility of the equipment than the impaired reliability and reduction in useful life.

[38] For these reasons, I conclude that a reasonable consumer would consider that the utility of the Yanmar equipment was reduced by at least 50 per cent because of the failures. Accordingly, I would assess the reduction in the value of the Yanmar equipment at the time of supply as 50 per cent of the price which the applicant paid for those goods. I note for completeness that this approach to the assessment of the reduction in value does not require the residual value of the engines which remain installed in Quick Fix to be brought to account.[48]

[39] Although the respondents' submissions focussed primarily on the applicant's claim for replacement costs, they addressed the question of the assessment of reduction of value under s 272(1)(a) by submitting that the evidence adduced at trial did not permit the primary judge—or this court on appeal—to undertake such an

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47 AB 428. The warranty period was 24 months or 2000 hours of operation after delivery. The replacement and repairs effected for the first to fourth failures occurred within the 24 month warranty period. The subsequent failures were outside the 24 month warranty period, although as already noted, following the fifth failure, the respondent replaced the sterndrives as a gesture of good will.

48 Contrast the differing approaches explained in *Toyota* at 549 [145] and [148].

assessment. That was consistent with the way in which the respondent conducted its case below.[49] For the reasons given, I do not accept that submission.

[40] The respondent advanced three further arguments in support of the primary judge's assessment of damages.

[41] The first argument was that, in circumstances where the first to fifth failures were addressed by repairs or replacement of the goods by the respondent, s 271(6) of the ACL precluded the applicant from relying upon any of those failures in a claim for damages under s 272(1)(a). Section 271(6) provides that no action can be commenced to recover damages for a reduction in the value of goods under s 272(1)(a) if the manufacturer of the goods has remedied the failure to comply with the guarantee of acceptable quality by repairing or replacing the goods. For s 276(1) to apply, the respondent was required to prove that, by repairing or replacing the goods, it remedied the non-compliance with the guarantee of acceptable quality.[50] I have already explained my conclusion that, although the repairs and replacements effected by the respondent permitted Mr Callinan to continue to use Quick Fix, the ongoing nature of the failures affecting both the engines and the replacement sterndrives meant those repairs and replacements did not remedy the failure of the Yanmar equipment to comply with the guarantee of acceptable quality. For that reason, I do not accept the respondent's submission that the applicant was precluded from relying upon the first to fifth failures in its claim for damages under s 272(1)(a).

[42] In any event, the respondent's argument amounts to a challenge to the primary judge's finding that all nine of the failures described above rendered the Yanmar equipment of unacceptable quality. It is a contention that the assessment of damages below should be affirmed on a ground other than a ground relied upon by the primary judge. Consequently, to advance that argument in response to the appeal from the assessment of damages the respondent was required to file a notice of contention within 14 days after service of the notice of appeal.[51] The respondent did not file a notice of contention.[52] In those circumstances, it cannot rely on this argument as a basis for resisting the appeal.

[43] The second argument was directed to the replacement sterndrives which were fitted after the fifth failure. The respondent submitted that the replacement of the sterndrives did not constitute a supply of goods for the purposes of s 54 of the ACL, such that the guarantee of acceptable quality did not attach to those goods. In support of that argument, the respondent relied on the inclusive definition of "supply" in s 2 of the ACL, that being "supply … by way of sale, exchange, lease, hire or hire-purchase." The respondent submitted that, having regard to their natural meaning, none of the words used in that definition extends to a manufacturer replacing goods as a voluntary act of goodwill. The natural meaning of each of those words involves some element of consideration. The respondent also relied upon the terms of ss 261(c) and 263(4)(b) of the ACL (which provide for the replacement of goods by a supplier) as well as s 264 which deems such replacement goods to have been supplied by the supplier. The respondent submitted that if the

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49 AB 198–200.

50 *Capic*, [754].

51 *Uniform Civil Procedure Rules 1999* (Qld) r 757.

52 The respondent filed a Notice of Cross Appeal on 20 April 2023 which raised this argument. That Notice of Cross Appeal was dismissed by consent following the filing of a Notice of Agreement to Dismissal of Cross Appeal on 19 June 2023.

replacement of goods came within the definition of supply then s 264 would have no utility and, given the presumed legislative intention that s 264 have some operation,[53] the general definition should not be construed as extending to replacement. This is important because there appears to be no provision equivalent to s 264 which is addressed to goods replaced by a manufacturer.

[44] I acknowledge there is some force in this argument, although I have difficulty in discerning the legislative purpose in ensuring (by s 264) that a consumer who is provided with replacement goods by a supplier continues to enjoy the protection of the guarantee of acceptable quality but a consumer who is provided with replacement goods provided by a manufacturer does not enjoy the same protection. Ultimately, I do not consider it necessary to resolve this question because this second argument challenges the primary judge's finding that the failure of the replacement sterndrives was a failure which rendered the Yanmar goods of unacceptable quality giving rise to an entitlement to damages under s 272. For the reasons already given in addressing the first argument, without having filed a notice of contention the respondent cannot rely upon this second argument to support the primary judge's assessment of damages.

[45] The third argument was also directed to the replacement sterndrives. The respondent submitted that, because the applicant did not pay anything for those replacement sterndrives, the "price paid" for the purposes of s 272(1)(a)(i) was nil such that there could be no reduction in the value of those goods. I cannot accept that submission. As explained above, the assessment of the reduction in the value of the goods is to be made at the date the applicant purchased the Yanmar equipment. The replacement sterndrives were provided by the respondent after the date of purchase to attempt to address the failure of the Yanmar equipment, including the original sterndrives, to comply with the guarantee of acceptable quality. I have found that the provision of the replacement sterndrives, among other repairs and replacements, did not remedy the failure to comply with the guarantee. In those circumstances, I can see no reason why the fact the applicant did not pay for the replacement sterndrives would preclude a finding under s 272(1)(a) that there was a reduction in the value of the Yanmar equipment resulting from the failure to comply with the guarantee of acceptable quality.

[46] It follows that, in my view, the primary judge erred in concluding that the applicant did not prove an entitlement to recover damages under s 272(1)(a) of the ACL for a reduction in the value of the Yanmar equipment. I would assess the reduction in value to be 50 per cent of the purchase price. This amounts to $62,425.

Second ground: the entitlement to recover replacement costs as a reasonably foreseeable loss under s 272(1)(b)

[47] The applicant submitted that the primary judge erred by apparently reading down the operation of s 272 of the ACL to the effect that, in an action brought against a manufacturer of goods, a plaintiff's entitlement to recover damages in respect of the goods themselves is limited to damages for a reduction in value under s 272(1)(a).

[48] In support of this submission, the applicant relies on several textual and contextual features of s 272.

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53 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 366–7 [17].

[49] First, the applicant submitted that, because use of the word "and" at the conclusion of s 272(1)(a)(ii) means that a plaintiff may recover damages under either or both limbs of s 272(1), the damages recoverable under ss 272(1)(a) and (b) are not mutually exclusive. The only limit imposed by s 272 is found in s 272(3) which operates to prevent double recovery. For example, on the applicant's construction, a plaintiff who claimed damages for a reduction in the value of goods could not also claim the replacement cost of the goods because this would compensate the plaintiff twice for effectively the same loss.

[50] Second, the words used in s 272(1)(b)—"any loss or damage suffered …"—are of wide import and do not indicate a legislative intention to exclude particular forms of loss or damage from the operation of the provision, provided such loss or damage is reasonably foreseeable.

[51] Third, s 272(2) contemplates that defective goods might be returned to the manufacturer. The applicant submitted that if the only damages recoverable by a plaintiff in respect of defective goods are for reduction in value pursuant to s 272(1)(a) there would be no occasion to return the goods to the manufacturer. On this basis, s 272(1)(b) should be construed as extending the entitlement to recover damages for reasonably foreseeable loss to include the replacement cost of goods which a plaintiff has returned to the manufacturer.

[52] The applicant also relied upon statements as to the application of s 272 in:

(a) *Vautin* where Derrington J said:[54]

> "… The damages available for breaches of the guarantees indicate the relief to which a consumer is entitled is that which reverses any worsening of the consumer's economic position by reason of the failure of the guarantee."

(b) *Capic* where Perram J said that the plaintiff claiming damages under s 272 of the ACL:[55]

> "… is to be placed in the position she would have been if the [goods] had complied with the guarantee of acceptable quality."

[53] These statements of general principle are doubtless correct, but must be understood in the context of other statements made in the same judgments.

[54] The statement which the applicant has cited from *Vautin* was made as part of Derrington J's consideration of the effect of the legislative change from an implied term approach to consumer protection under previous legislation to the statutory guarantee approach enacted under the ACL. The relevant paragraphs state:[56]

> "[291] In relation to consumer protection, the move by the legislature from the implied term approach, as had been the case in the Sale of Goods Acts and in the Trade Practices Act 1974 (Cth), to the statutory guarantee approach would appear to have altered the nature of the relief to which a consumer is entitled where defective goods have been delivered. Under the former

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54 *Vautin*, 767 [292].
55 *Capic*, 244 [14].
56 *Vautin*, 767-768 [291]–[293].

'implied term' regimes the consumer would have been entitled to the contractual measure of damages following upon a breach of a term. That is, they would have been entitled to be put into the position which they would have been had the supplier complied with the implied term. If the effect of pre-contract negotiations were to the effect that the goods to be supplied were to be of a particular quality, or might be used for a particular use, the implied term regime operated to impose the obligation of the supplier to meet those specifications. If the supplier fell short, it was obliged to pay damages which would, as far as money might do it, put the consumer into the position they would have been in had the implied term as to quality been performed or met. The consumer would be entitled to 'expectation losses' and that is so even where the supplier had made a bad bargain.

[292] The new scheme of statutory guarantees in the ACL appears to have abandoned that regime in favour of one which apparently imposes standards of normative behaviour in relation to the quality of goods produced by manufacturers and supplied by suppliers. The damages available for breaches of the guarantees indicate the relief to which a consumer is entitled is that which reverses any worsening of the consumer's economic position by reason of the failure of the guarantee. Where the failure to comply is a 'major failure' the consumer is entitled to, effectively, rescind the agreement and recover the consideration which was paid (see s 259(3)(a)). Alternatively, the consumer is entitled to retain the goods in question and recover an amount that represents the difference between the price paid for the goods and the value of the goods (see s 259 (3)(b)). …

[293] In addition to the right to return the goods or to damages representing the diminution in value, the consumer is entitled to recover loss or damage suffered 'because of' the failure to comply with the guarantee if that loss was reasonably foreseeable (see s 259(4)). This second limb of damages appears to cover those losses which are sustained consequent upon the acquisition of the defective goods. The scope of that 'head of damage' would include property loss which has occurred as a result of the defective goods (such as where a faulty electrical appliance causes a house to burn down); the cost of attempting to ascertain the defects in the goods; or, the cost of preserving the goods. It would appear that this sub-section is concerned with the recovery of 'reliance losses' as the inclusion of the limitation of 'reasonable foreseeability' pertains to such losses rather than expectation losses. Section 259(6) makes it clear the remedy for recovery of damages caused by the non-compliance with the guarantee is in addition to the alternative remedies of returning the goods or recovering an amount that represents the diminution in value of the goods."

[55] On a full reading of that passage, it can be seen that Derrington J was referring:

(a) in [291], to the entitlement of a plaintiff under the earlier consumer protection regime to claim "expectation losses" upon the breach of a statutory implied term;

(b) in [292] (the paragraph from which the statement cited by the applicant is drawn), to the relief a plaintiff may recover from a supplier under the present statutory guarantee regime in relation to the goods themselves, namely: the entitlement to rescind the agreement and recover the price paid for the goods (an entitlement that is not conferred expressly by s 272); or, alternatively, the entitlement to recover damages for a reduction of the value of the goods (which is the entitlement conferred by s 272(1)(a));

(c) in [293], to the scope of damages which may be sought under s 259(4) (which is in relevantly identical terms to s 272(1)(b)) being "reliance losses" sustained as a consequence of the acquisition of the defective goods and which concerns losses beyond the cost or value of the goods themselves.

[56] Understood in that way, the statement cited by the applicant does not support his construction of s 272(1)(b). To the contrary, the full passage (and particularly the observations made by Derrington J in [293]) points to a construction which does not permit a plaintiff to recover the replacement costs of goods under s 272(1)(b).

[57] In *Capic*,[57] Perram J observed that ss 272(1)(a) and (b) resemble the two components of compensatory damages available at common law for breach of contract, namely: (1) compensation directly for the performance interest; and (2) compensation for consequential losses. That statement drew upon the analysis of s 267(3) and (4) of the ACL by Edelman J in *Moore v Scenic Tours Pty Ltd*.[58]

[58] Section 267(1) of the ACL creates a cause of action against a supplier of services where the service fails to comply with a consumer guarantee. The remedies to which a consumer is entitled under ss 267(3) and (4) are described in terms which are relevantly identical to the remedies available against a supplier of goods in ss 259(3) and (4), discussed by Derrington J in *Vautin*, and the remedies available against a manufacturer of goods under ss 272(1)(a) and (b) (save that, as already noted, s 272 does not confer an express entitlement to recover the price paid for the goods).

[59] The passage from the judgment of Edelman J in *Moore* to which Perram J referred in *Capic* reads as follows:[59]

> "[63] The primary species of damages for a breach of contract are often expressed as 'expectation damages' or as responding to an 'expectation loss'. These expressions were relied upon by both parties to this appeal in their explanations of the nature of damages for breach of the consumer guarantees in s 61(1) and (2) of the *Australian Consumer Law* and the operation of Pt 2 of the *Civil Liability Act* on those damages. However, the expressions are problematic. In particular, they can conceal

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57 *Capic*, [891].
58 (2020) 268 CLR 326 (***Moore***).
59 *Moore*, 348–9 [63]–[67] (citations omitted).

> a fundamental difference between two components of compensatory damages for breach of contract, both of which are necessary parts of the compensatory goal of restoring the injured party to the position they would have been in if the breach had not occurred. Those components are compensation directly for the performance interest and compensation for consequential losses. The two components are provided for separately in s 267(3) and s 267(4) of the *Australian Consumer Law* respectively.
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> [64] Where contract damages provide compensation directly based on the performance interest, that component of the award is not concerned with loss in any real or factual sense. The compensation for the performance interest, 'by the value of the promised performance', appears 'as a "loss" only by reference to an unstated *ought*'. The aim of this component of the award is to provide the promisee with the difference between the value of what was promised and the value of what was received. The promisee had a primary right to performance of the contract so, upon termination, the law generally provides for a secondary right for the value of the performance that was not received or the difference in value due to the defect.
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> [65] This component of compensation is contained in s 267(3) of the *Australian Consumer Law*, where a consumer may 'recover compensation for any reduction in the value of the services below the price paid or payable by the consumer for the services'. …
>
> [66] A promisee might also suffer true, consequential, loss from a breach of contract. These consequential losses might include economic (financial) losses to the promisee to the extent that they go beyond the value of the promised performance and are within the boundaries of legal responsibility. They can also include some non-economic losses.
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> [67] This component of consequential loss is contained in s 267(4) of the *Australian Consumer Law*, a head of damages additional to s 267(3), which allows for recovery of further loss or damage for a relevant failure to comply with a guarantee as provided in s 267(1) 'if it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of such a failure'. …"

[60] The analysis of ss 267(3) and (4) by Edelman J in *Moore*, and of ss 272(1)(a) and (b) by Perram J in *Capic*, was approved by the New South Wales Court of Appeal in *Scenic Tours Pty Ltd v Moore*.[60]

[61] On that analysis, s 272 does not confer an entitlement to recover the replacement cost of defective goods. Adopting the terms used by Edelman J, an award of damages for the replacement cost of defective goods would constitute compensation for the performance interest. In this case, recovery of those costs would compensate

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60 [2023] NSWCA 74, [25]–[30] (Kirk JA with whom Ward P agreed).

the applicant for the value of the promised performance, namely that the Yanmar equipment would be of acceptable quality. Compensation for the performance interest is provided for by s 272(1)(a) and does not extend to the replacement cost of defective goods. To the extent that the consequential loss which may be recovered under s 272(1)(b) includes financial loss, that financial loss must go beyond the value of the promised performance. The replacement cost of the Yanmar equipment does not meet that description.

[62] On that construction, s 272(3) is consistent with ss 272(1)(a) and (b) providing for separate components of compensation. Contrary to the applicant's argument in [49] above, these components are mutually exclusive. It is correct that a plaintiff can, depending upon the nature of the loss suffered, recover damages for either or both components. However, notwithstanding the use of the words "any loss or damage" in s 272(1)(b), a plaintiff cannot recover compensation for the performance interest as a form of consequential loss.

[63] The reference to the return of defective goods in s 272(2) does not alter this analysis. The explanatory memorandum for the bill which introduced the ACL, the *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010* (Cth), addressed s 272(2) at [7.124] in the following terms:

> "To avoid doubt, the cost of returning goods or inspecting them to determine the cause of a failure is to be considered reasonably foreseeable as a result of failing to comply with a guarantee."

[64] This explanation indicates the legislature contemplated that a plaintiff might incur costs in returning defective goods to the manufacturer so that the manufacturer can investigate the cause of a failure. A plaintiff might also return defective goods to the manufacturer so that the manufacturer can repair those goods. Section 272(2) makes it clear that the costs of returning the goods in those circumstances is a consequential loss recoverable under s 272(1)(b). I cannot accept the applicant's submission that if the only damages recoverable by a plaintiff in respect of defective goods are for reduction in value pursuant to s 272(1)(a) there would be no occasion to return the goods to the manufacturer. Plainly that is not the case.

[65] The applicant also sought to draw support for his construction of s 272(1)(b) from the identity of language in that section and in s 259(4) and in the statement in [7.94] of the explanatory memorandum addressing s 259 that:

> "In some circumstances, it may be appropriate for the consumer to purchase a replacement and have the supplier pay for the replacement."

[66] Again, it is necessary to consider this statement in its full context. The full paragraph from which it was taken reads:

> "If a supplier fails to provide a remedy within a reasonable time, a consumer may have the goods repaired and have the supplier pay for the repair. In some circumstances, it may be appropriate for the consumer to purchase a replacement and have the supplier pay for the replacement. The consumer also has a right to have the supplier pay other costs incurred in having goods remedied elsewhere. In certain circumstances, these costs might include transportation costs and costs of having an alternative repairer inspect the goods."

[67] That statement is an explanation of the application of s 259(2)(b)(i) which has no equivalent in s 272. The statement sheds no light, as the applicant sought to argue, on the scope of the losses that can be recovered under s 259(4) or, by analogy, under s 272(1)(b).

[68] For these reasons, I am not persuaded that the applicant is entitled to recover the replacement cost of the Yanmar equipment under s 272(1)(b) of the ACL. Accordingly, I would dismiss the second ground of appeal. It is therefore unnecessary to address the parties' arguments on the question whether the applicant proved the replacement cost of the Yanmar equipment.

Consideration of the application for leave to appeal

[69] Leave will generally only be granted under s 118(3) of the *District Court of Queensland Act 1967* (Qld) where an appeal is necessary to correct a substantial injustice to the applicant and there is a reasonable argument that there is an error to be corrected.[61]

[70] I have concluded that the primary judge erred in finding that the applicant had not proved an entitlement to recover damages for the reduction in the value of the Yanmar equipment pursuant to s 272(1)(a). I am satisfied that the appeal is necessary to correct a substantial injustice caused to the applicant by that error.

[71] On that basis, I would grant leave to appeal and allow the appeal.

Orders

[72] I would order that:

1. Leave to appeal be granted.
2. The appeal be allowed.
3. Order 1 of the judgment delivered on 8 March 2023 be varied by deleting "$8,069.00" and substituting "$70,494 together with interest on the amount of $62,425".
4. The respondent pay the applicant's costs of the application for leave to appeal and of the appeal.

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61 *Pickering v McArthur* [2005] QCA 294, [3].