

LEGISLATION

THE HIRE-PURCHASE AGREEMENTS (AMENDMENT) ACT, 1957 AND THE CREDIT SALES AGREEMENTS ACT, 1957

The Hire-Purchase Agreements Act, 1941, amended in 1955, is now further amended. Both the amending Act¹ and the new Credit-Sale Agreements Act, 1957² were debated and passed together by the New South Wales State Parliament earlier this year and were proclaimed to commence on the 14th October, 1957.

The two Acts are in many respects complementary, and may be conveniently discussed together. They cover the field of hire-purchase (including the bailment of goods where the bailee is given an option to purchase),³ and the sale of the goods on instalments, and seek to control these transactions. This Note will deal with the Acts under three headings, Area of Control, Machinery of Control and Procedural and Incidental Matters.

I. Area of Control.

1. Hire-Purchase Agreements. The new section 26B introduced by the Amending Act for the application of maximum hiring charges does not alter the s. 2 definition of "hire-purchase agreement". On the other hand, it specifically excludes from the operation of the maximum hiring charge provisions hire-purchase agreements where instalments are to be paid less than nine times per year. In other words, a hire-purchase agreement providing for not more than eight instalments in any year, will be outside ss. 26B and 26C relating to minimum hiring charges. Such an agreement is, of course, subject to the other requirements of the Act. The exclusion of these agreements is presumably designed to allow the parties greater flexibility in dealing with the more unusual type of hire-purchase agreement where the repayments may be irregular. The hire-purchase of agricultural machinery is a ready example.

A more extensive definition of "hire-purchase agreement" had been inserted by the 1955 amendment in s. 30 for the purpose only of Part V of the Act, relating to Minimum Deposits. It was designed primarily to catch the device of a hiring for a fixed term at a rent which would pay for the goods, followed by an indefinite or perpetual hiring thereafter at a nominal rent. A wider and somewhat speculative definition was included in sub-paragraph (b) of the definition.⁴ The new amending Act leaves this definition un-

¹ Act No. 31 of 1957.

² Act No. 29 of 1957.

³ Hire-Purchase Agreements Act, 1941, s. 2.

⁴ Subpara. (b) of the definition is as follows: "Any scheme or device wholly or partly in writing on or in connection, directly or indirectly, with the sale or agreement for sale of goods or with the intended or future sale of goods which in the opinion of the court in which any proceedings under this Part are taken is intended to give to the vendor security for the payment of the purchase-price or any part or instalment thereof (whether referred to as rent or hire or otherwise) by retaining or attempting to retain the property in the goods in the vendor until due and full payments of such purchase-price or part or instalment thereof or until any later time." It is extremely difficult to predict what effect a court will give to this definition.

changed.

2. *Credit Sales.* A "credit-sale agreement" is defined as "an agreement for the sale of goods under which

(a) the purchase-price or any part thereof is payable by instalments or payments which are to be made over a period of one year and are to be made nine times or more than nine times in any period of twelve months that forms part of the period first mentioned in this paragraph; or

(b) the purchase-price or any part thereof is payable by instalments or payments which are to be made only over a period of one year or less than one year but more than nine months and are to be made nine times or more than nine times during that period.

There are several exceptions to this definition. These will be dealt with below.

Many retail firms operate what are known as "add on" accounts for their customers. Once a customer has opened such an account by the purchase of an item on time payment, he is able to purchase further items without deposit. In effect, the deposit on the first item and any subsequent instalments paid in respect of it act as the deposit on the further items. The balance under the first agreement is added to the purchase price of the additional goods (including charges) and the total becomes payable over a new period.

It will be seen that in the usual case while the period of repayment is in excess of nine months, an add-on agreement will be caught by the definition of "credit-sale" in the new Act. The position is, however, dealt with in s. 13, which specifically states: "in this Section 'credit-sale agreement' includes a credit-sale agreement that has been varied for the purpose of including additional goods in the agreement". The section further provides that in certain circumstances no deposit need be paid in respect of the purchase of the additional goods. However, even in these circumstances limits are placed on "charges" which can be imposed in respect of the additional goods.

3. *Outside Area.* Although the two Acts under review have extended the area of control, several types of analogous transactions remain outside the scope of either Act.

In the first place, neither Act applies to an agreement "under which the buyer is a person who is engaged in the trade or business of selling goods of the same nature and description as the goods referred to in the agreement". Nor do they apply where goods comprised in the agreement "are not to be delivered to the order of the buyer until the whole of the purchase price is paid". These latter transactions are familiarly known as lay-bys and are governed by the Lay-by Sales Act, 1943.

More important than either traders' purchases or lay-bys is the field of pure bailment. Hiring remains outside legislative control even where the bailee during the bailment, independently of the hiring agreement, may purchase the goods on favourable terms.⁵ It is essential in the latter case that the right of the bailee to purchase should be merely a speculative *in futuro* right or a right contingent on something outside the document.

II. Machinery of Control.

1. *Minimum Deposits.* Part IV of the Hire-Purchase Act introduced by the Amending Act of 1955 gave power to prescribe the minimum amount which could be accepted by the vendor as deposit on goods the subject of a hire-purchase agreement. Part IV envisaged that different proportionate deposits would be prescribed in respect of differing types of goods, and regulations were in fact gazetted on this basis.

The new Amending Act makes two important changes in the scheme of Part IV. In the first place, the prescribed percentage deposit is to be calculated with reference to the "cash price" instead of the "purchase price".⁶ From

⁵ *R. v. R. W. Proffit Ltd.* (1954) 2 Q.B. 35.

⁶ Section 4(b).

the point of view of commercial convenience this is an improvement as it enables the deposit to be more readily calculated. As the "purchase price" includes hiring charges, interest and insurance premiums, previously the minimum deposit on identical goods (*inter alia*) increased with the length of the hiring period. There seemed no relevant policy consideration for this result and the change is for the better.

A less welcome change is the introduction of subsection (3) to s. 31. This section provides that a hire-purchase agreement entered into in contravention of the section relating to minimum deposits "shall be void: Provided that all moneys paid and the value of any other consideration provided by the purchaser under the agreement shall be recoverable as a debt due to him by the vendor."

Previously, failure to comply with the minimum deposit requirements of Part IV constituted a punishable offence, but did not in any way affect the validity of the agreement. The new subsection is obviously designed to add a stronger sanction to the penalty provisions which are retained. One gathers that some such additional sanction may have been required. On the other hand, the new provision appears unnecessarily harsh on the vendor especially where the non-compliance is minor or inadvertent. A preferable course would have been to include some such provision as s. 4B of the Bills of Sale Act, 1898, giving the court power to rectify an agreement in an appropriate case where the non-compliance is "accidental or due to inadvertence or to some other sufficient cause" or where it is otherwise just and equitable that rectification should be allowed.

Another amendment to Part IV worthy of mention is the repeal of s. 35 which in extremely wide terms prohibited "no deposit advertising". The learned author of *Hire Purchase Law* in referring to this "extraordinary provision" had commented that it was inconceivable that the section was necessary to achieve or assist in achieving the object of the Part.⁷ It seems that no prosecutions were in fact brought under the section.

Section 3 of the Credit-Sales Agreement Act applies similar provisions to credit sales. Subsection (6) of that section is identical with s. 31(3) of the Hire-Purchase Act, and the same criticism can be levelled against it.

2. *Hiring Charges.* The major new feature of the legislation under review is the limitation of charges added by vendors to the cash price of goods sold by hire-purchase or on time payment terms. As indicated above, with certain defined exceptions this limitation applies to both hire-purchase and credit-sales transactions and the corresponding sections in each Act are substantially similar.

The "hiring charges" or "additional charges" (as the case may be) are first defined. They are (to summarise a long definition)⁸ ascertained by deducting from the purchase price the following items:

- (i) cash price
- (ii) delivery expenses
- (iii) any fee or tax payable in respect of a motor vehicle
- (iv) stamp duty (hire-purchase agreements, not credit-sales agreements)
- (v) insurance (prescribed goods only)

It will be seen that in the definition these "charges" (prescribed goods only) will largely comprise the profit or interest element although it may also include insurance in the case of the non-prescribed goods. From this "profit" element the vendor (or more usually finance company) will have to meet administration expenses and collection costs. Next, maximum charges are set out for different classes of goods. These have been calculated as a rate per centum per annum and are:

⁷ R. Else-Mitchell, *Hire-Purchase Law* 121.

⁸ Hire-Purchase Agreements Act, 1941, s. 26C(1); Credit-Sale Agreements Act, 1957, s. 11(1).

- (a) where the goods comprised in the agreement, not being second-hand goods at the time when the agreement is entered into, are any one or more of the following only, namely, industrial machinery, farm equipment or a motor vehicle (other than a motor cycle)—seven per centum;
- (b) where the goods comprised in the agreement, being second-hand goods at the time when the agreement is entered into, are any one or more of the following only, namely, industrial machinery, farm equipment or a motor vehicle (other than a motor cycle)—nine per centum;
- (c) where the goods comprised in the agreement are a motor cycle — nine per centum;
- (d) where the goods comprised in the agreement are goods which are not of any of the descriptions in respect of which a rate is fixed by or under paragraph (a) or (b) or (c) of this sub-section—ten per centum;

Where the agreement includes goods of more than one class the lowest rate is applicable.

Finally, a formula for the calculation of the rate is given. This is:

$$R = \frac{100 \times C}{T \times P}$$

For the purposes of this formula, R is the rate, C is the "charges" as above defined, T the time between the first and last instalment plus the time interval between any two instalments, expressed in years or fractions of years. P is the cash price plus delivery expenses, motor vehicle tax or fee (stamp duty, if hire-purchase agreement, insurance on prescribed goods, less deposit. The general effect of this formula is that "the net charges are applied to the total outgoings by the vendor and must conform to the rates applicable to the transaction."⁹

Apart from the economic argument that a prescribed maximum rate of this type inevitably becomes the normal rate, the statutory formula has been criticised on a number of grounds. In the first place, the formula adds a novel complexity to ordinary commercial transactions of a type which are often of small value and high frequency. Again, from a different point of view, the simplicity of the formula is deceptive. For the rate given by the formula is a flat rate, which the purchaser continues to pay on the whole of the sum outstanding for the duration of the contract. It ignores the fact that each time an instalment is paid the total amount of indebtedness is reduced. As a result, of course, the flat rate is appreciably less than the effective rate of interest. This latter rate has been used in connection with the Moneylenders and Infants Loans Act 1941, and its use would seem to have been more in keeping with the purposes of the present legislation.

Failure to comply with these minimum charges provisions makes the agreement void.¹⁰ The sanction is similar to that considered in relation to the minimum deposit provisions and the same comments apply.¹¹

⁹ Mr. Sheahan, Minister for Health, introducing the Bills. See *Hansard*, 11th April, 1957, p. 4703.

¹⁰ Hire-Purchase Agreements Act, 1941, s. 26C(4); Credit-Sale Agreements Act, 1957, s. 11(3).

¹¹ Another criticism of the formula was advanced in the Legislative Assembly by Mr. Doig, Member for Burwood. He pointed out that the larger the freight or insurance payable by the vendor in respect of any particular transaction, the larger would be the

$R \times T \times P$

permissible maximum charge. In other words, as $C = \frac{R \times T \times P}{100}$ every increase in P

(which includes insurance and freights) results in an increase in C. This means that there may be a different maximum charge in respect of identical goods sold at the same price.

3. *Insurance Premiums.* The other new control introduced by the new legislation is control of rates of insurance. Both Acts grant power to make regulations prescribing rates of insurance in respect of all classes of goods which may be the subject of either a hire-purchase or credit-sale agreement.¹² Such regulations have now been gazetted. The inclusion in the purchase price of an insurance rate in excess of that prescribed avoids the agreement.

III. *Procedural and Incidental Matters.*

A number of procedural innovations have been introduced by the Hire-purchase Agreements (Amendments) Act, 1957 and these will be briefly mentioned.

(1) It is, under the provisions of the new Act, essential that before any hire-purchase agreement is entered into in respect of any goods that the vendor shall give or cause to be given to the prospective purchaser a written statement of the purchase price of the goods. In a case where the agreement is entered into by way of acceptance by the vendor of a written offer signed by or on behalf of the purchaser, such written statement must be given to the purchaser before the written offer was signed.¹³

(2) Under the amending Act, it is essential that every hire-purchase agreement comply with the following requirements:

- (i) It must be in writing signed by all the parties;
- (ii) It must specify the price at which the goods comprised in the agreement might be purchased for cash (the cash price);
- (iii) It must specify any amount included in the purchase price to cover the expenses of delivering the goods or any of them to the purchaser (i.e. "freight");
- (iv) It must specify any amount included in the purchase price to cover registration fees or premiums in respect of compulsory Third Party Insurance of a motor vehicle in respect of which the agreement is made;
- (v) It must specify any amount included in the purchase price for insurance (not being compulsory Third Party Insurance) in respect of industrial machinery, farm equipment, a motor vehicle (including a motor cycle), a television set or other goods, which may be prescribed, included in the agreement;
- (vi) It must specify the total amount payable in respect of all charges *other* than those set out in (iii), (iv) and (v) above.¹⁴

(3) Any alteration of or addition to the matters required to be specified under (ii), (iii), (iv), (v), (vi) above must be signed or initialled opposite the alteration or addition by the purchaser or the agent for the purchaser, if the alteration or addition were made subsequent to the signing of the agreement.¹⁵

(4) Within 28 days after the agreement is entered into, the vendor must deliver to the purchaser:

- (i) A copy in writing of the hire-purchase agreement;
- (ii) A copy of the rights and privileges conferred by the Hire-Purchase Agreements Act, 1941-1957, as set out in the Schedule to the Act (the Schedule has not been altered and a summary of the rights will be identical to that which was provided to purchasers before the amending Act);
- (iii) A copy of any insurance policy held by the *Vendor* or by any person

This criticism does not appear to have been directly answered in the debate. However, it may be that it was considered more appropriate that the charge should be based on the total outgoings paid by the vendor rather than on the cash price of the goods.

¹² Hire-Purchase Agreements Act, s. 26D; Credit-Sale Agreements Act, 1957, s. 12.

¹³ Hire-Purchase Agreements Act, s. 23(2).

¹⁴ *Id.*, s. 23(3).

¹⁵ *Id.*, s. 23A.

on his behalf which extends to indemnify the purchaser against loss or damage to, or liability in respect of, industrial machinery, farm equipment, a motor vehicle (including a motor cycle), a television set (or other goods which may be prescribed in the future) comprised in the agreement.¹⁶

Substantially parallel provisions apply in relation to credit-sale agreements.¹⁷

Finally, the Hire-Purchase Agreements (Amendment) Act, 1957 introduces a new procedure for the recovery of possession of hired goods. Section 32 of the Police Offences Act is no longer applicable, the new procedure now being set out in s. 20 of the 1957 Act. The major alteration is that the Court of Petty Sessions may not order imprisonment for failure to deliver up hired goods in accordance with a court order made upon default under a hire-purchase agreement, until a further summons has been issued ordering the defendant to show cause why he should not be imprisoned.¹⁸

The policy behind the two Acts under consideration in this Note appears to be twofold. In the first place, they are designed to protect purchasers from certain existing malpractices. In this respect improvements have been made. On the other hand, it is a truism that legislation of this nature cannot ever be wholly successful in protecting consumers from their own folly or extravagance.

From a wider viewpoint, the new legislation is avowedly deflationary. It is designed to restrict the free supply of credit to purchasers of consumer goods. A review of this aspect is, of course, outside the competence of a Legislation Note of this kind. One may, however, be permitted the comment that as an economic weapon the legislation seems peculiarly inflexible.

G. C. MASTERMAN, M.A., LL.B., *Member of the New South Wales Bar.*

¹⁶ *Id.*, s. 23(4).

¹⁷ Credit-Sale Agreements Act, 1957, s. 11. There is, however, no similar provision *re* alterations to credit-sale agreements.

¹⁸ Other new provisions not specifically mentioned in this Note cover *inter alia* second-hand goods (Hire-Purchase Agreements Act, 1941, s. 17B) and the extension of time for commencement of prosecutions to 12 months (Hire-Purchase Agreements Act, 1941, s. 14(1)).