

## LEGAL RESEARCH ANSWER AND ROUTE

### LEGAL RESEARCH ANSWER

#### MAIN ISSUES

- Has title of the caravan passed from Mr Portman to Mr Michael Moorehead (Moorehead)?
- In the event that title has passed, what remedies are available to Mr Portman against Grange Garage (GG)?
- In the event that title has not passed, what remedies are available to Mr Portman against GG, and is Mr Portman entitled to pick the caravan up from the garage?
- Is Mr Portman obliged to pay the £452.00 + VAT to GG?
- What is the procedure for bringing any of the above actions, and under this procedure is there a chance that Mr Portman can recover the vehicle before 9<sup>th</sup> February, when he had been intending to use the vehicle for a family holiday?

#### LEGAL ANSWERS

##### 1. Has title of the caravan passed to Moorehead?

###### **The general rule – *nemo dat quod non habet***

1. The general rule in English law is that a person cannot transfer a better title to goods than he himself possesses. This rule is often referred to by the Latin maxim *nemo dat quod non habet*. Section 21(1) of the Sale of Goods Act 1979 (SGA 1979) partially sets out this rule in statutory form, stating that “where goods are sold by a person who is not their owner and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had.”

2. GG are a bailee of the caravan for work and labour (a bailment *locatio operas faciendi*). Although GG is in possession of the caravan, it does not have legal title to it, and so applying the general rule any purported sale by GG to Moorehead without the authority or consent of Mr Portman would not be effective to pass title to Moorehead.

### **Without authority or consent**

3. In a letter of the 18<sup>th</sup> January 2008, George Grange, the Managing Director of GG, claimed to have sold the caravan on behalf of Mr Portman. The position of GG is therefore likely to be that they acted as agents of Mr Portman, and sold the caravan with his consent and authority. Mr Portman denies having instructed GG to “take offers”. In fact, the only mention he recalls having made to GG of selling the caravan was to say that at some point in the future he might wish to use them to sell it. It is unlikely that this statement would amount to conferring authority or consent to sell. Even if it is found that Mr Portman did authorise the garage to “take offers”, this implies an authority to seek buyers on behalf of the owner, but not to complete the sale without consulting the owner.

4. In the unlikely event that it is found that GG acted within its authority as agent, Mr Portman will be entitled to recover the proceeds of sale from GG. He may additionally have an action in negligence against GG for selling the caravan at too low a price. However, it is more likely that GG will be found to have acted without authority or consent. In that case GG will not have passed title, unless the sale falls within one of the exceptions to the *nemo dat quod non habet* rule.

### **The exceptions to *nemo dat quod non habet***

5. There are two potentially relevant exceptions to the rule stated in s21(1) SGA 1979. If either of these exceptions apply, title will pass despite the fact that the seller does not himself have title to the goods in question, and despite

the fact that he does not act with authority or consent of the owner. The first exception is where the true owner of the goods is estopped from denying the buyer's title to the goods by way of the true owner's conduct. The second exception is where the seller transfers title to the goods as a mercantile agent under the Factors Act 1889.

### **Estoppel**

6. After establishing the general rule, s21(1) SGA 1979 goes on to state that the rule does not apply where "the owner of the goods is by his conduct precluded from denying the seller's authority to sell". One way in which this estoppel may arise is by reason of a representation made by the true owner that the seller is the owner of the goods. In the House of Lords decision in Moorgate Mercantile Co. Ltd. v. Twitchings [1977] A.C. 890, Lord Edmund Davies confirmed that in such circumstances the buyer will acquire real title, rather than merely a right to plead estoppel.

7. Defendants have commonly tried to plead this form of estoppel in cases involving motor vehicles, where the true owner has delivered the vehicle to the seller along with registration documents, as Mr Portman has done, arguing that the seller's possession of the registration documents is a representation made by the true owner to the buyer that the seller is the owner of the vehicle. This was the case made by the defendant in Central Newbury Car Auctions Ltd v Unity Finance Ltd and Another [1957] 1 Q.B. 371. However, the Court of Appeal in that case rejected the argument, finding (as per Morris L.J. at 397), that 'it cannot be assumed that the person in possession of a car and its registration book is the owner of the car...The existence of one in the hands of a seller does not remove all occasion for inquiry and does not prove legal ownership'.

8. In this case therefore, estoppel by reason of Mr Portman having represented to Moorehead that GG was the owner of the caravan is unlikely to operate. Mr Portman has delivered the registration documents to GG by leaving them in the glove compartment of the car. However, this in itself

should not enable Moorehead to assume that GG is the owner of the caravan, and there is no evidence of further acts or behaviour by Mr Portman that tends to suggest a representation to Moorehead that GG was the legal owner.

### **Mercantile Agents under the Factors Act 1889**

9. S.21(2)(a) SGA 1979 states that “nothing in this Act affects ... the provisions of the Factors Acts ... enabling the apparent owner of goods to dispose of them as if he were their true owner.”.

10. Under s.2(1) of the Factors Act 1889 (FA 1889):

“Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.”

The FA 1889 therefore provides a second exception to the *nemo dat quod non habet*.

11. In order for s.2(1) of the FA 1889 to operate to transfer title of goods by a sale by a non-owner, six conditions must be satisfied:

- i. the seller of the goods must be a mercantile agent as defined by the FA 1889, s.1(1);
- ii. the seller of the goods must be in possession of the goods or of the documents of title to the goods;
- iii. the seller must be in possession with the consent of the owner;
- iv. the seller must sell the goods;

- v. the seller must sell the goods when acting in the ordinary course of business of a mercantile agent;
- vi. The buyer must take in good faith, without knowledge of the seller's lack of authorisation to sell.

12. As the seller in this case, GG is in possession of the goods he is selling, and there is a contract of sale between GG and Morehead. Conditions ii., and iv. are therefore satisfied.

### **Definition of 'Mercantile Agent'**

13. S.1(1) FA 1889 defines a mercantile agent as 'a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods'.

14. Lush L.J. at 588 of Heap v Motorists' Advisory Agency Ltd, [1923] 1 K.B. 577 held that 'If at the time the owner parted with the possession the recipient was not a mercantile agent, if the owner did not part with the possession to a man who was filling that capacity, then in my opinion the section does not apply.'. It must therefore be shown that GG was a mercantile agent at the time Mr Portman delivered the caravan to GG.

15. The question of whether GG is a mercantile agent is one of fact. More information is needed regarding GG's usual type of business. However, the facts as they currently stand do tend to indicate that GG may be deemed to be mercantile agents. The fact that Mr Portman has used GG in the past to 'help [me] sell cars' suggests that selling cars is part of GG's business, as does the fact that Mr Portman recalls mentioning the possibility of selling the caravan through GG at some point in the future. It seems unlikely that Mr Portman would have mentioned this as a possibility if it was not in the customary course of GG's business to effect the sale of motor vehicles as an agent. Further, GG have a forecourt on their premises, which suggests they often have a need to display cars. This too would tend to indicate that they are

in the business of selling cars. However more facts are needed before a definitive conclusion can be drawn.

16. Even if on the facts GG does not engage regularly in the selling of cars, this will not be fatal to a finding that they are mercantile agents. Wright J. in Lowther v Harris [1927] 1 K.B. 393 at 393 held that “a mercantile agency under the Factors Act, 1889, may exist although the agent...is acting for one principal only and has no general occupation as agent”.

17. Once it is established that a seller is a mercantile agent, his motivations for selling the goods are immaterial with regard to the question of whether title has passed, so the question of whether GG acted with the knowledge that they were not in fact entitled to sell is irrelevant to the question of whether title has passed.

#### **Acting in the ordinary course of business**

18. A mercantile agent as defined in s.1(1) must have been “acting in the ordinary course of business of a mercantile agent” when he made the sale in order for the FA 1889 to operate to confer good title to the buyer. The case law confirms that this test is fairly relaxed. Relevant factors have been said to include whether the sale was “within business hours, at a proper place of business, and in other respects in the ordinary way in which a mercantile agent would act” (Oppenheimer v. Attenborough & Son [1908] 1 K.B. 221, as per Buckley, L.J. at 230).

19. The owners of a vehicle in Stadium Finance Ltd. v. Robbins, [1962] 2 Q.B. 664 had inadvertently left the registration book locked in the locked glove compartment of the car when they delivered it to the seller. In those circumstances the Court of Appeal held that the owner had not consented to the seller being in possession of the registration book. Dankwerts L.J. (at 676) and Ormerod L.J. (at 671) held that as a result, the sale (in that case under a hire-purchase agreement) could not be said to have been with the registration book. According to the judgement of Somervell, L.J. at 283 of Pearson v Rose

and Young, [1951] 1 K.B. 275, ‘a sale of a car without its registration book would not be a sale, within the words of the sub-section, “in the ordinary course of business”’. Therefore, if it can be shown that Mr Portman did not intend GG to be in possession of the registration booklet (which might be evidenced, for example, by his having locked the glove compartment in which the documents were left as was the case in Stadium Finance), then GG cannot be said to have been acting in the ordinary course of business. Otherwise, the evidence available indicates that GG were acting in the ordinary course of business when they made the sale to Moorehead.

### **Consent of the owner to the seller’s possession**

20. S. 2(1) FA 1889 has been interpreted so as to require that the owner consented not only to the seller being in possession of the goods in question, but specifically that the owner consented to the seller being in possession of the goods as a mercantile agent. (As per Denning L.J. at 288 of Pearson v Rose and Young)

21. According to s. 2(4) FA 1889, “For the purposes of this Act the consent of the owner shall be presumed in the absence of evidence to the contrary.” In order to displace this presumption Mr Portman will therefore have to prove that either GG were in possession of the caravan without his consent, or that any consent to their being in possession of the caravan was not to them being in possession as mercantile agents.

22. In Pearson v Rose and Young Ltd, Denning, L.J. at 288 clarified what would be held to amount to consent to possession as a mercantile agent: ‘[T]he owner must consent to the agent having [the goods] for a purpose which is in some way or other connected with his business as a mercantile agent. It may not actually be for sale. It may be for display or to get offers, or merely to put in his showroom; but there must be a consent to something of that kind before the owner can be deprived of his goods.’ Clerk and Lindsell, by way of application of Denning L.J.’s words have said that “if a person takes his car to a garage to be repaired, the proprietors of the garage cannot sell it

with a good title, under s.2 of the Act, merely because they happen to be dealers in second-hand cars” (Clerk and Lindsell, 31-080). This would imply that the fact that Mr Portman has sold cars through GG before, and the question of whether GG are dealers in second-hand cars generally, are not of great relevance in establishing whether Mr Portman consented to their being in possession of the caravan as mercantile agents on this particular occasion.

23. Following Denning L.J.’s judgement in Pearson v Rose and Young, the question of whether Mr Portman did instruct GG to ‘take offers’, as GG will claim he did, is therefore of crucial importance. Mr Portman denies that he gave any such instruction to GG, but if Mr Portman did in fact instruct GG to “take offers”, according to Denning L.J., this will amount to Mr Portman having consented to GG being in possession of the caravan as a mercantile agent. However, if Mr Portman’s recollection is correct and he did not authorise GG to “take offers”, on the facts as they stand there seems to be little to suggest that Mr Portman has consented to Moorehead being in possession of the caravan as a mercantile agent. More information is needed with regards communications between Mr Portman and GG prior to the sale of the caravan.

### **Good faith on the part of the buyer**

24. Lush J. at 589 of Heap v Motorists' Advisory Agency Ltd, held that the s.2(1) FA 1889 proviso that the person taking under the disposition acts in good faith, and does not have notice at the time that the person making the disposition is not authorised to do so has two parts: "The first requires that the person taking under the disposition acts in good faith. The second, and I think it is different, requires that that person has not notice that the person making the disposition has not authority to make it." The requirement that the buyer have “notice” that the seller does not have authority to make the disposition, rather than actual knowledge, means that if the buyer is aware of circumstances that would lead a reasonable man to make enquiries of the buyer, that will be sufficient to establish knowledge.

25. More information is needed as regards both parts of the test laid out by Lush L.J., as the information provided about the circumstances of the alleged sale of the caravan by GG to Moorehead is insufficient to draw conclusions regarding whether Moorehead purchased the caravan in good faith. If it can be shown that Moorehead did not purchase the caravan in good faith, or was aware that GG was not properly authorised to sell the vehicle, then title will not pass under s.2(1) FA 1889, even if it can be shown that GG acted as a mercantile agent.

26. Brett, J. in the Court of Appeal decision In re Gomersall (1875-76) L.R. 1 Ch. D. 137 (later affirmed by the House of Lords), suggested that where goods were purchased at a much lower price than the ordinary trade price, this would not be absolute proof of bad faith, but it may evidence fraudulent knowledge. That case involved the sale of stolen goods, but the good faith requirement is the same as where the seller lacks authority to sell for some other reason so it is of application in this case. Moorehead's offer of £8,300 is significantly lower than the £12,000 Mr Portman claims that a Venetia Motor Caravan would normally sell for, so this may be of evidential value in establishing whether Moorehead purchased the caravan in good faith.

Conclusion:

27. The question of whether title has passed under one of the exceptions to the rule *nemo dat non est factum*, is a question of fact to be decided on by the tribunal of fact. On the facts as they stand, it would seem that title has not passed. However, more information is needed before a decisive conclusion can be drawn.

**II. In the event that title has passed, what remedies are available to Mr Portman from Grange Garage?**

28. In the likely event that GG are found to have acted without Mr Portman's authority in passing title to Moorehead, Mr Portman is entitled to accept the sale and receive the proceeds of sale from GG. However this

would not be a satisfactory outcome for Mr Portman, as the sale price of £8,300 is less than the £8950 Mr Portman paid for the caravan. The sale price is also considerably lower than the market value of a 'Venetia' motorised caravan, which Mr Portman in paragraph 2 of his draft statement claims to have researched and found to be £12,000.

### **Conversion**

29. There is no clear authority on the precise range of acts that are capable of constituting a conversion. Ordinarily a mere bargain and sale by a non-owner without delivery is not a conversion. However, Delaney v Wallis, (1885) 14 L.R.Ir. 31 at 36, per Dowse B. established an exception to this rule where the wrongful sale is effective, despite the absence of delivery, to transfer title to the buyer under one of the exceptions to the rule *nemo dat quod non habet*. Although that case concerned the market overt exception to *nemo dat quod non habet*, since abolished by the Sale of Goods (Amendment) Act 1994, the principle remains. In the case of a wrongful sale that nevertheless passes title, the seller interferes with the owner's title and so does commit conversion against the true owner. According to s.1(a) Torts (Interference with Goods) Act 1977 (TIGA 1977), conversion is a "wrongful interference with goods' for the purposes of that Act".

30. Therefore, if title has passed to Moorehead by way of operation of the FA 1889 or s.21(1) SGA 1979, Mr Portman will have an action against GG in conversion. In order to bring an act for conversion, the person bringing the action must have either possession of the goods converted, or an immediate right to possess those goods. Mr Portman does not have possession of the caravan as it is on GG's forecourt, so to bring an action in trespass he must have an immediate right to possess the caravan.

### **Immediate right to possess**

31. Where a bailee under a bailment *locatio operas faciendi* contracts to make repairs to goods in return for payment and he performs his obligations under the contract he will be entitled to a lien over the goods until the other party pays him the contract price. The effect of such a lien is to give the person in whose favour the lien operates the right to retain possession of the goods until all his claims are satisfied (Grose J. at 235 of Hammonds v Barclay, (1802) 2 East. 227).

32. As there is a contract between Mr Portman and GG for the repair work done by GG and Mr Portman has not yet paid the contract price, it would appear that GG is entitled to a lien over the caravan. The effect of this lien would be to deny Mr Portman an immediate right to possess the caravan, until he pays the contract price.

33. However, it was held by the Court of Appeal in Mulliner v Florence, (1877-78) L.R. 3 Q.B.D. 484, that a lien conveys no right to sell, and that where a bailee with a lien over goods sold the goods without authority or justification he forfeited his right to the lien, and would be liable in conversion to the owner of the goods (Bramwell J. at 489). Although Mulliner v Florence is a cases in which the seller parted with the goods and so lost possession of them to a third party, they are still applicable to Mr Portman, if title is found to have passed to Moorehead. The legal effect of the sale effected by GG, i.e. divesting Mr Portman of title to his goods, is the same as if GG had delivered the caravan to Moorehead. Mulliner v Florence has been followed in a number of cases. The Court of Appeal in Union Transport Finance v British Car Auctions, [1978] 2 All E.R. 385 held that the act of entering bailed goods into an auction gave the bailor a right to immediate possession, suggesting that the action of offering the goods for sale will be sufficient to entitle the owner who is out possession to bring an action in conversion.

34. Mr Portman will therefore have a right of action against GG in conversion for the sale of the caravan to Moorehead. Following Union Transport Finance v British Car Auctions it would appear that Mr Portman will also have a right to bring an action in conversion where title has not passed,

as the action of offering the caravan for sale will be sufficient to cause this right to accrue.

### Remedies in conversion

35. TIGA 1977 s.3(1) and (2) provide that in proceedings for wrongful interference (which according to s.1(a) TIGA 1977 includes conversion) against a person in possession of the converted goods, the relief available is:

- (a) an order for delivery of the goods, and for payment of any consequential damages, (s.3(2)(a)) or
- (b) an order for delivery of the goods, but giving the defendant the alternative of paying damages by reference to the value of the goods, together in either alternative with payment of any consequential damages, (s.3(2)(b)) or
- (c) damages *simpliciter*. (s.3(2)(c))

36. A remedy may only be given under one of these heads (s.3(3)(a)). A remedy under s.3(2)(a) is at the discretion of the court, whereas a remedy under either of the other two heads is at the election of the claimant (by virtue of s.3(3)(b)).

37. An order for specific delivery of the goods to the original owner will not be appropriate where title has passed to a third party, as the original owner no longer enjoys the right of dominium over the goods. The court will therefore not use its discretion to make an order under s.3(2)(a) in favour of Mr Portman. Mr Portman could seek a remedy under s.3(2)(b), however if title has passed GG will be unlikely to opt to deliver the caravan, as this would expose them to an action in conversion brought by Moorehead. Therefore, the only remedy Mr Portman is likely to get in the event that title has passed is one in damages.

38. According to Lush J. at 590 of Heap v Motorists' Advisory Agency Ltd., the burden of proof is on the buyer to establish that on the balance of probabilities the conditions required by s.2(1) FA 1889 has been satisfied, in order for the buyer to acquire good title. Therefore, the burden will be on Mr Moorehead to show that the requirements under s. 2(1) have been satisfied.

### **Measure of damages**

39. In France v Gaudet (1871) LR 6 QB 199, Mellor J, giving the judgment of the Court of Queen's Bench, said, at 203-204, that the ordinary measure of damages would be "to ascertain the value of the goods at the time of the conversion, and in case the plaintiff could, by going into the market, have purchased other goods of the like quality and description, the price at which that would have been done would be the true measure of damages". The primary measure of damages to which a claimant is entitled in the case where he is deprived of his goods is therefore the market value at the time of the conversion. Moreover, the House of Lords has confirmed, at paragraph 430 of their judgement in Kuwait Airways Corp v Iraq Airways Co (No.6), [2002] 2 A.C. 883, that conversion is a tort of strict liability, so the mental state of the wrongdoer at the time of the conversion is irrelevant.

40. Mr Portman will be entitled to damages in the amount of the market value of a Venetia motorised caravan of the same quality and description as his caravan at the time it was converted by being sold by GG. The market value of a Venetia motorised caravan of that age, according to Mr Portman's research using the "Glassers Guide to Motor Vehicle Prices", is £12,000. However, Mr Portman also admits that when he purchased the van it needed quite a bit of work doing to it. Subsequent to Mr Portman purchasing the caravan, and prior to the act of conversion, GG had performed some repairs on the caravan. More information is therefore needed about what the market value of the caravan was after GG had carried out the repairs. The change in value to the caravan caused by the alterations requested by Moorehead will not however be taken into account as this occurred after the sale, which was the act of conversion.

41. In addition to the market value of the goods converted the time of conversion, a claimant is also entitled to recover any consequential loss that flows naturally and directly from the conversion provided it is foreseeable to the converter at the time of conversion. This is a well established principle, but for an example of its application see the Court of Appeal judgement of Lord Hanworth M.R. in In Re Simms, [1934] Ch. 1 at p18.

42. Given that a caravan is a vehicle used for holidaying, it will probably be held to have been reasonably foreseeable that in selling the caravan GG would deprive Mr Portman of accommodation for their upcoming trip to Cornwall and force Mr Portman and his family to pay for alternative accommodation. However, the £400 Mr Portman expects to have to pay for a hotel may be more than the cost of hiring another caravan, in which case Mr Portman may only be able to recover the lower cost of hiring an alternative caravan.

43. In Graham v Voigt, 89 A.L.R. 11, a case heard in the Supreme Court (Australian Capital Territory), the judge applied the principal of contract law developed by the English Court of Appeal in Jarvis v Swans Tours Ltd, [1973] Q.B. 233, that a claimant could recover general damages for disappointment and distress, to an action in conversion. Graham v Voigt is not binding authority in English courts, and in that case the claimant was able to recover damages for the loss of his stamp collection, which was irreplaceable. Given that he is a motor vehicle enthusiast this could be a possible head of damage if it were the case that “Venetia” motorised caravans are very rare, or that this particular model was of sentimental value to him. However, the fact that there is a guide price for the vehicle, and the price does not seem very high for a caravan it is likely he will be able to purchase another, so he is unlikely to be able to recover under this head of damage.

44. According to TIGA 1977 s.5, where damages for wrongful interference wholly compensate the claimant for his loss, the effect of payment of those damages is to extinguish the claimant’s title to his interest in the goods in

respect of which the damages are payable. The effect of GG compensating Mr Portman completely for his loss of the caravan will therefore be to extinguish Mr Portman's title in the caravan.

Conclusion:

45. In the event that title has passed to Moorehead, Mr Portman will be entitled to bring an action in conversion against GG for the sale, claiming the market value of the caravan at the time GG sold it to Moorehead, and the cost of providing alternative accommodation for the family weekend in Cornwall.

**III. What Remedies are available to Mr Portman against GG in the event that title has not passed?**

**Recaption**

46. According to Clerk and Lindsell at 31-12, in order for recaption of chattels to be lawful, the possession of the person from whom they are being recaptured must have been wrongful from its inception. So in the case of a bailee who came into possession of the goods in question with lawful authority or consent and who refuses to give the goods up at the termination of the bailment, the owner must bring an action and cannot use force to recover his property. There is definitive case law on this subject, as noted in Lloyd v DPP [1992] 1 All ER 982 at 990, however the passage quoted from Clerk and Lindsell has been referenced by Tuckey L.J., giving the judgement of the Court of Appeal in the English criminal case of R v Mitchell [2003] EWCA Crim 2188, and has also been given approval by the Canadian Supreme Court in Devoe v Long [1951] 1 D.L.R. 203.

47. Given that GG originally took possession of the caravan lawfully, it is unlikely that Mr Portman has a right to recapture the caravan by going onto the garage forecourt and driving it away. In any case, if Mr Portman were to drive the caravan away from GG's forecourt without permission he could be exposing himself to an action for conversion or trespass in the event that a

court of law later found that title had passed and the caravan did not belong to him. Such a finding cannot be ruled out.

48. Mr Portman may however have alternative remedies available to him in the event that title has not passed.

### **Conversion**

49. S11(3) of the Torts (Interference with Goods) Act 1977, states that mere “denial of title is not of itself conversion”. However, it is possible to show that property has been converted where a person with right to possession of the goods has demanded their return, and a person in actual possession has refused to return, or refused to allow the person with an immediate right to possession to collect the goods. In the Court of Appeal decision in Clayton v Le Roy, [1911] 2 K.B. 1031 Fletcher Moulton L.J. at 1048 held that it was a requirement that there was a ‘definite act or deliberate withholding’ on the part of the person in possession of the goods. This was held to mean that the demand for return or collection of the goods must be unconditional, and refusal of this request must also be unconditional.

#### **Right to immediate possession**

50. As discussed at paragraph 33, ante., following Union Transport Finance v British Car Auctions, the purported sale to Moorehead gives Mr Portman an immediate right to possess the caravan, so a denial by GG of this right to possession by refusing to allow Mr Portman access to or possession of the caravan will therefore amount to a conversion.

#### **Unconditional demand and unconditional refusal**

51. More information is needed about the precise terms of the telephone conversation between Mr Portman and George Grange after Mr Portman learned of the sale of the caravan to Moorehead by GG before a conclusion can be drawn about whether there has been an unconditional demand and refusal. Although GG has asserted the title of Moorehead in claiming that they

have effected a sale to him, a mere denial of Mr Portman's title will not amount to a conversion and it is not clear whether Mr Portman has actually demanded that GG return the caravan to him. However, a demand and refusal at any point will amount to a conversion, so even in the case that GG has not yet converted the caravan, they may still do so by refusing to return it to Mr Portman.

### **Defences to an action in conversion based on demand and refusal**

52. In Clayton v Le Roy it was held that detaining an object in order to ascertain the true owner would not amount to such a deliberate withholding for the purposes of bringing an action in conversion. However, in this case GG seems to be convinced that it is authorised to pass title to Moorehead. A refusal to allow Mr Portman is therefore unlikely to be held to be reasonable on the grounds that GG is trying to ascertain the true owners.

53. Under s.8(1) TIGA 1977, the defendant to a claim for wrongful interference with goods is permitted to plead that a named third party has a better right than the claimant, and to have all known competing claims determined simultaneously. Therefore, if Mr Portman brings an action in conversion against GG, GG will be permitted to defend the claim by joining Moorehead as a party and claiming that GG was justified in refusing to return the caravan to Mr Portman on the grounds that Moorehead was the true owner. The question of whether Moorehead is in fact the true owner has been analysed previously. In the event that GG is able to successfully plead that they were justified in refusing to return the caravan to Mr Portman they may still be liable in conversion for transferring title to Moorehead without authority or consent.

### **Remedy for conversion**

54. The remedies for conversion where the defendant is in possession of the converted goods are in s.3 SGA 1979, and are listed at paragraph 35. In the event that title has not passed, the court has a discretion to order the return of

the caravan to Mr Portman under s.3(2)(a). If his discretion is refused, Mr Portman will have the option of an order for delivery, with damages payable in the alternative (s.3(2)(b)), or damages *simpliciter* (s.3(2)(c)).

55. The courts are generally reluctant to make an order for specific delivery of goods. The cases in which they have exercised their discretion have tended to be where damages would be insufficient to compensate the claimant. Specific delivery has been accepted as an appropriate remedy in the case of an original manuscript of the poet Federico García Lorca (García v De Aldama [2002] EWHC 2087); the case of a confidential memorandum (Secretary of State for Defence v Guardian Newspapers Ltd, The Times, December 16, 1983), in the case where the goods in question were no longer available on the open market due to a strike (Howard E. Perry Ltd v British Railways Board [1980] 1 W.L.R. 1375).

56. It is highly unlikely that Mr Portman's "Venetia" motorised caravan will be held to fall within this category of goods for which compensation in damages is inadequate. The fact that there is a guide price for the caravan, indicates that it would probably be possible to purchase a replacement, and Mr Portman does not have any personal connection to the caravan.

57. If the court refuses to exercise its discretion in making an order for specific delivery of the caravan, Mr Portman has the option to choose between the remedies under s.3(2)(b) and s.3(2)(c). If Mr Portman decides to opt for damages *simpliciter* under s.3(2)(c), or if Mr Portman opts for a remedy under s.3(2)(b) and GG elect to compensate Mr Portman in damages, the measure of damages will be as discussed at paragraphs 39-44 for the market value of the caravan.

58. In the event that the courts do exercise their discretion to order specific delivery, or if GG opt to return the caravan to Mr Portman under s.3(2)(b), Mr Portman may be able to claim the cost of repairing the damage caused to the caravan by ripping out the upholstery and some of the seats, if the cost of

repair is considered to be a reasonably foreseeable consequence of the conversion.

59. The recoverability of the cost of hiring a replacement where a claimant is temporarily deprived of the enjoyment of his possessions was confirmed by the House of Lords decision in Lagden v O'Connor, [2004] 1 A.C. 1067. That was a case of negligence causing damage to goods, however it is likely that the principle stands in other cases where an owner is deprived of the possession of his goods due to a wrongful act by the defendant. If GG choose to return the caravan to Mr Portman it is likely that they will therefore also be found liable to compensate Mr Portman for the cost of alternative accommodation for Mr Portman and his family on their trip to Cornwall. However, Mr Portman will be expected to mitigate his loss by choosing the most economical form of alternative accommodation, since a decision to choose an expensive hotel would not be a result of his impecunity (The rationale for choosing a more expensive replacement in Lagden v O'Connor).

### **Breach of Contract**

60. In the event that the caravan is returned to Mr Portman but he is not able to recover damages for the ripping out of the upholstery and fittings in an action in conversion against GG, he will probably be able to bring an action for breach of contract to recover damages for the damage sustained to the caravan. This action will also be relevant in the event that GG agrees to return of the caravan and there is therefore no action in conversion.

61. A term may be implied into contracts where it is necessary to give efficacy to the contract (see Bowen L.J. at 68 in The Moorcock 9, (1889) 14 P.D. 64). More information is needed about the precise terms of the contract between Mr Portman and GG. However, in the case of vehicles being taken to the garage for repair it is usual for contracts to be made orally and without reference to express terms other than the work to be done, the price, and the date of performance. Assuming that this was the case, there may however be an implied term of the contract that GG would not do anything to the caravan

other than the repairs specified, as a contract for repairs to goods is not efficient if the workman is not obliged to refrain from taking instructions from third parties in making further alterations to the goods. The act of removing the upholstery and some of the fittings is clearly a breach of this implied term of the contract.

62. The damages available to Mr Portman for this breach of contract will be aimed at putting him in the position he would have been in had the contract had not been breached, as GG has already performed its positive obligations under the contract. As such, the damages available to Mr Portman will be the cost of cure, i.e. the cost of rectifying the ripping out of the upholstery and fittings.

63. In addition, a claimant in an action for breach of contract will be entitled to claim consequential damages flowing directly from the breach. The same question of reasonable foreseeability will arise as in conversion.

### **Trespass to goods**

64. An alternative action founded on the ripping out of the upholstery and removal of fittings from the caravan may possibly lie in trespass to goods. TIGA 1977 s.1(b) brings trespass within the definition of wrongful interference with goods. Actions in trespass are seldom successfully brought by bailors against bailees, as in order to bring an action for trespass a plaintiff is required to be in possession of the goods subject to the trespass. Unlike in an action for conversion, an immediate right to possession will not suffice. This point of law is expressed by Lord Kenyon C.J. in Ward v Macauley (1791) 4 T.R. 489 at 490.

65. However, it has been suggested that there may be an exception to the need for possession in the case of bailment at will and revocable bailment. The law on this subject is somewhat unclear, but it has been held that the bailor under such bailments has a sufficient degree of possession (in that they

have an absolute right of immediate possession) to bring an action in trespass.

66. Mr Portman is not in possession of the caravan, and as a bailment for work and labour, the bailment between Mr Portman and GG is not a revocable bailment or a bailment at will, as GG has a workman's lien over the caravan for the value of the work done (£452.00 +VAT). However, the acts of purporting to sell the caravan and damaging the upholstery may both be considered "acts repugnant to the bailment", in which case the bailment under which GG holds the caravan may be terminated and Mr Portman may be entitled to bring an action in trespass. However, given the lack of clarity in this area of the law there can be no certainty that such an action would be successful.

67. Available remedies for trespass, as a wrongful interference with goods for the purposes of TIGA 1977, are the same as for conversion (listed at paragraph 38, ante). The measure of damages where goods are damaged are those suffered as a direct result of the trespass. Mr Portman would therefore be awarded damages based on the cost of repairing the upholstery and fittings. The House of Lords decision in Lagden v O'Connor allowing the recovery of the cost of hiring a replacement while the damage caused by the negligence may also be applicable to damages recoverable for trespass.

Conclusion:

68. If GG can be said to have denied access to or refused to allow Mr Portman to collect the caravan, Mr Portman will have an action against GG in conversion. In any case Mr Portman will have an action for breach of contract, and possibly in trespass for the ripping out of the seats and fittings. Mr Portman probably does not have a right to collect the caravan from GG's forecourt, and in any event should not do so as he could expose himself to actions in trespass or conversion.

**IV. Whether Mr Portman is liable to pay GG the £452.00 + VAT quoted for repairs to the vehicle?**

69. Chitty on Contracts at 24-051 argues that where at the time of discharge the innocent party owes money under the contract, he will only escape his obligation to pay the sum in cases where the money would then be recoverable by him in a restitutionary claim. It would seem that since GG has at least partially performed its obligations under the contract and Mr Portman therefore does not have an action in restitution to recover the £452 + VAT (because there has not been a complete failure of consideration), Mr Portman will be obliged to pay the sum. This will be reflected in the remedy Mr Portman is entitled to. If the caravan is returned to him, it will be with the benefit of the repairs carried out by GG. If Mr Portman is awarded damages, the market value of the caravan is assessed at the time of the conversion, and so the value will have benefited from the work done by GG.

70. If Mr Portman does not pay GG for the repairs done, and he subsequently receives the caravan along with damages to compensate him for the removal of the upholstery and fittings, GG may have an action in restitution for total failure of consideration against Mr Portman.

Conclusion:

71. Mr Portman will have to pay the £452.00 + VAT to GG, regardless whether title has passed or not.

**V. Whether there is any chance Mr Portman could recover the vehicle before 9<sup>th</sup> February, which is the date set for the family reunion, for which he had intended to drive the caravan to Cornwall?**

72. If this claim were to go to court, since it has a potential value of in excess of £12,000, it would be allocated to the fast track, in which it is usual for a timetable of up to 30 weeks to be set for conclusion of the trial. Given this, if Mr Portman proceeds with a claim he would not ordinarily be able to recover his vehicle before 9<sup>th</sup> February.

73. However, Mr Portman may apply for an interim remedy from the High Court. This is specifically authorised by TIGA 1977 s.4. In order to get interlocutory relief Mr Portman will need to make an application, supported by evidence (CPR 25.3(2)). If made, such an order may provide for the collection by the claimant of goods that may become the subject matter of subsequent proceedings in court. However, it is unlikely that an application by Mr Portman for interim relief will be successful, since in general the court's discretion in making such orders will not be exercised if damages would fully compensate an applicant for any loss he may suffer. Since the reason Mr Portman wishes to retrieve the caravan before 9<sup>th</sup> February is to avoid having to pay hotel bills for the family weekend in Cornwall, damages will be adequate to compensate this loss. This is particularly true in the case where title has passed, since the appropriate remedy if Mr Portman obtains final judgment in his action for conversion will be damages rather than specific delivery.

74. The court is also unlikely to grant such a remedy in advance of Mr Portman bringing proceedings against GG, as the court will only grant an interim remedy before a claim has been made if the matter is urgent or it is otherwise desirable to do so in the interests of justice (CPR 25.2(2)(b)). Therefore, even if Mr Portman is able to get an interim order in relation to the caravan this is only likely to happen after the claim has been made, which in any event will be after 9<sup>th</sup> February.

75. The only circumstances in which there is a possibility of Mr Portman retrieving the caravan before 9<sup>th</sup> February would be if Mr Portman managed to come to some kind of agreement with both GG and Moorehead before that date. Given that GG believes he has sold the caravan to Moorehead and that title has passed this is unlikely.

Conclusion:

76. There is almost no chance that Mr Portman will be able to recover the van before 9<sup>th</sup> February.