SUPREME COURT OF QUEENSLAND

CITATION:	*Prestige Holdings Pty Ltd v Kevjen Pty Ltd* [2003] QSC 006
PARTIES:	**PRESTIGE HOLDINGS PTY LTD** **ACN 088 268 222** (plaintiff) **v** **KEVJEN PTY LTD ACN 010 836 656** (defendant)
FILE NO/S:	SC No. 10317 of 2002
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court Brisbane
DELIVERED ON:	23 January 2003
DELIVERED AT:	Brisbane
HEARING DATE:	14, 15 January 2003
JUDGE:	Muir J
CATCHWORDS:	CONTRACT – TERMINATION – Contract for sale of land – construction of "execution of contract" – valuation of motor vehicle – whether motor vehicle corresponds with description in contract – whether defendant entitled to terminate contract for failure of an implied condition *Associated Developers (Aust.) Pty. Ltd. v Allied & General Pty. Ltd*. [1995] ANZ ConvR 41 *Australian Broadcasting Commission v Australasian Performing Right Association Ltd.* (1972-73) 129 CLR 99 *Expectation Pty. Ltd. v Pinnacle VRB Ltd.* [2002] WASCA 160 *Gange v Sullivan* (1966) 116 CLR 418 *Hide & Skin Trading Pty Ltd v Oceanic Meat Traders Ltd.* (1990) 20 NSWLR 310 *Koikas v Greenpark Construction Pty. Ltd.* [1970] VR 142 *Perri v Coolangatta Investments Pty. Ltd.* (1982) 149 CLR 537 *Re Wickham Development (Australia) Pty. Ltd. v Feros* [1994] ANZ ConvR 347 *Sandra Investments Pty. Ltd. v Booth* (1981) 153 CLR 153 *Wickman Machine Tool Sales Ltd. v L Schuler A-G* [1974] AC 235
COUNSEL:	P J Dunning for the plaintiff

M Hinson for the defendant

SOLICITORS: Steindl Bell Lawyers for the plaintiff
Deborah Jean-Therese Kelly Lawyers for the defendant

[1] The plaintiff and the defendant entered into a contract in writing dated 20 September 2002 for the sale by the defendant to the plaintiff of land at Redbank Plains on which a service station business was being conducted by the defendant. The defendant purported to terminate the contract on 15 October 2002 and the plaintiff commenced these proceedings claiming specific performance, and alternatively, damages.

Relevant contractual provisions

[2] The items schedule in the contract states that the "contract date" is 20 September 2002 and that the purchase price is $1,390,000.00. It specifies a deposit of $1,000.00 and a date of completion of "on or before 28 November 2002".

[3] A handwritten annexure A to the contract provides that the deposit is to be paid upon execution of the contract and "held in trust by the deposit holder/trustee".

[4] Clause G of annexure A, which is of particular importance to the defendant's case, provides:-

> "This Contract is subject to Due Diligence, within 21 (twenty one) days of execution of Contract of Sale, and that Due Diligence have to be [sic] to the complete satisfaction of the Purchaser at it's [sic] sole discretion."

[5] Another clause of particular significance to the issues in dispute is clause K of annexure A which commences:-

> "This Contract is subject to and conditional upon the contemporaneous completion of the contract described in this clause:".

The clause then proceeds to describe the plaintiff as the vendor and the defendant as the purchaser of a "Aston Martin Lagonda Rapide" "vintage car" "model: 1962 with 50,000 miles" for a purchase price of $540,000. The clause concludes with the words "the 'above' Motor Vehicle is a collector's item. The said Motor Vehicle to be inspected by the Purchaser".

[6] Annexure A concludes with signatures on behalf of the plaintiff and the defendant and with the date 20 September 2002.

Factual narrative

[7] In November 2001 the defendant had entered into a contract for the sale of the land to Silegna Pty Ltd for a stated purchase price of $1,400,000.00 payable as $1,000,000.00 in cash, $50,000.00 in "mixed gold jewellery" and $150,000.00 in "310 carats of pink rubies and 750 carats of blue and green sapphires". In May 2002 the plaintiff entered into a contract with Silegna under which it agreed to purchase the land for a purchase price of $1,500,000.00. That contract provided for payment of a deposit of $1,000.00, as did Silegna's contract with the defendant. The former contract was expressed to be subject to "the satisfactory property title transfer from … [the defendant]".

[8] The contract between the defendant and Silegna was terminated in mid September 2002 and, in consequence, the sale by Silegna to the plaintiff came to an end. The defendant remained anxious to sell and shortly after that time Mr Hargreaves, a director of the defendant, had a conversation with Susan Zloch, an agent in the employ of Intercity Property Services, a firm of real estate agents which had acted as the vendor's agent in the Silegna transaction. The discussion between Ms Zloch and Mr Hargreaves lead to their meeting with the sole director of the plaintiff, Mr Bottriell the following day at a restaurant.

[9] Prior to the meeting Ms Zloch had told Mr Bottriell that Mr Hargreaves was looking for a purchase price of $950,000 of which $850,000 had to be in cash. During the meeting Mr Bottriell told Mr Hargreaves that he was prepared to pay $850,000 in cash if he would take the vintage car described in a brochure which he handed to Mr Hargreaves as the balance of the purchase price. At the conclusion of the meeting Mr Bottriell raised the possibility of stating the purchase price of the land and car in the contract at $1,390,000.00 and $540,000.00 respectively. Mr Hargreaves said that he didn't mind as long as the difference between the sale price of the land and that of the car was $850,000.

[10] Ms Zloch then prepared the contract and it was signed by Mr Bottriell on behalf of the plaintiff on 20 September. There is a dispute as to the date on which it was signed on behalf of the defendant. Mr Hargreaves and his wife, the other director of the defendant, went to Toowoomba on Monday, 23 September without receiving from Ms Zloch any contract documents for signing. After a telephone conversation between Mr Hargreaves and Ms Zloch, Ms Zloch posted the contract documents to a business address of Mr and Mrs Hargreaves in Toowoomba. Mr Hargreaves executed them on behalf of the defendant and Mrs Hargreaves returned them to Ms Zloch by express post.

[11] Mr Bottriell gave evidence that on 24 September he had a telephone conversation with Ms Zloch in which he asked whether the contracts had been signed. According to him Ms Zloch said that they had been but she couldn't tell him if all the terms had been accepted as all she had been told was that they had been signed and were being sent back.

[12] Mr Bottriell said that his next conversation with Ms Zloch was on 26 September when she telephoned him and said words to the effect, "You are not going to believe this. He's actually accepted the contract as it is with no changes".

[13] Also around this time Mr Bottriell said that he had been told by Ms Zloch that an employee at Intercity called Linda was refusing to accept a letter which he had written authorising the transfer of the $1,000.00 deposit in respect of the Silegna transaction to an account in respect of the subject transaction. He said that that person required the original trust account receipt before the transfer could be effected.

[14] On 10 October 2002 Mr Hargreaves called at the showroom in which Mr Bottriell conducted a used car business in partnership with a Mr Young. One of the purposes of the visit was for Mr Hargreaves to sign a form of appointment to act as real estate agent which he had neglected to sign when executing the contract documents. There had been a prior arrangement with Ms Zloch for the form of appointment to be sent to the showroom but Ms Zloch had either forgotten about it or had mistaken the time. Two calls from the showroom to Ms Zloch were made before her son came to the showroom well over an hour after Mr Hargreaves' arrival. In the meantime, Mr Bottriell took Mr Hargreaves over to the car in the showroom, removed a dust cover and the two looked over it. Mr Bottriell explained that the battery was underneath the back seat and had been disconnected because the car was only rarely driven. His offer to connect the battery, put trade plates on the car and take Mr Hargreaves for a drive was declined.

[15] On 14 October Mr Bottriell met with Mr McFadzean of the plaintiff's solicitors in order to obtain advice in relation to the contract. A diary note made by Mr McFadzean in the course of the meeting contains these notations:-

> "SCG – due diligence 21 days expires 11 October 2002 …
> - due diligence – request 7 day extension – advised concerned contract could be terminated by v[endor]
> - advised concerned contract may already be dead because date for due diligence ran 11/Oct
> - he said date was Wed".

Mr McFadzean gave evidence that "Wed" meant Wednesday, 16 October and that "SCG" referred to special condition G. He further said that after he made the first of the above notations he became aware that the date of execution of the contract was in fact after 20 September.

[16] Mr McFadzean said that he was told by Mr Bottriell that "the contract had not been formed until some days" after the date on the contract and that he advised "if the period runs from date of formation … Wednesday's, the day." It was not explained how the date of formation was fixed.

[17] Later on that day Mr McFadzean telephoned the defendant's solicitors. Mrs Kelly, the sole principal of the firm was absent and Mr McFadzean spoke to one of her employees, Miss Russell. His note of the conversation records:-

> "Due diligence – for a 7 day extension to clarify – Caltex lease – right of refusal – exercise of option – she'l [sic] get instructions."

[18] Miss Russell's diary note of the conversation records:-

> "He said that his client will need an extension of due diligence. I requested that he fax through an extension request so that I could take my client's instructions."

Mr McFadzean doesn't recall Miss Russell requesting that he fax a request for an extension of the due diligence period but his diary note of the conversation contains the fax number of the defendant's solicitors.

[19] Nothing turns on whether Mr McFadzean's recollection in this regard is correct but I think it probable that his recollection is faulty and that the request referred to in Miss Russell's diary note was made.

[20] On 15 October at 9.54 am Mrs Kelly sent a fax to the plaintiff's solicitors stating:-

> "I confirm that the contract was subject to due diligence by the 14th October 2002, which has not been satisfied. Therefore, my client has instructed me to terminate the contract and refund the deposit."

A copy of the fax was transmitted to Intercity Property Services. Mr McFadzean telephoned Mrs Kelly at about 10.15 am and discussed with her the question of whether the contract had been terminated. He disputed that the fax earlier that day had brought the contract to an end. Mrs Kelly's diary note of the conversation records, *inter alia*:-

> "I also noted that my client has a right to terminate under special condition K if the inspection of the vehicle were [sic] not to his satisfaction. I said that I was awaiting advice as to the outcome of that clause and in any event special condition M contemplated that if the vehicle transfer did not proceed, then the contract would be terminated."

[21] In other facsimiles that day between the solicitors Mrs Kelly confirmed the defendant's termination of the contract and stated:-

> "As your client requested an extension yesterday, and did not deliver a notice advising that due diligence been [sic] satisfied, my client elected to exercise its right to terminate the contract. …
>
> To avoid any prejudice, if your client believes that it has a basis for resisting the termination, please advise immediately."

That fax was sent at 13.46 pm. Mr McFadzean declined to be drawn on any matter of detail. In his fax of 15 October he stated:-

> "Due diligence – our client has satisfactorily completed due diligence investigations so that the contract is now unconditional in that regard.
>
> …

> Deposit – our client is agreeable to your client taking possession of the motor vehicle referred to in the Contract. We are instructed that your client has inspected and is satisfied with the motor vehicle."

[22] I now turn to the issues raised on the pleadings.

The meaning of special condition G

[23] The meaning of "execution of contract of sale" is of critical importance as it is that event which triggers the commencement of the 21 day due diligence period.

[24] The plaintiff contends that "execution" of the contract is necessarily a reference to its date of formation because, were it otherwise, the time for due diligence would commence without the purchaser being in a position to know that the vendor had signed.

[25] It is desirable to construe commercial documents so as to make commercial sense of them.[1] But there are limits to the court's ability, in construing a written contract, to avoid an inconvenient result. In *Australian Broadcasting Commission v Australasian Performing Right Association Ltd*[2] Gibbs J expressed the limitations on a court's power in construing a written contract as follows:-

> "If the words used are unambiguous the court must give effect to them, notwithstanding that the result may appear capricious or unreasonable, and notwithstanding that it may be guessed or suspected that the parties intended something different. The court has no power to remake or amend a contract for the purpose of avoiding a result which is considered to be inconvenient or unjust."

[26] The literal construction of special condition G may result in some inconveniences as the plaintiff contends but it would not have been difficult for the plaintiff to have taken some simple practical measures to avoid them.

[27] The plaintiff's argument may gain some support from clause C of annexure A which provides for the payment of the deposit of $1,000.00 "upon execution of the contract". It may be thought surprising that the plaintiff could be in breach of contract through not having paid the deposit even if it was unaware that the defendant had executed the contract. However, the nature of the deposit as security for the purchaser's performance and the unlikelihood that the purchaser will be present when the vendor signs the contract, as Gibbs J pointed out in Brien v Dwyer[3], tends to suggest the conclusion that "execution of the contract" in clause C means "execution by the purchaser".

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1 *Wickman Machine Tool Sales Ltd. v L Schuler A-G* [1974] AC 235 at 251; and *Hide & Skin Trading Pty. Ltd. v Oceanic Meat Traders Ltd.* (1990) 20 NSWLR 310 at 313-4.

2 (1972-73) 129 CLR 99 at 109.

3 [1979] 53 ALJR 123 at 128-9.

[28] An expression used in one clause of a contact, prima facie, has the same meaning in the other clauses but I think it improbable that "execution" in clause G means execution by the purchasers. If it had that meaning, not only would the purchaser be committed to the expenditure of money without the protection of a binding contract but the vendor may be obliged to provide information and even access to the land and records of its business. One would not readily conclude that the parties contemplated the commencement of such investigations prior to the coming into existence of a binding contract.

[29] "Execution", when used in relation to an instrument connotes the completion of all formalities such as signing, sealing etc necessary to give validity or legal efficacy to the instrument.[4] Depending on the context in which it appears, the word may contemplate communication of acceptance in addition to signing by both parties.

[30] Clause L of the annexure provides:-

> "This annexure "A" shall be a binding agreement, once each Party has signed this Document."

[31] That provision suggests, and I find, that "execution" is complete when both parties have signed.

Was clause G entirely for the benefit of the purchaser and could the vendor terminate the contract in reliance on it?

[32] The plaintiff, principally on the authority of *Koikas v Greenpark Construction Pty. Ltd.*[5] submits that clause G was for the sole benefit of the purchaser which alone had the right to terminate the contract in reliance on the clause. It was pointed out that the operation of such a provision is always dependent on its language and that decisions based on other non-identical provisions can only provide general guidance. *Koikas*, it was argued, could be distinguished from other decisions on the effect of such clauses because the provision in *Koikas* did not state the consequences of non-fulfilment.

[33] *Koikas* was decided after *Gange v Sullivan*[6] but before *Sandra Investments Pty. Ltd. v Booth*[7] and *Perri v Coolangatta Investments Pty. Ltd.*[8]. Those cases have been treated in subsequent decisions as establishing that even where a clause such as that under consideration is for the benefit of one party, once the time limit for its fulfilment concludes without that party having waived the benefit of it, both parties may act on it to terminate the contract.[9]

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4 See the Shorter Oxford Dictionary and c.f. J & S Holdings Pty Ltd v NRMA Insurance Ltd (1981) 57 FLR 385 at 401 and Sutherland v Willis (1850) Exch 715 at 717-718

5 [1970] VR 142.

6 (1966) 116 CLR 418.

7 (1981) 153 CLR 153.

8 (1982) 149 CLR 537.

9 *Expectation Pty. Ltd. v Pinnocle VRB Ltd.* [2002] WASCA 160; *Re Wickham Development (Australia) Pty. Ltd. v Feros* [1994] ANZ ConvR 347; and *Associated Developers (Aust.) Pty. Ltd. V Allied & General Pty. Ltd*. [1995] ANZ ConvR 41.

[34] There is nothing in the subject clause, such as an option to the purchaser to terminate, which leads me to the conclusion that only a purchaser may exercise rights in relation to it once the due diligence period has expired.[10]

When was the contract of sale executed?

[35] Both Mr and Mrs Hargreaves swear to having a recollection of receiving the contract documents from Ms Zloch in Toowoomba on 23 September, Mr Hargreaves then signing them and Mrs Hargreaves taking them that afternoon to a post office in Toowoomba and sending them by express post to Ms Zloch. Mrs Hargreaves gave a detailed account of events surrounding the signing and posting of the documents and professed a clear recollection that this had occurred on the first day on which she and her husband had arrived in Toowoomba from the Gold Coast. There is no dispute about the fact that the Hargreaves travelled from the Gold Coast to Toowoomba on 23 September.

[36] Ms Zloch was adamant that she posted the documents to Mr Hargreaves in Toowoomba on 23 September. She also professed a clear recollection of the circumstances in which the posting took place. Tendered through her were documents which purported to be a tab taken from the express post bag in which she dispatched the documents, an Australia Post receipt dated 23 September 2002 and a handwritten note, initially said to have been completed a day or so after the posting in which it was recorded as having been done on 23 September. Subsequent evidence revealed that the detached document did not relate to an envelope posted to Toowoomba and that the receipt was not a receipt from the branch of Australia Post which Ms Zloch asserted was the place of posting. She also conceded that her note may have been written well after the event. Accordingly I give little credence to this part of Ms Zloch's evidence.

[37] The envelope in which Mrs Hargreaves posted the contract documents though bears a notation "C/26.9" which appears to have been made by Australia Post. Ms Zloch gave evidence that in her experience that was a date placed on such envelopes by Australia Post to signify the date of delivery to the address shown on the envelope when no one is present to accept delivery. If Ms Zloch is correct about that, and her evidence in this regard appears credible, it is rather unlikely that the date of posting was prior to 25 September, or at the outside, 24 September.

[38] The documents sent by Ms Zloch to Mr Hargreaves included a form of appointment to act as real estate agent and a form of declaration by the seller on a sale of commercial property. The latter document bears Mr Hargreaves' signature in two places and the date "24/9/02" in Mr Hargreaves' handwriting under each signature. Mr Hargreaves asserts that the document was signed by him when he was at Mr Bottriell's showroom on 10 October. I do not accept that. Both Ms Zloch and Mr Bottriell gave evidence of the execution of one document on that occasion and there was no challenge to this evidence in cross-examination. Moreover, the date written on the appointment to act as real estate agent form has the appearance of

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[10] c.f. Sandra Investments Pty Ltd v Booth (1982) 153 CLR 153.

being scrawled in a hurry whereas the two dates on the declaration form have been written rather more clearly and apparently more deliberately. That suggests signing on different occasions.

[39] I think it unlikely that if the declaration form had, as I conclude, been signed in Toowoomba that Mr Hargreaves would have been mistaken about the date on which he was signing. He does not, of course, suggest that he made a mistake about the date when signing. His explanation for the date on the documents was as follows:-

> "Well, I was there on the 10th of October and I just sort of worked back quickly. I had been held up so long, I just worked back quickly to work one day I signed the contract and that's what I come up with, 24, and I wrote that in."

However the date was selected, it is plain that it was selected by Mr Hargreaves in an attempt to record the date on which the defendant signed the contract.

[40] It follows from the above that I have not accepted the accuracy of Mrs Hargreaves' evidence. She gave a plausible account of the circumstances surrounding the signing and posting of the documents and I accept that her evidence was given carefully and truthfully. I am persuaded however that she is mistaken in her recollection as is Mr Hargreaves.

[41] I find that the contract was executed by the defendant in Toowoomba on 24 September. The due diligence period thus expired at midnight on 15 October and the defendant's purported termination based on expiry of the due diligence period was ineffective.

[42] The plaintiff, by its solicitors gave notice both orally and in writing on 15 October that the plaintiff had satisfactorily completed due diligence investigations and that the contract was unconditional in that regard The plaintiff was entitled either to express satisfaction in terms of Clause G or to waive the benefit of it. The clause thus ceased to have any operative effect and the contract remains on foot.

The allegations of misleading and deceptive conduct in relation to the value of the motor vehicle

[43] Mr Hargreaves swears that at the meeting on 18 September with Mr Bottriell and Ms Zloch, Mr Bottriell, on being questioned about the value of the motor vehicle, stated that it had a value of US$100,000.00. He further swears that he entered into the contract in reliance on that representation. He claims that the representation was repeated at Mr Bottriell's showroom on 10 October.

[44] The representation allegedly made after the entering into of the contract does not appear, on the defendant's pleaded case, to be capable of giving rise to any legal consequences and I will disregard it.

[45] The defence alleges that the representations were untrue and were made "with reckless indifference as to whether they were true or not".

[46] Two persons with expertise in the vintage car market were called to give evidence of value. Mr Bird, who was called by the defendant, expressed the opinion that the value of the vehicle was in the range of $35,000.00 to $45,000.00. Mr Sabine, who was called on behalf of the plaintiff, was of the opinion that its value lay in the range of $50,000.00 to $60,000.00 but that, if properly marketed in the United States, it might realise $68,000.00. I was impressed by Mr Sabine's relevant experience and expertise and accept his evidence.

[47] Mr Bottriell says that he was asked by Mr Hargreaves about the value of the car at their first meeting but that he refused to be drawn, saying words to the effect that he didn't believe anyone in Australia knew what the car was worth, that it was left-hand drive, very rare and that the only place that he could foresee anyone getting "any real money for it would be in America". He is adamant that he did not tell Mr Hargreaves that the vehicle had a value of US$100,000.00.

[48] I doubt very much that Mr Bottriell successfully resisted the temptation to make some representations about the value of the vehicle with a view to assuring Mr Hargreaves that the vehicle had a substantial value. Mr Bottriell understood that Mr Hargreaves was not in a position to know whether the car was worth $10,000.00, $100,000.00 or something in between. It was very much in Mr Bottriell's interests to persuade Mr Hargreaves that the car's worth was to the order of $100,000.00 and I did not get the impression that Mr Bottriell was likely to have been reticent about extolling the virtues of a car he was selling.

[49] Ms Zloch denied in cross-examination that Mr Bottriell had represented the car to have a value of US$100,000.00. Although, as I have intimated, I am sceptical about Mr Bottriell's evidence in this regard I am not satisfied on the balance of probabilities that the actual representation relied on by the defendant was made.

[50] If I had come to a contrary conclusion I would not have been satisfied that the defendant relied on the representation in entering into the contract. Mr Hargreaves struck me as being a successful and astute businessman. He had not met Mr Bottriell before the occasion on which the alleged representation was made. He knew that it was in Mr Bottriell's interest to "talk up" the value of the vehicle. He knew nothing about the expertise, if any, of Mr Bottriell in relation to vintage cars beyond having been informed, I infer, that Mr Bottriell was in the business of selling used "prestige" vehicles. I think the probability is that Mr Hargreaves was looking to get a cash component in the sale of $850,000.00 and that anything beyond this was regarded by him as "the icing on the cake". This conclusion is supported by the fact that he did not even ask Mr Bottriell if he could assist him in identifying persons who could place a value on the vehicle. He was not concerned to have a clause in the contract which made it subject to his being satisfied as to the value of the vehicle. After entering into the contract he made only faint attempts to obtain a valuation. On 10 October he declined Mr Bottriell's invitation to take him

for a drive in the vehicle. Nor did he bother having the vehicle inspected by anybody with any relevant expertise.

Failure of the vehicle to correspond with its description in the contract

[51] The defendant contends that special condition K was a contract for the sale of goods by description within the meaning of s 16 of the *Sale of Goods Act* 1896, that it was an implied condition of the contract that the vehicle correspond with its description, and that it did not.

[52] The defendant's point is that the contract describes the vehicle as an "Aston Martin Lagonda Rapide" whereas it is in truth merely a "Lagonda Rapide". The contention is a silly one. Mr Hargreaves was never in doubt that the vehicle described in the brochure was the vehicle being sold. He was given a brochure on his first meeting with Mr Bottriell which described the vehicle in considerable detail and contained a number of clear photographs of its exterior and interior. The heading on the front cover of the brochure is "1962 Lagonda Rapide" and the vehicle is referred to throughout the brochure as a Lagonda Rapide. The description in the contract came about because the vehicle was manufactured by Aston Martin Ltd or a related company, Aston Martin Lagonda Ltd.

[53] Mr Sabine gave evidence that in the 1930's and early 1940's the luxury car manufacturer Lagonda produced a model called the Lagonda Rapide. The Lagonda business was acquired by Aston Martin Ltd in 1948 and in 1961 Aston Martin Ltd or a related company, Aston Martin Lagonda Ltd, manufactured a model which it called the Lagonda Rapide. The subject vehicle is one of the 55 cars produced by Aston Martin Lagonda Ltd or Aston Martin Ltd between 1961 and 1964. Mr Sabine swears, and I accept, that it is accurate to describe the subject vehicle as an "Aston Martin manufactured Lagonda Rapide" and inaccurate to describe it merely as a "Lagonda Rapide".

[54] Plainly, the prefix "Aston Martin", distinguishes those Lagonda Rapides made after Aston Martin acquired ownership of the Lagonda business from those previously manufactured.

[55] I have already said more than sufficient to dispose of this point but I note that the evidence discloses that the subject vehicle was first sold in 1962 to a retired group captain. One of the vendor's sale documents is headed "Aston Martin Lagonda Ltd". A United Kingdom customs' import certificate in respect of the vehicle dated June 1990 describes the "make and model" of the vehicle as "Aston Martin Lagonda Rapide". A bill of sale in respect of the vehicle executed in July 1989 also describes it as an "Aston Martin Lagonda Rapide" as does a vehicle import approval in respect of the vehicle given by the Australian Federal Office of Road Safety on 3 August 1993.

Was the defendant entitled to terminate the contract because of a failure of an implied condition that the plaintiff had the right to sell the motor vehicle or would have a right to sell it when property in the motor vehicle was to pass?

[56] This contention is of no more substance than the last one. There is nothing to show that the plaintiff will not be in a position to pass title when it is required to do so. Title to it rests in Mr Bottriell's partner.

Did the plaintiff, in breach of the terms of the contract, fail to pay the deposit?

[57] Clause C of annexure A relevantly provides:-

> "The deposit of $1,000.00 … shall be paid upon execution of the Contract of Sale and held in Trust by the deposit holder/trustee …".

The items schedule identified Intercity Property Services as the stakeholder. Prior to the entering into of the contract Intercity held a deposit of $1,000.00 paid by the plaintiff pursuant to its contract with Silegna. On 19 September, the day before the contract was signed by the plaintiff, Mr Bottriell gave a letter to Ms Zloch, addressed to Intercity Property Services which stated"

> "Dear Susan,
>
> Could you please organise the transfer of deposit from Silegna P/L [sic] to Kevjen P/L on the property at Redbank Plains discussed on the 18/09/02".

[58] Ms Zloch accepted those instruction on behalf of Intercity, the defendant's agent.[11]

[59] On 9 October 2002 Ms Zloch, on the letterhead of Intercity Property Services, wrote to the defendant's solicitors in relation to the subject transaction stating:-

> "We would like to confirm, that we are holding in our Trust Account a deposit of $1,000.00 … Please advise us when the Sale is completed to enable us to disperse the Deposit monies."

Also on that date Ms Zloch wrote on the same letterhead to the defendant enclosing a signed copy of the contract and stating "the deposit of $1,000.00 … is paid into the deposit holders [sic] trust account".

[60] The point under consideration arises because it was not until 22 October 2002 that an entry was made in the books of the agent in which the sum of $1,000.00 was transferred from the account in respect of the sale by Silegna to the plaintiff to an account in respect of the sale from the defendant to the plaintiff.

[61] The defendant argues that it was only the principal of Intercity Property Services, Mrs White, or a person authorised by her who could lawfully operate the agent's

[11] See the Items Schedule, Clause 30 of the Standard Commercial Conditions and Annexure A.

trust account and that Ms Zloch had no such authority. It follows from this, it is contended, that until the above trust account entries were made the deposit was not paid by the plaintiff to the agent. The argument has no merit.

[62] The agent was aware on and after 19 October that the sale from Silegna to the plaintiff had terminated and that the plaintiff was entitled to a return of the deposit. Yet the deposit was not returned. Ms Zloch was an employee of the agent and authorised to receive deposit monies and communications in that regard. She was requested by the plaintiff to hold the deposit monies, which Intercity was already holding, pursuant to the new contract. She accepted those instructions, as she was entitled to do. From that time onwards the monies were held by way of deposit under the contract. What internal book entries may or may not have been made are immaterial and the arguments advanced by the defendant in reliance on provisions of the *Property Agents and Motor Dealers Act* 2000 and the Regulations made thereunder have no substance.

[63] In the correspondence to which I earlier referred the agent acknowledged that the subject monies were held pursuant to the terms of the contract. Furthermore, if contrary to my view of the matter, the deposit was not paid in accordance with the terms of the contract, the defendant by the conduct of its agent waived any right to insist on strict compliance with relevant contractual provisions.

Conclusion

[64] None of the grounds relied on by the defendant to establish that the contract was terminated by it have succeeded. Consequently the plaintiff is entitled to the relief it seeks, subject to any election it must make between available remedies. By agreement between the parties at the commencement of the trial the question of damages was deferred pending resolution of liability. I invite the parties to agree upon minutes of judgment to reflect the above reasons.