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Hire-Purchase Agreements: the Unfortunate Triumph of Form over Function

Nicholas Curwen

Introduction

The doctrine of freedom of contract requires that the form of the agreement, that is, the words used by the parties, should be upheld. This doctrine can be tested to its limits where a contractor with dominant negotiating power tries to hide the true function of the agreement in order to avoid the unwelcome effect of particular legal rules. All sorts of shams and pretences have been used to try and pull the wool over the courts' eyes. Yet, English courts require compelling evidence before they are prepared to depart from the apparent form of the agreement in favour of a construction that upholds the substance or function of the agreement.

A notable example of an artificial form, suppressing the real purpose of an agreement, is the hire-purchase contract. In the standard scenario a prospective purchaser wants to buy goods on credit from a retailer. The retailer is not prepared to extend credit, so they sell the goods to a finance company, which in turn extends credit to the "purchaser". The credit transaction is structured as a hiring, requiring the debtor to make regular hire payments to the finance company for an agreed term. In addition, the debtor has an option to purchase the goods so long as all hire charges have been paid. The hire payments are much greater than normal hire payments because in reality they reflect part payment of the purchase price, which is confirmed by the fact that the option to purchase is exercisable upon payment of a nominal sum. The economic function of a hire-purchase agreement is a sale financed by a secured loan, but it takes the legal form of a hiring with an option to purchase. The reason why finance companies adopt this strange form for their credit agreements is to ensure that, if the hirer wrongfully sells the goods to an unsuspecting third party, the latter will not be protected

by the *nemo dat* exception found in s 9 of the Factors Act 1889.¹ In *Helby v Matthews*² the House of Lords sided with the finance company and held that hire-purchase agreements should be taken at their face value. These agreements were not to be construed as conditional sales; so, s 9 of the 1889 Act did not apply. Furthermore, in the contemporaneous case of *McEntire v Crossley Bros Ltd*,³ their lordships held that the finance company had simply reserved ownership and did not, therefore, have a registrable mortgage.

The unreality of this approach has prompted repeated calls for the reform of hire-purchase agreements to take account of their true economic function.⁴ The lower courts, however, have gone somewhat towards mitigating the full effect of these precedents by coming to the aid of a stranger who innocently acquires the hired goods from the hirer. Were the finance company permitted to sue the stranger in conversion for the full value of the goods, the finance company would reap a windfall if most of the hire charges had been paid. Accordingly, the courts have insisted that the finance company is limited to recovering no more than their loss, which is usually deemed to be the balance outstanding under the hire-purchase agreement. The purpose of this article is to examine the techniques used by the courts to limit the finance company's damages in such cases, and will conclude that all of the techniques used are illegitimate, thereby reinforcing the need for reform.

The House of Lords favours form over function

In *Helby v Matthews* a piano was let on hire-purchase terms, the consideration payable by 36 monthly instalments. The hirer had

¹ The relevant parts of s 9 provide that: "Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods ... the delivery or transfer, by that person ... of the goods ... under any sale, pledge or other disposition thereof ... to any person receiving the same in good faith and without notice of any ... right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods ... with the consent of the owner."

² [1895] AC 471.

³ [1895] AC 457. The agreement did not seem to confer on the "hirer" a right of premature termination and there was no separate option to purchase. It, therefore, seems that it was a conditional sale but the decision is as valid for hire-purchase agreements as for conditional sales.

⁴ See J S Ziegel, "Hire-Purchase Agreements: A Plea for Greater Realism", (1960) 104 *SJ* 996; J W A Thornley and J S Ziegel, "Hire-Purchase Reformed", [1965] *CLJ* 59; R M Goode, *Hire-Purchase Law and Practice*, 2nd edn (Butterworths: London, 1970), p 47; and *The Crowther Committee Report on Consumer Credit* (Cmnd 4596, 1971), para 5.2.2.

the option of returning the piano at any time, in which case they would not be liable for any future instalments. If all instalments were duly paid, the hirer would then become the owner. Having paid no more than five of the monthly instalments, the hirer pledged the piano with the defendant. When sued by the owner, the defendant pleaded in aid s 9 of the Factors Act 1889. The House of Lords held that a hirer under a hire-purchase agreement was not a person who had “bought or agreed to buy” the goods and, so, s 9 did not protect the defendant.

Lord Macnaghten did not regard the agreement as a sham, which he emphasised by saying:

The advantages are not all on one side. If the object of desire loses its attractions on closer acquaintance – if faults are developed or defects discovered – if a coveted treasure is becoming a burden and an encumbrance it is something, surely, to know that the transaction may be closed at once without further liability and without the payment of any forfeit. If these agreements are objectionable on public grounds it is for Parliament to interfere. It is not for the Court to put a forced or strained construction on a written document or to import a meaning which the parties never dreamed of because it may not wholly approve of transactions of the sort.⁵

In subsequent cases the lower courts have displayed a somewhat schizophrenic approach. In contests between the finance company and the hirer the courts have adhered strictly to precedent and permitted the finance company to recover the goods and have refused to give credit to the hirer for the fact that they have paid most of the “purchase” price. *Kelly v Lombard Banking Co Ltd*.⁶ is a notable example. In that case the plaintiff took a car on hire-purchase terms for a total price of just over £534. The initial payment of just over £186 was expressed to be in consideration for

⁵ [1895] AC 471, p 482. Modern hire-purchase agreements rarely give the hirer such advantageous rights of termination. Ss 99 and 100 of the Consumer Credit Act 1974 give a hirer under a regulated hire-purchase agreement the right to terminate the agreement without further liability provided that at least one half of the total “price” has been paid. Finance companies acknowledge this overriding stipulation by usually including a similar provision in their regulated hire-purchase agreements.

⁶ [1959] 1 WLR 41.

the option to purchase, which could be exercised on payment of a further fee of £1 provided that all hire payments had been made. Having paid in excess of £419, the plaintiff could not complete the payments. So, the finance company recovered the car. The hirer sued them for the return of the initial payment of £186 as representing a total failure of consideration. The Court of Appeal rejected his claim because they held that the ability to buy the car was a valuable right and could not be exercised until the hirer had paid all hire instalments. Lord Denning said: "I see the hardship on the hirer. I often think it is hard under these hire-purchase agreements when the hirer has parted with his money and the finance company takes both the car and the money: but there is the law."⁷ However, in contests between the finance company and a third party, who has acquired the goods from the hirer, the courts have endeavoured to prevent the finance company from recovering the value of the goods. Instead, the finance company is limited to recovering their loss, which is usually deemed to be the balance outstanding under the hire-purchase agreement with the hirer.

The finance company suing a third party in conversion

In their attempt to limit the damages recoverable by a finance company from an innocent purchaser of the hired goods the lower courts have adopted at least three distinct strategies, using, respectively, rules founded on contract law, property law and tort law. First, the hirer could be regarded as having assigned their contractual rights to the innocent purchaser, enabling the latter to assert those rights, including the option to purchase, against the finance company. Second, the finance company could be deemed to have only a limited proprietary interest in the goods and, hence, to be able only to recover the value of that interest (namely, the unpaid balance under the hire-purchase agreement) in a conversion action. Third, the finance company's cause of action could be regarded as governed by the usual rules of tort law and, hence, recovery limited to the actual loss suffered by the claimant, that is, either the unpaid balance under the hire-purchase agreement or the full value of the goods, whichever was the less. However, none of these approaches has been supported by convincing reasoning.

⁷ *Ibid*, p 44.

1. Assignment of contractual rights by the hirer

In *Whiteley Ltd v Hill*⁸ the plaintiffs let a piano on hire-purchase terms to Miss Nolan, who used it in her flat. Without paying off all charges under the agreement, she sold her flat and its contents to the defendant. She gave the defendant a receipt, in which she stated: "I solemnly declare that the property is my own and that no one has any claim upon it." The owners of the piano then commenced an action against the defendant for the return of the piano or its value. The defendant was only prepared to pay the outstanding balance under the hire-purchase agreement, which was a lesser sum than the piano's value. All three members of the Court of Appeal thought that the original hirer's option to purchase had been assigned to the defendant, which enabled the defendant to pay the outstanding balance and exercise the option to purchase against the owner. Both Swinfen Eady M.R. and Warrington LJ regarded it as an equitable assignment⁹ but failed to explain how it had been achieved. They seemed to assume that the sale of the piano assigned the hirer's contractual rights, but that could only be achieved by following the rules regulating the assignment of *choses in action* rather than the rules regulating the contractual transfer of ownership.

It is well understood that, whereas the equitable assignment of the benefit of a contract needs no written formalities, there must, at least, be evidence of an intention to assign that benefit.¹⁰ In *Whiteley v Hill* it is difficult to find that intention. The problem lies in the wording of the receipt signed by the hirer and given to the defendant. The hirer declared that the property belonged to her and that no one else had any claim upon it. Far from assigning the benefit of the hire-purchase contract, the hirer was desperately trying to suppress it; she had to do that in order to support the charade that it was hers to sell. As the facts do not support an equitable assignment of the hirer's option to purchase the piano, it is difficult to see how the defendant acquired the right to exercise that option.

The simple expedient of inserting a clause in the hire-purchase

⁸ [1918] 2 KB 808.

⁹ It could not have been a legal assignment because it did not satisfy the requirements concerning writing and notice, contained in s 25(6) of the Supreme Court of Judicature Act 1873. That provision is now to be found in the Law of Property Act 1925, s 136.

¹⁰ See *William Brandt's Sons & Co v Dunlop Rubber Co* [1905] AC 454.

contract prohibiting any assignment of the contract by the hirer should prevent strangers from ever acquiring the option to purchase. Third parties who acquired the goods could not then use the option as a way of reducing the damages payable when sued by the owner for the return of the goods. The House of Lords decision in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*¹¹ makes it clear that a prohibition against the assignment of contractual benefits must be upheld. In view of the almost universal prohibition against assignment, contained in modern hire-purchase agreements, this method of limiting the finance company's damages will work no longer. An alternative approach towards helping the innocent buyer is to concentrate on the finance company's proprietary interest in the goods.

2. Limiting the finance company's proprietary interest in the goods

The possibility that the finance company and the hirer may each have limited proprietary interests in the goods was explored by Denning LJ in *Wickham Holdings Ltd v Brooke House Motors Ltd*.¹² In that case a car was let on hire-purchase terms by a finance company for a total price of £889. When the outstanding balance had been reduced to £274, the hirer wanted to trade it in with a dealer in part-exchange for another car. The dealer got in touch with the finance company and was told by them that £274 was the settlement figure but that they would accept £270, if paid within seven days. The hirer duly sold the car to the dealer who in turn re-sold it. However, the dealer forgot to send the "settlement" cheque to the finance company. Not long afterwards the finance company found out what had happened and sued the dealer in conversion for the value of the car (£415) plus damages for detention. Not surprisingly, the Court of Appeal disliked the idea of the finance company recovering the full market value of the car when the outstanding balance under the hire-purchase agreement was far less. How, then, to deny them? The majority, Dankwerts and Winn LJJ, held that the finance company was estopped from denying that they would accept £274 in settlement and, therefore, that was the measure of their loss.

¹¹ [1994] AC 85.

¹² [1967] 1 WLR 295.

Denning LJ doubted that there was an estoppel because the money had to be paid within a reasonable time and it had not. This seems to be the better view. However, he found another way of limiting the damages to the amount outstanding under the hire-purchase agreement rather than the value of the car. He regarded the finance company as having a limited proprietary interest in the car and the value of that interest was the balance outstanding under the hire-purchase agreement. He explained himself as follows:

I am well aware, of course, that *prima facie* in conversion the measure of damages is the value of the goods at the date of the conversion. But that does not apply where the plaintiff, immediately prior to the conversion, has only a limited interest in the goods: see *Edmondson v Nuttall*,¹³ *per* Willes J. Take this case. The hirer had a most valuable interest in the car. He had paid already £615 10s towards the purchase price and had the right to buy it outright on paying another £274 10s. The interest of the finance company was limited correspondingly. Its interest was limited to securing the payment of the outstanding £274 10s. It is entitled to be compensated for the loss of that interest, and no more.¹⁴

He continued:

In a hire-purchase transaction there are two proprietary interests, the finance company's interest and the hirer's interest. If the hirer wrongfully sells the goods or the benefit of the agreement, in breach of the agreement, then the finance company are entitled to recover what they have lost by reason of his wrongful act. That is normally the balance outstanding on the hire-purchase price; but they are not entitled to more than they have lost.¹⁵

This sits uneasily with his lordship's comments in *Kelly v*

¹³ (1864) 17 CB (N.S.) 280.

¹⁴ [1967] 1 WLR. 295, pp 299-300.

¹⁵ *Ibid*, pp 300-301.

Lombard Banking Co, noted above.¹⁶ If the finance company has a limited proprietary interest in the goods, measured by the extent of the hirer's indebtedness, then why was the finance company, in *Kelly v Lombard Banking Co*, permitted to recover the goods and keep all "hire" payments? It also seems to fly in the face of the decisions of the House of Lords in *Helby v Matthews* and *McEntire v Crossley*. As we have seen, in those cases it was decided that the finance company did not have a mortgage or a charge and that the regular "hire" instalments paid by the hirer were consideration for hiring the goods; they were not consideration for purchasing them. If the finance company does not have a limited proprietary interest in the goods, it might be argued that, nonetheless, the hirer has a limited proprietary interest. Let us now examine that possibility by, first, considering whether the hirer's option to buy is a species of equitable proprietary interest.

(a) The hirer's interest as equitable property

Fleming was of the opinion that, under a hire-purchase agreement, the hirer has a property right in the chattel, not only in the limited sense of the "special property" vested in all bailees, but by reason of his prospective "general" ownership that will vest in him on exercise of his option to purchase or eventual payment of the full purchase price.¹⁷ Fleming's reference to the hirer's "prospective" ownership was no doubt prompted by analogy with equity's treatment of land options. Equity, however, does not treat land and goods in the same way. Options to purchase land are proprietary interests from the moment the option is granted¹⁸ because equity regards land as unique. Accordingly, if the grantor of the option fails to respond to the grantee's exercise of the option, damages are regarded as an inadequate remedy. Equity will then grant an order of specific performance. The prospective entitlement to specific performance gives the grantee of the option an immediate equitable proprietary interest in the land under a constructive trust because equity treats as done that which ought to be done.

Most goods are not unique and, so, equity will rarely grant

¹⁶ See the text referred to at fn 7 above.

¹⁷ John Fleming, "Tort Liability for Damage to Hire-Purchase Goods", (1958) 32 *Austr LJ* 267, 270.

¹⁸ See *London and South Western Railway Co v Gomm* (1882) 20 Ch D 562.

specific performance in support of an option to purchase goods. In any event specific performance is not required in the context of options to buy goods in order to vest ownership in the buyer. The vendor of an estate in land must execute a deed in favour of the purchaser before the latter can acquire legal title. A decree of specific performance compels the vendor to execute the deed. The hirer with an option to purchase goods acquires ownership, not by conveyance, but by their own unilateral act of paying all hire charges and tendering payment in exercise of the option to purchase. It requires no further act by the finance company to accomplish the desired transfer of ownership. Hence, specific performance is redundant and cannot, therefore, generate a constructive trust in favour of the hirer. If the hirer does not have an equitable proprietary interest, they may yet have a legal proprietary interest.

(b) The hirer’s interest as legal property

In *On Demand Information plc v Michael Gerson (Finance) plc* both the Court of Appeal¹⁹ and the House of Lords²⁰ held that a hirer under a finance lease of goods had a property interest in the goods. However, neither court was clear about the nature of that interest. By contrast, in *Helby v Matthews* Lord Macnaghten observed:

... it was the intention of the parties – an intention expressed on the face of the contract itself – that no one of those monthly payments until the very last, should confer upon the customer any proprietary right in the piano or any interest in the nature of a lien or any interest of any sort or kind beyond the right to keep the instrument and use it for a month to come.²¹

These apparently conflicting views can in fact be reconciled. To do so requires an analysis that regards ownership as a divisible interest in goods, a view prompted by the historical development of the action in conversion.

¹⁹ [2001] 1 WLR 155.

²⁰ [2002] 2 WLR 919.

²¹ [1895] AC 471, p 481.

In *Gordon v Harper*²² it was decided that, upon the creation of a hiring, the goods having been delivered to the hirer, the owner could not sue strangers in conversion for wrongful interference with the goods. The claimant in conversion needed both property in the goods and the right to their immediate possession.²³ Now clearly the owner, whose goods are out on hire, retains ownership in the goods but the owner does not have the right to the immediate possession of them. That right to possession is not a mere contractual right because conversion protects a proprietary interest in goods.²⁴ If the owner unlawfully takes the goods from the hirer, then the latter can sue the owner in conversion. The hirer needs a proprietary interest in the goods to do this. In *Lee v Atkinson*²⁵ it was held that an owner could not recover the goods at will during the term of the hiring because the hirer had a special property against all men. That special property could not be the special property vested in all possessors as against strangers because the owner is not a stranger. It, therefore, makes sense to regard the owner's proprietary right to immediate possession as having been conveyed to the hirer when the latter acquires possession. That right is part of full ownership; so, when it is conveyed to the hirer, the owner's interest shrinks to a reversion. There are, therefore, at least two types of ownership: full ownership and reversionary ownership. Full ownership incorporates the right to immediate possession, such as the interest of an owner who delivers goods to a carrier or warehouse-keeper but retains the right to call for delivery on demand. Reversionary ownership, by contrast, exists where the proprietary right to immediate possession has been conveyed to another person, such as a hirer or pledgee.

The hirer can, therefore, be regarded as having a limited proprietary interest in the goods, which binds the finance company. But, it is not an interest that is steadily swelling into full ownership. Only the exercise of the option to purchase can transfer ownership to

²² (1796) 7 TR 9.

²³ See: *Gordon v Harper* (1796) 7 TR 9; *Bloxham v Sanders* (1825) 4 B & C 941; *Owen v Knight* (1837) 4 Bing. (NC) 54; *Wilmshurst v Bowker* (1839) 5 Bing. (NC) 541; *Milgate v Kebble* (1841) 10 LJCP 277; and *Bradley v Copely* (1845) 1 CB 685.

²⁴ See *Bloxam v Sanders* (1825) 4 B & C 941, p 949; *Crocker v Molyneux* (1828) 3 C & P 470; *Melling v Kelslow* (1830) 1 Cr & J 184, pp 187 and 189; *Gillett v Hill* (1834) 2 C & M 530, p 536; *Owen v Knight* (1837) 4 Bing (NC) 54, p. 57; *Wilmshurst v Bowker* (1839) 5 Bing (NC) 541, p 551; *Milgate v Kebble* (1841) 10 LJCP. 277, 278; and *Bradley v Copely* (1845) 1 CB 685, p 697.

²⁵ (1609) Cro Jac 236.

the hirer. Furthermore, it is a right that lasts for the duration of the contractual term of the hiring. If the hirer wrongfully sells the goods, the terms of the hiring will almost certainly decree that the hiring is determined immediately. That means that the hirer's proprietary interest reverts to the finance company, whose reversionary ownership then swells to full, unencumbered ownership. To prevent that happening, the hirer would have to plead relief from forfeiture.²⁶ But, two points are relevant here. First, it is arguable that, where the hire-purchase agreement is terminated by the hirer's wrongful sale, equity will not grant relief in favour of the hirer because whoever comes to equity must come with clean hands. Second, it is not the hirer who will want relief from forfeiture but their buyer. How can the buyer step in and claim to take advantage of equitable relief if they have not taken an assignment of the hirer's option to purchase?

3. Limiting the finance company's loss by using the law of tort

In *Wickham Holdings v Brooke House Motors* Denning LJ was of the opinion that the plaintiff could recover no more than they had lost. He tried to limit their loss by regarding them as having a limited proprietary interest in the goods. But, as we have seen, that does not work. Another way of dealing with the matter is to invoke the normal rules of tort. According to Denning LJ, when the finance company sues a third party in conversion, the former can recover no more than their loss. That is measured by the amount outstanding under the hire-purchase agreement. But, this approach encounters a difficulty highlighted in *Chubb Cash Ltd v John Crilley & Son*.²⁷

In that case the claimants had let a cash register on hire-purchase terms. Bailiffs took the cash register from the hirer, who had wrongfully declared that it belonged to him. The owners sued the bailiffs and the Court of Appeal decided that, despite a finding to the contrary by the trial judge, the cash register was worth far less than the outstanding balance under the hire-purchase contract. The claimant (owners) then relied on *Wickham Holdings v Brooke House Motors* as authority for the proposition that the claimant in such cases was always entitled to the balance outstanding on the hire-

²⁶ The right to claim relief from forfeiture was recognised in *On Demand Information v Michael Gerson, ante*.

²⁷ [1983] 1 WLR 599.

purchase agreement. Both judges, Fox LJ and Bush J, disagreed, holding that in such cases the claimant was entitled to recover no more than whichever was the lesser sum between the value of the goods and the outstanding balance under the hire-purchase agreement. In the instant case the lesser sum was the value of the goods.

In this case the reasoning of Bush J is particularly instructive. He denied that the value outstanding on the hire-purchase contract was the measure of the claimant's loss. Referring to that loss, he said: "This damage does not in this case flow from the conversion, but flows from the failure of the debtor to perform his obligations under the [hire-purchase] agreement."²⁸ This is clearly correct in the context of a claim in tort: it was a matter of causation. As the defendants did not cause the claimant's loss under the hire-purchase agreement, they should not have to make good that loss. But this creates a contradiction in Bush J's reasoning. If the unpaid balance under the hire-purchase agreement is not a loss caused by the third party, then how can that sum *ever* be the measure of damages in tort even if it is less than the value of the goods? It must follow that, by using the rules of tort in such cases, the finance company's loss is always deemed to be the value of the goods. The balance outstanding under the hire-purchase agreement is a matter between the finance company and the hirer. If the finance company wants to make good its loss under that agreement, then it must sue the hirer for breach of contract.

The heavy weight of precedent

Early in the history of hire-purchase agreements the highest appellate court decided that those agreements should be treated according to their own terms rather than be treated as secured sales. What Denning LJ sought to do in *Wickham Holdings v Brook House Motors* was pretend that *Helby v Matthews* and *McEntire v Crossley* had not been decided because he treated a hire-purchase contract as if it were in substance a secured sale. If the finance company's interest is regarded as dwindling with each hire payment, then the finance company must be regarded as having either a share of ownership of the goods or a security interest in the goods. As the

²⁸ [1983] 1 WLR 599, p 604.

finance company and hirer are clearly not co-owners, the finance company by default must then be regarded as having a security interest; but, *McEntire v Crossley* ruled against that. None of the attempts made in the cases to prevent the finance company from recovering a windfall from third parties are convincing. They are all attempts to reach a just result in spite of the established rules. There is here a clear conflict between justice on the one hand and judicial consistency on the other hand.

Solving the problem of over-compensation

The techniques, so far used by the lower courts to deny the finance company a windfall at the expense of innocent third parties, are unsound because, in an attempt to side-step binding precedent, they are clearly at odds with well-established legal rules. If the finance company is to be denied its windfall, and if the law is to be coherent, then one or more of the established rules needs to be reformed. Reform of the rules of causation in tort is out of the question because causation is as much a matter of fact as of law and the facts cannot be turned on their head. The defendant who is a stranger to the hire-purchase agreement simply does not cause the hirer's indebtedness under that agreement.

A more realistic reform would be to relax the rules regulating the assignment of contractual rights enabling the hirer to assign their option to purchase. This can only be achieved at common law if the House of Lords departs from its decision in *Linden Gardens v Lenesta Sludge*, which is an unlikely prospect. Alternatively, Parliament might intervene by adopting the Australian model.²⁹ This provides that the option can be assigned, subject to the finance company's consent, such consent not to be unreasonably withheld. Such a reform would not be a panacea because many hirers fail to reveal to their purchasers the existence of the hire-purchase agreement. In such circumstances there is no scope for any express assignment and no opportunity for the finance company to object.

A more effective way of helping the third party would be to

²⁹ In Australia the uniform Hire-Purchase Act 1959, s 9 (Qld), s 13 (Tas), s 9 (Vic), s 9 (WA); 1960 s 9 (NSW) and s 9 (SA); 1961 s 14 (ACT) introduced the following provision: "The right, title and interest of a hirer under a hire-purchase agreement may be assigned with the consent of the owner or, if his consent is unreasonably withheld, without his consent." Most of these statutes have since been replaced by later legislation.

extend the statutory exceptions to the *nemo dat* rule by providing that all *bona fide* purchasers of goods, subject to hire-purchase agreements, are protected.³⁰ However, this would still leave the hirer without adequate protection because, towards the end of the hire period, they might find themselves financially embarrassed and unable to complete all hire payments. If the hirer is unable to carry on paying, then the court will not award relief from forfeiture. The finance company would then be able to recover the goods and keep the sums already paid, which in reality reflect the bulk of the capital value of the goods.

The most effective and comprehensive reform needs to look at the very nature of hire-purchase agreements and treat them according to their economic function, that is, secured sales rather than the legal form adopted by the finance company. The hirer's monthly payments should not be regarded as consideration for the right to possess the goods but as part payment towards the acquisition of ownership. As we have seen, in *Helby v Matthews* Lord Macnaghten was of the view that the hirer had the advantage of returning the goods if they proved unsatisfactory, without having to pay all hire instalments due under the agreement. In other words, the hirer could hedge their bets in a way they could not if it were a conditional sale. But, this is scant consolation to the hirer who has paid, say, nine-tenths of the hire instalments but cannot complete them due to financial difficulties. In any event modern consumers are not interested in hiring the goods; they simply want to buy them on credit. This is emphasised by the fact that most consumers are probably unaware that they have entered a hire-purchase agreement rather than a conditional sale agreement. The appropriate form is put before them by the retailer and they sign it without realising its full legal significance.

The Crowther Committee Report on Consumer Credit of 1971³¹ pointed out that hire-purchase agreements were really two agreements rolled into one. They were sales financed by loans. The Committee forcefully asserted that: "The notion that a hire-purchase agreement is a hiring with an option to purchase is well recognised

³⁰ Currently, where goods are subject to a hire-purchase agreement, only *bona fide* private purchasers of motor vehicles are protected: see the Hire-Purchase Act 1964, s 27.

³¹ Cmnd 4596.

as a legal fiction bearing no relation to reality. It is in truth a sale.”³² The Committee recommended a change in the law to recognise that “the extension of credit in a ... hire-purchase transaction is in reality a purchase-money loan and that the reservation of title under a hire-purchase ... agreement ... is in reality a chattel mortgage securing a loan.”³³

The Government of the day rejected that part of the Crowther Committee Report dealing with security interests in goods. A similar recommendation, made by the Diamond Report of 1989 on Security Interests in Property,³⁴ was also not taken up. If Parliament is reluctant to intervene, might the courts reform the law? That would require the House of Lords’ decisions in *Helby v Matthews* and *McEntire v Crossley* to be overruled. Their Lordships have power to depart from their own previous decisions but they are unlikely to exercise that power in this instance because it would retrospectively upset a long-established commercial practice. Alternatively, the House of Lords might regard this as an exceptional case meriting the application of prospective overruling as outlined in *Re Spectrum Plus Ltd.*³⁵ If *Spectrum* itself was not regarded as an exceptional case, then it is unlikely that their Lordships will regard hire-purchase as exceptional. The prospects for reform, therefore, do not look rosy.

Conclusion

There is a widespread belief that the legal form of hire-purchase agreements is a fiction. The need to prevent the finance company from recovering the full value of the goods from unsuspecting third parties who acquire the goods has been recognised by the courts. Unfortunately, the techniques used by the courts in this endeavour are unconvincing. This simply emphasises the need for reform. Various reforms are possible but the fairest and most effective reform would be to look at the economic function rather than the legal form of such agreements and treat them as secured loans rather than hirings with an option to purchase. In

³² *Ibid*, para 5.2.2.

³³ *Ibid*, para 5.2.8.i.

³⁴ *A Review of Security Interests in Property* (Report to the Department of Trade and Industry).

³⁵ See *In Re Spectrum Plus Ltd* [2005] UKHL 41.

reality this is what the lower courts have been doing but cannot admit as much because that would run counter to the decisions of the House of Lords in *Helby v Matthews* and *McEntire v Crossley*. The current conservative nature of *stare decisis* in England and Wales militates against the House of Lords departing from these decisions. Our system of law-making only works well if Parliament is prepared to reform the law when our system of rigid precedent prevents the courts from acting. In this instance Parliament has been reluctant to intervene. So, the courts will continue to fiddle the rules in the interests of justice, but at the expense of coherence and consistency.

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