MIHALJEVIC v. EIFFEL TOWERS MOTORS PTY LTD AND GENERAL CREDITS LTD[1]

Hire Purchase—Hire Purchase Act, Section 6—Implied Terms—Rescission

While hire purchase as a form of commercial credit has grown to a position of major importance in contemporary commercial life, the hardships and abuses associated with it have become increasingly manifest. As a result, all Australian States have legislated,[2] for the most part uniformly, to regulate hire purchase contracts and improve the legal position of the hirer.

Not least of the problems associated with hire purchase stems from the tripartite nature of most transactions, where the hirer enters into an agreement with a finance company, and the dealer, who has often conducted all the negotiations, is not a party to that agreement. In these cases, difficult questions may arise as to the hirer's rights if the dealer misrepresents the nature or the quality of the goods. A collateral contract between the dealer and the hirer can sometimes be spelt out, but this is limited to the case where the dealer's statement is made 'by way of promises in exchange for the hirer concluding the hire-purchase agreement'.[3] Furthermore, the hirer is usually left with no rights to rescind the hire purchase contract or to recover damages from the finance company.[4]

Section 6 of the Hire Purchase Act 1959 (Vic.) is an attempt by the legislature to overcome this problem. It provides that

> 6(1) Every representation warranty or statement made to the hirer or prospective hirer whether orally or in writing by the owner or dealer or any person acting on behalf of the owner or dealer in connexion with or in the course of negotiations leading to the entering into of a hire purchase agreement shall confer on the hirer—
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> (a) as against the owner—the same right to rescind the agreement as the hirer would have had if the representation warranty or statement had been made by an agent of the owner; and
>
> (b) as against the person who made the representation warranty or statement and any person on whose behalf such person was acting in making it—the same right of action in damages as the hirer would have had against them or either of them if the hirer had purchased the goods from such first-mentioned person or the person on whose behalf he was acting (as the case requires) as a result of the negotiations.

This provision is made more valuable by section 6(2) which safeguards its effect by providing that any attempt to 'exclude limit or modify' its operation 'shall be void and of no effect'.

The probable intention of section 6 is reasonably clear. It seeks to provide the hirer with the right of rescission against the finance company, even though the statements complained of were not made by it or on its behalf; and a right to recover damages against the dealer even though the hirer had no contract with him. However, the manner in which section 6 is drafted gives rise to much difficulty of interpretation and 'it may be doubted whether it has completely achieved its purpose',[5] for it 'still leaves many potential problems

[1] [1973] VR. 545. Supreme Court of Victoria; Gillard J.
[2] *E.g.* Hire Purchase Act 1959 (Vic.).
[3] Else-Mitchell and Parsons, *Hire Purchase Law* (4th ed. 1968) 81.
[4] Samuels, 'New Angles in the Eternal Hire Purchase Triangle' (1962) 25 *Modern Law Review* 25.
[5] Else-Mitchell and Parsons, *op. cit.* 3.

for lawyers and for the courts'.[6] In this context, *Mihaljevic v. Eiffel Tower Motors Pty Ltd and General Credits Ltd*,[7] a decision of Gillard J. in the Supreme Court of Victoria is significant, for it represents the first time that the effect of the section has been judicially considered in Victoria.

The plaintiff, Paul Mihaljevic, answered a newspaper advertisement which promised substantial yearly earnings for an interstate driver, after an initial investment of £1,100. He was interviewed by one French, an employee of the first defendant. After detailed discussions as to possible earnings, Mihaljevic agreed to purchase a Dodge truck which French assured him would be a suitable vehicle in which to complete two interstate trips per week. Some days later, the plaintiff inspected the truck, paid a deposit, and signed an offer of hire addressed to the second named defendants.

On the following day, after being introduced to one Doyle, the manager of Western Transport, the plaintiff loaded the truck and commenced a trip to Sydney, accompanied by a mechanic employed by the first defendant. Yet, although intensive work had already been done and continued to be done on the truck, its performance was far from satisfactory. It lost power on hills, had faulty brakes, and on several occasions the tail shaft vibrated excessively and dropped out.

For the next fortnight the plaintiff attempted to operate to both Sydney and Adelaide, but was frustrated by the constant breaking down of the truck and, to a lesser extent, by a failure to obtain complete back loading. He then told Doyle that he was finished and, although French tried to induce him to continue, he refused to have anything more to do with the truck. Having consulted solicitors and finding that his offer made to the finance company had been accepted, the plaintiff purported to rescind the contract on a number of grounds. Various correspondence ensued, the net result of which was to leave Gillard J. 'with a most unfavourable impression of the dealer and its employees'.[8]

The plaintiff's claims were based on French's statement (which Gillard J. held to be fundamental material and yet untrue) that the truck was suitable for the interstate trips envisaged. He purported, firstly, to rescind the contract on the basis that the statement constituted a condition of the hire purchase contract, or alternatively, an innocent or fraudulent misrepresentation. He further claimed that the consideration for his performing the contract had wholly failed, or alternatively and finally, that French's statement constituted a collateral warranty which had been broken and entitled him to damages.

Section 6 of the Hire Purchase Act 1959 (Vic.) was, of course, crucial to the plaintiff's case. In construing its provisions Gillard J. admitted that 'difficulties of interpretation do arise'[9] but noting that 'the legislative intention, it would appear, was to create new rights beneficial to the hirer',[10] His Honour adopted what is submitted to be a robust approach to overcome the problems inherent in the drafting of the section.

Section 6(1)(a) deems the dealer to be an agent of the finance company for the purposes of allowing the hirer to rescind the agreement. Goode and

[6] Mr Justice Walsh 'Statutory Controls affecting the Sale of Goods on Credit' (1960-2) 5 *University of Western Australia Law Review* 447.
[7] [1973] V.R. 545.
[8] [1973] V.R. 545, 552.
[9] [1973] V.R. 545, 558.
[10] [1973] V.R. 545, 558.

Ziegel suggest that[11] 'the hirer still has to prove that in making the representation complained of, the dealer was acting in the actual or apparent scope of his authority', but Gillard J. rejected this view for it 'narrows too severely the benefit conferred on the hirer and disregards the circumstances from which the right arises'.[12] The section, rather, raises a notional agency and '[i]t is of course nonsense to speak of the actual or ostensible authority of a notional agent'.[13] According to Gillard J. therefore, it seems that the hirer should have the same right of rescission as he would have if the representation warranty or statement had been made by an agent of the owner duly authorized to make it.[14] It is submitted that this is virtually synonymous with providing that the owner is to be liable as if he himself made the representation.

There are other limitations on the hirer's rights inherent in section 6(1). The statements must be made 'in connection with or in the course of negotiations', although the use of the conjunction 'or' makes the section potentially very wide, for it implies that a statement made in the course of, but not in connection with the negotiations will still come within the ambit of the section. Provided this condition is satisfied, there is in fact a hire-purchase agreement in existence, and the hirer can establish a representation warranty or statement made orally or in writing by either the owner or dealer or any person acting for either of them. Gillard J. held that: 'the statutory requirements are prima facie satisfied and the foundation is given for the exercise of the right to rescind'.[15]

At this point in the analysis further difficulties arise, for the legislature has done nothing to make the conditions under which rescission will be allowed more explicit;—preferring rather, merely to incorporate the common law rule by requiring the hirer to prove facts which in law justify a rescission, assuming the authorized agency of the person making the statement. Not all representations warranties or statements would make this possible.

It is well established law that, to justify rescission, representations (a) must be fraudulent, or if innocent, then material, and (b) must have induced the hirer to enter the contract.[16] Gillard J. held that the word 'warranty' was used in the Act in its technical sense; that is in contrast and collocation with the word 'condition'; and therefore its inclusion in section 6(1)(a) is difficult to understand for at common law a breach of warranty cannot justify rescission.[17] His Honour held that the word 'statement' 'compendiously could describe any declaration of words',[18] and since he could see no reason why the words 'representation warranty or statement' were intended to be mutually exclusive of each other, any statement that constituted a representation as set out above, or indeed, a condition of the contract, would justify rescission.

Gillard J. also considered which representations warranties or statements would enable the hirer to succeed in an action against the dealer or the maker of the statement under section 6(1)(b). This section raises a notional contract

[11] Goode and Zeigel, *Hire Purchase and Conditional Sale. A Comparative Survey of Commonwealth and American Law* (1965) 89.
[12] [1973] V.R. 545, 559.
[13] Else-Mitchell and Parsons, *op. cit.* 82.
[14] Braybrooke, 'The Inadequacy of Contract' (1960-2) 5 *University of Western Australia Law Review* 515, 539.
[15] [1973] V.R. 545, 559.
[16] *T. & J. Harrison v. Knowles and Foster* [1918] 1 K.B. 608, 610. *Newbigging v. Adam* (1886) 34 Ch.D. 582, 592.
[17] *Associated Newspapers Ltd v. Banks* (1951) 83 C.L.R. 322, 336.
[18] [1973] V.R. 545, 560.

of purchase between the hirer and the person making the statement, and the person on whose behalf he was acting. However, the liability imposed on the agent or salesman of the dealer personally, in addition to the vicarious liability imposed on the dealer is curious. It has been suggested that 'the aim of the provision is to restrain the exuberance and recklessness of salesmen in their commendation of the goods they sell',[19] yet no action was brought against French personally in the present case and Gillard J. did not discuss the provision.

At general law, only promises may be sued on as terms of a contract,[20] but it is not at all clear whether only real promises, or in fact other statements, were intended to be included in the notional contract raised by sub-section (b). The word 'representation', thought Gillard J., suggested an action for deceit, which would of course arise independently of any contractual nexus, and also an action for breach of contract—implying that a mere representation may become a term of the notional contract. His Honour thought that the inclusion of the word 'warranty' was superfluous, since while a breach of warranty would justify a damages claim, the same result could be achieved by resort to the common law doctrine of collateral warranty. It is submitted, however, with the greatest respect, that the inclusion of 'warranty' in section 6(1)(b) may provide the hirer with more extensive remedies than are available by recourse to the common law. For example, if a warranty is given at a time when the dealer and the hirer envisage a cash sale, and it is at a later date that a hire purchase agreement is substituted for it, the hirer could not prove that the warranty was given in exchange for his entering into the hire purchase agreement. He would thus be precluded from obtaining relief at common law, yet there appears to be no reason why such a warranty cannot become a term of the notional contract raised by the section. Furthermore, damages may be assessed differently under the section than for breach of collateral warranty for 'the dealer (or salesman) is to be liable as if the warranty were part of a contract of sale entered into by him, not collateral to a contract of hire purchase entered into by another'.[21]

Returning to the plaintiff's claim in the present case, the true nature of French's statement became a vital enquiry. Gillard J. held that it was not fraudulent,[22] but acknowledged that it was a question of some nicety whether the statement was a mere innocent misrepresentation or of a contractual character. Thus, His Honour saw fit to restate some principle to be applied in determining the matter, which he had first put forward in an earlier case, then unreported.[23] His Honour had held that in deciding whether a statement is contractual in character[24]:—

1. Proof of a common intention of the parties to impose a contractual obligation on the person making it is essential.

2. It is unnecessary that the statement contain an express form of words provided the context imparts the requisite meaning to impose a contractual obligation on the person making the statement.

3. A determination must be made objectively in the light of all the circumstances.

[19] Braybrooke, *op. cit.* 540.
[20] *Oscar Chess Ltd v. Williams* [1957] 1 W.L.R. 370. *F. Jones & Co. Pty Ltd v. C. G. Grais & Sons Pty Ltd* [1962] S.R. (N.S.W.) 410.
[21] Braybrooke, *op. cit.* 539.
[22] According to the test laid down in *Derry v. Peek* (1889) 14 App. Cas. 337.
[23] *Blakney v. Savage & Sons Pty Ltd* [1973] V.R. 385.
[24] [1973] V.R. 545, 555-6.

4. It is a question of fact to be determined from all the circumstances whether an intention to contract exists.

5. The tribunal of fact must not draw an inference contrary to the express terms of any written contract made between the parties.

6. It is easier to infer that a warranty was intended where the person making the statement as to condition or quality has a personal knowledge thereof, upon which the person to whom the statement is made, being ignorant as to condition and quality, relies.

7. The requisite intention of the parties will be inferred, if it would be so inferred by an intelligent bystander.[25]

Applying these principles to the present case, Gillard J. reached the conclusion that a promise was being made as to the condition of the vehicle. '[S]ince, however, the dealer was not a party to the hire purchase agreement, apart from any vicarious responsibility imposed on the credit company by the Hire Purchase Act, *prima facie*, the promise was a collateral warranty given by the dealer.'[26] The breach of this warranty (which had clearly occurred in this case) provided a remedy at common law against the dealer, but the remedy of rescission as against the second defendants was available only through recourse to the statutory provisions. Since fraud had been negated, the plaintiff could justify rescission only by showing the statement to be

1. an innocent misrepresentation of a material matter which induced the contract, or
2. incorporated into the contract as a condition.

With the second alternative, Gillard J. envisaged the immediate difficulty of attempting to add to the terms of a written agreement by evidence of such an oral condition. He added, however, that in other cases 'circumstances may exist under which it is patent that a contract being sued upon is both oral and in writing'.[27] Yet, with the greatest respect, it is difficult to see how this will ever be so, for hire purchase agreements must be in writing,[28] or else they are unenforceable by the owner.[29] By force of the notional agency raised by section 6(1)(a), the plaintiff may have been able to establish that the dealer's representations formed terms of a collateral contract with the owner. Yet, unlike the Queensland provisions,[30] the Victorian Act gives no right of damages against the owner. Since this is the only remedy for breach of a collateral contract[31] Gillard J. held that the notional agency did not extend authority to the dealer to give such a warranty.

In the present case, therefore, the plaintiff's right to rescind the contract depended on making out all the elements of innocent misrepresentation which, given the notional agency,would allow rescission according to the principles of equity. The defendants, however, raised several objections to the court given the notional agency, would allow rescission according to the principles right was lost; firstly because the plaintiff had affirmed the contract, secondly, because '*restitutio in integrum*' was not possible, and thirdly, because the

[25] This is the method suggested by Denning L.J. in *Oscar Chess Ltd v. Williams* [1957] 1 All E.R. 325, 328.
[26] [1973] V.R. 545, 557.
[27] [1973] V.R. 545, 562.
[28] Hire Purchase Act 1959 (Vic.) section 3(2)(a).
[29] Hire Purchase Act 1959 (Vic.) section 3(5).
[30] Hire Purchase Act 1959 (Qld) section 6(1)(a).
[31] *Street v. Blay* (1831) 2 B. & Ad. 456; 109 E.R. 1212.

plaintiff had an adequate remedy against the dealer in law for breach of the collateral warranty, which extinguished the equitable right of rescission.

The first submission was dismissed by Gillard J. as untenable on the facts, but the second was more substantial for the defendant claimed that the bailment of the truck had commenced and the contract had thus been executed, and that there had been no total failure of consideration. Support is added to this view by the comment of Else-Mitchell and Parsons that[32] 'in most cases where goods are disposed of under a hire purchase agreement, rescission would be impossible because any use by the hirer of the goods hired would preclude a *restitutio in integrum*'. The defendants cited *Seddon v. North Eastern Salt Co. Ltd*[33] and *Angell v. Jay*,[34] the principles of which have been repeatedly applied in Australian courts, yet Gillard J. found Privy Council authority conclusive of the matter. In *Senanayake v. Cheng*,[35] it was held that the word 'executed' was inapposite to describe the mere fact of becoming a partner under under an arrangement contemplating a continuing business relationship, and that even though there was no total failure of consideration, the plaintiff was entitled to relief provided a '*restitutio in integrum*' was possible. With this analysis Gillard J. agreed. His Honour stated that 'a Hire Purchase agreement was unquestionably a contract of an executory nature, which was not executed by the bailment commencing'.[36] In the present case, there had been no total failure of consideration and the plaintiff had used the vehicle for two weeks, but the relevant test for whether there could be a '*restitutio in integrum*' was whether the vehicle 'would be substantially of the same quality, condition and identity'[37] on return, as when the plaintiff received it. Gillard J. held that it would be.

Although Mr Justice Gillard's formulation of principle is not dissimilar to the High Court's view in *Alati v. Kruger*,[38] it is submitted with respect that his finding of fact is a liberal one. It stands in marked contrast to cases such as *Long v. Lloyd*[39] where one week's use of a vehicle extinguished a right of rescission, and *Woolf v. Associated Finance Pty Ltd*[40] in which Martin J. was prepared to hold that driving a car a distance of not more than half a mile constituted use and benefit of the car sufficient to bar recovery of purchase moneys under a void contract.[41] It is contended, nevertheless, that Mr Justice Gillard's finding is, with respect, extremely sensible. To hold that the plaintiff's use of the vehicle had barred his relief would be unduly harsh in a case where several interstate trips were necessary to establish the truth or falsity of the representation. However, it remains a matter of conjecture as to what degree of change in quality, condition and identity, will be necessary for a court to hold that a '*restitutio in integrum*' is impossible.

The defendant contended finally that since French's statement constituted a breach of collateral warranty which gave the plaintiff a remedy at common law against the dealer, the equitable right to rescind, which existed when the

[32] Else-Mitchell and Parsons, *op. cit.* 79.
[33] [1905] 1 Ch. 326; [1904-7] All E.R. Rep. 817.
[34] [1911] 1 K.B. 666.
[35] [1966] A.C. 63.
[36] [1973] V.R. 545, 564.
[37] [1973] V.R. 545, 565.
[38] (1955) 94 C.L.R. 216.
[39] [1958] 1 W.L.R. 753.
[40] [1956] V.L.R. 51.
[41] The case in fact turned upon s. 69 of the Supreme Court Act 1928 (Vic.), and application of the principle in *Valentini v. Canali* (1889) 24 Q.B.D. 166, but the finding of fact can still be validly compared with that in the present case.

representation was not a term of the contract, was extinguished. The defendant relied on the well known case of *Leaf v. International Galleries*[42] to support his contention. Gillard J, however, was still able to give judgment for the plaintiff for rescission for there was no alternative remedy against the credit company and His Honour did 'not believe that the discretionary nature of the equitable remedy can be invoked to defeat the patent legislative intent of conferring cumulative remedies on the hirer'.[43] Furthermore, 'since the section was intended to confer a dual right upon the hirer beneficial to the hirer, it should be interpreted liberally in the hirer's favour'[44] Accordingly, Gillard J gave judgment for the plaintiff against the second defendants for rescission and against the first defendants for damages. Thus, French's statement was classified both as a representation inducing the hire purchase contract, and as an actual term of the notional contract with the first defendants. This dual classification provided the plaintiff with both the rights of recission and damages, whereas if the statement had been classified the same way with respect to both contracts, only one of these remedies would have been available.

There is little doubt that the decision of the court was a just one. The plaintiff, handicapped by lack of English, had obviously suffered substantial loss at the hands of the defendants who, in the witness box, impressed Gillard J. as 'completely indifferent to the accuracy of their statements'.[45] It is submitted, further, with respect, that the approach of Gillard J. was commendable. Confronted with a section, clumsily drafted and of uncertain scope, His Honour was prepared to adopt a robust approach to overcome interpretation difficulties inherent in the section and substantially give effect to the legislative intent, so far as a fair reading of the section allowed.

P. R. FRANCIS

BICKNELL v. AMALGAMATED ENGINEERING UNION[1]

Conciliation and Arbitration—Registered Association—Election of Officers.

THE FACTS

The Amalgamated Engineering Union was originally constituted in Australia as a Section of an international union with its head office in England.

Its organs consisted of a Commonwealth Council, 17 district committees and over 200 branches. In Victoria there were five districts, in New South Wales there were four, and in South Australia one. The district secretaries in Melbourne, Sydney and Adelaide were full time officials but they did not have the right to vote at district committee meetings. The district committees in the state capitals had power to direct the other district committees in the same state in matters of policy, subject to the Commonwealth Council, and also had authority to act to protect the interests of the union in their states in matters of extreme urgency where the other district committees could not be consulted in time. This latter power had to be exercised having regard to the powers of the

[42] [1950] 2 K.B. 86; [1950] 1 All E.R. 693.
[43] [1973] V.R. 545, 568.
[44] [1973] V.R. 545, 561.
[45] [1973] V.R. 545, 552.

[1] (1969) 15 F.L.R. 215. Commonwealth Industrial Court; Spicer C.J., Smithers and Kerr JJ.