THE HIRE PURCHASE AND CREDIT SALES STABILISATION REGULATIONS, 1957: SOME ATTEMPTS AT AVOIDANCE

The would-be car owner in New Zealand has two particular sources of frustration: the high cost of motor vehicles, and the stringency of credit terms. Hire purchase controls have been abolished in the United Kingdom, yet in New Zealand the customer seeking credit must find a deposit of 50% when he buys a new or secondhand car and has just 24 months to pay off the balance.

Successive Ministers of Finance have offered little relaxation. Thus, the inevitable result has come about; attempts have proliferated at devising forms of agreement which, while not themselves hire purchase agreements, and while avoiding, therefore, the appropriate credit controls, have still essayed to offer all the benefits of such agreements.

Quartel v. *Credit Services Invesments Ltd.*

The necessary complement of tight credit is a far reaching definition of hire purchase. Such a definition is contained in reg. 2 of the Hire Purchase and Credit Sales Stabilisation Regulations, 1957. A hire purchase agreement, the definition runs, means

> "an agreement for the bailment of goods under which the bailee may buy the goods or under which the property in the goods will or may pass to the bailee, whether on the performance of any act by the parties to the agreement or any of them or in any other circumstances; and includes any agreement for the bailment of goods, with or without expressly giving to the bailee an option to buy the goods, under which instalments are payable by the bailee during a specified or ascertainable period at the end of which the bailee may continue the bailment without any payment or subject to the payment of a nominal rent only."[1]

As a back-stop to this regulation (and, as events have turned out, a singularly prescient one), reg. 8(b) prohibits a person from entering into any contract "for the purpose of or having the effect of, in any way, whether directly or indirectly, defeating, evading, avoiding, or preventing the operation of these regulations in any respect."

The landmark case hereabouts is *Credit Services Investments Ltd.* v. *Quartel.*[2] It appeared that Q had taken a lease of a motor car, the contract providing for an initial deposit and 23 monthly payments.

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1. To block up what would be an obvious loophole, subclause (3) treats two or more agreements as just one agreement where their net effect is the creation of a hire purchase or credit sale agreement.
2. [1970] N.Z.L.R. 933 (C.A.).

It was common ground that the deposit paid was less than that required by the Hire Purchase and Credit Sales Stabilisation Regulations.

But was this agreement controlled by the regulations: was it, in fact, a hire purchase agreement? At first instance, Henry J. said he thought it was,[3] for he was much impressed by the arrangements specified in the contract for disposing of the vehicle when the period of the lease expired.

These arrangements specified that the vehicle was to have a residual value of $640. At the termination of the lease, the lessor was to sell for the best possible price, further undertaking to pay to the lessee the amount in excess of $640 which such sale produced.

Henry J. pointed to the High Court's decision in *Kay's Leasing Corporation Pty. Ltd.* v. *Fletcher*[4] where it had been said that the expression "and the bailee may buy the goods" (and this was the expression Henry J. had to consider) contemplated "a contractual right in the bailee to purchase the goods the subject of the bailment if he wishes to do so".[5]

His Honour considered that the term "contractual right" was not to be interpreted in the restricted sense of "conferring an option", but must be taken as meaning a right to buy arising from the provisions of the contract itself.[6] Applying this reasoning to the facts of the instant case, Henry J. pointed out that the arrangements described above placed the lessee in an "invincible" position should he wish to buy the car. He could bid whatever sum he chose, because everything in excess of $640 was returned to him. This meant that if he were so minded, the lessee could buy the vehicle for a further outlay of $640, a potential state of affairs which meant, Henry J. decided, that here indeed was a contract under which the bailee "may buy" the goods.

The Court of Appeal did not agree. Well might the lessee be in the invincible position described by Henry J., said North P., but that did not confer on the lessee any right under the contract to become owner of the car.[7] If the lessee ever did become owner of the vehicle, added Turner J., in his concurring judgment, it "will not be *under the agreement*. His opportunity to bid may arise from the course of events which the agreement brings about, and it may be that the agreement will place him in a most favourable position if an auction be held; but if he buys he will buy under a new contract altogether."[8]

The Court of Appeal's holding is, it is believed, clearly right. Where Henry J. seems to have erred is in confusing the right to

3. [1970] N.Z.L.R. 89.
4. [1965] A.L.R. 673.
5. Ibid., at p. 678, per Barwick, C.J., McTiernan and Taylor, JJ.
6. Supra, n. 3 at p. 91.
7. Supra, n. 2 at p. 944.
8. Ibid., at p. 948: emphasis that of His Honour.

ownership with the facilities for ownership. That the lessee had the latter is not to say that he also had the former.

His Honour had purported to follow *Kay's Leasing Corporation Pty. Ltd.* v. *Fletcher*;[9] since the Court of Appeal also accepted it as correct, it merits further scrutiny.

The facts of this case showed an agreement whereunder one party had leased a tractor. A second agreement, entered into simultaneously with the other, gave the lessee an option to purchase goods "of the same general description as the goods described in the first agreement". A further clause in the second agreement gave the lessor an "uncontrolled discretion" to select the actual goods leased as those of which ownership would pass to the lessee should he decide to exercise his option.

Could it be said that, taking these agreements together, they were such that the lessee "may buy" the goods leased? Walsh J., in banco, thought not.[10] Though his Honour did not expand upon this decision, there seems little doubt but that it must be correct. The wording "may buy" seems to indicate an untrammelled right in the lessee to purchase the contract good should he so desire. As the majority in the High Court said, the expression adopted was "quite apt to cover the form of option covered in the conventional hire-purchase agreements";[11] where the bailee, that is, has an option to purchase the contract goods at his own discretion. There was no such right in this case.

But could it be contended, instead, that the property in the goods "will or may pass"? Plainly it could not here be said that property "will pass": this expression was appropriate only to conditional purchase agreements where the bailee binds himself to purchase the goods, property passing only when the final instalment has been paid.[12]

The majority did feel, however, that here was a case where property "may pass". Once again, it is respectfully believed that the correct decision was reached. The difference between "may buy" and "may pass" would seem to be the difference in the viewpoint of bailee and bailor. While the bailee in this case had no absolute right to buy *the* tractor should he decide to exercise his option — thus eliminating "may buy" — he nevertheless had an absolute right to *a* tractor. Thus, it could fairly be said the property in goods undoubtedly would pass if the lessee were so minded; and if the lessor was so minded, such goods may be the leased goods. It follows that property in those goods "may pass" under, and by virtue of, the two agreements. The whole, therefore, could properly be found a contract of hire purchase.

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9. Supra, n. 4.
10. (1964) 64 S.R.(N.S.W.) 195, 208.
11. Supra, n. 4 at p. 678 per Barwick C.J., McTiernan and Taylor, JJ.
12. Ibid.

It is worth repeating that in *Kay's* case the lessee could summon up an absolute right to property in some goods, for this appears to be the crucial factor in distinguishing *Quartel*. In the latter case, no such right was ever invested in the lessee: were he ever to own the vehicle, it would only be the result of successfully outbidding other willing purchasers. These others may not have had an equal opportunity to buy the car, but at least they had equal rights. That suffices to deprive the contract of any status as a hire purchase agreement.

The "Anti-Avoidance" Clause

Yet the Court of Appeal was still willing to strike down the contract. This followed from the unanimous finding that the agreement, in breach of reg. 8(b), was such as had the purpose and effect of enabling the parties to "defeat, evade and avoid" the regulations.

North P., delivering the leading judgment, relied heavily on *Newton* v. *Commissioner of Taxation of the Commonwealth of Australia*,[13] wherein a section identical with reg. 8(b) had been given close analysis. Lord Denning, the President observed, had dismissed motive as immaterial: the word "purpose", his Lordship had said, means the end desired; the word "effect", the end accomplished. If the purpose of some agreement was to "defeat, evade and avoid" the wishes of the legislature, that agreement was to be struck down. But if it was, in contrast, explicable by virtue of ordinary commercial dealings, then, Lord Denning concluded, the agreement could not be impeached.

The circumstances of the present contract, North P. said, were such that it could scarcely be saved by reference to ordinary business dealings: its purpose was plainly to avoid the rigours of the regulations. The lessor believed it had devised a scheme which enabled a customer to own a car even when he could not muster the minimum deposit: the lessee had been led to understand that ownership of the car would ultimately be his. Here, the President deduced, was plainly a breach of reg. 8(b).[14]

An elaboration of this judgment, coupled with a small, but important change of emphasis, was delivered by Quilliam J. in *Carroll* v. *Credit Services Investments*.[15] Again, a leasing agreement was involved, the contract being in almost the same form as that set out in *Quartel*. In particular, the agreements in both cases contained the same type of "residual value" clause.

There were, however, important differences. For instance, the

13. [1958] A.C. 450 (P.C.).
14. Supra, n. 4 at pp. 946-947. See too *Evans* v. *Credit Services Investments Ltd.*, (Auckland, 12 October 1972); *Northe* v. *Cord Motors Ltd.*, Auckland, 8 February 1973); *Ransfield* v. *Cord Motors Ltd.*, 13 April 1973.
15. [1972] N.Z.L.R. 460.

agreement in the later case specifically prohibited the lessee from becoming owner of the car upon its eventual sale. Plainly, then, there was no hire purchase contract.

Again, in the instant case, there was no surrounding evidence to show that the company considered itself to have adopted a scheme enabling a person to purchase a motor car when he could not afford the minimum payment.

Such differences, Quilliam J. said, were not enough. Consider, he asked, the effect of the agreement from the defendant's point of view. It was expecting to gain from the agreement some $7,348, after an initial outlay in buying the car of $5,300, But if this had been a standard hire purchase contract, his Honour continued, the defendant would have achieved the same return: so the conclusion must necessarily be, he said, that "the leasing agreement was so designed as to enable the defendant to achieve the same return on capital as it would for a sale on hire purchase".[16]

To the objection that all rental payments must be computed by reference to the original capital outlay, Quilliam J. replied that it could not be "common commercial practice" for the rental to be so computed "as to equate over a single short period of hiring not only a return of the capital outlay, but an interest charge as well."[17]

It will be seen that the change in emphasis was, as it were, to look over the lessor's shoulder, rather than over that of the lessee. If the latter could not avail himself of all the advantages of the traditional hire purchase agreement, it was nevertheless plain that the former could. Indeed, from his viewpoint, the leasing agreement differed neither in structure nor reward from a contract of hire purchase.[18]

Is this, then, to say that an ageement would not be in breach of the regulations were the lessee never to become owner, nor the lessor to receive quite the rewards obtainable under a hire purchase contract? Although such a combination of events did not occur in *De Ath* v. *Cord Motors Ltd. & Credit Services Investments Ltd.*,[19] Perry J.'s willingness to look afresh at the agreement from the lessee's point of view makes it clear that the answer would be "no".

The facts of this last case were substantially those of *Carroll's*. His Honour, observing that the lessee, a working man, had paid a deposit of $600, was paying rental at the rate of $3 a day, and could claim none of the sums as tax deductible allowances, believed that the lease was "not capable of explanation by reference to any ordinary business dealing".

16. Ibid., at p. 467.
17. Ibid.
18. Quilliam, J.'s decision was followed by Rothwell, S.M. in *Marsanyi* v. *Associated Group Securities Ltd* (Auckland, 29 March 1972) where the facts were broadly similar, with the additional factor of an oral agreement to let ownership pass at the termination of the lease to the lessee's spouse. This was affirmed by McMullin J., (Auckland, 6 November, 1972).
19. Auckland, 16 December 1971.

But to strike down leasing agreements on this ground alone is not always satisfactory. To the extent that all commercial ventures have their beginnings, and noting also that vehicle leasing was, at the relevant period, a far from uncommon practice,[20] it becomes really a prime example of question-begging to stigmatise a commercial practice as "unusual". For what Perry J. (and, it may be said, Quilliam J. before him) was really doing was to define "ordinariness", and therefore acceptability, by what was legal. But that, of course, is the very question involved. In *Quartel*, by way of contrast, there was sufficient in the circumstances surrounding the contract for it to be fairly said that it was not to be explained by reference to ordinary business dealing.

Better, then, to rely on Perry J.'s further finding that the lessee was, in effect, "buying a car" with a deposit less than permitted by law. True, the lessee might not ultimately acquire legal title to the vehicle, but for three years, the duration of the lease, he had all the trappings of ownership, and those acquired on terms that the law had been at considerable pains to prohibit.

These decisions by Quilliam and Perry JJ. seemed to sound the death-knell for car leasing: *Carroll* was really the ultimate case; if leasing was illegal there, it was illegal everywhere.

When the case reached the Court of Appeal,[21] this prospect seemed to compel a thoroughgoing analysis of the regulations, and of reg. 8(b) in particular.

It was accepted by Richmond J. that *Newton* v. *Commissioner of Taxation of the Commonwealth of Australia*[22] was good law. But, he said, its application to reg. 8(b) must proceed with care. First, it had to be asked whether the transaction under scrutiny was one which is "in its nature" capable of being regarded as having as its purpose or effect, in any way, whether directly or indirectly, to defeat, evade, avoid or prevent the operation of the regulations in some respect. If an affirmative answer were given, it had then to be asked whether such had been the "end in view"; in determining this issue, it could be asked whether the transaction could be explained by normal commercial practice. In *Quartel*, North P. had appeared to put this second question first, causing much of the confusion so evident in the later judgments.

Richmond J. began the task of answering the first limb of the test just posited by noting that the regulations had imposed restrictions on some types of dealing, but not all. Regulation 3, he said, imposes controls only on hire purchase agreements, and credit sales agreements;

20. Witness his Honour's own observation that the transaction before him was of a type that used to happen "many times daily throughout New Zealand".
21. [1973] 1 N.Z.L.R. 246, 255.
22. Supra, n. 13.

an offence could only be committed under reg. 8(b) where a transaction defeated, evaded, avoided or prevented the operation of reg. 3. An illegal transaction must, his Honour emphasised, "embody the element of a sale of goods".

Looking at the facts of the instant contract, the Court of Appeal concluded unanimously that it was not within the ambit of reg. 3, from which it followed that there could be no infringement of reg. 8(b). There was no intention that the lease would confer on the lessee the rights of an owner or any rights substantially equivalent thereto; his possessory title was to last but three years. The regulations were not, in terms, directed at this type of arrangement.

In attempting to deal with the Court of Appeal's ruling, one must, of course, recognise that reg. 3 does refer only to hire purchase and credit sales. So too, reg. 10, when it sets out the rights of the parties to an illegal contract, refers only to the moneys recoverable by the "buyer".[23] McCarthy J. chose to emphasise this in the Court of Appeal.

But against the conclusion drawn from these factors, it must also be recognised that no draftsman can foresee every type of arrangement which will be tried in an attempt to avoid these, or any other regulations: if he could, he would make express provision therefor. It is precisely because a draftsman is not a clairvoyant that "defeat, evade and avoid" clauses are necessary.

This enables us to argue that too much weight must not be given to the use only of the terms "hire purchase", "credit sale" and "buyer". Indeed, in a crucial phrase in *Quartel*, North P. stated that "those who were responsible for the drafting of the regulations did consider it necessary to introduce a provision which would catch arrangements which although *in terms outside* the regulations, plainly were intended to defeat, evade or avoid the operation of the regulations."[24]

If, on the other hand, we are to pay close heed to the language of the draftsman, there is more than passing interest in the construction of reg. 10. There it is stated that the categories of illegal agreement under which the buyer may claim the specified remedies are (in paragraph (a)) a "hire purchase agreement or credit sale agreement; or (in paragraph (d)), *"any other transaction"*. There could be no clearer indication that the draftsman aimed to catch more than just mere hire purchase and credit sale agreements.

More than this, it must be appreciated that the effect of the Court of Appeal's decision is virtually to obliterate reg. 8(b). If that regulation did not apply in the instant case, when does it apply?

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23. It might usefully be mentioned here that the Illegal Contracts Act 1970 has no application to contracts in breach of the regulations: *Harland* v. *Nu-Plan Motors Ltd* (Auckland, 5 May 1971, Gilliand S.M.).
24. Supra, n. 2 at p. 945.

There can be little doubt but that, even in the absence of reg. 8(b), *Quartel* would have been decided in the same way. No Court would have tolerated such a blatant evasion of the regulations; the "unruly horse" of public policy would readily be available to declare such a contract, at the least, unenforceable.[25]

It is, in fact, when we remember the earlier Court of Appeal decision that the problems caused by *Carroll* come into clearer focus; for it is not immediately obvious that the two decisions are compatible. As the former was avowedly concerned with neither a hire purchase nor credit sale agreement, it seems puzzling that an action founded on reg. 8(b) was upheld.

Nevertheless, the Court of Appeal in the later case gave express approval to the decision in the earlier. The point of contrast was, so it was said, that, on the evidence as a whole, the arrangement in *Quartel* was such as ultimately would allow ownership to pass, and thus approximated a credit sale.

No amount of linguistic dexterity, however, can overcome the fact that the particular arrangement was not a credit sale. Both Courts of Appeal, therefore, must be taken to have approved the view that the regulations are ill-served by a liberal approach.

Thus, the crucial point is to determine when the effects of a transaction are sufficiently close to those specifically mentioned in the regulations for it to be clear that the draftsman must have had the disputed transaction in mind when he considered reg. 8(b).

The Court of Appeal in *Carroll* thought that similarity necessarily involved the passing of property. An agreement could only be impeached by reg. 8(b), Richmond J. considered, if it embodied "at least the enjoyment by the lessee of rights substantially equivalent (from a practical point of view) to those enjoyed by a conditional purchaser".

Carroll, it was said, had no such rights: he could not dispose of the car, and was entitled to possession for no more than three years. This is not the place to examine the precise nature of property and ownership, but two points may be made: for three years, Carroll had sole right to the use and enjoyment of a motor vehicle; and that, at the end of the period, he had the benefits of resale insofar as the amount realised exceeded the residual value. These factors produce a situation not so very far removed from true ownership.

It is much more important, however, to attack the notion that the key element is necessarily the passing of property. It has been suggested already that the draftsman was not just concerned with a "buyer". There is, too, the fact that the definition of hire purchase (as we have again already seen) can include an agreement which is nothing more than a straight bailment. Indeed, the conclusion cannot be resisted that, if property is so important, the minimum deposit

25. A good precedent would be *Alexander* v. *Rayson* [1936] 1 K.B. 169.

requirements are a rather odd and misplaced means of control. Yet they really lie at the practical heart of the regulations.

This guides us to the crux of the issue. It was freely recognised in *Carroll* that the regulations are Treasury regulations issued under the Economic Stabilisation Act 1948, but nowhere was mention made of the observation of Turner J. in *Motor Mart Ltd.* v. *Webb*.[26] There his Honour had rationalised the regulations as "primarily Treasury Regulations *concerned with the quantity of currency in circulation*."[27] Viewed in this light, the first instance decision of Quilliam J. in *Carroll* makes eminently sensible reading.

McCarthy J., in the Court of Appeal, considered that an unrestained application of reg. 8(b) "could be devastating in its effects on legitimate activity." This, of course, is a prime piece of question begging since the very problem is to determine the scope of legitimacy. One cannot but wonder whether the Court of Appeal would have reached the same decision had there not been the backstop of the Economic Stabilisation (Motor Car Hiring) Regulations 1971.[28] Without them, it can be strongly urged that the decision of the Court of Appeal would itself have had a devastating effect on legitimate activity, namely, the disposal of motor vehicles on credit terms. Certainly, leasing cars would have become an attractive and viable alternative to hire purchase or credit sale.

Conclusion

The upshot is that one cannot view the Court of Appeal's decision with any degree of confidence. It is highly likely that the Court was influenced by the disastrous effects on some finance companies of the decision in *Quartel*. If Carroll's lease were to go the same way, some of the larger companies would similarly have been hard hit, and that could have provoked more than just a ripple through the economy. Instead, the Court of Appeal forestalled such a happening, tacitly recognising the relative insignificance (in economic terms) of the leasing of consumer goods (other than cars)[29] sanctioned by its decision.

The danger of this approach is that it necessarily assumes the continuance of the Economic Stabilisation (Motor Car Hiring) Regulations. Of this, of course, there can be no guarantee: and it may well be, if they are revoked, the fallacy in the Court of Appeal's thinking will be all too readily exposed.

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26. [1958] N.Z.L.R. 773.
27. Ibid., at p. 778.
28. Leasing transactions are valid if at least 15% of the cash price is paid as a deposit. No agreement is to endure for more than three years. Written contracts are mandatory.
29. Because of the 1971 Regulations; supra, n. 28.

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