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SUPREME COURT OF VICTORIA — FULL COURT

AUSTRALIAN GUARANTEE CORP LTD & ANOR v ROSS

Young CJ, Murray and Marks JJ

16 December 1982 — [1983] VicRp 92; [1983] 2 VR 319

HIRE PURCHASE – IMPLIED TERMS – TITLE – SALE OF STOLEN MOTOR VEHICLE – HIRER'S CLAIM FOR RECOVERY OF INSTALMENTS – RESCISSION – TOTAL FAILURE OF CONSIDERATION – MUTUAL MISTAKE – BAILMENT: *HIRE PURCHASE ACT* 1959, S5.

On 1 February 1980, a motor car dealer negotiated R.'s signature to a hire-purchase agreement with AGC Ltd in respect of a second-hand Ford Cortina motor vehicle. The vehicle had been purchased in good faith by the dealer, but it transpired that the vehicle had been stolen in late 1979 or early 1980. The Police took possession of the vehicle on 7 September 1980 from R., and 4 days later, her solicitors wrote to AGC Ltd rescinding the agreement. Subsequently, R. sued AGC Ltd for damages and for the failure by AGC Ltd to repay the hire-purchase instalments paid by R. The case was tried in the County Court, and the Judge awarded damages in R.'s favour. Upon appeal—

HELD: *Per curiam*: Appeal dismissed.
(1) As AGC was unable to give the hirer the right to possession of the vehicle against the true owner for the whole of the period of the agreement there was a total failure of consideration.
***Rowland v Divall* (1923) 2 KB 500; [1923] All ER 270; and**
***Warman v Southern Counties Car Finance Corporation* (1949) 2 KB 576; [1949] 1 All ER 711, applied.**
***Yeoman Credit Ltd v Apps* (1962) 2 QB 508; [1961] 2 All ER 281; [1961] 3 WLR 94, distinguished.**

Per Young CJ and Murray J: It is not significant or is of little consequence whether the present case involves a total failure of consideration or breach of a fundamental condition.

Per Young CJ: The statement in cl 8 that "so far as the law permits all other conditions and warranties which might be implied are also negatived and excluded", seems to exclude the implication that the vendor had title at the time of making the agreement.
***Richards v Alliance Acceptance Co Ltd* (1976) 2 NSWLR 96, followed.**

Per Murray J: As the owner and hirer at no time assumed and contracted upon the basis that the vehicle in question had been stolen, then the contract is void for mutual mistake.
***Bell v Lever Bros Ltd* [1931] UKHL 2; [1932] AC 161; [1931] All ER 1, applied.**

Per Marks and Murray JJ: As the owner did not confer on the hirer essential terms of the agreement namely, the possessory rights of a bailee, and the rights of ownership on exercise of an option to purchase, then the owner is in breach of the agreement.
***Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd* [1938] SR (NSW) 632; 55 WN (NSW) 228, applied.**

Per Marks J: The use of the motor vehicle by the hirer over the period before it was seized by police, did not alter the circumstance that there had been a total failure of consideration.
***Rowland v Divall* (1923) 2 KB 500; [1923] All ER 270, applied.**

Per Marks J (Murray J *dubitante*): The exemption cl. 8, when construed strictly and against the "proferens" cannot avail AGC, as to do so would lead to absurdity or defeat the main object of the agreement.
***Port Jackson Stevedoring Pty Ltd v Salmon & Spraggon (Aust) Pty Ltd* [1978] HCA 8; (1977) 139 CLR 231; 18 ALR 333; 52 ALJR 337; 34 ALT 75, applied.**

YOUNG CJ: *[After referring to the facts, His Honour continued]* ... **[2]** It was alleged in para 3 of the particulars as follows:

> "(a) It was an implied condition on the part of the Defendant in respect of the said agreement that it would have the right to sell the said vehicle at the time the property was to pass.
> (a)(a) Alternatively there was an implied or expressed condition on the part of the Defendant that at

the time of the agreement thereto it would have title to the said vehicle.
(b) there was an implied warranty by the Defendant that the Plaintiff would have and enjoy quiet possession of the said vehicle.
(c) (not relevant)."

It was further said that the said condition, warranty and term were implied by the provisions of ss5 and 11 of the *Hire Purchase Act* 1959. *[His Honour then referred to other allegations by R., referred to the facts, and continued]:* ... **[3]** Since the plaintiff relied in her particulars upon s5 of the *Hire Purchase Act* it will be as well to set out sub-s(1) of that section. It reads:

"(1) In every hire purchase agreement there shall be—
(a) an implied warranty that the hirer shall have and enjoy quiet possession of the goods;

(b) an implied condition on the part of the owner that he will have a right to sell the goods at the time when the property is to pass;

(c) an implied warranty that the goods will be free from any charge or encumbrance in favour of any third party (other than a charge or encumbrance created by or with the consent of the hirer) at the time when the property is to pass."

It is plain that para (b) of that sub-section is sufficient to imply the term alleged by the plaintiff in sub-para, (a) of para 3 of her particulars but it is to no **[4]** avail for the plaintiff because it was common ground that the time the property was to pass was upon the exercise of the option to purchase in the hire-purchase agreement. That time never arrived for the plaintiff never exercised her option to purchase. The plaintiff was accordingly obliged to rely upon the conditions alleged in sub-para (a)(a). Unless she could find a condition with which AGC had not complied, she could not rescind the agreement. Breach of the other terms upon which she relied would only give her a right to damages.

The learned trial Judge found that the plaintiff was entitled to rescind. *[His Honour then quoted 2 paras from the Judge's reasons for judgment, and continued]:* ... It is clear, however, that there was no express **[5]** condition that AGC would have title to the vehicle at the time of the agreement as alleged in sub-para (a)(a) (which I take to mean at the time of the making or the agreement). Nor did s5(1)(b) serve to imply such a condition until the time when the property in the vehicle was to pass. If the allegation is to be treated as made out therefore it must be upon the basis that there was an implied condition in the hire purchase agreement that at the time or the agreement AGC would have title to the vehicle. Sub-s(5) of s5 provides that nothing in the section is to prejudice in any way any other enactment or rule of law whereby any condition or warranty is to be implied in any hire purchase agreement.

There are, however, at least two reasons why in my opinion such a condition as the plaintiff alleges should not be implied into the hire purchase agreement. The first is that it is not necessary to do so in order to give business efficacy to the agreement. There is no reason why the vendor under a hire purchase agreement (called the "owner" in the *Hire Purchase Act* and in the agreement) should have title to the goods let on hire purchase at the time of the making of the agreement. It is sufficient that he has title at the time when the property is to pass as recognised by s5(1)(b) of the *Hire Purchase Act* and in the light of that provision I think it is impossible to imply a more stringent condition. The second in that the hire purchase agreement contains a clause (Clause 8) reading:

"If the goods are secondhand, and it is so stated in the Schedule all conditions and warranties as to quality and all conditions and warranties as to fitness and suitability are to the maximum extent that the law allows expressly negatived. So far as the law permits all other conditions and warranties which might be implied are also **[6]** negatived and excluded. Nothing contained in this instrument shall he construed as an express condition or warranty on your part."

The second sentence of that clause seems to exclude the implication sought to be made. For these reasons I think that the plaintiff failed to make out the basis for an entitlement to rescind the contract on which she relied. The case is on all fours in this respect with *Richards v Alliance Acceptance Co Ltd* (1976) 2 NSWLR 96 in which the majority of the Court of Appeal of New South Wales held that the hirer could not recover the deposit paid upon a vehicle found to have been stolen when he purported to rescind the agreement. Samuels and Mahoney JJA held

that the hirer could not rely upon the implied condition as to title appearing in s5(1)(b) because the time for its fulfilment had not arrived and that an implied condition based upon *Karflex Ltd v Poole* (1933) 2 KB 251 at p265 was excluded by clause 8 of the hire purchase agreement.

Samuels JA, in reasoning with which I respectfully agree also held that the description "owner" in the agreement could not be relied upon as having any contractual or representational force to mean that the person so described was indeed the owner. Mahoney JA also held in the particular case that, even if the plaintiff had the right to rescind the transaction, he had not effectively done so. Although *Richards' Case* is not technically binding upon us, I do not see any reason why we should not follow it.

The plaintiff's particulars might also be taken to claim damages for breach of the warranty of quiet possession but as no evidence was called in the County Court upon which an assessment of the damages suffered could be made there is some difficulty in the plaintiff's now relying upon that claim. **[7]** It was suggested during argument that the plaintiff might be able to support the judgment upon the basis that there had been a total failure of consideration. It is a question however whether the respondent should be allowed to rely upon such a contention.

The general rule is that a respondent can support a judgment appealed from upon any ground which was open to him in the court below. Now the case was not put in the County Court upon the basis of a total failure of consideration but in my opinion sufficient appeared in the plaintiff's particulars of demand to permit the case to be considered upon the basis of a total failure of consideration and it is clear that the appellant could have led no evidence relevant to that issue which was not already before the Court.

The question whether there was a total failure of consideration depends upon the nature of the rights sought to be conferred upon the hirer by the hire purchase agreement.

> "A hire-purchase agreement is in law, an agreement in two parts. It is an agreement to rent a particular chattel for a certain length of time. If during the period or at the end or the period the hirer does not wish to buy the chattel he is not bound to do so. On the other hand, the essential part of the agreement is that the hirer has the option of purchase, and it is common knowledge – and I suppose, common sense – that when people enter into a hire-purchase agreement they enter into it not so much for the purpose of hiring, but for the purpose of purchasing, by a certain method, by what is, in effect, deferred payments, and that is done by this special kind of agreement known as a hire-purchase agreement, the whole object of which is to acquire the option to purchase the chattel when certain payments have been made."

See *Warman v Southern Counties Car Finance Corporation Ltd* (1949) 2 KB 576 per Finnemore J at p582; [1949] 1 All ER 711.

It in not, however, possible or correct to treat a hire-purchase agreement as though it were two separate agreements. **[8]** This is because the consideration payable by the hirer is in part payment for the hire and in part instalments of the purchase price. The question is what rights were conferred upon the hirer by the agreement. That can be summarised I think by saying that they were rights to possession of the vehicle for the duration of the agreement or until the prior exercise of the option of purchase. AGC was not obliged to have a right to sell the vehicle until the option to purchase was exercised (*Hire Purchase Act* 1959, ss5(1)(b) and (11) but the agreement provided in clause 10 that until the exercise of the option the hirer should only be a bailee of the vehicle. The hirer is however a special sort or bailee for part of every payment which he makes is an instalment of the purchase price. Thus if it should turn out that the owner in unable to give to the hirer an indefeasible right to possession, indefeasible, that is to say, at the suit of a third party, the hirer cannot have had what he bargained for and there has been a total failure of consideration.

In *Karflex Ltd v Poole* (1933) 2 KB 251 Goddard J (as he then was) left open the question (at pp265-6) whether a hirer who had enjoyed the use of property the subject of a hire purchase agreement, could recover all moneys paid as upon a total failure of consideration where the "owner" failed to make title or whether he was obliged to give some allowance for the use of the property hired.

In *Rowland v Divall* (1923) 2 KB 500; [1923] All ER 270 the plaintiff bought a motor car from the defendant and used it for several months before he discovered that the defendant had no title to it. The plaintiff was compelled to surrender it to the true owner. The Court of Appeal held that the plaintiff could **[9]** recover all that he had paid for the vehicle as upon a total failure of consideration. The Court said that the plaintiff had not received any portion of what he had agreed to buy and thus there was a total failure of consideration notwithstanding that the plaintiff had had some use of the vehicle.

Similarly in the present case I do not think that the plaintiff received any part of what she had agreed to take on hire purchase. The instalments she paid were part of the purchase price and when the vehicle was seized by the police and taken from her she was entitled to rescind the agreement and to recover all that she had paid. Finnemore J in *Warman's Case*, from which I have already quoted, held that where a finance company had a defective title the hirer was entitled to recover the whole of the instalments paid as upon a total failure of consideration. It is true that that was a case of the owner's being unable to transfer title and it might be said that in the present case the time for transferring property in the vehicle had not arrived, but I think that the rights which the present plaintiff lost when the vehicle was seized by the police were just as fundamental to the hire purchase agreement as the loss suffered by the hirers in *Rowland v Divall* and *Warman's Case*.

I think that the decision in *Yeoman Credit Ltd v Apps* (1962) 2 QB 508; [1961] 2 All ER 281; [1961] 3 WLR 94 is clearly distinguishable. In that case the vehicle in question was found not to be fit for the purpose for which it was hired and that there had accordingly been a breach of an implied condition of the agreement giving the hirer a right to repudiate it. It was further held, however, that there had not been a total failure of consideration because the hirer had not rescinded the agreement. Instead he had retained the **[10]** vehicle for several months and approbated the agreement by paying three instalments. See also *Richards' Case*, *supra*, where Hutley JA, the dissenting member of the Court, expressed his concurrence (at p100) with the judgment of Finnemore J in *Warman's Case* and added the pertinent comment from Paton on *Bailment in the Common Law* at p323:

> "Why should the hire purchaser be forced to pay rent to the vendor for the use of a car belonging to a third party?"

I agree with Finnemore J that the real object of a hire purchase is usually purchase and not hire and as AGC was unable to give the hirer the right to possession against the true owner for the whole of the period of the agreement, there was a total failure of consideration. It is nothing to the point that the occasion had not arisen for the transfer of the property when under s5(1)(b) AGC would have been obliged to have a right to sell. It was essential to the agreement that the plaintiff have the right to exclude all comers from possession for the whole of the term of the agreement. The fact that she did not obtain a right even at the outset means that there was more than a mere breach of the warranty of quiet possession implied by s5(1)(a): there was, in my opinion a total failure of consideration.

I agree, however, with Murray J whose judgment I have had the advantage of reading, that in the final analysis it is not significant in this case whether there was a breach of a fundamental condition or a total failure of consideration. Marks J in his judgment which I have also had the advantage of studying has drawn attention to what Bray CJ said in *Van Reesema v Giameos* (1978) 17 SASR 353 at p574, an observation I would respectfully adopt. I would dismiss the appeal.

MURRAY J: **[1]** I have had the advantage of reading the reasons prepared by Marks J and I am in general agreement with them save that I have some reservations in respect of his treatment of Clause 8 of the agreement. It may well be quite correct to regard the provisions of s5(1)(b) *Hire Purchase Act* 1959 together with the operation of Clause 8 as precluding any implication of a term that the owner should have any better title to the goods than a right to sell them at the time when the property in them is to pass which time, in the present case, never arrived. But it is in my opinion fundamental to the agreement that both parties contracted upon the basis that the owner, at the time of entering into it, should have indefeasible rights to do so. This involves that the owner should have the right to hire the goods to the hirer and the right to confer upon the hirer the right to enjoy possession of the goods and to resist successfully any claims to possession by third parties while the **[2]** contract remained on foot.

On the agreed facts in this case the owner did not at any time have the legal right to hire the goods to the hirer nor to confer upon the hirer the right to take and continue to enjoy possession of them. The sub-stratum of the contract thus did not exist and whether the problem be approached on the basis of a total failure of consideration or a breach of a fundamental condition unaffected by Clause 8 is of little consequence.

A similar result would be achieved by viewing the case from the standpoint of mutual mistake. Both the hirer and the owner assumed and contracted upon the basis that the car in question was not stolen and this assumption was fundamental. In the discussion of the decision of the House of Lords in *Bell v Lever Bros Ltd* [1931] UKHL 2; [1932] AC 161; [1931] All ER 1 which appears in *Chitty on Contracts* (24th ed) p278 the learned author advances the view that the question of the effect of mutual mistake is basically one of the allocation of risk. He suggests that in cases in which the obligation sought to be enforced is fundamentally different from that which was originally contemplated at the time the contract was made and the terms of the contract, construed in the light of circumstances existing at the time it was made, do not indicate that one or other of the parties took the risk that the facts might turn out to be different than both parties had assumed them to be, the contract will be void for mistake.

Upon this view in the present case it could not be said, in my opinion, that either the owner or the hirer should be taken to have assumed the risk that the car in question had been stolen and the contract is therefore void. *[After referring to the trial Judge's decision, His Honour said]:* ... **[3]** I agree that the appeal should be dismissed.

MARKS J: *[His Honour set out the facts, referred to certain Clauses of the Agreement and sections of the* Hire Purchase Act *1959, including Clause 10 which provided: "I may exercise an option to become the owner of the goods by paying the total rent and fulfilling my other obligations hereunder or by compliance with Section 11 of the Act. Until then I shall only be a bailee and have no property in the goods." and continued]:* ... **[4]** It was submitted on behalf of the appellants that any express or implied condition that AGC was the owner, in the common law sense, of the Ford was subject to the exemption contained in Clause 8 of the agreement.

Accordingly it was argued that the decision of the Court of Appeal in *Karflex Ltd v Poole* (1933) 2 KB 251 to the effect that a hire purchase agreement describing the parties as respectively the "owners" and the "hirer" expressly stipulated a condition as to ownership did not apply to the circumstances of an agreement governed by the Act and which, on its proper construction, permitted it to contain the exemptions of Clause 8.

[5] *Richards v Alliance Acceptance Co Ltd* (1976) 2 NSWLR 96 the New South Wales Court of Appeal supports this contention. There the Court understood the law to permit a hire purchase agreement to contain conditions not rendered void by virtue of the statute. So for as is relevant, the New South Wales Act, like the Victorian, contained merely the provision corresponding to our s5(1)(b) and left open what conditions might be agreed or said to apply to title before the owner is called upon to pass any property.

Since *Karflex* there has been other decisions in the United Kingdom bearing on the problem. In *Karsales (Harrow) Ltd v Wallis* [1956] EWCA Civ 4; [1956] 2 All ER 866; [1956] 1 WLR 936 the motor vehicle delivered pursuant to the hire purchase agreement was in a radically different condition from when inspected by the hirer. There was an exemption clause in the agreement:

> No condition or warranty that the vehicle is roadworthy or as to its age, condition or fitness for any purpose is given by the owner or implied herein."

The Court of Appeal held that the vehicle delivered was not the thing contracted to be taken on hire purchase and there was a fundamental breach of the contract which disentitled the plaintiffs from relying on the exception clause. Some of the statements made by members of the court have been since disapproved by the House of Lords and the Privy Council but the decision itself has not been overruled and is capable of being supported by present law (see the speech of Viscount Dilhorne in *Suisse Atlantique v NV Rotterdamsche Kolen Centrale* (1967) 1 AC 361 at p392; [1966] 2 WLR 944).

[His Honour then referred to several authorities and continued]: ... **[7]** Counsel on both sides made

submissions on whether it was a fundamental term of the agreement that AGC was the owner of the Ford. Thus Mr Judd for AGC contended that *Richards' case* is highly persuasive that there was no such condition express or implied. *Richards* clearly supports him and as far as it goes I find no fault in the reasons there of the majority. In this case I do not think AGC's "ownership" of the Ford was an express or implied condition the light of it not being required by the provisions of the Act, the existence of Clause 8 and it being in terms unnecessary for business efficacy. But *Richards* was decided on rather narrow grounds in deference to the arguments presented and apparently in the light **[8]** of the appellant in that case being unable to establish absence of title or failure of consideration or that rescission had been properly effected.

However, as I understand it, it is not "ownership" as such which is critical to the operation of the agreement but the power of AGC to do what is promised, namely give possessory rights over and an option to buy the Ford. It was fundamental to the operation of the agreement that AGC give to the respondent according to its terms the possessory rights of a bailee and pass to her the property in the Ford when duly called upon. I consider that a person who expressly hires out a chattel, as did AGC (*inter alia*) in this case, expressly agree to confer on the hirer rights which a hirer normally enjoys such as exclusive use and control of the thing hired. The expressions "hire" "hirer" in the agreement compel such a meaning be given to the word. Further, there was, in my view, by Clause 10 an express agreement to confer on the respondent the possessory rights of a bailee. It imported the condition that AGC was legally competent to do so.

[His Honour referred to text-books concerning bailment and continued]: ... **[9]** It follows in my view that the condition as to bailment in the agreement was that the respondent have physical control of the Ford (see Paton p9) whilst the bailment lasted. By the agreement the bailment was to last until exercise of the option to purchase or its other termination. It was not necessary that AGC be the "owner" in order to confer these rights for it may have been able to do so pursuant to agreement with the "owner" or other legal right.

[After stating that the operation of an exemption clause depends on the construction of the agreement as a whole, His Honour referred to several authorities and continued]: ... **[10]** By Clause 10 of the agreement AGC expressly agreed to confer on the respondent the possessory rights of a bailee and the right to become the owner of the Ford at any time on compliance with her obligations under the agreement or s11 of the Act. According to the agreed facts those rights, as I understand it, were not or not entirely conferred and AGC was in breach of the agreement. There can be little doubt, in my view, that Clause 10 contained essential terms of the agreement.

[His Honour then referred to a statement of the law as to essentiality, and continued]: ... **[12]** There remains that an exemption clause should be construed strictly and against the "proferens" which in this case is AGC, and should not be applied if to do so would lead to an absurdity or defeat the main object of the agreement (see Barwick CJ, *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd* [1978] HCA 8; (1978) 139 CLR 231 at p238; 18 ALR 333; 52 ALJR 337; 34 ALT 75; also *Metrotex Pty Ltd v Freight Investments Pty Ltd* [1969] VicRp 2; (1969) VR 9 at pp12, 13, 16 and 18 and the authorities cited on p12; *Photo Production v Securicor Transport Ltd* [1980] UKHL 2; [1980] AC 827 particularly at p850; [1980] 1 All ER 556; [1980] 2 WLR 283; [1980] 1 Lloyds Rep 545). In my view Clause 8 cannot avail the appellants. To permit otherwise would clearly lead to absurdity, if not, certainly defeat the main object of the agreement.

Mr Heaton for the respondent also submitted that the respondent was entitled to treat the agreement as discharged for total failure of consideration. It may be that this is the more fundamental submission but I deal with it at this stage merely in deference to the order of the argument. I think it possible to regard some cases as **[13]** involving alternatively a breach of a fundamental condition giving rise to a discharge of the agreement or a total failure of consideration with the same consequences. In *Van Reesema v Giameos* (1978) 17 SASR 353 at p374 Bray CJ observed:

> "Nowadays we speak of essential and inessential terms rather than of a breach going to the whole or part of the consideration, but I think the principle is applicable to the altered terminology."

[After further discussion, His Honour continued): ... **[13]** Mr Judd for AGC conceded that if the respondent had never received delivery of the Ford there would have been a total failure of consideration giving rise to the discharge of the agreement. This concession I think flows clearly from *Karflex Ltd v Poole* but Mr Justice Goddard at pp265-6 specifically left open the question

whether a hirer in claiming the return of moneys paid would be obliged to make allowance for the use of the vehicle which a party to the agreement honestly believed was owned by him. Mr Judd submitted that the respondent was not entitled to rescind because she in fact had use of the Ford until its seizure by the police. In one sense therefore the **[14]** concession by Mr Judd left success for him hanging by the one thread – actual use by the respondent of the Ford. The question therefore is whether the use amounted to consideration under the agreement sounding against total failure.

[After considering a line of authorities concerning the consequences of the hirer's having use of the vehicle, His Honour concluded]: ... **[16]** It leads to the conclusion that the mere use by the respondent of the Ford over the period before seizure does not alter the circumstance that there has been a total failure of consideration.
