AFFIN CREDIT (MALAYSIA) SDN BHD V *YAP YUEN FEI*: THE DENOUEMENT OF A HIRE—PURCHASE MYSTREY?

Malaysia's first and parent statute on hire-purchase, the Hire-Purchase Act 1967, came into force on 11th April 1968. Although the bulk of the new Act was borrowed from the Hire-Purchase Act 1960-1965 of the Australian state of New South Wales, a number of significant innovations were incorporated into the Malaysian statute by the draftsman. The Malaysian statute was revised and re-enacted in 1978 as the Hire-Purchase Act 1967 (Revised 1978), incorporating amendments made in 1968, 1969 and 1976.

Partly because of the Malaysian draftsman's attempts to make innovations and partly because of the inherent weakness in the New South Wales statute the Malaysian legislation was enacted with several puzzling gaps which left the legal position in some instances uncertain. Some of these gaps involve provisions which impose duties on the owner without specifying the remedies for the hirer if the said provisions are breached. In *Affin Credit (Malaysia) Sdn Bhd* v. *Yap Yuen Fei*[1] the Federal Court considered one of these gaps. The case involved section 4(1) which imposes a duty on an owner to serve on the hirer a written statement, commonly called the Second Schedule notice, before any hire-purchase agreement is made.

The intention behind section 4(1) is that the hirer should be told of his financial obligations before he takes the important step of signing a hire-purchase agreement. The Second Schedule notice explains in brief as to how the hire-purchase price is calculated. It also provides other details like (a) the amount of each instalment, (b) the total number of instalments and (c) the intervals between each instalment. The statutory duty on the owner to serve this written statement cannot be evaded by accepting a written offer signed by the hirer. This compulsory pre-contractual disclosure is one of many statutory devises to protect the hirer. Many hirers faced by the temptation of obtaining goods on credit, forget their bleak financial resources and do not weigh the burden about to be imposed upon them by the new transaction. The Second Schedule notice encourages them to consider whether they would be able to bear the new financial obligation. The only weakness is that the Act does not specify the interval that must pass between the service of the notice and the signing of the agreement.

Section 4(1) reads as follows

> "Before any hire-purchase agreement is entered into in respect of any goods the owner shall give or cause to be given to the prospective hirer a written

[1] [1984] 1 M.L.J. 169.

> statement duly completed in accordance with the form set out in the Second Schedule.
>
> Provided that where the agreement is entered into by way of acceptance by the owner of a written offer signed by or on behalf of the hirer, the provisions of this subsection shall be deemed not to have been complied with unless the written statement was given to the prospective hirer before the written offer was signed."

The scenario is incomplete unless section 4(1) is viewed in conjunction with sections 4(2), 4(3) and 6 of the Act. Section 4(2) of the Malaysian Act provides that a hire-purchase agreement must be in writing and sets out the matters that should be included in all hire-purchase agreements. Section 4(3) makes it a criminal offence for non-compliance of section 4(2) but there is no similar criminal sanction for a breach of section 4(1). Section 6 provides civil remedies for breach of section 4(2). Whilst section 4(2) is expressly mentioned in section 6 no reference is made to section 4(1). The result of all these is that the Malaysian Act provides neither a criminal penalty nor a civil remedy for failure to serve the Second Schedule notice mentioned in section 4(1).

Section 4(1) of the Malaysian Act is in *pari materia* within section 3(1) of the New South Wales legislation. It is pertinent to consider the remedies provided by the Australian legislation if its section 3(1) was contravened. Unlike the Malaysian statute the Australian Act provided adequate remedies. Failure to serve the notice was a criminal office under section 50(1) of the New South Wales Act which read

> "Any person who contravenes or fails to comply with any provision of this Act is guilty of an offence against this Act."

Secondly by section 3(4) of the New South Wales Act the omission to serve the notice caused the liability of the hirer to the owner under the hire-purchase agreement to be reduced by the amount included in the agreement for term charges. In other words the interest on the amount financed by the owner was deleted from the agreement and the hirer paid the cash price (minus whatever deposit he had paid) in instalments.

For some unknown reason the Malaysian draftsman failed to include a criminal sanction or a civil penalty for failure to serve the Second Schedule notice. A criminal penalty is missing because section 50(1) of the Australian Statute was not incorporated into the Malaysian Act. A civil penalty is lacking because section 6 which provides the remedies for breach of section 4 refers to section 4(2) but omits reference to section 4(1).

What is the position in Malaysia if the Second Schedule notice is not served on the hirer? This matter came up for decision in *Affin Credit (Malaysia) Sdn Bhd* v *Yap Yuen Fui.*

The plaintiff let a Toyota motor car to the defendant under a hire-purchase agreement. The defendant fell into arrears with the payments due under the agreement and the plaintiff repossessed the vehicle. The plaintiff then brought an action in the Sessions Court claiming $13,174.97 as

the balance outstanding and due under the hire-purchase agreement. The defendant denied the claim and sought the protection of the Hire-Purchase Act 1967. He alleged, *inter alia*, that section 4(1) of the Hire-Purchase Act 1967 was not complied with in that a written statement in the form of the Second Schedule notice was not served on him. The Sessions Court President found that the provisions of section 4(1) had been breached and dismissed the plaintiff's claim.

The plaintiff's appeal to the High Court was heard and dismissed by Abdul Razak J. The learned judge held that by the plaintiff's breach to comply with section 4(1) it had failed to prove that it had entered into a valid and proper agreement with the defendant. Where the Second Schedule notice was not served there was not an offer within the meaning of section 4(1). Any agreement made without the prior service of the said notice would be void *ab initio* for lack of offer and acceptance.

Dissatisfied with the judge's interpretation of section 4(1) the plaintiff appealed to the Federal Court on a question of law as to whether non-compliance with the provisions of section 4(1) would render a hire-purchase agreement void *ab initio*. The Federal Court dismissed the plaintiff's appeal with costs. Mohamed Azmi, F.J. who delivered the judgement of the Federal Court pointed out that the plaintiff-appellant had conceded that a written statement in compliance with section 4(1) was not given to the defendant-respondent before the written offer was signed on August 14, 1980. His Lordship said,[2]

> "Can such an offer without the requisite written statement being given to him before he put down his signature be a lawful offer capable of acceptance by the plaintiff/owner under the Act? That in our view is the pertinent and relevant question to be asked in this appeal. As a general principle, in order to decide whether the parties have reached an agreement, it is usual to enquire whether there has been a definite offer by one party and an acceptance of that offer by the other. Section 4(1) deals with entering into and formation of a contract; whereas section 4(2) and also sections 5(2) and 6 deal principally with the contents of the contract, after a lawful offer by the prospective hirer has been made and accepted. If there is no consensus *ad idem* under the Act and a contract has not been entered into and therefore still not legally in existence, what is the purpose of the legislature dealing with it in sections 4(3) and 6(2) as to the consequences of non-compliance? To do so would be totally futile. The exclusion of section 4(1) from the provisions of sections 4(3) and 6(2) supports the view that section 4(1) deals merely with the entry stage of the agreement by making it mandatory for the promisee to give the written statement to the promisor before there can be a promise."

His Lordship held that an offer to enter into a hire-purchase agreement is subject to a condition precedent imposed by section 4(1). To this extent the said section had modified the law of offer and acceptance as provided

[2] *Ibid.*, at p 172.

in the Contracts Act 1950. The learned judge also held that there was no gap in our Act as to non-compliance of section 4(1). His Lordship said,[3]

> "Section 4(1) contains a positive and mandatory obligation on the part of the owner to give a written statement to the prospective hirer *before* an offer to enter into a hire-purchase agreement can be accepted and thereby brings about the formation of an agreement. This is the plain meaning of such words as 'Before any hire-purchase agreement is entered into' and 'unless the written statement was given to the prospective hirer' used in section 4(1). There is no gap in that provision and there can be no other interpretation unless we want to make nonsense of the words used by the legislature. That would exactly be the result if we were to conclude that although the obligation imposed by the sub-section was mandatory it had practically no purpose and had no meaningful consequences."

Despite the Federal Court's forceful assertion that there was no gap as to the non-compliance of section 4(1) lawyers and law students may be forgiven if they had in the past debated as to the consequences of a breach of the provision. It could be argued, for instance, that a hire-purchase contract that contravened section 4(1) was void under section 24 of the Contracts Act 1950. It could also be argued that section 4(1) created a statutory duty and that if its breach caused loss to the hirer he may sue in tort for damages. Although the Federal Court's approach in holding the contract void for lack of consensus is convincing few could have anticipated it as a consequence of a breach of section 4(1). All the same *Affin Credit* is a landmark decision. The legal position is now clear and doubts regarding the effects of non-compliance of section 4(1) have now been dismissed.

Other parts of the mystery remain unsolved. What was the intention of the draftsman and the legislature in failing to provide a penal saction or civil remedy in the Act? Why was the Australian statute not followed? One can only guess until the draftsman's files become available for consultation in the due course as public archives under section 2 of the National Archives Act 1966. Was the omission deliberate or accidental? It is unlikely that the omission was accidental as the draftsman's replacement of the Australian section 3(4) with the Malaysian section 6(2)[4] would have made it apparent that section 4(1) was without a statutory civil sanction. If deliberate what remedy was actually intended? Did the draftsman or the legislature think a breach of section 4(1) to be so innocuous that no remedy should be provided for its breach? Such a conclusion is probably absurd because as Azmi F.J. said it would make nonsense of the words used in the section. It is not known whether the Federal Court's attention was drawn to the New South Wales civil remedy for breach of the corresponding provision in the Australian statute. The reported judgment contains no clue on this point. As was pointed out earlier, in the original Australian statute

[3] *Ibid.*

[4] This was based on section 10 of the [English] Hire-Purchase Act 1965.

the hirer may claim to have his liability reduced by being relieved of the term (interest) charges.

To many the *Affin Credit* case may have come as a surprise (but pleasant) ending to a hire-purchase mystery. The provisions in section 4(1) are meant for the protection of ignorant hirers. Section 4(1) must, without doubt, be one of the most commonly flouted sections of the Act. Owners who breach it must be made to realise that the consequences for such a breach are very severe. *Affin Credit* must have alarmed many a finance institution providing credit for hire-purchase. Another reason why the decision is most welcome is because it fills a glaring "gap" in our Hire-Purchase Act.

Finally the *Affin Credit* case must have kindled the curiosity of all those with an interest in hire-purchase law as to how the courts may deal with other gaps in the Hire-Purchase Act 1967. For instance, section 26(1) of Act provides that the owner may require the hirer to insure the goods let but section 26(2) states that the owner shall not require a hirer to insure with any particular insurer. A practice in the hire-purchase trade is for some finance companies to have a business arrangement with a particular insurance company with whom their hirers are required to insure. What is the position if the hirer is compelled (in breach of section 26(2)) to insure with a particular insurer? The Act provides neither a civil remedy nor a criminal penalty. What remedy is available to the hirer in such a case? Probably the hirer is only entitled to damages for breach of statutory duty but after the *Affin Credit* case owners are forewarned not to treat the duty lightly.

P. Balan