SUPREME COURT OF QUEENSLAND

CITATION:	*Jessop v McInteer* [2003] QCA 170
PARTIES:	**MICHAEL NORMAN JESSOP** (plaintiff /appellant) **v** **MICHAEL DAVID MCINTEER** (defendant/respondent)
FILE NO:	Appeal No 7582 of 2002 DC No 214 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED ON:	24 April 2003
DELIVERED AT:	Brisbane
HEARING DATE:	31 March 2003
JUDGES:	McPherson JA, Fryberg and Muir JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	CONTRACT – CONSTRUCTION AND INTERPRETATION – PAROLE EVIDENCE – BREACH – TERMINATION - DAMAGES – where parties' agreements both oral and in writing – where termination and breach of contract by respondent alleged – whether terms of written contract binding – whether damages are payable for the loss of commission under the contract and loss of opportunity to recover expenditure by the appellant *Sale of Goods Act* 1896 (Qld), s 41(1)(c), s 42 *Boy Scouts of Canada v Doyle* (1997) 149 DLR (4th) 22, cited *Codelfa Constructions Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337, applied *Commonwealth v Amann Aviation Pty Limited* (1991) 174 CLR 64, applied *Doe dem Bedford v White* (1827) 4 Bing 276 (130 ER 773) *Gates v The City Mutual Life Assurance Society Limited* (1986) 160 CLR 1, followed *FCT v Cooke* (1980) 29 ALR 202, followed

Gillespie Bros & Co v Cheney Eggar & Co [1896] 2 QB 59, applied
Hope v RCA Photophone of Australia Pty Ltd (1937) 59 CLR 348, applied
Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41, followed
Hoyt's Pty Ltd v Spencer (1919) 27 CLR 133, distinguished
L J Hooker Ltd v W J Adams Estates Pty Ltd (1977) 138 CLR 52, followed
Luxor (Eastbourne) Ltd v Cooper [1941] AC 108, followed
Majestic Homes Pty Ltd v Wise [1978] Qd R 225, cited
Masters v Cameron (1954) 91 CLR 353, cited
Murdoch (1975) 91 *LQR* 357, cited
Nemeth v Bayswater Road Pty Ltd [1988] 2 Qd R 406, followed
Poseidon Ltd & Sellars v Adelaide Petroleum NL (1994) 179 CLR 332, followed
Roadshow Entertainment Pty Ltd v C E L Home Video Pty Ltd (1997) 42 NSWLR 462, cited
Ross T Smyth & Co Pty Ltd v T D Bailey, *Son* & Co [1940] 3 All ER 60, cited
Smith v Hughes (1871) LR 6 QB 597, distinguished
State Rail Authority of New South Wales v Heath Outdoor Pty Ltd (1986) 7 NSWLR 170, followed

COUNSEL: The appellant appeared on his own behalf
N V Stubbins for the respondent

SOLICITORS: The appellant appeared on his own behalf
Heiner & Doyle for the respondent

[1] **McPHERSON JA:** This is an appeal against a decision in the District Court dismissing the plaintiff's claim for damages for breach of contract. The contract concerned what was called a commission agency for the sale by the plaintiff of boats manufactured by the defendant. The contract later assumed the form of a distributorship agreement in terms of which the plaintiff ordered and bought boats manufactured by the defendant and resold them at a profit. There were some subsidiary issues concerning two vessels named *Bartender* and *Maldives*; but the trial judge disposed of the plaintiff's contentions on those topics, and on appeal nothing has been said to persuade me that his determination in that regard was not correct.

[2] The relations of the parties went through three phases. In the first, which began in May 1999, the agreement was that the plaintiff should receive a commission of 10% on sales of boats manufactured by the defendant which the plaintiff succeeded in selling. At that stage he was acting simply as a selling agent for the defendant in much the same way as an estate agent authorised to find and introduce a purchaser with whom the owner enters into a contract of sale. It is well settled that under those circumstances, the owner is entitled with impunity to revoke his authority at any time before a purchaser is introduced: *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108; *Murdoch* (1975) 91 *LQR* 357, 362-367. That state of affairs continued

throughout 1999 until January 2000, when the parties signed a memorandum dated 11 January 2000 (ex 8) confirming their "commission only" agreement under which sales "generated and produced by" the plaintiff would attract a commission of 10% of the invoiced total price less GST when paid in full to the defendant.

[3] The second phase in the parties' relations began in March 2000 only shortly after the January contract (ex 8) was signed. The parties orally agreed to another arrangement under which the plaintiff was to buy each vessel himself at a price to be fixed by agreement with the defendant, and was then to be free to resell it when and to whom he liked. In that form of transaction, the plaintiff was acting not as agent but as buyer of the goods from the defendant for resale, or "on-sale" as the parties described it, on his own account. Being the principal, he was, of course, entitled to retain any profit on the resale. The "commission only" arrangement which had prevailed until then was not, the plaintiff considered, returning a sufficient remuneration to him for the effort and expense he was investing in promoting boats manufactured by the defendant. He believed he would do better under the new arrangement in which he acted as principal in buying the boats himself.

[4] So matters continued until October 2000. Before entering into a contract to manufacture and sell a specific vessel under the "on-sale" regime, it was necessary for the defendant first to quote a sale price to the plaintiff, which he said he arrived at in conjunction with the plaintiff using material and labour costs as the starting point. He required payment of a deposit of 10% in advance, with the balance on completion before he would release the vessel to the plaintiff. The plaintiff complained at trial that, in insisting on payment at or before delivery, the defendant was exercising some form of commercial duress over him; but in truth he was doing no more than enforcing the right of retention conferred by s 42 of the *Sale of Goods Act 1896* on an unpaid seller pending payment in full of the price, the goods not having been sold to the plaintiff on terms as to credit.

[5] During this phase a number of boats was ordered and manufactured by the defendant. He was keeping an internal register (ex 9) of the boats he was building, which shows a total of 17 ordered or under construction. Only no 1 is shown as having been "sold" by the plaintiff under the 10% commission arrangement, the buyer from the defendant in that instance being a Mr Doug Bliss. From that particular item down to order no 14 there are a further 13 vessels recorded in the register for the year 2000 followed by three (15, 16 and 17) in 2001 and 2002 after relations between the parties had been brought to an end. The plaintiff's name appears against some but not all of the orders received in the year 2000. In evidence, the defendant identified each of the boats ordered by the plaintiff under the "on-sale" agreement. They were nos 3, 7, 8, 9, 10, 11, 12, 13 and 14, making a total of 9 units in all.

[6] It was in the course of these transactions that the plaintiff again approached the defendant with a request, which in due course became the third phase of their relationship, which was referred to by everyone as the October agreement. He produced a document or letter which he asked the defendant to agree to and sign. An undated draft of it became ex 11. It may possibly not have been the only draft because the defendant recalled refusing to agree to some terms which he insisted be deleted, but which do not appear in ex 11. One was that the plaintiff would be working for him; another, to which he objected, was that the plaintiff would, as the defendant put it, have total control of his company. This seems to be an implicit

reference to the fact that the draft did not say that the defendant himself could sell his boats off his own "leads" as they were described. "I made it clear to Mr Jessop", the defendant said in evidence, "that this was unacceptable. I should be able to sell my own boats off my own leads". The defendant insisted on having the relevant paragraph of the letter, or a portion of it, deleted. He had no argument, he said, with the proposal that he would appoint no one besides the plaintiff to do the marketing; but he wished to retain the right to sell off his own leads, meaning by that to people whom he knew or who contacted him independently of prior association with the plaintiff. In other words, he was agreeable to what is sometimes called a solus agreement, but not to an exclusive dealing arrangement under which he himself would be precluded from selling to contacts of his own without paying 10% commission.

[7] The document in its amended form was signed and dated 21 October 2002. It was ex 1 at the trial, and its terms are set out in the reasons of Muir J. As can be seen, those terms do not necessarily achieve the result that the defendant said he was looking for. There are references: (a) in the third paragraph of ex 1, to wholesale distribution and the appointment of distributors around Australia "unless a sale can be identified as a prior customer and lead of Omega Marine"; and (b) in the fourth paragraph, to the agreement applying to "exclusive wholesale purchases and distribution of Omega Craft". A comparison with the draft ex 11 shows that the words "ie before July 1999" have been omitted from the third paragraph, as well as the words "other than through distributors appointed and managed by MNJ", who was the plaintiff.

[8] The plaintiff's claim in the action depends ultimately on his establishing that the October agreement conferred on him an exclusive and irrevocable agency or dealership franchise; that is, one under which the defendant for two years forwent his freedom to sell to contacts made by him, and not by the plaintiff as intermediary, on which the plaintiff was or would be entitled to the agreed commission of 10%. As to that, the two paragraphs to which I have referred are ambivalent. The reference to "exclusive" in the fourth paragraph seems to me to have been misplaced, and is, in my opinion, not sufficiently clear to support the interpretation contended for. That is especially so in the light of the fact that it was the plaintiff's drafting, and in case of ambiguity is to be taken against him; and because the defendant made it clear to the plaintiff before he signed ex 1 that he would not agree to an arrangement which deprived him of the right to sell his boats to his own "leads" without reference to the plaintiff. A promisor is not bound to fulfil a promise in a sense in which the promisee knew at the time the promisor did not intend it: *Smith v Hughes* (1871) LR 6 QB 597, 610; *Majestic Homes Pty Ltd v Wise* [1978] Qd R 225. If what the defendant said in evidence (and his Honour accepted it) is correct, the plaintiff must have been aware that the defendant was not intending to be bound to an exclusive dealership precluding him from selling his boats to others on his own account.

[9] The second of the two authorities referred to was one in which rectification of a written contract was granted. The first (*Smith v Hughes*) did not involve a contract in writing. I am very far from persuaded that ex 1 in this case amounts to a written contract to which the parole evidence rule applies. It is not a contract that appears on its face to be a complete record of the parties' agreement; nor is the writing represented by ex 1 the complete and accurate "integration" of the contract. See *State Rail Authority v Heath Outdoor Pty Ltd* (1986) 7 NSWLR 170, 191-192

(McHugh JA), *Nemeth v Bayswater Road Pty Ltd* [1988] 2 Qd R 406, 414-415. By no stretch of the imagination can it be described as "definite". On the contrary, it is plain on its face that it did not contain the whole agreement of the parties. Its terms are concerned mainly with the commission agency aspect of the parties' relations. Only the penultimate two paragraphs are directed to the "on-sales" element of their previous agreement. No one suggests that that element did not survive the October contract. Indeed, both parties agree that it did. The second last paragraph of ex 1 requires payment by the plaintiff for boat craft as "completed and delivered" to the plaintiff. It says nothing about payment of deposit, which until then had been a term of their dealings throughout, and it would be astonishing if their joint intention suddenly was to omit it. Quite apart from that feature, ex 1 does not look like a contract that is either complete, accurate or integrated. Its manifold drafting defects are far too numerous to justify such a conclusion, which would have the consequence of raising serious questions about the certainty of its terms.

[10] Construed in the way the plaintiff contends, as a contract conferring on him an exclusive agency or distributorship franchise, it involves a serious restriction on the defendant's freedom of trading. Such agreements, if enforceable at all, have traditionally received a narrow and not an expansive interpretation. A major problem for the plaintiff is to demonstrate that the agency or franchise was not revocable at the will of the defendant. There is nothing in ex 1 to expressly oblige the defendant to continue manufacturing boats to the plaintiff's order. He could have ceased doing so altogether if he had wished without being in breach of contract. Only by some form of implication of terms could the defendant be obliged to accept an order from the plaintiff to construct any more of such craft. Equally, there is nothing expressed in ex 1 that would compel the plaintiff either to order any boats or even to sell those which he has already purchased. Before this Court he submitted that consideration for the defendant's giving him an exclusive franchise was to be found in his efforts and expenditure in promoting the sale of boats of the defendant's manufacture. But it does not follow that the services he rendered were provided as a *quid pro quo* in exchange for the defendant's promise, if any, to confer an exclusive dealership or distributorship in what ex 1 describes as "Omega Craft". Except as to each individual boat ordered by the plaintiff and manufactured by the defendant, there was no standing offer or binding promise by the defendant to pay him commission, or not to revoke or retract his exclusive agency or distributorship franchise. *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108 is authority for saying that, in the case of the agency agreement, he was free to do so even though on one view he had agreed not to do so for two years. The authority of that decision has been recognised in Australia: *L J Hooker Ltd v W J Adams Estates Pty Ltd* (1977) 138 CLR 52.

[11] If there were such an offer or promise, it would be necessary to distinguish between services provided by the plaintiff before and after the October contract. Only those services, if any, provided after 21 October 2000 would be capable of constituting supporting such a promise. Those that were rendered before that date, being past and done with, could not in law satisfy the test. There is no evidence anywhere of a request express or implied on the part of the defendant to the plaintiff for those services to be provided. In short, as was said by the Full Court of the Federal Court in *FCT v Cooke* (1980) 29 ALR 202, 215, in speaking of the distribution arrangement there in issue:

> "Here the parties were in the position of manufacturer and retailer. One sold and the other bought bottles of soft drink. The retailer paid the manufacturer a price for those drinks.
>
> There was no service which the respondent retailer rendered to the manufacturers. Although the successful conduct of the retailers' respective businesses enhanced the sales by the manufacturers to the retailers, and added to the notoriety of the manufacturer's products, the conduct of the retailers' business was not a service rendered to the manufacturers. The businesses were conducted for the benefit of the retailer, and the advantages which thereby accrued to the manufacturers were not the product of services rendered to the manufacturers. Advantages accrued to the manufacturers because the retailers, independently of any obligation owed to the manufacturers, conducted their businesses in a way which yielded advantages to both. It is true that the retailer was required to keep a round book containing a record of customers, but we agree with Jenkinson J that this was no more than the 'performance of an obligation ancillary to the agreement for sale and resale of the products'.
>
> The relationship was essentially one of seller and buyer. The taxpayers did not render services to the companies with which they had contracted.

The precise point at issue there concerned assessability to income tax; but Dean J, who was a member of the Full Court on that occasion, later cited with approval the above passage in the wider context of *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 122. There the relevant contract expressly incorporated a provision from the Uniform Commercial Code imposing an obligation on the buyer to "use best efforts" to promote the sale of the goods. No such obligation is imposed on the plaintiff in the October contract ex 1.

[12] As it happened, after the October contract was executed no more orders were placed by the plaintiff for boats to be manufactured by the defendant. That was the evidence of the defendant, which was accepted by the trial judge. The boat register ex 9 tends to bear him out. It shows that the boat the subject of order no 12 was the last vessel sold and delivered to the plaintiff. It is annotated in the register as "Sold to… Jessop", the "Date out" (which was the date of delivery) being given as "10.11.00" and the total price as $2,416, which was less than the preceding order no 11 at $2,658. The defendant said he discounted it for the plaintiff. The plaintiff's final two orders were nos 13 and 14. Some time after those two orders had been placed, the plaintiff arrived at the workshop and said "Stop work on the boats. They are too heavy". The defendant said "Look, I'm sorry. I've made a commitment here". When the two craft were completed, and the plaintiff was notified to take delivery, a meeting took place at the premises of the defendant attended by him, his wife and his secretary, as well as by the plaintiff himself. The plaintiff informed those present that he was in financial difficulties and was not going to complete the sales on those two boats. The defendant agreed to and did refund the deposits on those two vessels. He later sold them himself, one (no 13) to someone in Brisbane; the other (no 14) was taken into stock and, at the time of the defendant's testimony at the trial, had only "recently" been sold. The defendant said he was unhappy at having the boats landed back on him after they had been ordered by and built for the

plaintiff. On 14 December 2000 solicitors for the defendants on his instructions sent a letter to the plaintiff saying that all contractual arrangements between him and the defendant were terminated. The letter added that if the plaintiff "wished to continue to be involved in the marketing of Omega craft", he would be required to pay the full price of the boats in cash on delivery at the defendant's premises. The plaintiff never sought to take advantage of this offer. Nor did he ever again introduce or attempt to introduce a prospective purchaser to the defendant. The defendant had not refused to deal with him at all, but had simply refused to do so on terms that the plaintiff had an exclusive, as distinct from sole, agency or dealership.

[13] The plaintiff considered this conduct by the defendant to be a repudiation of the October contract for which he claimed damages in proceedings in the District Court. The learned trial judge rejected the plaintiff's claim for unpaid commission earned on sales, as well as his claim for damages for breach of contract consisting of loss of the opportunity to earn further commissions and, it may be, profits on resales of boats. He did so essentially on the ground that the defendant was entitled to terminate the October contract because of the plaintiff's refusal or inability to complete the sales of nos 13 and 14 when called upon to do so. His Honour also assessed at nil the damages recoverable by the plaintiff for loss of the chance to earn commissions on future sales of the defendant's boats. Only by introducing future purchasers could the plaintiff have established a right to commission of 10% on sales. He failed to establish that he would ever have been in a position to do so.

[14] I respectfully agree with his Honour's conclusions. The plaintiff had refused to accept delivery of the last two boats numbered 13 and 14 after he had ordered them and they had been completed. That was plainly a breach of his contract with the defendant to pay on delivery for the vessels he had ordered. Under the October contract he had agreed to pay for boat craft "as they are completed and delivered". The reason he gave for refusing to take delivery was "financial difficulties", which in the context can only mean that he was unable to pay those debts as they fell due. So far as the evidence goes, he gave no indication that his difficulties were only temporary or that he would in the future be able to pay for them or for any further orders placed. He made no offer to do so. The defendant was left with the two boats, which he would not have built if the plaintiff had not contracted to buy them, and which in the case of no 14 took a long time to sell. The risk of loss on resale, which he had expected the plaintiff to bear, was thus thrown back on him. In the meantime, his own working capital, and not that of the plaintiff, was tied up in those two boats.

[15] In my opinion he was justified in terminating the contract as and when he did. It is not clear from the evidence precisely when the meeting took place at which the plaintiff announced his financial inability or unwillingness to pay for the two boats. It must, however, have been before 14 December 2000, when his solicitors' letter of termination was sent, and it is a compelling inference that it was after 10 November 2000, when, according to the boat register "date out" against order no 12, the last boat was delivered and paid for by the plaintiff. Given the sequence of events, it seems likely that the letter was sent soon after that meeting; for the plaintiff's financial position and his refusal to accept delivery of nos 13 and 14 was what prompted the defendant to give instructions to the solicitors to terminate the contract.

[16] The defendant said that, thinking about what had happened and what had been said by the plaintiff at that meeting, he was unhappy about the plaintiff ordering boats

and then refusing to take delivery of or pay for them; he wondered how often he was "going to be caught". When regard is had to the fact that these were two out of the only three vessels completed for delivery after (although ordered before) ex 1 was entered into, he was in my opinion justified in terminating the contract for breach by the plaintiff. Cf *Benjamin's Sale of Goods* (5th ed) §8-074. Continuing to be bound by an exclusive agency or exclusive dealing restraint, if there was one, precluding him from selling boats himself which the plaintiff had ordered, but refused or failed to pay for when built, was wholly inconsistent with what he had agreed to in the October contract. In my view his conduct in returning the deposits on nos 13 and 14, and retaining those boats himself, cannot be regarded as a waiver on his part of the plaintiff's repudiatory breach so as to preclude the defendant from terminating the October contract. On the contrary, he was doing no more than exercising his statutory right of resale under s 41(1)(c) of the *Sale of Goods Act*. Indeed, if the plaintiff was justified in regarding the defendant as continuing to be bound by the exclusive dealing arrangement in ex 1, the defendant would have been in breach of its terms when he sold boats no 13 and 14. The plaintiff raised no objection to the defendant's doing so. He can surely not have expected the defendant to retain those boats indefinitely against the day, if it ever came, when the plaintiff might return to pay for and take delivery of them. The plaintiff made no offer to do so. The fact that the defendant returned the deposits which had been paid on those two boats cannot count against him. It demonstrated his intention of treating the October contract as at an end, which was something that his solicitors' letter dated 14 December 2000 amply confirmed.

[17] I consider that the learned trial judge was correct in reaching the conclusion which he did. The appeal should be dismissed with costs.

[18] **FRYBERG J:** For the reasons given by Muir J, this appeal should be dismissed with costs.

[19] **MUIR J:**

The pleadings

[20] This appeal is by a plaintiff whose claims in the District Court for damages for breach of contract were dismissed with costs. The Statement of Claim consists of four paragraphs and a prayer for relief. The first paragraph claims for "unpaid commission arising from sale of 'Maldives Boat'". The second paragraph claims damages for breach of contract –

> "relating to delivery and supply of goods and services of outboard engine, and installation thereof including cabling and wiring to controls and navigation rights … of a proto-type five metre OMEGA craft 5000 'Bartender'.

It was also alleged in respect of the "Bartender" that the respondent unreasonably refused to pay for "installation work … and … goods after premature termination of contract …".

[21] The remaining paragraphs claim damages "arising from numerous unreasonable, unscrupulous, predatory and tortuous acts to frustrate the contract by the defendant" and for "the premature and unreasonable termination thereof on 15 December 2000 … frustrating the plaintiff's opportunity to recover sales marketing and P.R. effort …". There is a further claim for damages for breach of contract,

> "relating to commission only sales, marketing and public relations agreement for foregone commission December 2000 – November 2002 owing to premature termination of contract by the defendant …"

The claim thus has two components, one is for loss of commission and the other is for the loss of opportunity to recover past advertising, sales and marketing expenditure.

[22] The three claims are for $450, $3,674 and $65,293 respectively.

[23] The defence denies the allegation in paragraph 1 on the basis that the alleged transaction had nothing to do with the respondent. The response to paragraph 2 of the statement of claim is to the effect that the "outboard engine and other equipment fitted" to the "bartender" were supplied and fitted by a third party at the request of the appellant, that such equipment was removed from the craft and returned to the supplier or to the appellant and that the expense so incurred "was incurred by the plaintiff and not by the defendant".

[24] The response in the defence to the remaining, and more general, allegations is that:-

(a) Although a document dated 21 October 2000 entitled "Sales, Marketing and Public Relations Agreement" ("the October Agreement") was signed by the plaintiff and the defendant "the relationship between the parties was not governed by that document and … neither party adhered to it";

(b) Both before and after 21 October 2000 the respondent sold boats to the appellant on terms that he paid a 10% deposit before manufacture, paid the balance purchase price on delivery and made no claim for commission. Further, the price on re-sale by the appellant was not required to be disclosed to the respondent;

(c) The October Agreement was terminated by the respondent on 15 December 2000.

[25] The defence, by alleging termination of the October Agreement, admits implicitly that such an agreement was entered into and was in existence on 15 December 2000. The pleader deemed it unnecessary to supplement this allegation of law with allegations of the material facts on which he proposed to rely. Nor is it disclosed whether the alleged termination was for breach or for some other legally justifiable reason.

[26] The reply is a much lengthier document than the statement of claim but is argumentative in nature, contains lengthy discussions of evidence thought relevant by the appellant and is of little assistance in defining the issues to be litigated.

Relevant findings of the primary judge

[27] The learned primary judge found that -

(a) After the signing of a document dated 11 January 2000 headed "Confirmation of Commission only Sales and Marketing Agreement" the appellant and the respondent entered into an oral "on-sale agreement" which did not contemplate the payment of a commission and under which it was agreed that upon the appellant's ordering a boat and paying a deposit

the respondent would manufacture the boat and, upon its completion, the appellant would "make the final payment and take possession".

(b) The agreement between the parties was partly oral and partly written. The written part being the October Agreement and the oral part consisting of the on-sale agreement and other oral terms under which the appellant was required to pay a deposit in respect of each transaction and by which the respondent "reserved to himself the right to sell his own boats."

[28] Immediately after the finding as to the content of the agreement between the parties the reasons state -

> "That is, I find in the context in which the October document was signed the October document was part of the agreement between the parties or it was subject to the "on sale" agreement."

[29] Earlier in his reasons the primary judge found that the oral on-sale agreement was entered into sometime between January and October 2000. He found it to be a term of that agreement that the appellant was required to pay a deposit on ordering a boat. There is no express finding, however, that the on-sale agreement contained a term reserving to the respondent the right to sell his boats himself. That reservation, according to the reasons, was made by the respondent in discussions with the appellant prior to the discussions which gave rise to the October Agreement.

[30] In that regard, it was found that there was discussion between the parties concerning sole marketing rights prior to 21 October centring on a draft of the October Agreement prepared by the appellant. In the course of such discussion –

> "The [respondent] said the draft document did not say that the [respondent] could sell his boats off his own leads. He said he made it clear to the [appellant] that this was unacceptable. He said he should be able to sell his own boats off his own leads. The [respondent] said that the [appellant] wanted to have the [respondent] agree not to appoint anyone else over and above him to do the marketing. The [respondent] said he had no argument with that. The [respondent] said he told the [appellant] that he would like the opportunity to sell his own boats."

[31] His Honour found also –

> "… I do not accept the parties did not adhere to the October document as claimed in the defendant's defence."

The point being made seems to be that there were no transactions between the parties after the October Agreement and thus no acts by the parties showing that the October agreement was not intended to be binding on them.

[32] His Honour went on to find that there was a breach by the appellant of the composite agreement between the parties which entitled the respondent to terminate it. That breach was identified as the failure by the appellant to "complete the sale of the two boats on the terms of the 'on-sale' agreement".

[33] It was found also that even if the agreement had not been terminated the appellant had failed to establish any loss as "the probability of sales occurring after December 2000 would be so low as to amount to speculation".

Grounds of Appeal

[34] The only grounds of appeal are –

> "Because the lower court has erred in fact relating to entitlement by the defendant to terminate the contract."

[35] On appeal the appellant did not regard himself constrained by these grounds. The respondent's counsel made no objection to this course of conduct, perhaps bearing in mind the way in which matters had unfolded at first instance.

Summary of relevant facts

[36] The facts relevant to the issues for determination are in short compass. Any difficulty which exists in their ascertainment arises through the imprecise and often confusing manner in which the evidence was presented. The facts may be summarised as follows:

[37] The respondent is a manufacturer of small boats. In about mid 1999 he was approached by the appellant who proposed that he be appointed agent to sell the respondent's boats on the basis that the appellant be entitled to payment of a commission of 10% of the sale price. On 11 January 2000 the respondent prepared the document headed "Confirmation of Commission Only Sales and Marketing Agreement" which the respondent also signed. That document provided inter alia:

> "... I hereby confirm the commision only sales and marketing agreement made between Mike Jessop and Michael McInteer of Omega Marine in May 1999 for the sale of Omega Craft directly through sales generated and produced by Mike Jessop and which will attract a commision of 10% of the invoiced total when paid in full (less any sales tax or GST applicable) payable to Mike Jessop…"

[38] Shortly after that document was signed, the appellant approached the respondent's secretary and informed her that the 10% commission was unsatisfactory to him and that "he would be moving it to an on sale agreement where he would purchase the boats off us and on – sell them." It does not appear that there was any discussion directly between the appellant and the respondent concerning the proposal but, with the exception of the dealings in relation to the boat "Bartender", all business between the parties was thenceforth conducted on this new basis. Under it, the respondent paid no commission and the profit or benefit obtained by him from the purchase and sale of the boats was the difference between the price he paid to the respondent and the price he was able to obtain from purchasers of the boats less his costs of sale. Adopting the terminology employed in the trial, sale transactions conducted on this basis will be referred to as sales on the on-sale basis.

[39] Only one transaction between the parties took place on a commission only basis and that was in 1999. In 2000, five boats were acquired by the appellant on the on-sale basis. The appellant, in the latter half of 2000, paid deposits on two further boats (which were described in evidence by reference to the defendant's register of manufactured boats as boats 13 and 14) which he ordered from the respondent. These transactions were on the on-sale basis also. Before they were finalised, the appellant, owing to financial difficulties being experienced by him, requested that the transactions be terminated and that the deposits be returned.

[40] There was some controversy about when the deposits were returned. The appellant, in cross-examination after consulting documents which appeared to include his diary, agreed that the deposits were returned to him in November. He later cross-examined on the basis that they were returned in September. The respondent gave conflicting evidence on the point but the thrust of his evidence was that his best recollection was that the deposits would have been returned after the signing of the October Agreement.

[41] The October Agreement, which had been drafted by the appellant, was entered into after fairly brief discussion and negotiation between the parties. It provided inter alia:

> "1. … As an authorised Director and Shareholder of OMEGA MARINE instructing Michael N JESSOP as a commission only salesman in the sales and marketing and public relations of Omega Craft boat since May 1999 this agreement is to confirm MNJ's position as sales and marketing manager for the demonstration and acceptance and testing and delivery of OMEGA boat craft to prospective purchasers and customers and people who influence the purchase of such boats on a commission only basis.
>
> 2. And such sales which will attract a commission of 10% of the invoiced less GST total payable to Michael N JESSOP t/a OMEGA MARKETING taking into account GST regulated tax inputs and outputs sold directly by MNJ.
>
> 3. This agreement applies to the wholesale distribution and appointment of distributors in and around Australia unless a sale can be identified as a prior customer and lead of OMEGA MARINE…
>
> 4. And the agreement applies to exclusive wholesale purchase and distribution of OMEGA CRAFT.
>
> 5. And by way of confirmation of Commission Only Sales and Marketing Agreement between Michael N JESSOP t/a OMEGA MARKETING OMEGA MARINE and agree not to sell directly or indirectly to any other customer at a price lower than the wholesale price available to MNJ and, in the event such a sale eventuates and if the sale would otherwise reasonably have been lost through sickness or absence of MNJ a commission of 10% will be payable to MNJ of the purchase price ie 10% of the sale price to the customer less 10% GST. . .
>
> 6. Omega Marine agrees to put all prospective buyers on to MNJ…
>
> 7. In the event of no sales from MNJ within a reasonable period Omega Marine will have the right to sell to whom it wishes no commission to MNJ will applicable….

> 8. And MNJ agrees to pay for boat craft as they are completed and delivered to his complete satisfaction upon inspection at the wholesale price OR at sale price less a 10% commission of the end customer purchase price by cheque or cash in Australian Dollars.
>
> 9. This agreement to be renewed in two years from the date of this agree or unless otherwise agreed in writing…"

(The paragraph numbering has been added for ease of reference.)

[42] It may be seen that despite the fact that early in 2000 the parties had abandoned any previously existing agreement entitling the appellant to commission on sales, the October Agreement, in paragraph 1, purported to confirm the appellant's appointment as "a commission only salesman … since May 1999". As the previous discussion shows this was not an accurate statement of the terms on which the parties dealt prior to 21 October. Nor did it accurately state the effect of the October Agreement as reference to paragraph 8 of the agreement makes apparent.

[43] On 14 December 2000 the respondent's solicitors wrote to the plaintiff noting "the basic arrangements contemplated by the Sales Agreement which has never really been observed by either party for some time" and stating that their client wished to terminate the October Agreement. The letter also recorded that the respondent had no objection to the appellant purchasing the respondent's boats if he did so on a cash on delivery basis. The respondent's solicitors wrote to the appellant again on the following day, referring to a "without prejudice" letter from the appellant dated 15 December, and stating:

> "…. To the extent that any sense can be made of the 'Sales Marketing and Public Relations Agreement' it is clear that your remuneration under the agreement is on a commission only basis. Your claim for payment set out in your "tax invoice" has no foundation in the 'Sales Marketing and Public Relations Agreement'.
>
> Mr and Mrs McInteer deny any liability to pay you any money.
>
> The 'Sales Marketing and Public Relations Agreement' is hereby terminated…."

[44] It will be noticed that the letter makes no allegation of breach of contract or of repudiatory conduct.

[45] There is also doubt about whether any new transactions of sale and purchase were entered into between the date of the October Agreement and the date on which the respondent purported to terminate it. The appellant sought to prove the contrary by reference to a handwritten document tendered by him on the trial which contained two columns of figures. One, under the heading "Invoices", listed each of the totals on six invoices of the respondent for boats sold by it to the appellant between 5 September 2000 and 20 October 2000. The second column, under the heading "chq book payment" listed the following –

> "12/9 3134.74
> 12/9 440.00
> 9/11 2041.36
> 9/11 3721.20

9327.30"

[46] The appellant led no evidence about the meaning of these entries and, on their face, it is inconceivable that they could all represent sale prices of boats. At best for the appellant, they are merely evidence of payments made by the appellant to the respondent in satisfaction of liabilities incurred prior to the dates of the cheques.

[47] The foregoing discussion is not intended to convey that there were no contractual dealings between the parties after 21 October and before 15 December. Boat 12 was paid for by the appellant and appears to have been delivered on 5 or 15 November 2000. The sale was on the on-sale basis but the evidence does not reveal when the order was placed.

Conclusions as to the nature of the contractual relationships

[48] In view of the foregoing the primary judge concluded, correctly, that the allegation in the defence that after the date of the October Agreement the parties acted only on the basis of the on-sale agreement cannot be sustained. The correctness of the finding is fortified by the fact that the October Agreement contemplated sales on such a basis as well as on a commission basis. Nor does the evidence support the respondent's contentions that "the relationship between the parties was not governed by that document [ie, the "October Agreement"] and that neither party adhered to it."

[49] There is no allegation in the pleadings that the October Agreement was not intended at the time of signing to be legally binding. Nor are there any allegations of mistake or uncertainty or any claim for rectification. The parties having litigated on the basis that the October Agreement was legally binding it would, in my view, be inappropriate to determine the appeal on any other basis. It follows that, unless lawfully terminated, the October Agreement continued to be binding on the parties.

[50] Whatever may have been the position prior to 21 October, once the October Agreement was entered into, subject to one qualification I am about to make, it governed the parties' trading relationship.

[51] Where parties have reduced their agreement to writing they are permitted to give evidence of prior negotiations and surrounding circumstances for limited purposes only. One such purpose is to determine whether it was the intention of the parties, objectively ascertained, to be legally bound by the alleged agreement.[1] Another is to establish whether the instrument in writing expresses all the terms of the parties' agreement.[2]

[52] In *State Rail Authority of New South Wales v Heath Outdoor Pty Ltd*,[3] McHugh JA approved the following statement by the English Law Commission – [4]

> "… the mere production of a contractual document, however complete it may look, cannot as a matter of law exclude evidence of oral terms if the other party asserts that such terms were agreed. If that assertion is proved, evidence of the oral terms cannot be excluded because the court will, by definition, have found that the

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1 Cf *Masters v Cameron* (1954) 91 CLR 353, 362.
2 *Hope v RCA Photophone of Australia Pty Ltd* (1937) 59 CLR 348 at 357.
3 [1986] 7 NSWLR 170 at 192.
4 Law of Contract, The Parol Evidence Rule (January 1986) Cmnd 9700, par 2.12 at 11.

> contractual terms are partly to be found in what was agreed orally as well as the document in question. No parol evidence rule could apply. On the other hand, if that assertion is not proved, there can be no place for a parol evidence rule because the court will have found that all the terms of the contract were set out in the document in question and, by implication, will thereby have excluded evidence of terms being found elsewhere."

[53] Where the parties enter into "a definite written contract", there is a strong implication that it contains all the terms of their bargain but "it is open to either party to allege that there was, in addition …, an antecedent express stipulation not intended by the parties to be excluded, but intended to continue in force with the express written agreement.[5]"

[54] There can be little doubt that the October Agreement was intended to be a contractual document. The appellant presented a precursor of it to the respondent who, after due consideration, altered it so that its content was satisfactory to him. That was done after brief negotiations between the parties. The final document was then prepared by the respondent, signed by both parties and dated. It bears the heading "Sales Marketing and Public Relations Agreement". Although it bears the signs of having been prepared by a person untutored in legal drafting who lacks precision of thought, its language is plainly that of contract.

[55] There is a considerable body of evidence, however, to the effect that at all times the understanding of the parties was that the respondent would not be obliged to commence work on a boat unless he was first paid a deposit of 10 percent of the sale price. That evidence establishes that when signing the October Agreement the respondent had no intention of abandoning the deposit requirement, which was a term of the on-sale agreement, and that the appellant was aware that the respondent believed that he retained the right to insist on a deposit as before.

[56] I think it likely that the appellant was endeavouring, by the October Agreement, to circumvent the deposit requirement. Whether he was successful in doing so does not depend on the determination of any subjective intent but upon the ascertainment of the objective intention of the parties gleaned from the language of the October Agreement and from the parties' conduct.

[57] The better view of the parties' dealings in this case is that the term of the on-sale agreement requiring the appellant to pay a deposit in ordering a boat continued in existence unaffected by the October Agreement. As no new collateral oral agreement to that effect was entered into around the date of the October Agreement there is no scope for the operation of the rule in *Hoyt's v Spencer*.[6]

Was there a breach of the October Agreement which entitled the respondent to terminate?

[58] As has been mentioned previously, the defence alleges termination but not the breach of the October Agreement and the allegation is unparticularised. The reason for the termination of the agreement given by the respondent in cross-examination was the failure by the appellant to proceed with the sales of boats 13 and 14. The primary judge identified the breach as the failure to complete the sales of boats 13

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5 *Gillespie Bros & Co v Cheney Eggar & Co* [1896] 2 QB 59 at 62 per Lord Russell CJ.

6 (1919) 27 CLR 133

and 14 "on the terms of on-sale agreement that were still on foot after the October document was signed."

[59] I agree with the primary judge that the agreement between the parties was partly oral and partly written, but I cannot accept that what occurred could be said to be a breach of the parties' agreement or that the entitlement to terminate the agreement was established.

[60] At one point in his evidence during cross-examination the respondent gave this account of the circumstances leading up to the return of the deposits –

> "The first indication that there was trouble was that Mr Jessop come running into the workshop and said to me, 'Stop work on the boats.' Terry was there, the boat builder. 'They are too heavy.' I just was – said, 'Well, look, I'm sorry. I've made a commitment here. I'm – we will carry on.'"

After this exchange, boats 11 and 12 were delivered and, presumably, paid for. The deposits were then returned.

[61] The effect of other evidence is that the appellant, having run into financial difficulties, asked to be let out of the subject transactions and for deposits to be returned. The respondent, although displeased at the prospect of having this expensive stock on his hands, acceded to the appellant's request and returned the deposits. When doing so he did not allege any wrongful conduct on the part of the appellant or otherwise reserve his rights. He continued to deal with the appellant by completing the sale of boat 12.

[62] In these circumstances, there was no breach of contract. The appellant did not fail to pay for the boats when required to do so as the time for performance of such an obligation could not arise once the respondent returned the deposits and implicitly excused the appellant from further performance. There may have been an anticipatory breach of contract by the appellant which could have been relied on by the respondent. But repudiation is "a serious matter not lightly found or inferred".[7] Repudiation was not alleged by the respondent and the return of the deposits in the circumstances just described is inconsistent with the acceptance of any repudiation. I conclude therefore that the respondent did not lawfully terminate the agreement between the parties.

[63] After 15 December, although the pleadings do not deal with the point directly, the appellant seems to have accepted this conduct by the respondent as grounds justifying termination by him of the parties' agreement.

The appellant's claim for damages resulting from the respondent's repudiation of the October Agreement.

[64] The appellant's damages claim is particularised in an invoice dated 25 January 2001 which he delivered to the respondent. In it the he seeks reimbursement for –

a) $30,000.00 described as "12 months at 1/2 salary $60,000.00".

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[7] Lord Wright in *Ross T Smyth & Co Pty Ltd v T D Bailey*, *Son* & Co [1940] 3 All ER 60 at 71 in a passage referred to with approval in *Roadshow Entertainment Pty Ltd v C E L Home Video Pty Ltd.* (1997) 42 NSWLR 462 at 479 and in the authorities cited at that reference.

b) $5,910.00 described as "12 months at 1/2 sales marketing and PR effort".

[The latter sum was the total of a number of items which appear to be estimates of overheads the appellant would have occurred had the Agreement not been terminated].

c) $20,000.00 on account of an additional "six months at 2/3 salary $60,000.00".

d) $3,456.66 on account of overheads of the nature of those previously specified, but this time divided by two thirds.

[65] The measure of damages for breach of contract is described in the following passage from the joint judgment in *Gates v City Mutual Life Assurance Society Ltd* – [8]

> "In contract, damages are awarded with the object of placing the plaintiff in the position in which he would have been had the contract been performed – he is entitled to damages for loss of bargain (expectation loss) and damage suffered, including expenditure incurred in reliance on the contract (reliance loss)."

[66] The claim formulated by the appellant bears no relationship to either basis of damage. It claims compensation for some notional loss of salary and for expenses which were not incurred. In order to sustain the latter component of his claim the appellant asserts that the moneys claimed are "wasted expenditure" or "reliance damages" and recoverable in accordance with principles expressed in the *Commonwealth v Amann Aviation Pty Limited*.[9]

[67] It was affirmed in *Amann* that where a contract has been lawfully terminated by a plaintiff as a result of the defendant's breach, the law will assume that expenditure by the plaintiff in reliance on the contract would have been recovered had the contract been performed, even though the plaintiff fails to prove that it would have made a net profit in such circumstances. The plaintiff, however, must prove that such expenditure was in fact incurred and that it was reasonable to incur it.[10] Also, it is open to the defendant to establish that even if the contract had been fully performed, the plaintiff would not have recovered his reasonable expenditure.[11]

[68] The evidence led by the appellant does not establish the reasonable expenditure of moneys under or in reliance on the October Agreement. There was thus no "reliance" loss and I return to a consideration of the loss of profits claim.

[69] In response to questioning by the primary judge the appellant asserted that had the respondent not breached the agreement he "could have easily been selling a couple of boats a week easily". Having regard to the number of boats sold by him in the period of 12 months or so prior to 15 December 2000, that assertion lacks credibility. His Honour did not accept it and he found the appellant's evidence generally unreliable.

[70] The appellant, not surprisingly, having regard to the way in which his claim was formulated, led no other evidence with a view to establishing the number of boats which, on the balance of probabilities, he would have been able to sell had the

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8 (1986) 160 CLR 1 at 11-12.
9 (1991) 174 CLR 64.
10 *Amann (supra)* per Mason CJ and Dawson J at 86.
11 *Amann (supra)* at 87 per Mason CJ and Dawson J.

October Agreement not been terminated. Nor did he attempt to establish the probable sale prices for any such sales or the cost to him of effecting such sales. In this regard, his evidence that he made no profit on four boats purchased by him under the on sale agreement and resold is hardly helpful to his claim. Nor is the evidence that in early 2000 he abandoned commission only sales in favour of the on-sale basis because he perceived the latter to be more beneficial to him.

[71] In formulating the terms of the October Agreement, the appellant regarded it necessary to retain the ability to deal on the on-sale basis. That does not suggest any confidence on his part that sales on a commission basis would be more profitable to him than sales on the other basis. Another piece of evidence which is harmful to the appellant's damages claim is his evidence of inability to proceed with the sales of boats 13 and 14. That shows an inability on his part to find buyers.

[72] The basic measure of the appellant's damages for the respondent's repudiation of the October Agreement was the amount of commission to which he would have been entitled on the commission earning sales he would have been able to effect during the period of his claim less the cost of making the sales.

[73] The respondent's evidence was that since 15 December 2001 he sold only five boats, two of which were boats 13 and 14. The Statement of Claim did not seek commission on the sales of these boats and in the course of his evidence the appellant expressly disavowed a claim for such commission. As matters proceeded however the primary judge raised the possibility of such a claim and the appellant appeared to embrace it without objection by the respondent. It is therefore necessary to digress to examine the merits of this more limited claim. In order to see whether such a claim has substance it is necessary to consider the terms of the October Agreement.

[74] That agreement, whilst making the appellant the respondent's sole agent for the sale of respondent's boats, enables the respondent to sell his boats to any person who meets the description of a "prior customer" or where the sale results from one of the respondent's own "leads". The agreement refers to "prior customer **and** lead" but there is little doubt that "and" in this context is used disjunctively in the sense of "or".[12] Extrinsic evidence, which is admissible as the words under consideration are susceptible of more than one meaning,[13] provides overwhelming support for this conclusion.

[75] The parts of the October Agreement of particular relevance to this discussion are those numbered in the earlier quotation of some of its provisions extracts from the October Agreement.

[76] There is an apparent conflict between the exclusion from the third paragraph of the Agreement of prior customers and leads on the one hand and the next paragraph (which refers to "exclusive wholesale purchase and distribution") and paragraph 6 (in which the respondent agrees "to put all prospective buyers on to" the appellant).

[77] It is possible however to construe the document in a way which gives some meaning to all of its provisions. Paragraphs 3 and 4 appoint the appellant the respondent's

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12 cf *Doe dem Bedford v White* (1827) 4 Bing 276 (130 ER 773) and *Boy Scouts of Canada v Doyle* (1997) 149 DLR (4th) 22 at 58.

13 *Codelfa Constructions Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 352.

sole agent for the sale of the boats but paragraph 3 acknowledges that the respondent retains a limited right to sell boats himself. Paragraph 5 confirms that right by providing that if the respondent's sales are lower than a specified price the appellant becomes entitled to 10% commission on the sale.

[78] Paragraph 6, if construed broadly and applied without regard to other parts of the document would prevent, in a practical way, the respondent from himself selling his boats. When considered in the light of the other provisions just discussed, however, it becomes apparent that it does not apply to prospective buyers who come within the exclusion in paragraph 3.

[79] The evidence supports the conclusion that any boats sold by the respondent after 21 October resulted from the respondent's leads. Consequently, no commission is payable by operation of the terms of the October Agreement.

[80] It follows from the conclusion that the post October Agreement sales resulted from the respondent's leads (and from the respondent's evidence) that there were no such sales as a result of any of the appellant's leads prior to 15 December.

[81] The appellant's broader damages case has additional problems. He was in financial difficulties and seemingly could not pay deposits unless he obtained the deposit moneys from a prospective buyer. And, on his own evidence, the prices for the boats being demanded by the respondent were too high to encourage purchasers.

[82] In circumstances where precise evidence of damages is not available mere difficulty in estimating damages does not prevent the court from estimating them as best it can.[14] Additionally, damages for deprivation of a commercial opportunity, which is what is now under consideration, stand to be assessed "by reference to the court's assessment of the prospects of success of that opportunity had it been pursued".[15] The plaintiff, however, must show that "*some* loss or damages was sustained by demonstrating that the contravening conduct caused the loss of a commercial opportunity which had *some* value".[16]

[83] For the reasons advanced earlier the appellant failed to do this and the primary judge was correct in concluding that the appellant had failed to establish any loss or damage.

[84] The appellant also advanced a claim based on the alleged unconscionable conduct of the respondent in increasing prices for his boats. There is no credible evidence of any increase after the date of the October Agreement upon which the appellant sues. Moreover, the findings of the primary judge do not support any such claim. It is therefore unsustainable.

Claim for $3,674.00 in respect of the craft "Bartender".

[85] This claim is in respect of an engine and other materials which the appellant caused to be fitted to a boat manufactured by the respondent which the parties contemplated would be used as a prototype for promotional purposes. The respondent referred to it as "a research boat" and the appellant did not demur from that description.

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14 *Amann (supra)* at 83.

15 *Poseidon Ltd & Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 355.

16 *Poseidon Ltd & Sellars (supra)* at 355.

[86] The primary judge found that "any loss suffered by the plaintiff for the supply and installation of the outboard engine and equipment for the "Bartender" is an expense he incurred in his own interests to improve his prospects of earning commission." It was further found that the respondent had no obligation to reimburse the appellant for any such expense.

[87] The foundation in law for the appellant's claim is uncertain. It is perhaps a claim on a quantum meruit or based on restitutionary principles. However, as it is framed the evidence does not support it. The primary judge accepted the respondent's evidence. Relevantly, it was to the effect that when the appellant requested a fit out of the nature of that eventually undertaken, the respondent told him that if he wished to proceed with it it was a matter for him entirely. The boat after its fitting out by the appellant was returned in due course to the respondent who removed the materials fitted by the appellant and returned them to him.

Claim for unpaid commission of $450.00 arising from the sale of the Maldives Boat.

[88] The findings in this regard are that the boat was sold by the respondent, that the appellant was not the effective cause of the sale and that the sale was one which the respondent was "entitled to make without any obligation to pay commission to the (appellant)".

[89] The boat was described as the "Maldives boat" because it was sold to a purchaser resident in the Maldives. The respondent's evidence was that the appellant played no role in the sale of that vessel. Moreover, the sale was effected whilst the parties were conducting business pursuant to the "on-sale" arrangement and prior to the entering of the October Agreement. Under that arrangement there was no entitlement to commission and the appellant's claim is unsustainable.

Conclusion

[90] For the above reasons the appellant has failed to establish that the orders made at first instance were wrong and I would dismiss the appeal with costs.