

## CASE NOTE

### GENOVEZOS v. PETROVIC<sup>1</sup>

#### A. INTRODUCTION

In *Genovezos v. Petrovic*, the Supreme Court of Victoria had occasion to interpret for the first time certain provisions of the Motor Car Traders Act 1973. The major provision examined was section 30 of the Act and in particular sections 30(1) and 30(4).

Section 30(1) states:

Every agreement for the sale of a motor car (not being an agreement all the parties to which are motor car traders or special traders) shall —

- (a) be in writing;
- (b) be signed by or on behalf of the vendor and the purchaser;
- (c) where the vendor is a motor car trader or a motor car trader acts on behalf of the vendor in the making of the sale, be signed by any employé of the motor car trader who negotiated the agreement;
- (d) in the case of a second-hand motor car, contain a description of the motor car sufficient to identify it and record its engine number;
- (e) specify the price and any other charges to be paid and the time and manner in which the price and any other charges are to be paid and, where a motor car or other goods are to be accepted as part payment of the price or any other charges, the amount agreed to be represented by the motor car or other goods;
- (f) state the mileage recorded on the instrument or device installed in the motor car for recording mileage either at the time when the purchaser signs the agreement or at any earlier time at which the purchaser takes delivery of the motor car; and
- (g) state whether or not the vendor or, where a motor car trader acts on behalf of the vendor in the making of the sale, the motor car trader believes the mileage so recorded to be true.

Section 30(4) states:

Where —

- (a) in any written agreement purporting to comply with sub-section (1) the vendor or, where a motor car trader acts on behalf of the vendor in the making of the sale, the motor car trader states that he believes to be true a mileage that he knows to be false or does not believe to be true; or
- (b) a motor car is sold otherwise than by an agreement that complies with sub-section (1) —

the purchaser may apply to a Magistrates' Court for an order for rescission of the sale of the motor car, or recover damages from the vendor or the motor car trader (as the case requires) for any loss suffered as a result of his relying upon any false statement concerning mileage made in any written agreement purporting to comply with sub-section (1).

Section 30(1) requires two things. It requires agreements for the sale of motor cars to be made in a particular form, and secondly, it requires agreements for the sale of motor cars to contain the matters which are enumerated in paragraphs (d) to (g). When section 30(1) is complied with, the purchaser is armed with a document

<sup>1</sup> [1978] V.R. 17.

providing clear proof of what the express terms of the contract were: an accurate description of the car, the price, the terms for payment and also a form of warranty with respect to the mileage of the car, except where the vendor expressly states that he does not believe the recorded mileage to be true. The possession of such a document is of benefit to both purchaser and vendor as its existence should prevent disputes as to the contents of their agreement.

Failure to comply with section 30(1) is an offence against the Act<sup>2</sup> subject to a fine not exceeding \$250.<sup>3</sup> In addition the purchaser may institute proceedings under section 30(4) for rescission and/or damages where either section 30(1) is not complied with, or a contract contains a statement that the mileage is believed to be true, when in fact the vendor does not believe it to be true or knows it to be false. *Genovezos v. Petrovic* involved an action brought under section 30(4).

### B. THE FACTS

On 16 April 1975, Paris Genovezos (referred to hereafter as G) spoke to Marko Petrovic (referred to hereafter as P) with a view to purchasing a Jaguar car belonging to P. An agreement was reached in which G agreed to pay a deposit (\$1,000) and the remaining purchase price with interest (\$3,000) in monthly instalments (of \$125 each). On 23 April, G paid the deposit and took delivery of the Jaguar the next day. During the course of transactions a representation was made to G that the motor car was in good condition. G commenced using the car and found it to be faulty. Over the next seven months, the car's performance was defective in several ways and G was required to spend \$500 on repairs. In the meantime he had paid five monthly instalments.

Eventually in November 1975, G felt he could no longer afford to keep the car and asked P if he would take it back. P initially stated that he would take the car back, subject to G obtaining a road worthiness certificate. However, at a later stage, when G had obtained the certificate, he refused to do so. Despite this, G left the motor car, the keys and the certificate at P's residence (effectively delivering up possession). It was an implied term of the agreement that should the purchaser return the car the transaction would be at an end, G would not have to make further payments and P would not be required to give any refunds.

On 12 March 1976, P issued a summons in the County Court asking for money due on the sale contract and on a bill of sale given by G to secure the outstanding instalments when he paid his deposit. While that suit was pending, G applied to the Magistrates' Court under the provisions of s. 30(4) of the Act, for an order of rescission and consequential orders.

The Magistrate held that as the agreement for sale had been completely oral, s. 30(1)(a), which required all such agreements to be in writing, had been clearly breached. Furthermore, he found that having regard to the whole of the evidence a good case for rescission had been made out and he therefore granted the application and ordered the repayment to G of amounts paid and interest. P obtained an order *nisi* to review that decision. The matter came on for hearing before Harris J. in the Supreme Court of Victoria.

### C. THE JUDGMENT

Harris J. felt he was required to answer two questions. Firstly, what is the scope of the discretionary power which is given to a Magistrate to make an order for a sale to be rescinded in a case which comes within s. 30(4)(b)? Secondly, had the Magistrate

<sup>2</sup> See s. 30(2) and s. 30(3), Motor Car Traders Act 1973 (Vic.).

<sup>3</sup> *Ibid.* s. 53(2).

in the present case wrongly exercised that discretion when he made his order under the section?<sup>4</sup>

P's counsel's first argument was a preliminary point that s.30(4) applied only to those transactions in which the vendor is a motor car trader as defined in the Act.<sup>5</sup> This contention was rejected by Harris J., who held that the provision applied whether or not the vendor was a motor car trader.

Before the Magistrate, counsel for G had argued that s.30(4) was extremely broad, that the grounds for rescission were not the common law grounds, but that any breach of s.30(1) of the Act was sufficient to allow such an order to be made. It was his contention that the common law limits on the right to rescission did not apply and that the Court had power to grant rescission in the case as a breach of s.30(1) had been shown. The Magistrate had accepted this view.

However, the Magistrate's reasoning was not entirely clear. Harris J. thought that his ruling was capable of at least two interpretations.<sup>6</sup> The first (and most plausible<sup>7</sup>) was that the Magistrate had taken the view that although the discretion conferred on the court by s.30(4) to order rescission was conditional upon the vendor having failed to comply with s.30(1), once that point was established, there were no further limits to the court's jurisdiction and rescission could be granted on whatever grounds the court chose in its discretion to entertain. On this reasoning, according to Harris J., the Magistrate, once satisfied that s.30(1) had been complied with, took account of the mechanical problems G had had with the car subsequent to taking delivery (a matter in no way connected with s.30) and ordered rescission on that basis.

Harris J. rejected this approach. He held that the sole factor relevant to the exercise of the discretion conferred by s.30(4) was the vendor's failure to comply with s.30(1) and, further, that the principal factor to be taken into account was the extent to which the purchaser had been prejudiced or disadvantaged by the non-compliance.<sup>8</sup> Since there was no evidence that he had been substantially disadvantaged by the non-compliance, there was no basis for ordering rescission pursuant to s.30(4). The fact that G may have had additional grounds for complaint (such as breach of contract and misrepresentation) were not material to an application for rescission pursuant to s.30(4).

The second possible (though according to Harris J. less likely) view of the Magistrate's decision was that it had been based on a view that rescission could be ordered once non-compliance with s.30(1) had been established, irrespective of whether or to what extent the purchaser was prejudiced as a result and subject only to the requirement that substantial restitution be possible.<sup>9</sup>

Harris J. also rejected this approach, reiterating his view that it was an essential pre-condition to the ordering of rescission under s.30(4)(b) that the purchaser has suffered prejudice or disadvantage as a result of non-compliance with s.30(1).

A further point made by Harris J. in support of his view that rescission ought not to have been ordered in the case before him was that the return of the car by G in November 1975 had effectively terminated the sale agreement between the parties. The agreement being no longer in existence at the date of the hearing before the Magistrate, there was nothing on which a rescission order could operate.<sup>10</sup>

<sup>4</sup> [1978] V.R. 17, 23.

<sup>5</sup> See s.2(1), Motor Car Traders Act 1973 (Vic.).

<sup>6</sup> [1978] V.R. 17, 23-4, 28-9.

<sup>7</sup> *Ibid.* 28-9.

<sup>8</sup> *Ibid.* 24.

<sup>9</sup> *Ibid.* 28-9.

<sup>10</sup> *Ibid.* 30.

<sup>11</sup> *Ibid.* 25.

## D. DISCUSSION

The decision in *Genovezos v. Petrovic* has quite widespread implications which may not be immediately obvious.

In the first place, the initial finding that s. 30(4) applies to agreements when the vendor is not a motor car trader means that the whole of s. 30 is applicable to both commercial and private dealings. This means that when individuals sell their cars at private sale, through classified newspaper advertisements or trade them in to motor car dealers without complying with the formalities of s. 30(1), they commit an offence under s. 30(2) and render themselves liable (technically) to prosecution. Furthermore, they expose themselves to the possibility of civil proceedings being instituted for rescission pursuant to s. 30(4).

There seems no doubt that Mr Justice Harris's decision is the correct one. The Act clearly and consistently distinguishes between vendors and motor car traders in many sections. This finding reinforces the view, perhaps already apparent on the face of the Act, that a vendor, particularly for the purposes of s. 30, need not be a motor car trader.

Although it is unlikely that these contingencies will frequently arise in practice, it is hardly desirable that they be allowed to continue to exist on paper. *Genovezos v. Petrovic* emphasises the need to tidy up this part of the Act and to remove the uncertainties and potential hazards to which it gives rise.

The other interesting aspect of the decision is the limitation which it imposes on the discretion conferred by s. 30(4) on Magistrates' Courts to order rescission. The basic failing in the judgment here, with respect, is that it does not clearly distinguish between two different situations.

On the one hand, the limitation imposed by Harris J. does seem reasonable in so far as it is confined to proceedings brought under s. 30(4)(b). If, in such cases, the purchaser were not required to show that his position was prejudiced by the seller's non-compliance with s. 30(1), he would be able to avoid his obligations under an otherwise valid agreement simply by pleading a technicality. That situation would hardly be consistent with the notion of fairness toward which the Act is presumably striving.

On the other hand, rescission for non-compliance with s. 30(1) should not be confused with rescission under s. 30(4)(a), which deals separately and explicitly with false statements by vendors and motor car traders as to mileage. In this area different policy considerations apply. By separating the issue of false mileage statements from other forms of non-compliance with s. 30(1), Parliament has clearly signalled its view that it regards the former as more critical. In cases brought under s. 30(4)(a), therefore, proof of the false statement ought to be sufficient, without further proof that the purchaser has suffered loss as a result. That is a consequence which ought to be presumed.

In Mr Justice Harris's judgment this distinction between paragraphs (a) and (b) of s. 30(4) is not sufficiently clear. At one stage<sup>11</sup> he cites the provisions of s. 30(4)(a) and considers that they support his decision as to the extent of the statutory jurisdiction conferred in s. 30(4)(b). This appears to be equating the power to make discretionary orders under paragraph (b) with that power in relation to paragraph (a); it would seem reasonable to submit that such equation is incorrect. Different legal considerations and policy aspects relate to the two paragraphs, the most obvious being the fact that whereas s. 30(4)(a) deals with active mischief on the part of the vendor, s. 30(4)(b) merely deals with a simple failure to comply with a formality. It would seem reasonable therefore to suggest that the statutory jurisdiction to order rescission in the former case is less limited by the restrictions imposed on that jurisdiction in the

case of agreements failing to comply with s. 30(1) and falling within the scope of s. 30(4)(b).

The failure by Harris J. sufficiently to emphasise the differences between the paragraphs seems to indicate a view that the statutory jurisdiction with regard to s. 30(4)(a) is just as limited as the statutory jurisdiction with regard to s. 30(4)(b). To the extent that the judgment does support that view, it is, with respect, incorrect.

#### E. CONCLUSION

It would seem that the principal source of confusion as to the scope of the discretion to make orders is the imprecise and unclear wording of the section itself, especially s. 30(4). The draftsman has attempted to combine in s. 30(4) several points but has failed to clearly delineate each one from the others. The result is a confusing provision which does not clearly define or state what the law is. If recourse were had to legislative amendment in this area, the principal problems associated with interpretation could be easily solved.

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