01/92

SUPREME COURT OF VICTORIA

ARNOL v RBP PTY LTD

O'Bryan J

23 May 1991 — (1991) ASC 56,885

SALE OF GOODS – CONSUMER AFFAIRS – PURCHASE AGREEMENTS – DOOR-TO-DOOR SALES – CERTAIN AGREEMENTS EXCLUDED – ORIGINAL APPROACH AT TRADE PREMISES – "ORIGINAL APPROACH" – MEANING OF – WHETHER INCLUDES TELEPHONIC APPROACH: *CONSUMER AFFAIRS ACT* 1972, S14(3)(a).

The provisions of the *Consumer Affairs Act* 1972 ('Act') regulating "Door-to-Door sales" apply to all purchase agreements unless—

> "the original approach leading to the agreement or offer was made at appropriate trade premises."

HELD: The words "original approach" in s14(3)(a) of the Act mean initial physical attendance and do not include a telephonic approach. Where a person telephoned the vendor's place of business requesting a salesperson to attend for the purpose of giving a quote, such a request was not an "original approach" within s14(3)(a) of the Act. Accordingly, the agreement subsequently entered into was subject to the provisions of the Act.

O'BRYAN J: [1] This is the return of an order nisi to review a decision of the Magistrates' Court at Melbourne on 29th June 1990 whereby the Court dismissed two charges laid by the applicant (informant in the Court below) which alleged that the respondent was guilty of two offences against the *Consumer Affairs Act* 1972, Part II, Division 3 (s15(1)(b) and s15(4)). Section 15 is contained in a division of the Act which regulates "Door-to-Door Sales". By s14(3), Division 3 applies to all purchase agreements and all offers to enter into purchase agreements unless—

> "(a) the original approach leading to the agreement or offer was made at appropriate trade premises; and
>
> (b) any negotiations leading to the agreement or offer which took place away from appropriate trade premises took place—
> (i) as a result of a request by the purchaser; or
> (ii) not relevant."

"Appropriate trade premises" means for present purposes premises at which the vendor normally carries on business (s14(11)). Relevantly, s15 of the *Consumer Affairs Act* the (Act) provides:

> "(1) An agreement or offer to which this Division applies shall be in writing and shall be signed by the purchaser ... and the vendor shall give to the purchaser at the time the agreement or offer is made—
> (b) a statement in the form or to the effect of the statement set out in Schedule One duly completed by the vendor.
>
> (4) Where there is a failure by a vendor to comply with this section the agreement shall **[2]** not be enforceable by the vendor and any person asserting a right of payment in respect thereof shall be guilty of an offence ...

By ss(3), a failure to give to the purchaser a Schedule One statement is an offence. The Act is remedial legislation enacted for the protection of purchasers or consumers of goods and services and it should be construed beneficially to give the fullest relief which the fair meaning of its language will allow. *Bull v Attorney-General for NSW* [1913] HCA 60; (1913) 17 CLR 370 at 384.

Notwithstanding this well-known principle, it is also necessary to bear in mind that one

is concerned here with the construction of penal provisions. It is necessary, in my opinion, to construe the penal provisions in the Act according to their plain meaning but if the language of the Act remains ambiguous or doubtful the ambiguity may be resolved in favour of the person charged. *Beckwith v R* [1976] HCA 55; (1976) 135 CLR 569 at 576; (1976) 12 ALR 333; 51 ALJR 247; 28 ALT 39.

The facts are fully and fairly set out in the following paragraphs in the learned Magistrate's reasons for decision:

> "On the 31st day of May 1989 in response to an advertisement placed on behalf of the company which she [Mrs B] saw on a TV program she rang the company and her call was received at the company's place of business. She requested a quote in respect of her premises at 11 Barkly Avenue, Malvern. She was later telephoned by a company employee and an appointment was confirmed for a salesman to attend at her home that evening.
>
> The defendant Raymond Yallouz, the managing director of the company, attended at her home at approximately 7.30 p.m. She helped him measure and after some discussions about the size of the house he gave a quote for $16,000. She said she could not afford that. He told her that it could be cheaper if white or beige was used and **[3]** a contract was completed that night. During the course of discussions he told her that a competitor Formflex had gone out of business. He brought the price down to $9,820 after she informed him that she had $9,000 in the bank.
>
> Finally she signed an agreement for the supply and installation of vinyl weatherboards for the price of $9,820, see exhibit C, and she paid a deposit of $982 by cheque. She did not fully read the agreement and was not aware of any conditions in relation to cancellation nor was she informed of this by the defendant.
>
> After the defendant left she had second thoughts and contacted her family. On the following morning she rang the company, spoke to a female and requested to cancel the agreement. She later spoke to the defendant when he rang back and he told her that the matter had gone into the computer. He contacted her again later and told her it was impossible to take the matter out of the computer and 30 per cent of the purchase price, that is $3,000 approximately, was payable on cancellation.
>
> Mrs B was never given a notice in the form of schedule 1 of the *Consumer Affairs Act.* After contacting Legal Aid Mrs B cancelled the deposit cheque and forwarded on 2nd June 1989 a notice in writing to the company purporting to terminate the agreement, see exhibit D. A day or so later the defendant telephoned Mrs B and raised the problem of the cheque which she then told him had been cancelled.
>
> When she advised him that she did not intend to pay the 30 per cent he told her that a summons would issue and on 7 June 1989 a summons was issued claiming $2,946 and costs and apparently the hearing of that summons has been adjourned *sine die*."

The learned Magistrate heard legal argument and determined that the original approach (emphasis added) leading to the agreement or offer was made at appropriate trade premises (the place of business of the respondent) and "the negotiations which took place away from the trade premises, namely at (Mrs B's) home, which led to the agreement took place as a result of her initial (telephonic) request for a quote."

[4] The order granted by Master Evans on 3rd September 1990 raised two grounds for review of the decision.

> "A. The learned Magistrate erred in law in holding as he must have done that 'the original approach' referred to in paragraph (a) of ss(3) of s14 of the Act -
> (i) applies to approaches made by the purchaser;
> (ii) applies to approaches made by telephone call by the purchaser to appropriate trade premises."
>
> B. The learned Magistrate erred in law and no reasonable Magistrate could have concluded on the evidence before the Court -
> (i) the purchaser requested that negotiations leading to the agreement take place away from the trade premises;
> (ii) all the negotiations that took place at the home of the purchaser resulted from a request by the purchaser."

The first submission of Mr Dennis, who appeared for the applicant, was that the expression 'original approach' in ss(3)(a) of s14 means 'physical attendance' by a purchaser at 'appropriate trade premises'. Mr Dennis supported his argument by reference to the *Oxford Dictionary* meaning

of 'approach':- (1) "the act of coming nearer or of drawing near; (2) movements towards the establishment of personal relations with one." *The Macquarie Dictionary* definitions of 'approach' include "to make advances or a proposal to."

In my opinion, the plain meaning of 'approach' does not exclude one person making an approach to another person by telephone or by letter. It appears to me that one person may approach another person either, physically or orally or in writing. The language used in paragraph (a) – 'original **[5]** approach' – is ambiguous or doubtful, in my opinion, because it admits an approach in more than one manner.

Mr Dennis next supported his argument by reference to the history of the Act and, in particular, to the critical words earlier underlined. In 1963, in Act No. 7091, the equivalent section (s6) excluded from the operation of the Act agreements made at the residence of the purchaser "as a result of an unsolicited request made by the purchaser or bailee to the vendor to attend at his place of residence." Clearly enough, an unsolicited request could be made orally either by telephone or face to face, or in writing.

In 1972, by Act No. 8276, s14(3) was first enacted in Consumer Protection legislation regulating "Door-to-Door Sales" By ss(3) Division 3 was to apply to all credit purchase agreements and all offers to enter into credit purchase agreements unless—

> "(a) the original approach lending to the agreement or offer—
> (i) was made at appropriate trade premises or at a bona fide public fair or show; or
> (ii) was made by the purchaser;"

In the second reading speech of the Bill which later became Act No. 8276, the Minister said that s14(3) exempted from the "Door-to-Door Sales" provisions agreements where the initial approach was made at the appropriate trade premises on the sole initiative of the purchaser (see *Hansard* 1972 at 4290). The *Consumer Protection Act* (No. 8276) in s14(3) enacted for the first time the expression 'original approach'. **[6]** In 1975, by Act No. 8824 paragraph (ii) was removed from s14(3)(a). Paragraph (a) now reads:

> "the original approach leading to the agreement or offer was made at appropriate trade premises or at a bona fide public fair or show; and".

Although the Minister's second reading speech does not say so expressly (*Hansard*, 19/11/75 at 8849-8850) one may infer that the Consumer Affairs Bureau was concerned that paragraph (ii) limited the protection of the "Door-to-Door Sales" provisions against the interests of a purchaser who made an original approach to a vendor by telephone to invite the vendor to call at his place of residence. By removing paragraph (ii) a telephonic request by a purchaser would no longer avail a vendor. A further amendment was made to paragraph (a) in s14(3) in 1977 by Act No. 9036 when the words "or to a *bona fide* public fair or show" were repealed.

The Minister explained the reason for the amendment in his second reading speech (Hansard, 1977, 9888):

> "Clause 5 proposes to extend the coverage of the door-to-door sales provisions of the Principal Act to include cases where the original approach leading to the sales agreement was made at a bona fide public fair or show. The Consumer Affairs Bureau continues to receive complaints concerning high-pressure sales tactics in private houses. Many of these relate to agreements signed in the house but where the householder made the initial approach for information at a public fair or show. This change will allow the consumer to terminate the agreement within 10 days should he wish to do so."

The Minister's explanation to Parliament shows clearly, I consider, that he understood the words 'original approach' to mean 'initial physical attendance' by a consumer. **[7]** The history of legislative changes to s14(3) assists the argument made on behalf of the applicant by Mr Dennis, in my opinion. Until 1975, when paragraph (ii) was removed from s14(3) (a) by Act No. 8824, the exception created by paragraph (ii) probably included an approach of any kind initiated by a prospective purchaser. An approach may have been made to a vendor at any address either by telephone or in writing or by physical attendance. Between 1975 and 1977 when Act No. 9036 was enacted the argument that 'approach' meant and was intended to mean 'face to face' or 'physical

attendance' became stronger. One would indeed be surprised were a purchaser to telephone or write to a vendor at a 'public fair' or 'show' to initiate a credit purchase agreement concerning goods or services. The Minister's speech in 1977 clearly envisaged an 'original approach' as a physical attendance.

Since 1977, paragraph (a) in s14(3) has remained unaltered. The history of the section does point towards the construction proposed by Mr Dennis as being correct. The ambiguity or doubt which existed in my mind has been removed by reference to the history of s14(3). There is another section in Division 3 of the Act, s20A, introduced in 1972 by Act No. 8382, which assists one in the construction of s14(3), in my opinion. Section 20A requires a vendor making any 'approach' to a prospective purchaser or consumer to carry and produce an identification card. The word 'approach' must bear the restricted meaning of 'physical attendance' in the context in which the word is used. One may conclude, I consider, that the draftsperson of **[8] s**20A chose the word 'approach' deliberately and intended it to have the same meaning it had in s14(3).

In the circumstances I have reached the conclusion, not without some hesitation, that the words 'original approach' in s14(3)(a) mean initial physical attendance and do not include a telephonic approach. The learned Magistrate erred and, accordingly, ground A (ii) is made out. It is unnecessary to consider Ground B. The order nisi will be made absolute with costs. The order made in the Court below dismissing charges numbered 3 and 6 is set aside. The Clerk of Courts at Melbourne Magistrates' Court will be directed to amend the register accordingly.

APPEARANCES: For the applicant Arnol: Mr BM Dennis, counsel. Ms S Harvey, Solicitor to the Ministry of Consumer Affairs. No appearance for the respondent RBP Pty Ltd.
