

COMMENTS

CONSUMER LITIGATION BEFORE THE CREDIT TRIBUNAL

One of the difficulties of setting up an appropriate forum to resolve consumer disputes is that their legal complexity often bears little relation to the sums of money involved. Recent South Australian litigation reaffirms this proposition. Litigation involving the form of General Motors Acceptance Corporation's credit contracts has so far involved two High Court appeals;¹ and since the credit charges on all the company's contracts might be forfeited, millions of dollars would appear to be at stake. Yet the arguments advanced in this litigation have struggled to find some constitutional dimension and on the whole produced little more than some theoretically insignificant technicalities. Of course at the time of writing the real legal issues seem not yet to have been addressed. On the other hand, some of the fundamental concepts of the South Australian consumer sale/credit contract legislation have been raised in a case to be discussed in this note where what was at issue was whether a consumer was entitled to \$69 in clothing or in cash.

It is now some years since the Consumer Credit Act, 1972-1973 (S.A.), and the Consumer Transactions Act, 1972-1973 (S.A.), came into force. Certainly by now one would expect that almost all personal loans and chattel security agreements in force would have been made subject to those Acts. However, beyond discussion of the general concepts of the Acts little has been written about them. Some of the problems of rescission were discussed by Dr. Turner in this journal,² and CCH Australia Ltd. have produced a descriptive commentary on the Acts.³ The purpose of this note is to look at three recent decisions of the Credit Tribunal and the problems they raise.

The case of *Anderson v. Shuttleworth*⁴ involved an application under s.46 of the Consumer Credit Act on the basis that a term of a mortgage provided for an excessive credit or other charge, or was harsh or unconscionable or such that a court of equity would give relief in respect of it. The decision has significance beyond the consumer credit area because general unconscionability legislation is currently being proposed in several Australian jurisdictions.

Anderson had granted a real estate mortgage to secure repayment by him of a loan of \$20,000 he used to buy a house property. The loan was repayable over a period of three years. The mortgage agreement provided that Anderson might repay the whole of the balance of the principal on any quarter day provided he gave one quarter's notice of his intention to do so. Anderson resold the property with settlement in one month. At this time, there were five months before he was entitled to a discharge of the mortgage. In order to gain a discharge, he negotiated payment in lieu of notice. The payment demanded was \$364, which was equivalent to three months' interest. Anderson regularly bought and sold properties. He negotiated with

1. *Re Credit Tribunal (S.A.), ex parte General Motors Acceptance Corporation Australia* (1977) 51 A.L.J.R. 612; the second appeal is as yet unreported.

2. Turner, "Misrepresentation, Agency, and Contracts for the Sale of Goods in South Australia", (1975) 5 *Adel. L.R.* 221.

3. *Consumer Credit Law* (CCH, Sydney, 1977).

4. Unreported, Credit Tribunal No. 03/013/75.

several sources for the mortgage, and the early repayment clause was specially agreed upon.

Before the Credit Tribunal, Anderson challenged the early repayment clause. The Tribunal concluded, however, that the \$364 payment had not been made pursuant to the original credit contract but under a new contract made to vary the original contract. This new contract did not involve any element of credit. Therefore, its terms could not be altered by the Tribunal which only had jurisdiction over credit contracts. Despite this conclusion, the Tribunal went on to indicate that the early repayment clause would have been set aside. The Tribunal's concern seems to have been much more with the nature of the clause than any injustice to Anderson.

The Tribunal concentrated on the concepts of "harshness" and "unconscionability". It pointed out that in the Consumer Credit Act the terms were for the first time used in the alternative. This usage indicated a wider scope than the single concept of "harshness *and* unconscionability". It attributed the wider scope to "unconscionability".

The Tribunal considered that "harshness" involved some oppression, surprise, or use of economic ascendancy. It pointed out that at common law there was no right whereby the mortgagor could obtain an early discharge. The clause thus conferred a benefit upon Anderson. Moreover, the clause was not one dictated to a prospective borrower at the mercy of the financier.

In considering the meaning of "unconscionability", the Tribunal referred to s.2-302 of the United States Uniform Commercial Code. This reference could have been limiting as the Code commentary emphasises the prevention of oppression through the exercise of bargaining superiority, and the prevention of surprise through particularly disadvantageous clauses in small print. However, the commentary does refer to the commercial background of the bargain, and the Credit Tribunal seized on this factor. It stated that a term would be unconscionable if it was plainly unfair when viewed in light of current trade, commercial and social conditions and South Australian legislation. The Tribunal concluded that the particular term was unconscionable because it went beyond the reasonable protection of the mortgagee. Two months' notice would give a mortgagee a reasonable time in which to reinvest.

Looking simply at the words, one is surprised that "unconscionability" rather than "harshness" provides the new extension. Indeed the value of developing separate concepts rather than a single though expanded concept is questionable. The process seems unworkable under the Contracts Review Bill before the South Australian Parliament at the time of writing. That Bill relates to unjust contracts which are defined as those which are harsh or unconscionable or oppressive or otherwise unjust.

Moreover in its application the Tribunal's definition of unconscionability gains further liberality. The clause in question would seem not to be uncommon or very different from the norm. But the Tribunal considered it gave too much to the mortgagee: he got more than his interest required. Indeed the Tribunal seems to be applying a test not unlike that applied in restraint of trade cases. Previously in the unconscionability jurisdiction, courts have emphasised the conduct of the parties in formulating an agreement whereas the Tribunal has concerned itself with the bargain reached. It seems to demand not just equality of bargaining but equality of bargain.

The \$69 dispute was that of *Heufner v. Knight*.⁵ Heufner went to a store and agreed to buy a suit. The trousers were altered for him. He paid for the suit by Bankcard. He took it home, but his wife was dissatisfied with the fit. He returned to the store and asked for his money back. The storekeeper indicated that his policy was simply to grant credit towards other goods for the price of the returned goods. Heufner did not accept this proposal. Despite Heufner's refusal to accept a credit note and the storekeeper's refusal to refund the \$69, the storekeeper took the suit and ultimately sold it to another (apparently also short-legged) customer.

Heufner brought an action in the Credit Tribunal claiming the return of his \$69. The Tribunal held that the "refund in goods only" policy had not been incorporated as a term of the contract. The defect in the suit might not have amounted to a breach of a condition. But, at least by the resale, the storekeeper had accepted the rescission and so Heufner was entitled to the return of his money. The real issue was whether the Tribunal had power to make such an order. Its jurisdiction, if any, was derived from s.18 of the Consumer Transactions Act. That section provides:

"(1) In any dispute arising out of the rescission of a consumer contract, consumer credit contract or consumer mortgage the Tribunal may, upon the application of a consumer, supplier, credit provider or mortgagee make such orders as may be necessary—

(a) to give effect to, or to enforce any rights or liabilities consequent upon the rescission arising under this Act;

or

(b) subject to any such rights or liabilities, to restore the parties as nearly as practicable to their respective positions prior to the formation of the consumer contract, consumer credit contract or consumer mortgage.

(2) The jurisdiction conferred by this section is in addition to, and does not derogate from, the jurisdiction of any court."

The first issue arising from s.18 was whether the Tribunal was limited to orders in respect of rescissions arising under the Consumer Transactions Act. It asserted that it was. Whatever the difficulties of para. (a), it is hard to see how the way in which it is limited can be used to limit the alternative jurisdiction under para. (b). Indeed it seems more plausible to regard para. (a) as the special provision directing the Tribunal to implement the post-rescission rights and liabilities introduced by the Act (in ss.16 and 17).

The next issue became what amounts to a rescission arising under the Act. The Tribunal considered that it was not enough that the Act implied the relevant condition; the right of rescission had to be conferred by the Act. Three sections conferred a right of rescission—ss.7, 16 and 15.

S.7 is the simplest provision. It confers a new right to rescind wherever a consumer makes known an intention to seek credit to perform his obligations and the consumer's reasonable steps to obtain credit are unsuccessful.

S.16 also involves sales associated with credit. Where the sale or other consumer contract is rescinded then a consumer credit contract made in

5. Unreported, Credit Tribunal No. 03/025/77.

respect of that contract with the same supplier or a linked credit provider is also rescinded. So the Credit Tribunal has jurisdiction where there is an associated consumer credit contract with the supplier or a linked credit provider. (Similarly, it would seem to have jurisdiction because of s.17 where there is a mortgage over the goods in favour of a non-linked credit provider.) Heufner paid for his suit by bankcard. Was the bank a linked credit provider? The Tribunal determined that the bank was not a credit provider because s.6 of the Credit Act exempts banks from Parts II, III, IV and VII of that Act.

This reasoning of the Tribunal is extraordinary. It is true that a credit contract is one under which credit is provided by a credit provider. But the term "credit provider" is defined as one "whose business includes the provision of credit" and thus covers a bank. How can an exemption from parts of the Consumer Credit Act change this definition? And, even though the Consumer Transactions Act expressly adopts the Consumer Credit Act definitions of credit contract and credit provider, how can an exemption from part of one Act change the definition in another Act? The matters relating to bankcards under the legislation are obviously important. Whether the arrangements between the banks and retail stores are sufficient to create a "link" within the Consumer Transactions Act⁶ is a difficult question but one which the Tribunal's reasoning avoids. It is most doubtful whether these matters can be taken as concluded by this rather unsatisfactory means.

The third type of rescission arising under the Act is that under s.15. That section provides:

"15. (1) A consumer shall be entitled, within a reasonable time (not exceeding seven days) after the delivery of goods in pursuance of a consumer contract, to rescind the contract on the ground of any breach of condition on the part of the supplier.

(2) The contract may be rescinded by notice in writing served upon the supplier.

(3) Where the property in the goods has passed to a consumer in pursuance of a contract, and the contract has been rescinded under this section, the property in the goods shall forthwith re-vest in the supplier with whom the contract was made, and the consumer shall return the goods to that supplier.

(4) In the event of rescission under this section, the consumer may recover from the supplier, as a debt, the amount or value of any consideration paid or provided by him under the consumer contract.

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6. By s.5 a "linked supplier" is defined as one
 "... who introduces a consumer to a credit provider or who takes any part in negotiations leading to the formation of a credit contract between that credit provider and a consumer and, without limiting the generality of the foregoing, includes —
 (a) a supplier who by agreement or arrangement (whether formal or informal) with a credit provider refers applicants for credit to that provider;
 (b) a supplier who has available for use by those who may seek credit documents intended to be used as contracts with, or offers or applications to, the credit provider;
 or
 (c) a supplier on whose premises any contract with, or offer or application to, the credit provider is signed by the consumer in pursuance of an arrangement between the supplier and the credit provider, or in circumstances from which the existence of such an arrangement between the credit provider and the supplier might reasonably be inferred."

(5) Where—

- (a) the goods are not returned to the supplier within a reasonable time after rescission;
- (b) the goods have been rendered unmerchantable after delivery to the consumer;
- (c) the goods have been damaged by abnormal use after delivery to the consumer;

or

- (d) the Tribunal on the application of the supplier made within fourteen days of the date of the purported rescission declares the rescission invalid on the ground that rescission is not an appropriate remedy in view of the nature of the goods, the conduct of the parties, or any other circumstances of the transaction,

any purported rescission of a consumer contract under this section shall be void.

(6) There shall be no appeal against a declaration of the Tribunal under this section.

(7) The right of rescission conferred by this section shall be in addition to, and shall not derogate from, a right of rescission under any other act or law.”

S.15 gives a right of rescission for breach of any condition, not just conditions implied by the Consumer Transactions Act. It does not affect the right of rescission under the Sale of Goods Act. Under that Act, rescission depends on acceptance which largely depends on whether a reasonable opportunity to inspect the goods has expired. That time might exceed seven days.

The right of rescission conferred by s.15 is qualified in sub-s.5. The first three grounds of that subsection relate to the consumer's use of the goods and accord quite closely to the *restitutio in integrum* requirement of the common law. The fourth ground gives a new right of objection to rescission and gives the Tribunal exclusive jurisdiction to decide the issue. This jurisdiction is subject to a strict time limit. The Tribunal points out that the time limit ensures a speedy resolution of the issue of appropriateness. But the limit only applies to that issue and, despite some comments by the Tribunal, not to, say, a trader's objection that rescission is not available. Furthermore, the Tribunal's jurisdiction is to declare the rescission inappropriate—it can do nothing more with what must then be a limping transaction.

The Tribunal determined that Heufner was exercising his seven-day right of rescission and thus it had jurisdiction to order repayment of the purchase price.

The Tribunal tells us that deciding whether it has jurisdiction should not present us with any difficulty once we bear in mind its explanations. What we have to decide is whether a consumer has a right of rescission and whether that right arises under the Act. If we think the consumer might have a right of rescission, we can go to the Tribunal; but if we fail, the Tribunal has no jurisdiction and we must go elsewhere for other relief, such as damages, which might be available. Furthermore, we must decide whether the right of rescission arises under the Consumer Transactions Act. Ss.7 and 16 should be clear-cut, but what of s.15? Heufner had tried on

the suit and taken it away, so he had probably accepted it within the Sale of Goods Act meaning and lost his right of rescission under that Act. But what if a consumer orders unascertained goods of a particular description, they are delivered, he inspects them and rejects them? Under what Act is he rescinding?

Consumer remedies are complicated by the exclusive jurisdiction conferred on the Federal Court of Australia by the Trade Practices Act, 1974 (Cth.). The need for simple resolution referred to at the start of this paper is hardly assisted by a pre-Judicature Act type of jurisdictional division. The Credit Tribunal referred to the need to confine its jurisdiction to credit matters. But s.15 matters need not involve any element of credit. Because of the limits of the Tribunal's jurisdiction, a consumer would be unwise to go there except in the clearest cases. The s.15(5)(d) exclusive jurisdiction seems to this writer absurd. On the other hand, the concept that a purported rescission is effective unless speedily challenged is a good one. Overall, there seems uncertainty whether to encourage hearings before the Credit Tribunal or through the small claims proceedings under Part VIIA of the Local and District Criminal Courts Act, 1926-1976 (S.A.).

*Davis v. Stevens*⁷ also involved an application for orders consequent upon rescission. Fortunately, no jurisdictional issues were raised. The case is of interest because of its discussion of the Consumer Transactions Act implied terms of merchantability and fitness for purpose.

Mrs. Davis responded to an advertisement in a Victor Harbour newspaper and went to Stevens' home. There she bought a second-hand washing machine for \$55. She took the machine home, but on attempting to use it, she found it to be defective. She complained to Stevens and contacted the Consumer Affairs Branch. Attempts were made to negotiate a settlement, but ultimately these failed and application was made to the Tribunal under s.18.

The machine was held to be unmerchantable and unfit for its purpose. The Consumer Transactions Act for the first time applied non-excludable terms to second-hand goods. But the standards of merchantability and reasonable fitness vary to take account of this factor. The statutory definition of merchantability⁸ points to a number of matters requiring a lesser standard for second-hand goods: price, contractual terms and conditions, circumstances surrounding formation of the contract, and the apparent condition of the goods. Reasonable fitness connotes similar factors. The Tribunal pointed out that it was not a case where "the complaint was that the machine worked but slopped water or worked but worked slowly . . . the complaint is, and the complaint is justified on the evidence, that the machine with its defects did not work at all."⁹

Mrs. Davis bought the machine at Stevens' home. The defendant argued under s.8(6)—the fitness for purpose term—that he was not in the business of supplying goods of that description. The Tribunal concluded that there was ample evidence to refute this argument. Four advertisements relating to home appliances were tendered. They had been inserted in the local paper within a fortnight of each other by Stevens. A Consumer Affairs

7. Unreported, Credit Tribunal No. 03/032/77.

8. Consumer Transactions Act, s.8(5).

9. At p.10 of the typed text of the judgment.

Branch inspector had noticed six to eight machines with various spare parts in one portion of a shed and in another part of the shed a further eight to twelve machines.

Interestingly, the course of business argument was raised in connection with s.8(6) but not in connection with s.8(4) (the merchantability term). The only reference in s.8(4) to the vendor as a dealer comes in one of its exceptions protecting a supplier who is on reasonable grounds unaware of a defect. A supplier is defined so as to be a businessman.¹⁰ S.8 implies terms in every consumer contract for the sale or supply of goods. A consumer contract is one for not more than \$10,000 in favour of someone who is not a company and who does not deal in that type of goods.¹¹ The Consumer Transactions Act implied terms are derived principally from the repealed Hire-Purchase Agreements Act, 1960-71 (S.A.). Under the hire purchase legislation, the implied term as to merchantability extended to private transactions.¹² But the peculiar form of a hire purchase transaction was unlikely to be used by private individuals. S.8 covers contracts for the sale and supply of goods. If its implied term as to merchantability does indeed extend to private sales, little argument has been advanced as to why a private seller should be bound to such an undertaking whatever agreement he reaches.

The cases have revealed a number of issues which cannot be regarded as resolved. It is a truism that in commerce costs override emotion so that litigation does not produce the detailed learning of other areas of the law. Indeed the cases reviewed are recorded for public criticism if not official reporting only because they came before the Credit Tribunal rather than a local court. One of the greatest problems caused by South Australia's mass of consumer legislation is that the jurisdiction is too small for many of the legislative ambiguities to be ventilated and authoritatively resolved. For an academic lawyer, there should never be a shortage of subtle examination problems. There are significant ramifications for the legal system. All common law jurisdictions are adapting to a judicial role within the confines of written law; statutes can no longer be regarded as changing the common law only so far as their words plainly indicate. The Credit Tribunal, for instance, points out that fairness must be judged against a legislative code of consumer protection. However, in the area of South Australian consumer law, law-making is almost solely the work of parliament unaided by the courts.

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10. Consumer Transactions Act, s.5.

11. *Ibid.*

12. Else-Mitchell & Parsons, *Hire Purchase Law* (4th ed., 1968), 66.

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