

Between: Nylers Department Stores Pty Ltd (Appellant)

And: Gespresso Coffee Machines Pty Ltd (Respondent)

1. Gespresso Coffee Machines Australia ('GCMA') imports and sells the Gespresso Coffee Machine. It is a machine that produces an espresso or lungo coffee by placing a patented Gespresso capsule into it. They were introduced onto the Australian market in 2014 and have seen significant growth over the past six years. The current manager for GCMA is Mr Matt Pratt.

2. Bill Bond ('Bond') is one of the managers for Nylers; a large department store in Brisbane. Bond's first cousin is Matt Pratt ('Pratt'), the two frequently catch up for beers at the football on Saturday afternoons.

3. In September of 2019 Pratt and Bond met at the football and proceeded to have a few drinks. The conversation eventually turned to work, and Pratt mentioned that Gespresso was releasing a new coffee machine called the 'Y'. Pratt stated that Vee-Jays Department Store (a rival of Nylers) had already ordered 250 units. Pratt also went on to say that the sales in Europe of the 'Y' had been very promising, with most stores selling out within the first three weeks of the 'Y's European release. Bond was aware that Nylers sales were down and he was afraid that VeeJays would get all the business. He told Pratt that he would like him to hold 300 units for him so that he could get approval from the other managers to place the order. Bond then said to Pratt "*It won't be an issue though mate, I practically run that hole....we will need delivery to by the 12th of November 2019 though, otherwise we won't have it set up in time for Christmas*". Pratt responded with "*Listen Billy, I've only got 400 units, if I get you 300, I'll have to let VeeJays know I couldn't secure the order for them.....you need to let me know by the 1st of next month ok? I'll do 300 units for you at \$229 a unit, how's that tickle you?*" Bond replied that the price was good, and that he would let Pratt know whether Nylers would proceed or not by the 1st of October 2019.

4. On the 29th of September 2019 Bond faxed a letter to Pratt's office stating that Nylers would be purchasing 300 'Y's from GCMA. The letter also said that delivery had to be made by the 10th of November 2019. When the fax arrived at GCMA a secretary placed it on Pratt's desk. That day however Pratt was at home with the flu. That night the fax was blown onto the ground by a gust of wind and was subsequently thrown into the bin by cleaning staff the following morning.

5. On the 3rd of October 2019 Pratt returned to work. He assumed as he had not heard from his cousin Bond, that Nylers must have not been willing to buy the 'Y' machines from Gespresso. Pratt immediately contacted Vee-Jays to arrange a contract for the sale of 250 Y units.

6. On the 27th of October 2019 Bond and Pratt again met at the football where Bond asked Pratt "*how the Y's coming along cuz?*". Pratt responded that as he had not heard from Nylers he had assumed that they had decided not to proceed with the contract. Bond was furious, "*What do you mean; we faxed you on the 29th of last month!*" Pratt replied that it would be difficult to get more stock by the 10th of November 2019. At this point Bond stormed off to his car and left.

7. The next day Bond rang up another capsule coffee machine company called Loots Toots and arranged to buy 200 units of their machine.

8. On the same day Bond rang Loots Toots, Pratt also rang the Gespresso Townsville office to see if they had any stock of the Y. He was overjoyed when they said they had 300 units left over from a bulk order.

Pratt immediately ordered 250 of those units for Brisbane. Combined with his 50 units Pratt could now fill the Nylers order of 300 units.

9. On November 11th November 2019 GCMA delivered 300 units to Nylers Brisbane, Nylers refused to accept delivery saying that when it looked like GCMA could not deliver they took their business elsewhere. Nylers also said that delivery was one day late.

10. The time and expense incurred by GCMA was extensive, and they demanded that Nylers pay for the Ys. GCMA Pty Ltd issued a letter of demand and started proceedings in the Queensland Supreme Court after the demand was not complied with.

11. At first instance, Justice Daniels found that:

1. There was indeed a contract between the parties
2. The term in regards to time was not an essential one and so the minor breach did not justify termination, Nylers was ordered to pay GCMA \$68,700 for the Y's plus another \$700 for the cost of moving and storing the Y's after Nylers refused delivery.

12. Nylers appeals on the second point stating that, whilst there was a contract between the parties

1. GCMA repudiated the contract when they made it clear they could not deliver the order on time
2. The term in regard to delivery by the 10th of November 2019 (as per the fax) was an essential one and so its breach did justify termination.