RECOVERY OF POSSESSION AND OWNER'S MONEY CLAIM UNDER HIRE PURCHASE LAW – A CRITICAL STUDY

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KUALA LUMPUR

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ABSTRACT

This paper is mainly concerned with the various pitfalls, from the financier or owner's perspective that can be found in Malaysia's hire-purchase law. These can be found in the Hire Purchase Act 1967 (Act 212) (hereinafter called "the Act") and common law. Since the subject matter i.e., the Malaysian hire-purchase law is quite extensive, this paper shall focus on two areas of our hire-purchase law, mainly, "Recovery of Possession" and "Owner's Money Claim". The object is basically to examine the remedies available to the Owners in event of breaches by the Hirers and the problems associated with such remedies.

The researcher has endeavoured to provide a comprehensive analysis of the abovementioned topics of hire-purchase law in all its salient aspects. Further, the researcher hopes that the paper can be used as a work of reference for the busy legal practitioner which will solve the myriad pitfalls of everyday practice. Therefore, the researcher has dealt in some detail with the mechanics of hire-purchase finance. The researcher's own experience has always been that it is easier to absorb legal principles when one is 'hands-on' and familiar with the machinery of their application.

This paper shall try to make a comparative analysis of the hire purchase laws of UK, Australia, Singapore and Malaysia in order to expose the weaknesses in our existing hire purchase law. The paper has proposed crucial and important changes albeit drastic to the Malaysian Hire Purchase law.

ABSTREK

Kertas kerja ini adalah secara khususnya berkenaan dengan pelbagai kekurangan undang sewa beli dari perspektif institusi kewangan. Undang-undang sewa beli adalah yang terkandung dalam Akta Sewa Beli 1967 (Aturan 212) dan undang-undang am. Subjek sewa beli adalah sangat luas. Kertas kerja ini akan memberi perhatian kepada dua aspek undang-undang sewa beli, iaitu "Penarikan Balik Kenderaan" dan "Tuntutan Wang". Matlamat utama adalah untuk mengkaji pelbagai remedi yang sedia ada kepada Syarikat Kewangan jikalau Penyewa memungkiri perjanjian sewa beli dan masalah yang terlibat dengan remedi tersebut. Kertas kerja ini akan membuat analisa komprehensif tentang topik sewa beli yang tersebut dalam semua aspek yang penting. Adalah diharapkan bahawa kertas kerja ini boleh digunakan sebagai rujukan kepada peguam-peguam yang aktif dalam bidang sewa beli. berkenaan cuba membentangkan secara ringkas aspek sosio-perundangan undang-undang sewa beli sebagai yang dipraktikkan di Malaysia.

Ianya membentangkan undang-undang sewa beli secara umum dengan pemerician terhadap aspek-aspek tertentu, iaitu membuat perjanjian sewa beli, hubungan tiga segi, fasal pembayaran minima dan rampas balik. Penyelewengan-penyelewengan perdagangan Common Law dan di bawah Akta Sewa Beli juga dikajikan.

Dalam proses menganalisakan sistem sewa-beli di UK, Australia, Singapore dan Malaysia, kertas kerja ini akan cuba menunjukkan kelemahan-kelemahan tertentu. Jika difikirkan perlu, penulis akan mencadangkan perubahan-perubahan yang patut dibuat terhadap sistem ini.

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CHAPTER 1

INTRODUCTION

1.1 PREFACE

Ever since the purported invention of hire purchase law by Mr. Henry Moore circa 1846 in England[1], ghosts of problems still come to haunt practitioners; Hirers; dealers and financiers or the Owners alike. It may seem puzzling that a law that existed thus long is still far from perfect and the reality sets in when test cases are being brought into our courts of law.

Malaysians, including practitioners; drafters and judges alike, are notorious for having short memories. There seems to be a lack of conformity to the actual mischief of the rule in the application of the laws of hire-purchase by the practitioners; in the drafting of laws of hire-purchase; and in the interpretation of the laws of hire-purchase by the judges. The writer is reminded of an article by Rehman Rashid[2] that informed us that goldfish have short memory spans of about 10 seconds. This means if a goldfish takes longer than 10 seconds to swim from one end of aquarium to the other, it thinks it's in the ocean. An endlessly exciting ocean, moreover, as every 10 seconds it bumps into a mysterious invisible wall it can never remember bumping into before.

Hence, the advantage of short memories is that things remain forever fresh, new and thrilling. However, the down side of short memories is that things remain forever muddled, repetitive and confusing. This aptly describes the laws of hire-purchase in Malaysia.

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[1] Goode, R. M., Hire-Purchase Law And Practice, (1962), Butterworths [London].
[2] Rehman Rashid, 'The Mysterious Invisible Wall of Forgotten Things', New Straits Times, 4 December 2002.

Professor P. Balan stated[3] that partly because of the Malaysian draftman'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. He later gave the example of provisions which impose duties on the Owner without specifying the remedies for the Hirer if the said provisions are breached.

The law governing hire-purchase is so eclectic that it cannot be considered in isolation from other ramifications of law like contract, tort, revenue law, company law, equitable principles and many others.

This project is mainly concerned with the various pitfalls, from the Owner's perspective that can be found in Malaysia's hire-purchase law. These can be found in the Hire Purchase Act 1967 (Act 212) (hereinafter called "the Act") and common law.

Practitioners, judiciary, financial institutions, Hirers, guarantors and like are faced with the said pitfalls every day. Yet, there seems to be a lack of effort in trying to eradicate the said pitfalls. Since our hire-purchase law is quite extensive, this project shall focus on two areas of our hire-purchase law, mainly, "Recovery of Possession" and "Owner's Money Claim", basically to examine the remedies available to the Owners in event of breaches by the Hirers and the problems associated with such remedies.

1.2 OBJECTIVES & SCOPE

In writing this thesis, the writer has endeavoured to provide not only a comprehensive analysis of the abovementioned topics of hire-purchase law in all its salient aspects

[3] P. Balan , "Affin Credit (Malaysia) Sdn Bhd v Yap Yuen Fei : The Denouement of a Hire-Purchase Mystery?", (1985) JMCL 225.

but to provide a work of reference for the busy legal practitioner which will solve the myriad pitfalls of everyday practice. To this end, the researcher has dealt in some detail with the mechanics of hire-purchase finance, since the researcher is practising in this area and the researcher's own experience has always been that it is easier to absorb legal principles when one is 'hands-on' and familiar with the machinery of their application. This approach has revealed the existence of many pitfalls of hire-purchase law which are unresolved and unrecognised. This is where the researcher shall express an opinion or two on difficult points rather than to play safe and take refuge in unassailable silence by ignoring the points.

1.3 OUTLINE

The first chapter shall be an introduction on the origin and development of hire-purchase law, focusing on the two topics. The second and third chapters shall deal with repossession under the Common Law and the statutes, respectively. The fourth chapter shall deal with the real remedies available to the Owners in the event of breaches of the hire-purchase laws for example, court action or under Section 42 of the Act. The fifth and sixth chapters shall focus on money claims under the Common Law and the statutes respectively. The seventh and final chapter shall be a conclusion to the critical study of the topic of recovery of possession and Owner's money claim under the Malaysian hire-purchase law and shall suggest reforms.

1.4 RESEARCH METHODOLOGY

The research methodology adopted for this dissertation consists of primarily library research. Materials will be obtained from text books as well as international and local law reports. Various provisions of the old New South Wales Hire-Purchase Act 1960-

65 (which has since been repealed in 1985) and the hire-purchase laws of Australia will be adverted to in the course of this study. Reference will also be made to articles from local and international law journals, parliamentary debates and various senate committee reports.

Materials on money claims and repossession forming the basis of the case studies will be obtained from legal textbooks, case laws, newspapers and journal articles. There are no proper textbooks pertaining to the Hire-Purchase Laws in Malaysia and also Singapore. References for the Common Law position can be made to Chitty On Contracts[4] and Goode's "Hire-Purchase Law and Practice"[5]. Whereas, references for the statutory position can be made to "Hire-Purchase Law" by Else-Mitchell and Parsons.[6] In addition, other relevant information was obtained through the internet.

The writing of this dissertation involved an in-depth study and reading of case laws, statutory provisions and materials sourced as above. For the purpose of comparative study between the position on money claims and repossession in Malaysia and other Commonwealth jurisdictions, materials from various Commonwealth jurisdictions, especially Australia and the United Kingdom, will be referred to. Proposals for reforms will be based on developments in Australia and the United Kingdom. As for the equitable principles, locally reported cases will be referred to whenever possible. Nonetheless, constant reference to other Commonwealth cases will be necessary due to the dearth of locally reported cases on the subject.

[4] Joseph Chitty, Chitty on Contracts, [2004], [29th Edition], Sweet & Maxwell, [London].
[5] Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London].
[6] Else-Mitchell, R. and Parsons, R.W., Hire-Purchase Law : Being the Hire-Purchase Act, 1960-1965 : Annotated and Explained [1968] [4th Edition] Law Book Company [Australia].

1.5 TRACING THE GROWTH OF HIRE-PURCHASE LAWS

Since the 19th century, the hire-purchase agreement has been used as a common method for commercial transactions with its indispensable features. However, two outstanding cases in 1895 created an impact on hire-purchase agreements in the legal world.[7] They established such practices as a convenient and safe method by which goods could be disposed off to persons who could not afford to pay the cash price in full at the very point of time of purchase.

The first case is ***McEntire v Crossley,***[8] where it was held that an agreement with a provision that the property in the goods did not pass to the Hirer until full payment is not a bill of sale.[9] Thereafter, marked the arrival of the landmark case of ***Helby v Mathews***[10] where the House of Lords held that the true form of hire-purchase agreement does not constitute an agreement to buy under the Sale of Goods Act, 1893. That was based on the ground that the Hirer had a right to determine hiring by returning the goods without incurring any further liability.

In ***Helby v Mathews***,[11] Lord MacNaghten clairvoyantly chided the counsel for the Hirers in the 19th century for speaking of hire-purchase dealings with an air of righteous indignation as if they were traps for the extravagant and the impecunious and mere devices to tempt improvident people into buying things which they do not want and for which at the time they cannot pay. That undoubtedly represented the view of many people right up to the end of World War II. Yet, the most striking feature in the

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[7] R. Else-Mitchell and R. W. Parsons, Hire-Purchase Law Being the Hire-Purchase Act, 1960-1965 (N.S.W.) Annotated and Explained, (4th Ed., 1968), The Law Book Company Limited [Australia], at page 1.

[8] *[1895] A.C. 457.*

[9] Bills of Sale Act (1878) Amendment Act, 1882. Under the Acts of 1878 and 1882 bills of sale are of two kinds, i.e. absolute bills of sale (where chattels are sold absolutely to a purchaser), and bills of sale by way of security for the payment of money. The Bills of Sale Act 1878 governs both kinds and is the only Act which applies to absolute bills. Bills of sale given by way of security for the payment of money on or after the 1st of November 1882 are governed by the Act of 1882, which, however, does not apply to absolute bills.

[10] *[1895] A.C. 471.*

[11] Ibid.

development of hire-purchase in the 21st century is undoubtedly its popularity. Today, hire-purchase has become respectable.

As time goes by, it dawned on everyone that a hire-purchase agreement is an extremely convenient way to one (the Hirer) who wished to 'purchase' their dream car or any other goods by 'hiring' the goods from another party (the Owner). This means that the Hirer is able to obtain physical possession of such goods before full payment. This arrangement also protected the Owner because he is in no danger of losing his title to the goods by an improper assignment or purported sale by the Hirer. A win-win situation whereby the Hirer's money is 'stretched' and the Owner's goods are easily disposed of.

Hence, the hire-purchase agreement became a popular mode for the consumer to acquire goods. Since it is the Owner who occupies a dominant position and decides on the content of a hire-purchase agreement, a Hirer would be faced with an agreement with clauses favourable to the Owner. Thus Hirers were subjected to harsh terms like stringent minimum payment clauses; unfair exemption clauses; and wide repossession clauses which permitted repossession for minor breaches.

Later, the introduction of the financial institution eradicated the personal relationship between the trader and consumer. This gave rise to contractual relations formed without the customary freedom and equality between the parties. A standard form of hire-purchase agreement was used and in general it applied across the board and had to be signed by every Hirer notwithstanding that it was one-sided and biased. This usually involved an exclusion of virtually every benefit, and little or no variation was allowed

to suit the Hirer. Hence, the parties to a hire-purchase agreement will be the Owner, very often, a financial institution; and the Hirer. There may be a Guarantor. A Guarantor is a third party who agrees to make good any default by the Hirer in consideration of the Owner entering into the hire-purchase agreement with the Hirer. For the purpose of our study here, we shall not elaborate on Guarantors.

In recent years, the system of hire-purchase has expanded greatly and hire-purchase transactions are increasing daily. It is used not only for consumer goods but also for commercial and industrial financing. Hire-purchase is here to stay, in the sense that short of a major statutory recasting of the law, use of the hire-purchase agreement has become a major form of consumer credit.

Nowadays, almost all vehicle purchases, be it a car, motorcycle, bus or lorry, are done through hire-purchase and most household items, be it electrical goods like television, radio, refrigerator, hi-fi equipment, sewing machines, air conditioners or furniture are all obtained through hire-purchase terms. In fact, if not for the hire-purchase transactions, the whole business world would collapse. In 1989, for example, out of RM 20 billion worth of loans disbursed by the financial institutions in Malaysia, some 38% of the loans were for goods bought under hire-purchase.

1.6 HIRE-PURCHASE LAWS IN MALAYSIA

In Malaysia, the statutory law on hire-purchase was first introduced by the Hire-Purchase Act in 1967 (Act 212)[12] (hereinafter referred to as "the said Act").[13] Further, the Federal Court in ***Affin Credit (Malaysia) Sdn. Bhd. v Yap Yuen Fui [1984] 1 MLJ***

[12] The said Act came into force on 11-4-1968.

[13] Prior to 11-4-1968, there was no specific statute to regulate hire-purchase transactions in Malaysia. Such transactions were governed by the general principles of contract as well as Sale of Goods Ordinance 1957 as "agreements to sell"; .

169 held that the said Act has been passed by Parliament for the purpose of regulating the form and contents of the hire-purchase agreement and the rights and duties of the parties to such agreements.

The said Act is based largely on its namesake originating from New South Wales, Australia[14] and the United Kingdom, respectively. In UK, the statutes governing hire-purchase transactions are, inter alia, the Consumer Credit Act, 1974 (hereinafter referred to as "the UK CCA"); the Hire-Purchase Act, 1938 (hereinafter referred to as "the UK 1938 Act"), the Hire-Purchase Act, 1954 (hereinafter referred to "the UK 1954 Act") and the Hire-Purchase Act, 1964 (hereinafter referred to as "the UK 1964 Act") (hereinafter collectively referred to as "the UK Acts"). The UK Acts implemented most of the recommendations of the Molony Report of 1962 on the subject of hire-purchase law.

Before the said Act came into force in April 1968, the Malaysian courts used the Common Law to regulate hire-purchase agreements. Commercial transactions in Malaysia has been given an impetus when the government through the Hire-Purchase Act (Amendment) Act 1992 (Act A813)[15] (hereinafter referred to as "the 1992 Act"), updated the law relating to hire-purchase transactions. The 1992 Act came into force on 1 June, 1992.

[14] The Hire-Purchase Acts 1960-1965 of New South Wales, Australia (hereinafter referred to as "the NSW Act"). The NSW Act has since been repealed.

[15] Prior to the 1992 Act, the said Act was revised and re-enacted in 1978 as the Hire-Purchase 1967 (Revised 1978), incorporating amendments made in 1968, 1969 and 1976. Apart from the said Act, reference has also to be made to the following regulations and order under the said Act :-

(i) Hire-Purchase (Term Charges) Regulations 1968 (hereinafter referred to as "the 1968 Regulations");
(ii) Hire-Purchase (Recovery of Possession and Maintenance of Records by Owners) Regulations 1976 (hereinafter referred to as "the 1976 Regulations");
(iii) Hire-Purchase Order 1980 (hereinafter referred to as "the 1980 Order").

The said Act is the main source for the Malaysia hire-purchase laws but according to Section 1(2) of the said Act, the Act is only applicable if the goods are listed in the First Schedule of the said Act.[16] Goods listed in the First Schedule are as follows :-

(1) All consumer goods;

(2) Motor vehicles, namely

(a) Invalid carriages;

(b) Motor cycles;

(c) Motor cars including taxi cabs and hire cars;

(d) Goods vehicles (where the maximum permissible laden weight does not exceed 2540 kilograms);

(e) Buses, including stage buses.

In a nutshell, goods caught under the Act are all consumer goods and all motor vehicles as listed in Paras 2(a)-(e) of the First Schedule to the said Act.

The definition of "consumer goods" was inserted by the Section 2(a) of the amending Act.[17] Section 2(1) of the said Act defines "consumer goods" as goods purchased for personal, family or household purposes. The First Schedule of the said Act restricted the application of the said Act to cover only consumer transactions[18] and limited the Act's application to certain goods listed therein.[19] However, even where the goods are not listed in the First Schedule and the Act does not apply, the parties may still agree to be bound by the provisions of the Act.[20]

[16] Supra, note 2.
[17] Brought into force with effect from 1-4-1992 vide PU(B) 219/92.
[18] see Schedule 1 of the said Act.
[19] Ibid.
[20] see ***Kesang Leasing Sdn Bhd v Mohd Yusof Bin Ismail & Anor [1990] 1 MLJ 291; Siew Nguong Hin & Ors v Mayban Finance Bhd Originating Summons No 24-864-91, High Court (Penang) (digested in Mallal's Digest 1992 at para 1072).***

If a certain goods does not fall within either one of the above two categories, then such an agreement shall be governed by the hire-purchase law at Common Law of England.[21]

The Common Law does not adequately protect the Hirers. Statutes like the 1938 UK Act and the said Act were enacted to overcome the Common Law's weaknesses and to protect the Hirers.

1.7 DEFINITION OF HIRE-PURCHASE

A hire-purchase transaction usually involves two parties, that is, the Owner of the goods and the Hirer of the goods from the said Owner.

At Common Law, a hire-purchase agreement may be defined as a contract for delivery of goods on hire under which the Hirer is granted an option to purchase the goods.[22] For e.g., the Hirer hired a vehicle from the Owner for a period of 36 months coupled with an option given to the Hirer by the Owner to purchase the vehicle at the end of the period. The Hirer shall service the monthly instalments during the period of hiring.

It is very important to differentiate between a hire-purchase transaction from a sale by way of credit. In the former, the proprietorship of the goods does not shift from the Owner to the Hirer until the Hirer exercised his option to purchase the goods. Whereas, for the latter, the proprietorship of the goods shift from the Owner to the Buyer upon the sale of the goods. Therefore, the Hirer in a hire-purchase transaction does not have the proprietorship of the goods. Hence, the Hirer cannot transfer the proprietorship of the goods to the 'new buyer' if the Hirer purportedly sold the goods the 'new buyer' as

[21] P. Balan, "The Hire-Purchase Order" [1980] JCML 277-283.
[22] Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], at page 9.

the principle of 'nemo dat' applied to the 'new sale'. The proprietorship of the goods remained with the Owner and the Owner has Ownership claim against the 'new buyer'. The studies on the cases of ***Lee v Butler***[23] and ***Helby v Matthews*** are pertinent in order to fully comprehend the differences enunciated above.

Whereas the definition under the said Act is wider. Section 2(1) of the said Act defines "hire-purchase agreement" as including a letting of goods with an option to purchase and an agreement for the purchase of goods by instalments, but does not include the following :-

(a) any agreement whereby the property in the goods comprised therein passes at the time of the agreement or upon or at any time before the delivery of the goods;[24]

(b) any agreement under which the person by whom the goods are being hired or purchased is a person who is engaged in the trade or business of selling goods of the same nature as the goods in the hire-purchase agreement.[25]

The word 'includes' instead of 'means' is used in the Act to relate the definition to the words defined. The definition includes the ***Lee v Butler*** type of agreement under which the Hirer is bound to buy the goods hired as well as the ordinary ***Helby v Matthews*** form of agreement where the Hirer has the right to return the goods and terminate the hiring.

As a result of the above statutory definition, all sale by way of credit that involves payments by instalments are hire-purchase transactions unless the Ownership of the

[23] ***[1893] 2 Q.B. 318.***
[24] Section 2(1) of the said Act.
[25] Ibid.

goods passes at the time of the agreement or delivery of the goods or unless the Hirers are engaged in the trade of selling the goods of the same nature as the goods 'hired'.

The Common Law does not provide for the formalities required in order to make a hire-purchase agreement, as an oral contract suffices. By its nature a hire-purchase agreement is a complex arrangement,[26] so that in practice it will invariably be in writing and will contain elaborate and carefully drafted provisions, precisely specifying the rights and liabilities of the parties. The contents of the agreement are dependant on the freedom of contract and agreement between the Owner and the Hirer. Invariably, the Common Law hire-purchase agreements are in a standard form and the Hirers are not permitted to discuss or change the terms of the agreements. From the consumers' perspective, this is definitely a dent in the protection of the Hirers.

On the other hand, the said Act stipulated several provisions to protect the Hirers, for e.g., Sections 4, 4A, 4B, 4C, 4D and 5 of the said Act.

Section 4(1) of the said Act required the Owner to serve a written statement[27] under the Second Schedule of the said Act to the Hirer before any hire-purchase agreement is entered into in respect of any goods[28]. The main objective is to inform the Hirer of his financial obligations in the event he entered into the hire-purchase agreement as proposed. If the Section 4(1) of the said Act is breached, then the hire-purchase agreement is void (Section 4(4) of the said Act). Further, the Owner shall be deemed to have committed an offence (Sections 4(5) and 46 of the said Act).

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[26] ***Scammell (G.) & Nephew Ltd. v. Ouston, [1941] A.C. 251, H.L.. at p. 270; [1941] 1 All E.R. 14, at p. 27,*** per Lord Wright.

[27] **Written statement** – This includes printing, lithography, typewriting, photography and any other mode of representing or reproducing words in a visible form; see Section 3 of the Interpretation Acts 1948 and 1967 (Act 388). As the hire-purchase agreement is a prescribed document within Section 45(2) of the Act, the additional requirements of Section 45 of the Act would apply.

[28] **In respect of any goods** – Despite the words 'any goods' is referred to here without any qualification (c.f., Section 4A of the said Act), the Act would not apply to the hire of goods that are not listed in the First Schedule of the said Act.

The hire-purchase agreement executed between the Owner and the Hirer must comply with the requirements in Sections 4A, 4B, 4C and 4D of the said Act. For e.g., the requirement under Section 4A(1) is that the agreement shall be in writing and the printing size must not be smaller than ten-point Times (Section 45 of the said Act). The civil penalty for non-compliance of Section 4A is that the agreement shall be void (Section 4A(2) of the said Act). The criminal penalty for non-compliance is that the Owner shall be guilty of an offence under the said Act (Sections 4A(3) and 46 of the said Act).

The requirements under Section 4B of the said Act are that the hire-purchase agreement shall be signed by both the Owner and the Hirer (Section 4B(1) of the said Act) on the condition that the agreement shall be duly completed (Section 4B(2) of the said Act). The effects of non-compliance are the same as above (Sections 4B(2), 4B(4) and 46 of the said Act).

The requirement under Section 4C of the said Act is that the agreement shall contain contents like date on which hiring shall commence; number of instalments; description of goods etc. The effects of non-compliance are the same as above (Sections 4C(2), 4C(3) and 46 of the said Act).

The requirement under Section 4D of the said Act is that there shall be separate hire-purchase agreement in respect of every item of goods purchased (sic)[29] under the said Act. The effects of non-compliance are the same as above (Sections 4D(2), 4D(3) and 46 of the said Act).

[29] A misnomer, should be 'hired' instead.

Thereafter, the Owner is required to serve on the Hirer a copy of the hire-purchase agreement within 14 days after the making of the agreement (Section 5(1) of the said Act). Uncannily,[30] the said Act merely provided for a civil penalty (Section 5(1A) of the said Act) that the agreement is not enforceable by the Owner[31] in the event of non-compliance and not a criminal penalty.

The said Act also required the Owner to insure the goods. Under Section 5(3) of the said Act required the Owner to immediately serve to the Hirer a copy of the insurance payment receipt and to serve a copy of the insurance policy within 7 days of receipt of the said policy by the Owner from the insurance company. Here too, the said Act only provided for a civil penalty for non-compliance

1.8 RELATED ISSUES

The writer shall be touching on the following related issues in relation to the topic at hand, i.e the Owner's remedies of repossession and money claims in Common Law and statutory law.

The first related issue is consumerism. The Malaysian hire-purchase law as laid out by the Act has a distinctive feature which is different from UK's hire-purchase laws. In UK, it was commented that the expression 'hire-purchase' even though common in usage, has no legal significance except in the Hire-Purchase Acts.[32] A hire-purchase transaction was defined as a form of bailment,[33] but with the added refinement that

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[30] Maybe a better word to describe this situation is "unfortunately".

[31] **Unenforceable by the Owner** – Where Section 5(1) of the said Act is breached, the Hirer may still enforce the agreement (c.f. Sections 4-4D of the said Act where the failure to comply with the provisions of those Sections will render the agreement void). The agreement is the present circumstances would be a voidable contract as defined in the Sections 65 and 66 of the Contracts Act 1950 and be brought into operation. Contrast with ***Warman v Southern Counties Car Finance Corporation [1949] 2 KB 576; MacLeod v Traders Finance Corporation Ltd. (1967) 67 SR (NSW) 275.*** It would appear that the principles stated in these cases are applicable.

[32] Wild, David, The Law of Hire-Purchase, [1965] [2nd Edition], Butterworths [London], at page 2 and also supra, note 10.

[33] Ibid. The following are the different definitions of 'bailment' :-

is made for the possible transfer from the bailor to the bailee of the property in the thing bailed. Under the UK Acts, hire-purchase agreement is defined as an agreement for the bailment of goods under which the bailee may buy the goods or under which the property in the goods will or may pass to the bailee. As shown above, there's no reference made to consumerism in the UK laws both in Common Law or statutory law. Hence, consumer law has an important role to play in this thesis. The writer shall attempt to incorporate the Consumer Protection Act, 1999 into the thesis.[34]

Secondly, the principle of "the reasonable expectations of men". Lord Steyn stated that English court's decisions explicitly and/or impliedly gave effect to the reasonable expectations of honest men.[35] It is opined here that this particular notion is indeed an important subject for the future of the Malaysian law of hire-purchase, which is part of our common heritage. It may be of interest in this commercially vibrant country.

The mischief rule of interpretation is that the reason for the rule is important i.e the rule ought to apply where reason requires it, and no further. At the end of the day, judges are meant to solve common law problems in accordance with legalistic common sense after much deliberation. Simple fairness ought to be the basis of every legal rule. This involves adopting an external standard given life by using the concept of the reasonable man, which promotes certainty and predictability. Although the hypothetical reasonable man pursues his own commercial self-interest, he is by definition not dishonest. As such, the expectations that will be protected are those that are, in an objective sense,

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(i) Bailment is a delivery of goods in trust upon a contract expressed or implied, that the trust shall be faithfully executed on the part of the bailee;

(ii) Bailment is a delivery of goods in trust on a contract, expressed or implied, that the trust shall be duly executed and the goods redelivered, as soon as the time or use which they were bailed shall have elapsed. (Jones on Bailment, p. 117);

(iii) A bailment is a delivery of a thing in trust for some special object or purpose, upon a contract, expressed or implied, to conform to the object or purpose of the trust (Story on Bailment, Section 2).

[34] The Consumer Protection Act, 1999.

[35] Lord Steyn, "Contract Law : Fulfilling the Reasonable Expectations of Honest Men", (1996) 23 JCML 2-11.

common to both parties.[36] Reasonableness is concerned with the contemporary standards not of moral philosophers, but of ordinary right thinking people. Sometimes those standards will receive their distinctive colour from the context of a consumer transaction, a business or even a transnational financial transaction. And the usages and practices of dealings in those disparate fields will be prime evidence of what is reasonable.

This particular notion is certainly not a rule of law but possibly, a general principle of law. For example, the principle that no man may benefit from his own wrong. The writer prefers to regard it as the central objective of the law of hire-purchase. This shall be a guiding point throughout the writer's search for solutions to the existing problems in hire-purchase law.

Thirdly, the concept of good faith. In Europe, it is a general principle that the parties must negotiate in good faith, conclude contracts in good faith and carry out the contracts in good faith.[37] In the United States the influential Uniform Commercial Code is explicitly and squarely based on the concept of good faith. Elsewhere in the common law world, outside the United Kingdom, the principle of good faith is gaining ground. It is the explicit basis of many international contracts. The threshold requirement of good faith is that the party must act honestly. From July 1995 the EC Directive on Unfair Terms in Consumer Contracts has been operation in England.[38] It is likely to influence domestic English law and it is suggested that it be incorporated into our hire-purchase laws. Where in specific context duties of good faith are imposed on parties, our legal

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[36] Reiter and Swan, "Contracts and the Protection of Reasonable Expectations", in Studies in Contract Law, ed by Reiter and Swan, 1980, Toronto, 1-22, at 7.

[37] Principles of European Contract Law, Part I : Performance, Non-performance and Remedies, prepared by the Commission on European Contract Law, ed by Ole Lando and Hugh Beale, Art 1.106, at 53 and Art 1.7, at 16-17. of the Principles of International Commercial Contracts published by Unidroit provide that in international trade, parties must act in accordance to good faith and fair dealing, and that they may not exclude or limit this duty.

[38] Unfair Terms in Consumer Contracts Regulations, SI 1994/3159. The Directive treats consumer transactions within its scope as unfair when they are contrary to good faith.

system can readily accommodate such a well tried notion. After all, there is not a world of difference between the objective requirement of good faith and the reasonable expectations of the parties.

Fourthly, the doctrine of privity of contract. It is opined that the failure to recognise a contract for the benefit of a third party is a serious blemish in the common law of hire-purchase. Eighty years ago, the House of Lords in ***Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd*** [39] held that common law does not recognise a contract for the benefit of a third party. Despite strong protests by many judges and academicians, this rule prevailed. Logically, a bilateral contract cannot impose a burden on a third party. However, if two parties agree that one will confer a benefit on a third party, and the latter accepts the benefit, legal logic demands that the stipulation be given effect.

The ruling in ***Dunlop Pneumatic*** is inconsistent with the prime function of the law of contract which is to facilitate commercial dealings. It ignores the fact that parties in good faith rely on the agreement for the benefit of the third party. Sometimes hire-purchase transactions may involve a triangle comprising of the Hirer, the dealer and the financial institution. In such a situation, only the Hirer and the Owner are privy to the contract i.e the hire-purchase agreement. It is then proposed to look at the possibility of incorporating UK's Contracts (Rights of Third Parties) Act 1999 to combat the evils of the doctrine of privity.[40]

[39] ***[1915] AC 847.*** See also ***Midland Scruttons Ltd v Silicones Ltd [1962] AC 446 and Kepong Prospecting Ltd v Schmidt [1968] AC 810.***

[40] Chan Wai Meng, "Contracts (Right of Third Parties) Act 1999 – Legislative Reform of the Doctrine of Privity in the United Kingdom", [2001] JCML 137-159.

1.9 TERMINATION OF THE AGREEMENT

The Owner's right to Money Claims and Repossession only arises if the agreement is terminated. Therefore, it is only logical that we explore this topic first before we go into the details of Money Claims and Repossession. A hire-purchase agreement may be terminated in any ways applicable to the termination of contracts generally. In this chapter we shall consider only those acts which *ipso facto* (by that very act) determine the agreement. Hence facts which may entitle a party to avoid the agreement if he so desires, such as mistake, undue influence, misrepresentation, infancy, etc., will not be treated separately but will be mentioned only insofar as they are relevant to the discussion of termination of the agreement by repudiation. A hire-purchase agreement may be determined in any of the following ways.

1.9.1 Under the Agreement Itself

"The agreement may provide for termination in a number of different ways, and this provision may be express or may arise by implication. The most common causes of termination by virtue of the agreement are to return the goods by the Hirer; notice of termination of agreement by the Owner (usually on the account of the Hirer's breach); breach by the Hirer (where this is made to cause termination independently of notice by the Owner) and fulfilment of some other condition upon which the agreement is to determine"[41].

(a) Return of Goods by the Hirer

Where the Hirer exercise a contractual right to terminate the agreement by returning the goods, the agreement will *ipso facto* determine on redelivery of the goods to the Owner. As we have seen, the Hirer is under no obligation (unless so provided in the agreement), to redeliver the goods at the Owner's business or private address; all the

[41] Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], at pages 117-118.

Hirer is required to do is to hold them ready for collection at the Hirer's own address. It would seem to follow from this that redelivery of the goods (and consequently the termination of the agreement) takes effect the moment the Hirer notifies the Owner that the Hirer has decided to terminate the agreement and is holding the goods to the Owner's order.[42]

At Common Law the Hirer has no implied right to terminate the agreement or his liabilities thereunder by returning the goods before the end of the period of hire[43]; and if the Hirer wrongfully returns them before such time the Owner may at the Owner's election treat the agreement as at an end and claim damages[44] or alternatively affirm the agreement and sue the Hirer for each instalment of rent as it falls due.[45]

(b) Notice of termination by the Owner

"Where the agreement provides that the Owner may determine the agreement by notice to the Hirer the agreement will come to an end on the giving of such notice. If the post is the express or implied means of communication the agreement is determined as soon as the notice is delivered to the Post Office for transmission to the Hirer[46] or put into an authorised post box.[47] Delivery to a postman is not sufficient[48] and a notice so delivered will not take effect until the letter is handed in at the Post Office. Receipt by the Hirer is also necessary in cases where the post is not the contemplated method of communication"[49].

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[42] Where the Hirer has power to terminate on notice, it seems that in giving notice he must intend to rely on that power, otherwise the notice will constitute a breach.

[43] ***Wright v. Melville (1828), 3 C. & P. 542.***

[44] ***Wright v. Melville (1828), 3 C. & Page 542.***

[45] ***Automatic Salesmen, Ltd. v. McDonald,[1935] L.J.N.C.C.R. 364.***

[46] ***Drages, Ltd. v. Owen, [1935] All E.R. Rep. 342.***

[47] ***Household Fire and Carriage Accident Insurance Co. v. Grant (1879), 4 Ex. D. 216, C.A.*** This is so even though the letter is lost in the post and so never reaches the hirer.

[48] **Re London and Northern Bank, Ex parte Jones, [1900] 1 Ch. 220.**

[49] Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], at page 118.

A point to be borne in mind is that it is possible to determine the hiring of the goods without putting an end to the agreement *in toto*, and indeed the clause now commonly in use, known as a "***Smart* v. *Holt***" clause,[50] provides that in the event of a breach by the Hirer the Owner may at his option:-

(i) without prejudice to the Owner's claim for arrears of instalments or damages for a pre-existing breach forthwith and without notice terminate the **hiring** and repossess himself of the goods; or

(ii) alternatively, by notice in writing for all purposes absolutely determine the **agreement** and the **hiring**, and thereupon neither party shall have any rights thereunder but such determination shall not discharge any pre-existing liability of the Hirer to the Owner.[51]

The effect of a notice served under (i) differs materially from that of a notice served under (ii). If the Owner determines the hiring alone, then although the Hirer's right to possession of the goods and liability for future hire-rent comes to an end, the remaining provisions of the agreement (save such as are applicable purely to the hiring part of the agreement) continue to operate. As a result, the Hirer may still be able to exercise his option to purchase by paying the balance due under the agreement; and the goods remain "comprised in" the agreement for the purpose of the Law of Distress Amendment Act, 1908, and are therefore not exempt from distress by the Hirer's landlord.

Although none of the above events follows when the agreement itself, as opposed to the hiring alone, is determined, they are not of such significance as appears at first sight. In

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[50] So named after the case of ***Smart Brothers, Ltd. v. Holt, [1929] 2 K.B. 303; [1929] All E.R. Rep. 322, D.C.***

[51] It has been held that the words "pre-existing liability" refer only to unpaid instalments which have accrued due and do not enable the owner to recover damages for breach of the agreement ***(Universal Funding Association, Ltd. v. Brown, [1938] L.J.N.C.C.R. 99).*** It is, however, submitted that this decision is quite insupportable.

the case of agreements under which the option to purchase may be exercised at the end of the hire period by payment of an additional sum a strict time limit for exercise of the option (usually seven days) is normally prescribed, so that if the hiring is determined by a ***Smart* v. *Holt*** notice the agreement itself will also automatically come to an end if the Hirer does not exercise his option to purchase within the prescribed time. If the agreement is one under which the property in the goods is to pass to the Hirer on payment of the last instalment of hire-rent, the option must be exercised during the currency of the hiring.[52]

Hence, the Owner's termination of the hiring will automatically terminate the option also in most cases. Once the time limit for exercise of the option has expired,[53] the agreement automatically comes to an end and all its provisions become inoperative.

As a result, paragraph (i) of the ***Smart v. Holt*** clause is of little value to the Owner, and indeed it is if anything likely to be detrimental to the Owner in possibly extending for a short time the liability of the goods to distress by the Hirer's landlord.

A demand for and acceptance of hire-rent due in respect of a period subsequent to the date of a notice terminating the agreement has been held to operate as a waiver of the notice.[54] Inasmuch as a hire-purchase agreement confers a limited interest in the goods on the Hirer which automatically determines upon the service by the Owner of an effective notice of termination, it is perhaps more accurate to speak of a subsequent acceptance of hire-rent as giving rise to a fresh agreement on the same terms rather than

[52] as will normally be expressly stated by the agreement itself as will normally be expressly stated by the agreement itself
[53] *Ex hypothesi* (according to all assumptions made), the hiring itself has previously been determined,
[54] ***Keith, Prowse & Co. v. National Telephone Co., [1894] 2 Ch. 147.***

as waiving the notice[55]; but this will only be of significance in cases where the date on which an agreement is to be deemed to commence is material to the rights of the parties, e.g., where an act of Parliament affecting future hire-purchase agreements comes into force between the date of the original agreement and the date of the so-called waiver.

(c) Termination on Fulfilment of Condition

Like any other contract, a hire-purchase agreement the terms of which provide for its determination on the fulfilment of a particular condition will automatically come to an end as soon as the condition is fulfilled. Thus, in order to protect goods from seizure by third parties before the property in them has passed to the Hirer it is customary to insert a provision to the effect that the agreement and the Hirer's interest in the goods shall immediately determine in the event of the Hirer committing any act of bankruptcy or having any process of distress or execution levied upon his goods. This is self-explanatory and needs no further comment.

1.9.2 By Performance

A hire-purchase agreement comes to an end by performance as soon as the option to purchase has been exercised. Normally, the termination of the agreement will coincide with the termination of the hiring. Namely, in those cases where under the provisions of the agreement the property in the goods is automatically to pass to the Hirer on payment of the last instalment of hire-rent, without an option to purchase having to be actively exercised by any further act such as the payment of an additional sum.

However, the termination of the agreement is not necessarily coterminous with the end of the hiring, since the agreement may, and nowadays usually does, provide that the

[55] See, for example, ***Davies v. Bristow, [1920] 3 K.B. 428; [1920] All E.R. Rep. 509, D.C. ; Thompsons (Funeral Furnishers), Ltd. v. Phillips, [1945] 2 All E.R. 49, C.A.*** , cases on "waiver" of notice to quit.

option to purchase shall be exercisable by payment of a further nominal sum within a stated period after the expiration of the period of hire. In that event, the Hirer becomes bound to return the goods as soon as the period of hire expires but remains entitled to purchase them by paying the balance required within the time stipulated by the agreement. The effect of the distinction between the termination of the hiring and the termination of the agreement has already been discussed.

Where the provision for payment by instalments as opposed to immediate payment in full is solely in favour of the Hirer, as will normally be the case, the Hirer is entitled to anticipate such payment and, by paying the full amount due before the time specified in the agreement, to terminate the agreement and acquire the property in the goods earlier than the Hirer would have done under the provisions of the agreement.

1.9.3 By Subsequent Agreement

The parties may at any time make a fresh agreement terminating the contract originally concluded between them, provided that such contract has not already come to an end. The new agreement may simply release both parties from their obligations under the original agreement without doing anything further or it may substitute new obligations for those released. However, in the former case the new agreement, unless under seal, must normally be supported by consideration in order to be effective.[56] No difficulty arises if the original agreement is still executory, i.e. if there are obligations remaining unfulfilled on both sides, since the consideration consists in the mutual releases given.[57] If the original agreement is executed, one party having obligations still to fulfil whilst the other has performed his part of the contract, a release of the former by the latter is

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[56] *Cumber v. Wane (1721), 1 Stra. 426; Foakes v. Beer (1884), 9 App. Cas. 605, H.L.; Underwood v. Underwood,[1894] 42 W.R 372.*

[57] *Henderson v. Stobart (1850), 5 Exch. 99; Evans v. Powis (1847), 1 Exch. 601;*

nudum pactum unless given under seal,[58] there being no consideration.[59] However, in certain circumstances the doctrine of "waiver" may operate to make the release effective despite the absence of consideration.

In order to have legal force the new agreement must, in addition to being under seal or supported by consideration, comply with all the other legal requirements (such as form, legality of purpose and performance, etc.) necessary to constitute a valid contract. In most cases the new agreement will contain an express provision termination the original agreement but this not essential. It is also unnecessary for the agreement to refer to the original agreement at all. If its terms are inconsistent with the earlier agreement, the inference is that the latter is intended to be discharged. Even if there is no inconsistency the Court may in a proper case infer that the fresh document is intended to represent all the terms of the new agreement, with the result that any rights which might have been vested in a party under the original agreement, for e.g., claims for unpaid hire-rent, depreciation, etc, will be deemed to be extinguished by the new contract,[60] unless the terms of this indicate a contrary intention of the part of the parties.

1.9.4 By Notice Independent of the Agreement

There are two cases where even at Common Law a hire-purchase agreement can be determined by notice given by either party, notwithstanding the fact that no provision for notice is made in the agreement. The first is where a breach has been committed by one party which entitles the other to repudiate. Repudiation may be effected by notice, though this is not the only method available and indeed in many instances no formal act

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[58] *Preston v. Christmas (1759), 2 Wils 86.*
[59] *Cumber v. Wane (1721), 1 Stra. 426; Foakes v. Beer (1884), 9 App. Cas. 605, H.L. ; Underwood v. Underwood, [1894] 42 W.R. 372.*
[60] *Lamburn v. Cruden (1841), 2 Man. & G. 253.*

of repudiation is required at all.[61] The second case is where the hiring is a periodic one, i.e. for an indefinite term (monthly, quarterly, yearly, etc), the Hirer having an option to purchase the goods by making a payment which, when added to the total rent paid, amounts to a stated price. In such a case, unless otherwise provided by the agreement itself, the agreement is determinable by either party by notice (monthly, quarterly, yearly, or as the case may be) in much the same way as a periodic tenancy of property is determinable by notice to quit. However, it is unusual for a periodic hiring to be stipulated in a hire-purchase agreement, hirings of this nature being ordinarily found only in contracts of simple hire.

Where the agreement is within the Act, the Hirer is given an absolute right to terminate it at any time before the final payment is due by giving notice in writing to any person entitled or authorized to receive the sums payable under the agreement.[62] Presumably, the rule laid down in ***Drages, Ltd.* v. *Owen***[63] as to the date when a notice served by the Owner by post takes effect applies equally to service in this way by the Hirer. The statutory right of termination given to the Hirer in no way prejudices his Common Law or contractual rights; and if these allow of termination by the Hirer on terms more favourable than those prescribed in Section 4(1) of the UK Act 1938 the Hirer is entitled to the benefit of those rights.[64]

The Hirer's statutory power of termination is exercisable despite any provision in any agreement to the contrary and it is to be noted that neither the return of the goods nor the payment by the Hirer of the sum prescribed by Section 4(1) of the UK Act 1938 is a condition precedent to the effective termination of the agreement by notice under the

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[61] ***North Central Wagon and Finance Co. , Ltd. v. Graham, [1950] 1 All E.R. 780; [1950] 2 K.B. 7, C.A.***
[62] Section 4(1) of the Hire-Purchase Act, 1938.
[63] ***[1935] All E.R. Rep. 342.***
[64] Sections 5(b) and (c) of the Hire-Purchase Act, 1938.

section. Upon notice being given within the time and in the manner prescribed the agreement will come to an end, and a provision in the agreement seeking to make the Hirer's statutory power of termination dependent upon fulfilment of the obligations under the agreement or under the provisions of the Act is void.

1.9.5 By Repudiation on Renunciation[65]

Where the Hirer expressly or by implication renounces his obligations under the agreement before the time for performance falls due the Owner may elect to treat the agreement as terminated by the Hirer's renunciation and immediately sue the Hirer for breach of the contract. Renunciation by the Hirer takes the form of an intimation given to the Owner before the goods are due to be delivered that the Hirer does not propose to accept delivery. Such an intimation entitles the Owner to treat the agreement as at an end, and the measure of damages which the Owner can recover is the same as upon refusal to accept delivery actually tendered except that expenses of delivery will not of course form an item of the claim.

Similarly, if the Hirer states that the Hirer will not pay instalments of hire-rent due in the future, the Owner can repudiate the agreement immediately without waiting for the time when the instalments in question accrue due, and will be able to recover damages on the same basis as if the Hirer was already in arrears.

The Owner need not accept the Hirer's renunciation as causing the termination of the agreement. The Owner may instead await the time for performance by the Hirer of the Hirer's obligations, in which event the contract continues to continue for the benefit of both parties. If the Hirer in fact performs the Hirer's obligations at the prescribed time,

[65] Loosely termed as "anticipatory breach" which is inaccurate because the obligation broken is the promise to perform, not the performance itself, so that a party who renounces commits a present breach of an existing obligation.

the Owner has no cause of action. However, where the Hirer's renunciation consists of an intimation that the Hirer will refuse delivery when tendered, and in fact the Hirer does refuse delivery, the Owner gains no increase in damages by waiting for hire-rent to accrue due, since the hiring does not commence until delivery. The Owner's remedy is therefore to claim damages and not to sue for hire-rent. Hence unless the Owner is prepared to have to wait indefinitely for the Hirer to change his mind and accept the goods the Owner has little choice but to treat the agreement as at an end and claim damages accordingly.[66]

Where a party to the agreement, being lawfully entitled to repudiate it, whether on account of breach by the other party or otherwise, does some act unequivocally referable to his intention to treat the agreement as at an end the agreement is thereby immediately determined. It would seem to follow from ***North Central Wagon and Finance Co., Ltd. v. Graham, [1950] 1 All E.R. 780; [1950] 2 K.B. 7, C.A.***, that unless the agreement itself provides for the mode of termination by the owner the institution of proceedings may itself constitute the appropriate unequivocal act sufficient to terminate the agreement. However, if the repudiation is unlawful for e.g., where the breach by the other party is one which entitles the innocent party merely to recover damages but not to repudiate[67] then the repudiation is itself an "anticipatory breach" which does not automatically determine the agreement but entitles the other party to elect whether to affirm the agreement or to treat it as at an end by reason of the repudiation.

1.9.6 By Release

Where a hire-purchase agreement has been completely performed by one party but there are obligations remaining unfulfilled by the other, the former may agree to release

[66] Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], at page 120.
[67] As where it is a mere breach of warranty.

the latter from the outstanding obligations, and thereupon, if the release be legally operative, the agreement will come to an end.

In order to be effective, a release which amounts to a unilateral discharge of the agreement must normally be either given by deed[68] or supported by consideration.[69] Hence if the Owner of goods, having delivered the goods to the Hirer under a hire-purchase agreement, voluntarily and without consideration agrees at the Hirer's request to take the goods back and release the Hirer from his obligations under the agreement, such a release is not regarded at law as binding on the Owner. Therefore, the Owner is still entitled to insist on performance of the agreement by the Hirer. However, if the Hirer acts on the release to his detriment, as by returning the goods or incurring some other liability on the strength of the release, the Hirer may invoke the equitable doctrine of waiver to inhibit the Owner from going back on his promise to release. In such a case the Court will not enforce the hire-purchase agreement at the suit of the Owner, even though the release was given without consideration and was not under seal.

1.9.7 By Waiver

In certain circumstances a party who grants a release which is not under seal and which is unsupported by consideration will be estopped in equity from denying the efficacy of the release. This principle of equitable estoppel, otherwise known as "waiver", was first brought into prominence in the ***High Trees House*** case[70] and has since been consistently applied,[71] though within certain defined limits.[72] In order for the principle to operate it must be established :-

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[68] ***Preston v. Christmas (1759), 2 Wils. 86.***

[69] ***Cumber v. Wane (1721), 1 Stra. 426; Foakes v. Beer (1884), 9 App. Cas. 605, H.L. ; Underwood v. Underwood, [1894] 42 W.R. 372.*** When given after a breach and supported by consideration the release is known as accord and satisfaction.

[70] ***Central London Property Trust, Ltd. v. High Trees House, Ltd., [1956] 1 All E.R. 256, n.; [1947] K.B. 130.***

[71] ***Charles Rickards, Ltd. v. Oppenheim, [1950] 1 All E.R. 420; [1950] 1 K.B. 616, C.A ; Foster v. Robinson, [1950] 2 All E.R. 342; [1951] 1 K.B. 149, C.A. Tool Metal Manufacturing Co., Ltd. v. Tungsten Electric Co., Ltd., [1955] 2 All E.R. 657, H.L.***

(a) that a party to whom an obligation was owed under the agreement in question voluntarily[73] agreed to suspend or cancel the obligation:

(b) that the other party altered his position by acting on such agreement;

(c) that he had not, within a reasonable time before so acting, received an intimation from the party to whom the obligation was owed that the latter intended to resume his strict legal rights.

If the Hirer persuades the Owner voluntarily to release the Hirer from the hire-purchase agreement, and in pursuance of that offer to release, the Hirer returns the goods or otherwise alters his position by acting on the Owner's offer, the Owner cannot subsequently set up the absence of consideration for the release as a ground for holding the Hirer to the hire-purchase agreement.

However, the presence of consideration (or an agreement under seal) remains significant to this extent, that until the Hirer has acted on the release and altered his position in such a way that he would be not merely restored to his status quo but actually prejudiced if the release were revoked, the Owner's concession may be withdrawn, in which event the Hirer will remain bound by the agreement. It would seem that before the Owner can require payment of the sum due under the hire-purchase agreement the Owner must first give the Hirer reasonable notice of his intention to withdraw his concession and resume his strict legal rights.[74]

To ascertain the exact point of time at which a hire-purchase agreement is terminated by waiver is a point of some difficulty. It would seem that the agreement is determined

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[72] ***Combe v. Combe, [1951] 1 All E.R. 767; [1951] 2 K.B. 215, C.A.***

[73] If there is consideration the release is, of course, a binding agreement, and it is unnecessary to invoke the doctrine of waiver.

[74] ***Tool Metal Manufacturing Co., Ltd. v. Tungsten Electric Co., Ltd., [1955] 2 All E.R. 657, H.L.***

at the particular moment when the waiver becomes binding on the Owner as the result of the Hirer having done some act to alter his position on the strength of the waiver. Until this has been done, the Owner is entitled to withdraw his concession and resume his strict legal rights.

It would accordingly appear that between the time when the Owner voluntarily offers to waiver his rights under the agreement and the time when the Hirer acts on the waiver the agreement is not in fact extinguished but is merely suspended and is capable of revival by the Owner at any time before the Hirer acts on the waiver.

It has been doubted whether the equitable doctrine of waiver extends to promises to abandon a right altogether, since the authorities are all concerned with cases where the agreement has been merely to suspend the right for the time being. But there seems no difference in principle between abandonment and suspension, since in each case the party seeking to rely on the waiver has *ex hypothesi* (according to the assumptions made) acted to his detriment and ought therefore to be granted relief.

1.9.8 By Merger

Where the obligations of a party to a contract become embodied in a security of a higher order than the original contract, the latter is merged by operation of law into the higher security and is extinguished[75] in the absence of a contrary intention on the part of the parties concerned.[76] Thus, if the stipulations of a simple contract are subsequently transcribed into a document under seal the original agreement ceases to be operative, unless it can be established that the parties intended the specialty contract to be by way of collateral security.

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[75] ***Price v. Moulton (1851), 10 C.B. 561.***
[76] ***Norfolk Rail. Co. v. M'Namara (1849), 3 Exch. 628.***

Similarly, the recovery of judgment in respect of a particular cause of action merges the cause of action in the judgment, so that no further proceedings can be taken in respect of the same cause of action.[77] However, the rule applies only where the parties to the later transaction or proceeding are the same as or derive their interest from the parties to the original contract which it replaces.[78]

The following rules illustrate the application of these principles to hire-purchase agreements:-

(a) Where a hire-purchase agreement not under seal is followed by a hire purchase deed between the same parties (or those deriving an interest from them) relating to the same goods then unless a contrary intention on the part of the parties is established the later document will be deemed to have replaced and extinguished the earlier.

A point to be noticed is that where an oral agreement is followed by an agreement in writing under hand only this does not constitute a merger, since the law regards all simple contracts as of equal degree. Nevertheless the effect will in most cases be similar to that of merger in that under the law of evidence a presumption arises that a written contract following upon an oral agreement is intended to represent all the terms agreed by the parties and the inference is that the written provisions are designed to replace those orally agreed.

[77] *King v. Hoave (1844), 13 M. & W. 494.*
[78] *Bell v. Banks (1841), 3 Man. & G. 258; Isaacs & Sons v. Salbstein, [1916] 2 K.B. 139; [1916-17] All E.R. Rep. 386, C.A.*

However, this is merely an evidential presumption and it is always open to a party to plead that the written document does not accurately record the terms agreed,[79] though such an allegation will not be lightly accepted and must be strictly proved.[80]

(b) Where the Owner obtains judgment against the Hirer for sums due under the agreement the Owner cannot later institute further proceedings in respect of the same debt but must be content to enforce the judgment the Owner has obtained.

(c) Only the particular cause of action in respect of which the judgment was obtained merges in the judgment. Hence, a judgment against the Hirer for the value of the goods by reason of the Hirer's failure to redeliver does not preclude the Owner from instituting separate proceedings for arrears of hire-rent.

Moreover, since judgment for the value of the goods does not operate to vest the goods themselves in the Hirer until the judgment is satisfied the Owner may at any time before satisfaction sue the Hirer for specific return of the goods, though the Owner cannot do this once the money judgment has been satisfied, since the property in the goods is thereupon transferred to the Hirer.

Nice questions arise where the Hirer satisfies a judgment for the value of the goods after the owner has instituted separate proceedings for specific delivery but before he has obtained judgment. *Semble* (it seems), the Hirer will thereupon be entitled to have the second action dismissed, but the Court would no doubt take account of the circumstances in considering the question of costs.

[79] ***Walker Property Investments (Brighton), Ltd. v. Walker (1947), 177 L.T. 204, C.A.***
[80] ***Heilbut, Symons & Co. v. Buckleton, [1913] A.C. 30, H.L.***

Conversely, a judgment for the hire-rent does not prevent the Owner from seizing the goods under the terms of the agreement or from suing for their recovery. However, it is not altogether clear what the position is if the hire-rent which has accrued due and for which the Owner sues and recovers judgment amounts to the entire balance of the hire-purchase price. Does the satisfaction of such a judgment operate to vest the property in the goods in the Hirer so as to disentitle the Owner from recovering them under the provisions of the agreement? It is submitted that it does, since although the judgment is not for the value of the goods as such but only for accrued hire-rent, as this amounts to the balance of the hire-purchase price the Owner is in effect compelling the Hirer to complete the purchaser.

In cases where the whole of the hire-purchase price has accrued due and the agreement is outside the Act the curious situation thus arises that if the Owner forbears to include the final instalment of hire-rent in his claim the Owner is entitled to recover not only the great part of the hire-purchase price but also the goods as well, whereas if the Owner sues for the entire balance and the judgment which the Owner obtains is satisfied the property in the goods vests in the Hirer and the Owner's claim to them is extinguished.

Although particular obligations under a hire-purchase agreement may be merged in a judgment, the termination of a hire-purchase agreement as a whole in consequence of such a merger is rare, for in most cases the agreement will already have been determined. In hire-purchase transactions, therefore, the principle of merger in relation to judgments will normally be of significance only in the destructive effect it has on particular provisions in a hire-purchase agreement, and not in its effect on the existence

of the agreement as a whole.

1.9.9 By Frustration

Where complete or substantial performance of the agreement becomes impossible by reason of some act or event occurring subsequent to the formation of the agreement, the supervening impossibility will in certain circumstances automatically determine the agreement and discharge the parties from further liability thereunder. Thus, the Hirer will in general be discharged from his obligation to redeliver the goods if without negligence on his part redelivery becomes impossible through accidental destruction of the goods or though the wrongful act of some third party over whom the Hirer could not reasonably have been expected to exercise control.

However, the terms of the agreement may be such as to indicate that the Hirer's obligation to redeliver is absolute, in which event the risk of loss lies on him and he will not be able to avoid liability by pleading that he exercised all reasonable care. The circumstances in which the law will recognise acts or events as sufficient to constitute frustration and cause a discharge of the agreement, and the rights and liabilities of the parties in the event of frustration, from an intricate branch of contract law too complex to be considered in a work of this nature, and reference should be made to standard works on the law of contract.

1.9.10 By Effluxion of Time

A hire-purchase agreement comes to an end by effluxion of time where it is in a form requiring the Hirer to exercise the option to purchase within a stated time after the expiration of the period of hire and the time expires without the option having been

exercised.

1.10 PROBLEMS AND LIMITATIONS

One of the main difficulties encountered in this study was in relation to the extent and depth to which the various aspects of repossession and money claims in Malaysian hire-purchase law (hereinafter referred to as "the said topic") should be covered. Repossession and money claims form a part of the wider remedies available to the Owner. In view of the limited scope of this study (not the entire law of hire-purchase but limited to repossession and money claims only), attempts had to be made to limit the extent to which various issues pertaining to the Owner's remedies were elaborated on.

There is a dearth of reported case laws and articles on the remedies of repossession and money claims in the hire-purchase law in Malaysia. As a result of that, reported cases; journals and articles from other Commonwealth countries were resorted to.

The writer started this project with the Owner's perspective on the said topic due to the nature of the writer's field of work, representing financial institutions. However, as the studies progressed, consumer law has lurked its head intermittently, making it impossible to ignore it. The writer now has to step into the shoes of the Hirer in order to incorporate consumer law into the studies. This results in the greatest challenge that the writer had to overcome, that is, to gel the said topic together with consumer law and putting it forward in the Owner's perspective.

CHAPTER 2

REPOSSESSION UNDER THE COMMON LAW

2.1 GENERAL

As shown in the previous chapter, the definition of hire-purchase at Common Law is much wider than that of the Act and that if the Act does not apply, then the transaction shall be governed by the hire-purchase law at Common Law of England.[81] Further, at Common Law, the Owner, upon determination of the agreement and/or breach by the Hirer[82] and in the absence of any contractual provision to the contrary, is entitled to recover the goods. If the agreement is in reality an unregistered bill of sale granted for the purpose of securing a loan, the agreement is unenforceable and void.

Therefore, the Owner who exercises an apparent right to recover the Owner's goods may be exposed to an action for trespass.[83] The Owner is not entitled to retain goods or accessories such as detachable rubber types which have been affixed to the chattel by the Hirer during the hiring agreement and which have been acquired under another hire-purchase agreement made between the Hirer and a third party; at least this is so, if the third party should demand them.[84] The Owner must enter the premises peaceably and without trespass or violence. The most satisfactory method of repossessing goods is to obtain the written consent of the Hirer and make an appointment with the Hirer for the Owner's collection at the Hirer's home. The Owner has no right to enter upon the premises of the Hirer, unless the agreement contains an express licence to enter and seize. In practice, agreements not subject to the UK 1938 Act and the UK 1954 Act,

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[81] P. Balan, "The Hire-Purchase Order" [1980] JCML 277-283.

[82] Please refer to Chapter 1 for the discussion of termination by the Owner and Chapter 5 for the discussion of the types of breaches by the Hirer that resulted in Money Claims for the Owner.

[83] ***Beckett v. Tower Assets Co., [1891] 1 Q.B. 638, C.A.***

[84] ***Bergougnan v. British Motors Ltd. (1930), 30 S.R. (N.S.W.) 61 (Australia).***

will invariably reserve such a right for the Owner, but it is important to remember that this is a purely personal right which cannot be assigned to a third party.[85]

The earliest reported case that mentioned the expression "hire-purchase agreement" was ***Hart v Wright***[86] in 1885. It was also mentioned in ***Lee v Butler.***[87] These two cases were described as the *locus classicus* (a classic case) upon the subject of hire-purchase.[88] The landmark cases of ***McEntire v Crossley***[89] and ***Helby v Mathews***[90] carved a niche for hire-purchase agreements in the legal world. Then came the case of ***Scammell v Ouston***[91] where the House of Lords held that a hire-purchase agreement is not a contract of sale but bailment. As far as the Common Law attaches any precise meaning to the expression hire-purchase, it envisages an agreement of the kind in ***Helby v Mathews***[92] in which there is no obligation to buy and under which the Hirer may determine the agreement and return the goods at any time.[93]

A hire-purchase agreement as known to Common Law may be defined as goods on hire under which the Hirer is granted an option to purchase the goods.[94] Being a genus of bailment, hire-purchase is applicable only to goods i.e. personal chattels capable of physical delivery. Hire-purchase agreements fall into two classes as follows :-

(i) agreements whereby the Hirer takes the goods on hire for a stated rent and is given an option to purchase the goods at the end of the hiring on

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[85] ***Re Davis & Co., ex parte Rawlings (1888), 22 Q.B.D. 193, C.A.; see Chapter XIV, P. 154.***
[86] ***(1885) 1 T.L.R. 538.***
[87] ***[1893] 2 Q.B. 318.***
[88] Wild, David, The Law of Hire-Purchase; [1965] [2nd Edition] Butterworths [London], at page 3.
[89] ***[1895] A.C. 457.***
[90] ***[1895] A.C. 471.***
[91] ***[1941] 1 All ER 14.***
[92] ***[1895] A.C. 471.***
[93] Wild, David, The Law of Hire-Purchase; [1965] [2nd Edition] Butterworths [London], at page 4.
[94] Wild, David, The Law of Hire-Purchase; [1965] [2nd Edition] Butterworths [London], at page 9.

payment of an additional sum, which in practice is unusually[95] insignificant; and

(ii) agreements under which the price of the option to purchase is paid at the outset or included in the hire rent payable, so that the property in the goods passes automatically to the Hirer on completion of the instalments stipulated, without the active exercise of any option to purchase.

The distinction between the two categories is important. Class (i) do not require the inclusion of a power to enable the Hirer to determine the hiring.[96] Even if the hiring runs its full term, the property in the goods will not pass to the Hirer unless the Hirer exercise the option to purchase at the end of the term by paying the additional sum stipulated. This is, therefore, a true hire-purchase agreement even though the Hirer is powerless to terminate the hiring before the expiration of the period of hire.

For class (ii) to avoid being classified as contracts of sale, it is essential that they contained a clause enabling the Hirer to determine the hiring before the final instalment of hire becomes payable. If not, the Hirer cannot avoid ultimately acquiring title to the goods,[97] and the Hirer is, therefore, one who has "agreed to buy" within Section 25(2) of the Sale of Goods Act 1893 and Section 9 of the Factors Act 1889.[98]

As a true hire-purchase agreement does not constitute a contract of sale, the proprietary right in the goods does not pass to the Hirer until the full amount has been paid. This is so even though the agreement itself is silent on whether when the property shall pass. Therefore, it is reasonable to presume that during the currency of the hire-purchase

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[95] The writer opine that Goode used the word "unusually" because in practice at that time, the final payment to exercise the option to purchase is usually a fraction more than the monthly instalments when it should be much higher.

[96] Ibid. In order to prevent the agreement in question from being construed as a contract of sale.

[97] Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], at page 11. Unless the Hirer terminated the agreement.

[98] ***Lee v Butler [1893] 2 Q.B. 318.*** Even though this chapter focuses on Common Law repossession, Acts of Parliament like the above (other than the Hire Purchase Acts) has to be referred to.

agreement, the Hirer was merely a bailee having no proprietary interest in the goods themselves but merely an added contractual right in the form of an option to purchase the goods.

Lord MacNaghten held in ***Helby v Mathews***[99] that "it was the express intention of the parties, that no one of those monthly payments until the very last in the series was reached, nor all of them put together without the last, should confer on the customer any proprietary right in the [goods] or any interest in the nature of a lien [...] or kind beyond the right to keep the instrument and use it for a month to come.".[100]

Nevertheless, the courts[101] have over the years developed the principle that the option to purchase in the hire-purchase agreement conferred on the Hirer constitutes a contractual right to buy the goods and gives the Hirer a limited property in the goods. The value of that proprietary interest is to be measured at any given time by the total amount which has at that time been paid by the Hirer under the agreement. Swinfen Eady, M.R. held in ***Whiteley v Hilt,***[102] that the whole terms of the agreement show that the contract was not merely a bailment for reward, but that it conferred on the bailee an interest in the chattel.

The curious position thus arises that any payment made by the Hirer under the hire-purchase agreement *pro tanto* (partially fulfilled until a better solution arises) reduces the value of the Owner's absolute property and increases the value of the Hirer's limited proprietary right. This is so regardless of the fact that only part of the payment made will normally be in respect of the option to purchase, the remainder being solely

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[99] ***[1895] A.C. 471.***
[100] ***[1895] A.C. 471,*** at page 481.
[101] Ibid. Disregarding theoretical objections as above.
[102] ***[1918] 2 K.B 808,*** at pages 817-818.

for the hiring. It seems that the Hirer starts to accumulate an interest in the goods from the time the Hirer makes a first payment under the agreement.

This is so even though the agreement stipulates that in order to acquire ownership the Hirer must make an additional payment at the end of the period of hire instead of automatically becoming vested with the title on payment of the last instalment. In valuing the Hirer's interest at any given moment no distinction is drawn between agreements falling into class (i) and (ii).

The courts' decisions cannot be reconciled with the Hirer's proprietary limbo in the event the Owner lawfully terminated the agreement[103] (for example, on a breach by the Hirer of some term of the agreement). Furthermore, such termination operates not only against the Hirer himself but also against third parties who had taken an assignment of the Hirer's rights. This is so save in exceptional cases,[104] whether the assignment was lawful or unlawful and whether or not the third parties in question had notice of the Owner's rights.

The uncertainty attaching to the Hirer's interest inevitably gives rise to questions of considerable complexity.[105]

The above and similar problems are all due to the anomaly of attributing proprietary interest in goods to one who has merely an option to purchase. Hire-purchase is not the only branch of law which is faced with difficulties through the confusion of property

[103] Ibid. Will automatically bring the Hirer's right to an end.
[104] Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], at page 273.
[105] See Chapter 5.

with contract rights.[106] However, the principle that the option to purchase in the hire-purchase agreement conferred on the Hirer constitutes a contractual right to buy the goods and gives the Hirer a limited property in the goods is well-settled now. Theory must acquiesce with good grace to established practice, treating the Hirer's right *sui generic* (as unique).

The principle has the following important consequences, especially for Money Claims upon Repossession :-

(i) Unless otherwise provided for in the agreement, the Hirer has an assignable interest in the goods. As a result, the Owner who seeks to recover the value of the goods from third parties to whom the Hirer has wrongfully purported to sell them must give credit for sums paid by the Hirer under the agreement.[107] The exception is when the Owner determines the agreement before instituting proceedings.[108]

(ii) If the Owner sues third parties for damage to the goods during the prevalence of the hire-purchase agreement, the Owner must likewise give credit for sums paid by the Hirer under the agreement. Only an Owner out of possession can sue for damages to his reversion, and the value of the reversion in goods, as established by the above principle, is the amount unpaid under the hire-purchase agreement.[109]

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[106] Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], at page 13, n. 4.
[107] Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], at page 279. This is not, of course, the case where the agreement expressly prohibits assignment by the hirer of his interest, for in such a case there is nothing capable of being assigned.
[108] Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], at page 275.
[109] Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], at page 195.

(iii) In the absence of a provision in the agreement prohibiting assignment, the interest thus given to the Hirer can be lawfully seized in execution and disposed of by the execution creditor.[110]

(iv) A document by which the Hirer assigns his option to purchase constitutes a bill of sale under either the Bills of Sale Act 1878 (if the assignment is absolute) or under the Bills of Sale Act (1878) Amendment Act 1882 (if the assignment is by way of security).

2.2 THE RIGHT TO REPOSSESSION[111]

It is now understood that the property in the goods let under a hire-purchase agreement remains in the Owner[112] until the terms and conditions of the agreement including the exercise of the option to purchase have been complied with. The question sometimes arises whether and in what circumstances the Owner can recover the possession of the goods at any time while he is still the Owner of them.

Clearly, there can be no recovery by the Owner unless the Owner has a present right to repossession and this cannot arise so long as the hiring continues in accordance with the agreement. However, it may be that the agreement itself provides that the Hirer lose his right to possession on the occurrence of certain events. Alternatively, if the agreement makes no special provisions, such a right may arise at common law.

It is well established law that where the chattels have been placed in the hands of a bailee for a limited purpose and he deals with them in a manner wholly inconsistent

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[110] Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], at page 186.

[111] The Owner's right to repossession in Common Law is also applicable in cases where the Acts do not apply. See E. Campbell-Salmon, Hire Purchase And Credit Sales Law And Practice, [1962], Sir Isaac Pitman & Sons Ltd. [London], at page 83. Section 11(1) of the 1938 Act (cases subject to statutory control , if less than one-third of the hire-purchase price has been paid). See Chapter 3.

[112] Albeit diminishing in accordance to amount paid by the Hirer.

with the terms of the bailment and consistent only with his intention to treat them as his own, the right to possession reverts to the Owner.[113] It is only a clear misuse of the goods bailed such as a sale, or pledge,[114] or destruction or maltreatment that will determine a bailment. As opposed to merely using the chattels for a proper but different purpose from that for which they were bailed.[115]

Although the principle in hire-purchase is the same as in simple bailment, the position is not clear for what is inconsistent with a bailment for hire may not be inconsistent with a hire-purchase agreement. As the latter contains an option of purchase and other complicated terms designed to secure the use to the Hirer of the goods as though he were the Owner and yet retain Ownership in the bailor.[116]

In ***Whiteley v Hilt,***[117] a piano was let by the plaintiffs under a hire-purchase agreement to a person who subsequently purported to sell the piano to the defendant. The hire-purchase agreement did not contain a clause prohibiting a sale but merely forbade the Hirer to remove the piano without the consent of the Owners. The Court of Appeal held that the sale of the piano did not determine the agreement.

In ***Belsize Motor Supply Co. v Cox,***[118] the plaintiffs let a motor taxi-cab under a hire-purchase agreement to the Hirer. After defaulting in the payments under the agreement, the Hirer pledged the cab to the defendant, also in breach of the agreement. The agreement provided that upon any breach by the Hirer "it shall be lawful for the Owners to take possession of the cab and to terminate the agreement". Channel J held

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[113] ***Plasycoed Collieries Co., Ltd v Partridge, Jones & Co., Ltd., [1912] 2 K.B. 345***, at page 351 per Hamilton, J.
[114] ***Singer Manufacturing Co. v Clarke (1879) 5 Ex. D. 37.***
[115] ***Lee v Atkinson and Brooks (1609) Cro. Jac. 236.***
[116] Wild, David, The Law of Hire-Purchase; [1965] [2nd Edition] Butterworths [London], at page 65.
[117] ***[1918] 2 K.B 808.***
[118] ***[1914] 1 K.B 244.***

that Clause 6 gives the Owner the option to take possession and terminate. The option to terminate has to be exercised otherwise the agreement continues to be in force.

In ***North Central Wagon & Finance Co. Ltd. V Graham,***[119] the Court of Appeal held that the Owner had the right to retake possession upon any breach without giving any notice to the Hirer.[120]

In ***Reliance Car Facilities Ltd v Roding Motors,***[121] the claim was by a finance company against a car dealer under a recourse agreement. The dealer, whose customer had become the Hirer of a motor car under a hire–purchase agreement with plaintiffs, was bound to repossess the motor car and purchase it from the plaintiffs at the balance outstanding under the agreement in the event the hiring agreement is terminated. Sellers J held that under the hiring agreement, there must be a declaration or notice to the Hirer or some act towards him showing unequivocally that the hiring is terminated. David Wild's proposal was to state "shall thereupon determine" in the agreement for certainty.[122]

The Owner must enter the premises peaceably and without trespass or violence. The most satisfactory method of repossessing goods is to obtain a written consent of the Hirer and make an appointment with him for their collection at his home. The Owner has no right to enter upon the Hirer's premises, unless the agreement contains an express licence to enter and seize. In practice, agreements not subject to the Acts, will

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[119] ***[1950] 1 All ER 780, [1950] 2 K.B 7.***
[120] The Court of Appeal relied on ***Jelks v Hayward [1905] 2 K.B 460*** where Kennedy J held that the agreement is terminable ipso facto.
[121] ***[1952] 1 All ER 1355.***
[122] Wild, David, The Law of Hire-Purchase; [1965] [2nd Edition] Butterworths [London], at page 68.

invariably reserve such a right for the Owner, but it is important to remember that this is a purely personal right which cannot be assigned to a third party.[123]

2.3 RECOVERY FROM THE HIRER

2.3.1 By Retaking the Goods

The Owner is entitled to immediate possession of the goods and may repossess the goods from the person who wrongfully retain them. In other words, the Owner is entitled to repossess the goods. However, the problem of how to exercise the right to immediate repossession arises.[124] The Owner may otherwise resort to action to repossess the goods[125]. The hire-purchase agreement must be scrutinised to see whether a notice must be issued against the Hirer before repossession.

In ***Reliance Car Facilities Ltd v Roding Motors,***[126] the hire-purchase agreement provided that if the Hirer defaulted then the Owner shall have the right to declare the hiring terminated and retake possession. Sellers J held that under the hiring agreement, there must be a declaration or notice to the Hirer or some act towards him showing unequivocally that the hiring is terminated.

In ***Blades v Higgs,***[127] it was held that if a person refuses to give up the goods, then reasonable force may be used. However, it would appear that the Owner is not entitled to enter upon the Hirer's property without the Hirer's consent for the purpose of retaking the goods, since the right of entry upon the land to seize one's own goods is only limited to cases where the detainer's possession was wrongful in its inception as where he took the goods by trespass, and does not extend to cases in which the

[123] ***Re Davis & Co., ex-parte Rawlings (1888), 22 Q.B.D. 193.***
[124] Wild, David, The Law of Hire-Purchase; [1965] [2nd Edition] Butterworths [London], at page 68.
[125] See 2.3.2 on detinue.
[126] ***[1952] 1 All ER 1355.***
[127] ***(1861) 10 CBNS 713.***

detainer's original possession was lawful and has only become unlawful as a result of a termination of the bailment under which he held the goods.[128]

Where, however, the hire-purchase agreement contains an express provision entitling the Owner to enter upon the property of the Hirer for the purpose of enforcing a right to seize the goods, it would seem that this constitutes an irrevocable licence to enter so as to render the Owner immune from an action for trespass in the event of the Hirer purporting to determine the licence.[129]

The Owner should not enter forcibly, for by so doing he commits a criminal offence of common law misdemeanour but a trespass by the Owner is not a misdemeanour at common law and does not infringe the Forcible Entry Act, 1381.[130] However, the Owner is not liable in any civil action as he is regarded as entitled to enter. After entry has been made, it is lawful to use reasonable force to repossess the goods.[131] Although a forcible entry renders the Owner liable under the Forcible Entry Act,[132] it does not give the Hirer a right of action for damages for trespass to land[133] nor will the Hirer be able to obtain damages for assault if the Owner uses reasonable force against the person of the Hirer in order to enforce his right to possession.[134]

Scrutton LJ in ***Hemmings v Stoke Poges Golf Club*** [135] held that the right of entry if it exists is not made ineffective by the use of force. In ***Milner v Maclean*** [136] it was held that no actual violence to the person is necessary to constitute a forcible entry, if there

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[128] ***Webb v Beaven (1844) 6 Man. & G. 1055.***
[129] ***Hurst v Picture Theatres Ltd. [1915] 1 K.B. 1.***
[130] *Statute of Forcible Entry, 1381.* ***Ferguson v Roblin (1888) 17 O.R. 167 (Canada); Lucas v Bernard (1894) Q.R. 5 S.C. 529 (Australia).***
[131] ***Wiener v. Phillips (Belfast) Ltd. (1915), 49 I.L.T. 205.***
[132] ***Hemmings v. Stoke Poges Golf Club, [1920] 1 K.B. 720, C.A.***
[133] ***Hemmings v Stoke Poges Golf Club [1920] 1 K.B 720.***
[134] Ibid. ***Blades v Higgs (1861) 10 CBNS 713.***
[135] ***[1920] 1 K.B 720.***
[136] ***(1825) 2 C. & P. 17.***

is some violence in the course of the entry such as breaking open doors, threats, arms, or overwhelming numbers. To enter by an open window or by means of a trick does not constitute forcible entry.[137]

The Owner cannot however enter the land of the third party[138] (other than the wrongful possessor)[139] even though the Hirer may have purported to give him a licence to do so. If the Owner does enter upon such land he will be liable for damages for trespass.[140] However, ***Patrick v Colerick,***[141] held that if the goods are not actually in the hands of the wrongful possessor but are on his land, the Owner may enter the land and remove them and there can be no action for trespass against the Owner. Further, the Owner may also do so where the goods were moved there accidentally or by the felonious act[142] of a third party. In this case, any damage done must be remedied.[143] There appears to be no direct authority but David Wild stated that a forcible entry on the land to recover goods wrongfully placed there would be no more a trespass than the peaceable entry.

After entry has been made, it is lawful to use reasonable force to retake or repossess the goods.[144] If undue force is used in the course of entering premises and seizing hired goods pursuant to an ordinary licence to enter and repossess goods, the Hirer cannot succeed in a civil action against the person entering with force, but such person may have committed a criminal offence under the Forcible Entry Act 1381.[145]

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[137] Com. Dig. Tit. Forcible Entry, I Hawk. C. 64.
[138] ***Keary v Pattinson [1939] 1 All E.R. 65.***
[139] Wild, David, The Law of Hire-Purchase; [1965] [2nd Edition] Butterworths [London], at page 69.
[140] ***Miller v Strohmenger (1887) 4 T.L.R. 133.***
[141] ***(1838) 3 M & W 483.***
[142] ***Blac. 3 Comm. 4.***
[143] ***Anthony v Haney (1832) 8 Bing. 186.***
[144] Campbell-Salmon, Hire Purchase And Credit Sales Law And Practice, [1962], Sir Isaac Pitman & Sons Ltd. [London], at page 83. ***Wiener v Philips (Belfast) Ltd. (1915) 49 I.L.T. 205.***
[145] ***Hemmings v Stoke Poges Golf Club [1920] 1 K.B 720.***

On the other hand, where the manager of a shop supplied furniture on hire-purchase terms to a Hirer and went to the Hirer's house and removed the furniture, because there had been a default by the Hirer, it was held that a criminal assault by the manager upon the Hirer was committed in the course of his employment, so that the person who owned the shop and employed the manager was liable under civil action.[146]

Where a third party was in possession of goods under a colourable title as a result of having obtained them from a Hirer who had no property in the goods, it was held that an Owner might be liable in an action for trespass, if he forcibly removed the chattel instead of requesting its return and on refusal bringing an action for conversion or detinue against the third party.

2.3.2 Recovery By Action

Detinue is the proper action[147] by which to seek recovery of possession of goods wrongfully detained. Where the Owner sues for detinue, judgment is for the return of the goods or the value,[148] and damages for detention.[149] The Hirer is not entitled as of right to elect whether to return the goods or pay their assessed value as the Court is empowered by Statute, on the application of the Owner, to order return of the goods without giving the Hirer an option to pay their value.[150] The damages awarded are such

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[146] ***Dyer v Munday [1895] 1 Q.B. 742.***

[147] In UK, it is under Section 14 of the UK Acts. In cases for the Acts to apply, the action must be brought in the County Court even if the Hirer paid less than a third of the hire purchase price.

[148] Normally the value at the date of the judgment (***Rosenthal vAlderton & Sons Ltd. [1946] 1 All E.R.***) Where the Hirer has increased the value of the goods by his own labour and expenditure, he is entitled to be credited with the increase (***Munro v Willmott [1948] 2 All E.R. 983***).

[149] Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], at page 151.

[150] Common Law Procedure Act, 1854, Section 78. This section was repealed as a result of various Statute Law Revision Acts, but those Acts made general provision for the saving of any jurisdiction conferred by the various Acts repealed, so that notwithstanding the repeal of s. 78 the jurisdiction which it conferred remains. Further, the High Court is by rules of procedure given power to order specific return of the goods (R.S.C. , Ord. 48) and it has been held that a similar power is vested in the County Court (***Winfield v. Boothroyd (1886), 54 l..T. 574***).

as will compensate the Owner for all loss of use of the goods during the period of detention.[151]

Thus, if the goods are of a profit-earning nature, the Owner can recover the loss of profits consequent upon the absence of the goods from the date on which the goods ought to have been returned by the Hirer to the date on which the Owner obtains or ought reasonably to have obtained the use of other goods, together with hiring charges reasonably incurred by the Owner for those other goods after the latter date. If the Owner has suffered no loss through not having the goods during the period of detention, the Owner is nevertheless entitled to a reasonable hiring charge for that period.

The fact that the Owner might not have been able to re-let the goods if they had been redelivered on the due date[152] has no significance if the Owner chooses instead to claim a sum representing a proper hire charge for the period in which the Hirer wrongfully continued in possession of the goods.[153] However, it is relevant to the assessment of damages if the Owner bases his claim on loss of profits.

It is uncertain whether this principle applies where the goods are not of a profit-earning character or are not applied by the plaintiff to profit-earning uses, but there seems no reason why even in this case the Hirer should not be charged a reasonable sum for his wrongful use or possession of the goods; for if he had returned the goods on the due date and required the use of similar goods he would have had to pay for them.

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[151] ***Strathfillan (Owners) v Ikala (Owners), The Ikala [1929] A.C. 196.***

[152] See Chapter 5.

[153] ***Strand Electric and Engineering Co. Ltd. v Brisford Entertainment Ltd. [1952] 1 All E.R. 796.***

Bailey v Gill[154] held that although judgment in detinue was for delivery of the goods or their value, the plaintiff could not at common law object if the defendant elected to pay the assessed value and keep the goods. Under O. 48, rule 1 of the UK's Rules of the Supreme Court, power was given to the court to make an order for the specific restitution of the goods by way of execution of the judgment.

In ***Peruvian Guano Co. v Dreyfus Bros. & Co.,***[155] Lord MacNaghten held that the effect of the provision above is to enable the court to make an order for delivery where it would be unjust to have the option of either giving up the goods or paying the value. In ***Whiteley v Hilt,***[156] it was held that the power to order delivery up of a particular chattel is discretionary. The power ought not to be exercised when the chattel is an ordinary article of commerce of no special value and where damages would fully compensate.

In detinue, the ground for legal action is the manner of detention (***Clossman v White***[157]) which must be adverse (***Clements v Flight***[158]). The mere possession of the goods is not enough to support the action. There must be a withholding of the goods in such a way it may be said to be a conversion to a man's own use.[159] In most cases evidence of adverse detention consists of a demand for the goods and a refusal by the defendant to give them up.[160]

However, proof of a demand and refusal is not essential to support the action if there is evidence to infer that the defendant refused to deliver the goods. Therefore, it is prudent

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[154] ***[1919] 1 K. B. 41.***
[155] ***[1892] A.C. 166.***
[156] ***[1918] 2 K.B. 808.***
[157] ***(1849) 7 C.B. 43.***
[158] ***(1846) 16 M. & W. 42.***
[159] ***Burroughes v Bayne (1860) 5 H. & N. 296.***
[160] Wild, David, The Law of Hire-Purchase; [1965] [2nd Edition] Butterworths [London], at page 70.

to make a formal demand before commencing any proceedings. Some definite act or deliberate withholding is the necessary preliminaries to the arising of the cause of action.[161]

Conversely, the Owner cannot insist on an order for specific delivery. The matter is entirely within the discretion of the Court, which can, against the wishes of the Hirer or the Owner, make any of the following orders : -

(A) Specific delivery to the Owner without giving the Hirer the option of paying the value of the goods; and/or

(B) Delivery of the goods to the Owner unless payment of their assessed value is made by the Hirer within a specified time; and/or

(C) Payment to the Owner of the value of the goods without giving the Hirer the option of returning them.

However, if the Owner and the Hirer both agree to the form of order they desire, the Court must presumably give effect to this. The effect of order (A) is to enable the Owner to recover the goods by execution without having to accept a tender by the Hirer of the value of the goods; for this form of order gives the Hirer no option. Further, in making order (A), the Court may impose such terms as may be just to do equity between the parties; and if the defendant has, since the date of his refusal to deliver the goods, increased their value by his own labour and expenditure, the Court may make it a term of the order that the plaintiff shall make a fair allowance to the defendant in respect of the value of the goods[162].

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[161] *Clayton v LeRoy [1911] 2 K.B. 1031.*
[162] *Peruvian Guano Co. v. Dreyfus Brothers & Co. , [1892] A.C. 166, H.L.*

Order (B) allows the Hirer to prevent the issue of a writ or warrant for delivery of the goods by paying the assessed value before the time allowed for payment expires. Under Order (C) the Owner is entitled to recover the value of the goods as assessed by the Court, but the Owner is not given any right under the order to recover the goods themselves.

The words "under the order" are used with intent. The mere fact that the Owner has obtained judgment for the value of the goods does not in itself vest the property in the goods in the Hirer[163] and the Owner retains his Ownership until the judgment has been satisfied.[164] This is so whether the judgment is for the value of the goods or for the return of the goods with an option to pay their value.[165]

It follows that notwithstanding the judgment the Owner is entitled to enforce any extra-judicial remedies against the goods which may be available to him for e.g. seizure and may also sue in detinue any third party into whose hands the goods come before the judgment against the Hirer is satisfied.

However, once the sum awarded by the judgment or order has been paid, the Owner's title to the goods is forthwith transferred to the Hirer (or any person to whom he may previously have assigned them) and the Owner's proprietary interest *ipso facto* (by that very act) determines. Similarly, if the Owner succeeds in securing the recovery of the goods, the judgment in his favour for their value becomes inoperative, for by accepting the goods he is deemed to have waived his right to their value under the judgment.

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[163] ***Brinsmead v. Harrison (1872), L.R. 7 C.P. 547.***
[164] Ibid.
[165] ***Ellis v. John Stenning & Son, [1932] 2 Ch. 81 ; [1932] All E.R. Rep. 597.***

There can be no payment into court in an action in detinue,[166] unless it is an action both in detinue and conversion. Then the plaintiff by so suing gives the defendant the option of paying into court the amount of the damages recoverable in an action in conversion.[167]

Normally the party who converts the property of another is bound to pay him the real value of the property.[168] However, in hire-purchase cases, where the defendant has taken the goods from the Hirer the damages to which an Owner may be entitled to may be affected if the defendant has acquired an interest in the goods. This is usually a question of assignment.[169]

If the Owner, instead of suing in detinue, brings his action in conversion, he has a presumptive right to damages which is not lost by the subsequent acceptance by him of a tender of the goods by the Hirer.[170]

In ***Belsize Motor Supply Co. v Cox***[171] and ***Whiteley v Hilt,***[172] the court held that the Hirer had effectively disposed of all his interest under the hire-purchase agreement to the defendant including the option to purchase. The defendant could therefore exercise the option by paying the amount outstanding under the agreement . It was held that this sum was the extent of the plaintiff's interest in the goods and was the proper amount of damages.

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[166] ***Allan v Dunn (1857) 1 H. & N. 572.***
[167] ***Whiteley v Hilt [1918] 2 K.B 808.***
[168] ***United Dominions Trust (Commercial) Ltd v Parkways Motors Ltd [1955] 2 All ER 557.***
[169] Wild, David, The Law of Hire-Purchase; [1965] [2nd Edition] Butterworths [London], at page 124.
[170] See Chapter 5.
[171] ***[1914] 1 K.B 244.***
[172] ***[1918] 2 K.B. 808.***

On the other hand, in ***United Dominions Trust (Commercial) Ltd v Parkways Motors Ltd,***[173] McNair J. distinguished the facts from those in the ***Belsize Motor Supply Co. v Cox***[174] and ***Whiteley v Hilt,***[175] on the basis that the prohibition clauses in the agreement were wide enough to prevent the Hirer from assigning any interest to the defendant and therefore the damages were the full value of the goods. Detinue is an action founded on tort[176] but the judgment in such an action not being for a sum of money is outside the scope of section.[177]

An action by the Owner against the Hirer to recover the goods under the hire-purchase agreement is not barred by a previous but unsatisfied judgment against the Hirer in respect of the instalments due and unpaid.[178] If a postponed order is sought[179] where there is no unpaid balance of the hire-purchase price, David Wild submitted that the court can make payments under the previous judgment save as is represented by an unsatisfied prior judgment for all instalments due.[180]

2.4 RECOVERY FROM THIRD PARTIES

Generally, the recovery of the goods has been considered only as between the Owner and the Hirer. However, there are many cases where the right to possession against the Hirer arises from the wrongful disposal[181] by the Hirer to some third party. Sometimes the goods passed through many hands before the Owner is aware of it.[182]

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[173] ***[1955] 2 All ER 557.***
[174] ***[1914] 1 K.B 244.***
[175] ***[1918] 2 K.B. 808.***
[176] within the meaning of Section 47 of the UK County Courts Act 1959.
[177] ***Bryant v Herbert (1878) 3 C.P.D. 389.***
[178] ***South Bedfordshire Electrical Finance Co. Ltd v Bryant [1938] 3 All ER 580.***
[179] Section 12(4)(b) of the 1938 Act.
[180] Wild, David, The Law of Hire-Purchase; [1965] [2nd Edition] Butterworths [London], at page 72.
[181] Only intentional disposal by the Hirer is meant here, i.e., by sale or pledge. Interference by third parties such as distress, execution, etc., is dealt under the appropriate heading. Where the goods have been feloniously or tortuously taken from the Hirer he himself has the right of recovery.
[182] ***Buttersworth v Kingsway Motors [1954] 2 All ER 694.***

Under the ordinary rule of law of *nemo dat quod non habet*, the Owner can trail the goods and recover them from a third party to whom the Hirer has disposed of them. The purchaser of a chattel takes the chattel as a general rule subject to what may turn out to be certain infirmities in the title.[183] This rule is incorporated into the UK's Sale of Goods Act 1893.[184] Generally, goods can be recovered by retaking or by action in the same way as from the Hirer. In ***Pearson v Rose & Young Ltd,***[185] it was held that person without the right to dispose of goods may nevertheless pass a good title to whoever takes them from him.

The following special rules affect motor vehicles hired under hire-purchase agreements to which the UK Acts apply :-

(i) If a Hirer wrongfully disposes of such a vehicle to a person not being a trader or finance company who takes in good faith without notice of the agreement, a good title passes;

(ii) Where the wrongful disposition is to a trader or finance company the first purchaser thereafter acquires a good title provided the first purchaser takes bona fide without notice;

(iii) If the disposition to him is also under a hire-purchase agreement, title can be transferred under that agreement to him, or to a person claiming under him, even though that person or he may not be bona fide purchasers without notice;[186]

(iv) If a vehicle is let under a hire-purchase agreement and some person became a private purchaser in good faith without notice it is presumed that he took from the Hirer. On the contrary, he did not, it is presumed that he took from a private purchaser who did take from the Hirer;

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[183] ***Cundy v Lindsay [1878] 3 App. Cas. 549.***
[184] Section 21(1).
[185] ***[1951] 1 K.B. 275.***
[186] Presumptions are enacted under Section 28 of the UK 1964 Act.

(v) If the Hirer sold to a trader it is presumed that the vehicle was sold to a private purchaser from whom he, the private purchaser, took.[187]

2.5 MALAYSIAN COMMON LAW ON REPOSSESSION

There seems to be a dearth of Malaysian case laws on this topic due to the fact that most of the Malaysian hire-purchase transactions are governed by the Hire Purchase Act, 1967. Furthermore, most of the pre-Act common law cases are either overruled by the post-Act common law cases or by the Act itself.

Hire-purchase transactions are essentially hiring transactions which possession of goods is handed over along with right to use, for a stated period and for consideration. Hiring transactions are species of bailments in contract law. Therefore, the hire-purchase transactions are governed by the common law of contracts dealing with bailment transactions. Contracts law, being common law, is codified in the Malaysian Contracts Act 1950 but is enriched by history of precedents from English; Australian and Malaysian Courts. Notably, the common law of contracts in Malaysia is based largely on the Australian and British legal principles, which have by and large been accepted as applicable to Malaysia.

In Malaysia, the case of ***P.N. Pillay v Kah Motor Ltd,***[188] it was held that under the terms of the agreement the Owner cannot repossess the car until he has terminated the hiring and as there was no evidence that the defendant had terminated the hiring in this case before seizure, the seizure was unlawful.

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[187] Wild, David, The Law of Hire-Purchase; [1965] [2nd Edition] Butterworths [London], at pages 73 and 74.
[188] ***[1965] MLJ 47.***

In ***Anglo-American Corporation Ltd v Goodwood Sawmill,***[189] it was held that whether a written notice is a condition precedent to the termination of a hiring in any particular case depends upon the true construction of the relevant clause in the hire-purchase agreement and a formal written notice is necessary only where there is an express stipulation to that effect in the agreement. In ***Thambipillai v Borneo Motors Ltd,***[190] it was held that the Owners were entitled to terminate the hiring without notice.

2.6 CONCLUSION

Under the Common Law, there are very few formalities or procedures that the Owner needs to adhere to in order to repossess the vehicle, unlike under the Act.[191] As we can see from the above, the Owner has the option of either repossessing the goods without a court action or with a court action, that is, by way of detinue.

Generally, there's a clear term in the hire-purchase agreement that gives the Owner a licence to enter the Hirer's premises to repossess. This is an irrevocable licence. However, if the agreement is silent on this point, then we fall back to the Common Law,[192] where it was held that the Owner may enter the Hirer's premises even without a licence if the Owner did so peaceably and without force. The position under the Act is quite different and strict, whereby Section 34(e) of the Act provided that any provision in the hire-purchase agreement whereby the Owner or its agent is authorised to enter the Hirer's premises to repossess the goods otherwise than in accordance with the provisions of the Act is relieved from liability for any such entry, shall be void and of no effect.

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[189] ***[1966] 1 MLJ 263.***
[190] ***[1970] 1 MLJ 70.***
[191] See Chapter 3.
[192] ***Devoe v Long & Long [1951] 1 DLR 203, 222.***

CHAPTER 3

REPOSSESSION UNDER THE ACT

3.1 PREFACE

The Act does not confer a general power or right on the Owner to repossess the goods. The power or right of repossession must be derived from the hire-purchase agreement[193]. The exercise of such power or right is subject to the provisions of the Act. If non-payment of hire authorises repossession (as is invariably the case) the Owner's rights will not be prejudiced by recovery of judgment for arrears of instalments of hire, unless the judgment has been satisfied.[194] Some hire-purchase agreements authorise repossession in the event of the Owner "deeming it proper in his own interest so to do" or if the Hirer "shall suffer or do any act or thing whereby the (Owner's) rights shall or may be prejudiced."[195]

It will be important in drafting the terms of the repossession clause to ensure that it does not provide for repossession in the circumstances specified in Section 34(f) of the Act (relating to the bankruptcy of the Hirer or execution of a deed of assignment), or in a manner involving entry on premises without permission given on the occasion of the entry (Section 34(e) of the Act). If it does, it will, to this extent, be void (Section 34 of the Act).

A clause may be void for contravention of Section 34(f) of the Act notwithstanding that none of the events (bankruptcy, act of bankruptcy, execution of deed of assignment or deed of arrangement) is named in the clause, provided that the clause would justify

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[193] Section 16(1) of the Act.
[194] ***South Bedfordshire Electrical Finance Co. Ltd. v. Bryant [1938] 3 All E.R. 580***
[195] ***Beale & Co. v. Price (1904) 4 S.R. (N.S.W.) 101; 21 W.N. (N.S.W.) 28; National Pictures Ltd. v. Gibbs, Bright & Co. [1925] S.A.S.R. 358***

repossession in any of those events. It would seem to follow that a clause which gives the Owner discretion to repossess is void.

A clause which provides for repossession where the Hirer does anything "whereby the Owner's rights may be prejudiced" is open to question[196]. It would be interesting to see how the Malaysian courts would interpret such a clause. It is submitted that it the court should interpret such clause by ensuring that on the facts of the case, it does not run afoul of Section 34 of the Act.

The repossession clause should not purport to empower the Owner to repossess for non-payment of instalments save subject to the conditions as to notice imposed by Section 16(1) of the Act. If it does, it may be void under Section 34(g) of the Act. Where that part of the repossession clause which is made void by Section 34 of the Act cannot be severed the whole clause will fail. Before we go into the details of repossession under the Act, it is proposed to briefly touch on the applicability of the Act; types of goods; and definitions.

3.1.1 Applicability of the Act

According to Section 1(2) of the Act, the Act is only applicable in respect of hire-purchase agreements relating to the goods specified in the First Schedule.[197] The object and purpose of the Act is to regulate the form and contents of hire-purchase agreements and the rights and duties of the parties to such agreements.

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[196] Else-Mitchell, R. and Parsons, R.W., Hire-Purchase Law : Being the Hire-Purchase Act, 1960-1965 : Annotated and Explained [1968] [4th Edition] The Law Book Company Limited [Australia], at page 112.

[197] ***MBf Finance Bhd. (formerly known as Malaysia Borneo Finance Corporation (M) Bhd.) v Ting Kah Kuong & Anor. [1993] 3 MLJ 73, per Abdul Kadir Sulaiman, J.***

This certainly does not exclude the application of the provisions of the Act to hire-purchase agreements in respect of goods not specified in the First Schedule if the parties to the agreement have agreed to be bound by the provisions of the Act. In other words, in respect of goods not specified in the First Schedule of the Act, the parties are free to contract outside the provisions of the Act, or agree to be bound by those provisions.[198]

If a hire-purchase agreement is not caught by the provisions of the Act for the reason that the goods in question are not covered by the First Schedule of the Act, the question of resisting the defence that the agreement is void and unenforceable for the non-compliance with the provisions of the Act will not arise.[199]

3.1.2 Types of Goods Covered by the Act

At all times, whether prior to or after the coming into force of the Act, motor cars have largely been the subject matter of hire-purchase transactions.[200] Besides cars, other motor vehicles like lorries[201]; vans[202] or luxury coaches[203] are also governed by the Act[204].

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[198] ***Kesang Leasing Sdn. Bhd. v Mohd. Yusof Bin Ismail & Anor. [1990] 1 MLJ 291, per Eusoffe Chin, J.***

[199] ***MBf Finance Bhd. (formerly known as Malaysia Borneo Finance Corporation (M) Bhd.) v Ting Kah Kuong & Anor. [1993] 3 MLJ 73.***

[200] ***Affin Credit (Malaysia) Sdn. Bhd. v Yap Yuen Fui [1984] 1 MLJ 169; Siow Kwang Joon & Anor. v Asia Commercial Finance (M) Bhd. [1996] 3 MLJ 641; Hong Leong Finance Bhd. v Rajandram [1998] 7 MLJ 409; Public Finance Bhd. v Ehwan Bin Saring [1996] 1 MLJ 331; Hong Leong Finance Bhd. v Thamilcheleven s/o Palinesamy & Anor. [1996] 1 MLJ 351; Public Prosecutor v Mohamed Nor [1988] 3 MLJ 119; Soon Teck Finance (M) Bhd. v Public Finance Bhd. [1988] 3 MLJ 417;Pang Brothers Motors Sdn. Bhd. v Lee Aik Seng [1978] 1 MLJ 179;Credit Corp. (M) Bhd. v Malaysia Industrial Finance Corp. & Anor. [1976] 1 MLJ 83; Ming Lian Corp. Sdn. Bhd. v Haji Noordin [1976] 1 MLJ 83; Thambipillai v Borneo Motors (M) Ltd. [1970] 1 MLJ 70; Ahmad Ismail v Malaya Motor Co. & Anor. [1973] 1 MLJ 117; Ahmad Ismail v Malaya Motor Co. & Anor. [1973] 2 MLJ 66; Public Prosecutor v Ong Keng Seong [1967] 1 MLJ 40; Wearne Brothers (M) Ltd... v Jackson [1966] 2 MLJ 155; PN Pillay & Co. Ltd.. v Kah Motor Co. Ltd.. [1965] 1 MLJ 47; Innaya & Anor. V Lombard Acceptance (Malaya) Ltd.. (1963) MLJ 30; Dorothy Kwong Chan v Ampang Motors Ltd.. & Anor. [1969] 2 MLJ 68; Malayan Credit Ltd.. Mohamed Kassim [1965] 2 MLJ 134; Cheah Swee Hock v Public Prosecutor (1961) MLJ 183.***

[201] ***Kan Yeow Wing v Keng Soon Motor Finance Co. (1962) MLJ 391.***

[202] ***Heng Long Motor Trading Co. v Osman Bin Abdullah [1994] 2 MLJ 456.***

[203] ***Leong Weng Choon v Consolidated Leasing (M) Sdn. Bhd. [1998] 3 MLJ 860.***

[204] Expensive machinery (***Syarikat Bunga Raya Timor Jauh Sdn. Bhd. & Anor. v Tractors (M) Bhd.[1980] 2 MLJ 127; Syarikat Bunga Raya Timor Jauh Sdn. Bhd. & Anor. v Tractors (M) Bhd.[1983] 1 MLJ 121***) or heavy machines (***Guthrie Sdn. Bhd. v Trans-Malaysian Leasing Corp. Bhd. [1991] 1 MLJ 33)*** like crawler piling machines (***Hong Leong Leasing Sdn. Bhd. v Tan Kim Cheong [1994] 1 MLJ 177)*** or hydraulic excavator (***Public Finance Bhd. v Ehwan Bin Saring [1996] 1 MLJ 331; UMW Industries Sdn. Bhd. v Ah Fook [1996] 1 MLJ 365);*** payloader (***United Engineers (Malaysia) Ltd.. v Lai Ping Yoon [1968] 1 MLJ 189);*** a bulldozer (***Ka Yin Credit & Leasing Sdn. Bhd. v Pang Kim Cha & Bros Development Sdn. Bhd.[1989] 2 MLJ 61; Lau Hee Teah v Hargill Engineering Sdn. Bhd. & Anor. [1980] 1 MLJ 145);*** a road grader (***Hong Leong Finance Bhd. v Lee***

3.1.3 Definitions

Some of the definitions relevant to this Chapter are set out as follows :-

(1) "Hire-purchase agreement" includes a letting of goods with an option to purchase and an agreement for the purchase of goods by instalments. The meaning of hire-purchase agreements was elaborated in Chapters 1 and 2;

(2) "hire-purchase price" means the total sum payable by the Hirer under a hire-purchase agreement in order to complete the purchase of goods to which the agreement relates, exclusive of any sum payable or as compensation or damages for breach of agreement;

(3) "Hirer" means the person who takes or has taken goods from an Owner under a hire-purchase agreement and includes a person to whom the Hirer's rights or liabilities under the agreement have passed by assignment or by operation of law;

(4) "Owner" means a person who lets or has let goods to a Hirer under a hire-purchase agreement and includes a person to whom the Owner's rights or liabilities under the agreement have passed by assignment or by operation of law;

(5) "statutory rebate" in relation to terms charges means inter alia, where it is agreed in a hire-purchase agreement that the terms charges have been calculated on a simple interest basis at a rate specified in the agreement on the amount outstanding from month to month, means the amount of interest attributable to the period of complete months still to go under the agreement. ***Lau Hee Teah v. Hargill***

Cheng Heng t/a Lee Cheng Heng Earthworks & Anor. [1987] 2 MLJ 266) also are let under hire-purchase agreements. Electrical goods and equipment can also form the subject matter of a hire-purchase agreement (***Khoo Chooi Sim v The Radio & General Trading Co. Ltd.. (1964) MLJ 101).***

Engineering Sdn. Bhd. & Anor [1980] 1 MLJ 145 held that "statutory rebate" in relation to terms charges means the amount of interest attributable to the period of complete months still to go under the agreement.

3.2 REPOSSESSION UNDER THE ACT (Section 16 of the Act)

3.2.1 General

As shown in the previous chapter, at Common Law, the Owner can repossess the goods from the Hirer in the event of the latter's failure to service the instalments. The Owner can do so by physically retaking his goods (provided he does so 'peaceably') or by filing an action in court. Such a drastic step taken by the Owner purportedly can cause hardship to the Hirer who had paid a substantial proportion of the value of the goods but who, due to financial constraints, could not continue making the monthly payments towards the end of the period of hire. The Act was intended to overcome such a problem.

It is a norm for the hire-purchase agreement to stipulate that if the Hirer breaches any terms of the agreement, the Owner shall have the right to terminate the agreement and take necessary steps to repossess the goods. If the Hirer defaults in payment of instalments then there is repudiation on the Hirer's part. Any act or breaches of the Hirer that can be deemed as repudiation shall give the Owner the right to terminate the agreement.

In such a situation, repossession is the main remedy for the Owner. In addition, the Owner can make Money Claims which shall be discussed at length in the Chapters 4 and 5.

The Act[205] contain detailed provisions as to the manner of repossession the goods and as to rights and liabilities arising on repossession. The procedure and formalities involved in repossession by the Hire-Purchase (Recovery of Possession and Maintenance of Records) Regulations 1976 (hereinafter referred to as "the Regulations"). These procedure and formalities only come into play when the Hirer defaulted and not for any other reasons.

Under Section 16(1), it is provided that an Owner can only repossess the goods if there had been 'two successive defaults of payments' or a 'default in respect of the last payment' and the Hirer has been served with a notice in the form set out in the Fourth Schedule; and the period fixed by the notice has expired (which shall not be less than 21 days after the service of the notice).

In addition to the requirements set out, additional requirements prior to taking possession as may be prescribed in the regulations made pursuant to the power in Section 57(2) of the Act will have to be complied with by the Owner. Primarily, the Owner has to comply with the Hire-Purchase (Recovery of Possession and Maintenance of Records by Owners) Regulations 1976 (PU (A) 1/77) (hereinafter referred to as "the said Regulations"). Non-compliance with certain regulations may amount to offences against the Act – regulation 9 of the said Regulations.

If a notice is served before there are two successive defaults, such notice would be bad in law and if the goods are repossessed pursuant to that notice, it would constitute a

[205] Part IV, Sections 16-20 of the Act.

breach of warranty of quiet possession as implied by Section 7 of the Act.[206] Such service by the Owner is also an offence against the Act.[207]

Under Section 16(1A)[208], a new provision inserted by Act A813, where a Hirer is deceased, the Owner cannot repossess the goods unless there had been "four successive defaults of payment".

Further, rule 3(1) of the Hire-Purchase (Recovery of Possession and Maintenance of Records by Owners) Regulations 1976 requires the Owner to send a notice informing the Hirer that the Owner intends to repossess the goods. A copy of this notice must be sent to the Controller of Hire-Purchase. This notice is in addition to the notice contained in the Fourth Schedule.

Augustine Paul J held in ***Hong Leong Finance Bhd. v Rajandram [1998] 7 MLJ 409*** that the right of the Owner to take possession of goods comprised in the hire-purchase agreement is governed by Section 16[209] of the Act. Of special significance are the Fourth Schedule notice and the Fifth Schedule notice which the Owner must serve on the Hirer as prescribed by Sections 16(1) and (3) of the Act, respectively. This case shall be discussed at length later.

K.C. Vohrah J held in ***Koh Siak Poo v Med-Bumikar Mara Sdn. Bhd. [1994] 3 MLJ 610*** that where the period fixed by the Fourth Schedule notice (i.e 21 days) has expired, the Owner of the vehicle may take possession of the vehicle.

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[206] ***Chong Seng Yong t/a Chong Electric Engineering v Credit Corporation (M) Bhd [1982] CLJ 420.***

[207] Non-compliance with certain regulations may amount to offences against the Act. Please see regulations 2 & 9 of the said Regulations.

[208] There seems to be no civil or criminal penalty prescribed for the breach of this subsection.

[209] Prior to revision, this was Section 15 of the Act. Section 16 of the Act was amended by Section 12 of the 1992 Act with effect from 1-4-1992 (vide PU(B) 219/92).

The onus is on the Owner of the goods to show that notices were served in accordance to Sections 43(a) and (c) of the Act, either by personal service or by registered post addressed to the Hirer at the Hirer's last known place of abode or business.

Affidavits or oral evidences of the Owner or Hirer, or his servant or agent[210] as to the service of the notice are admissible as prima facie proof of the service of the notice.[211] Proper evidence through persons who handled the posting of the said notices or under Section 32 of the Evidence Act 1950, showing that indeed the notices were posted by registered post will have to be tendered.

It was held by Gunn Chit Tuan, J in ***United Manufacturers Sdn. Bhd. v Sulaiman Bin Ahmad & Anor. [1989] 1 MLJ 842*** (hereinafter referred to as the "***Sulaiman's case***") that Section 16(1) of the Act only requires that before repossession, the notice to be served on the Hirer must be in writing[212]; in the form set out in the Fourth Schedule; and that the period fixed by the notice has expired, which shall not be less than 21 days after the service of the notice.

The ***Sulaiman's case*** also held that Section 16(1) of the Act does not specify any time limit within which an Owner must repossess after the service of the Fourth Schedule notice. The effect of this is that, so long as the provisions of Section 16(1) of the Act has been complied with, the Owner can repossess the goods and the relevant notice

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[210] Whether one person is the servant of another is a question of fact (***Brady v Giles*** (1835) 1 Mood & R 494; *Jones v Scullard* [1898] 2 QB 565), but, in general, a servant is a person who is subject to the commends of his master not only as to what work he is to do but also the manner in which it is to be done (***Yewens v Noakes*** (1880) 6 QBD 530 at 532, CA, per Bramwell LJ; ***Simmons v Heath Laundry Co*** [1910] 1 KB 543 AT 552, CA, per Buckley LJ). See also ***Mat Jusoh bin Daud v Syarikat Jaya Seberang Takdir Sdn Bhd*** [1982] 2 MLJ 71.
An agent is a person who is employed to do any Act for another or to represent another in dealings with third persons: Contracts Act 1950 (Act 136) Section 135. The dealer, in normal circumstances, does not Act as agent for the Hirer: ***Campbell Discount Co Ltd v Gall*** [1961] 1 QB 431.

[211] ***Koh Siak Poo v Med-Bumikar Mara Sdn. Bhd. [1994] 3 MLJ 610.***

[212] This includes printing, lithography, typewriting, photography and any other mode of representing or reproducing words in a visible form; see Section 3 of the Interpretation Acts 1948 and 1967 (Act 388). As the hire-purchase agreement is a prescribed document within Section 45(2) of the Act, the additional requirements of Section 45 of the Act would apply.

does not cease to be effective merely because the Owner did not actually repossess until two years after the service of the notice so long as the arrears of instalments including arrears of interest due on overdue instalments remain payable and unpaid.

Even where there is a doubt as to the proper compliance with the service of the Fifth Schedule, where the goods have been repossessed, a Hirer may not be heard to complain of wrongful by the Owner, if the Hirer takes no action at all to enforce the Hirer's rights under the Act to get back the goods by reinstating the hire-purchase agreement by paying the arrears of instalments etc.

It was held in ***Public Prosecutor v Mohamed Nor [1988] 3 MLJ 119*** that where an attempt is made to repossess a vehicle under a hire-purchase agreement without complying with the provisions of Section 16(1) of the Act and the Owner's men try to take possession from the address of the Hirer, the Hirer can use reasonable force to oust the said men from the Hirer's house.[213] It is arguable that the same standard as to what may deemed as 'reasonable force' for the Owner is applicable to the Hirer as well.[214]

It was held in the Federal court decision in ***Khoo Thau Sui v United Engineers (Malaysia) Sdn. Bhd. [1977] 2 MLJ 204*** that in a hire-purchase, if all instalments are paid, the hired goods would then become the property of the Hirer. However, until final and full payment, the subject matter of the hire would remain the property of the Owner, who would be entitled to terminate the hiring and take possession if there had been two successive defaults of payment. Where the Hirer has contractually undertaken

[213] If the Hirer raises a reasonable doubt in the case of prosecution, the Hirer will not be convicted for an offence punishable under Section 506 of the Penal Code (FMS Cap. 45).
[214] Please see Chapter 2.

to pay the costs of repossession, the Hirer cannot thereafter dispute his obligation to pay the actual costs incurred.[215]

Section 16(2) of the Act provided that the Owner is excused from complying with Section 16(1) where there are reasonable grounds for believing that the goods will be removed or concealed by the Hirer contrary to the provisions of the agreement.

If the Owner is prepared to accept the onus of proof, the Owner need not give notice or await the expiration of the period if "there are reasonable grounds for believing that the goods comprised in the hire-purchase agreement will be removed or concealed by the Hirer contrary to the provisions of the agreement".[216]

There are authorities that suggest that these words require not only that the person in question has reasonable cause or grounds to believe but also that he does actually believe.[217] The existence of the reasonable grounds and on the belief founded on it is ultimately a question of fact to be tried on evidence and the grounds which the person acted must be sufficient to induce in a reasonable person the required belief.[218] Section 16(2) of the Act makes sense because Hirers (who have defaulted in their monthly instalments) have been known to disappear and to remove the goods or conceal them in order to prevent the Owner from repossessing them.

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[215] For the position of the NSW Act, please refer to Else-Mitchell, R. and Parsons, R.W., Hire-Purchase Law : Being the Hire-Purchase Act, 1960-1965 : Annotated and Explained [1968] [4th Edition] The Law Book Company Limited [Australia], at pages 110-116.

[216] Section 16(2) of the Act.

[217] ***R v Banks [1916] 2 KB 621, [1916-17] All ER Rep 356; R v Harrison [1938] 3 All ER 134*** and ***Nakkuda Ali v Jayaratne [1951] AC 66.***

[218] ***McArdle v Egan & Ors [1933] All ER Rep 611; Nakkuda Ali v Jayaratne [1951] AC 66; Registrar of Restrictive Trading Agreements v WH Smith & Son Ltd.. [1969] 3 All ER 1065 and Inland Revenue Commissioners v Rossminster Ltd. [1980] AC 952, [1980] 1 All ER 80*** "it is obvious that the existence or non-existence of reasonable cause must be judged not by the event but by the party's means of knowledge at the time" : ***In the Matter of the Petition of Right of Tan Eng Hoe (Petitioner) v The Attorney-General of the Straits Settlements [1933] MLJ 151***, at page 153, per Whitley, J.

3.2.2 Mandatory Notices

(i) The Fourth Schedule Notice

The form in the Fourth Schedule requires the date on or before which the Hirer must settle the arrears to avoid repossession to be stated. The notice must give the name of the "Owner" who proposes to repossess. This may help to resolve some of the difficulties arising from the fact that there may be more Owners than one in respect of each hire-purchase agreement. However, that bare right to repossess is not assignable.[219] The notice gives the Hirer an opportunity to pay up the arrears within the time specified in the notice. While the time which must expire before the Owner may repossess is controlled by Section 18(1) of the Act, it is apparently for the Owner to set the time within which the Hirer must pay the arrears. After the time for payment has expired the Hirer is entitled as a matter of law to pay only by way of redemption and subject to the added costs of redemption.

Where the goods have been hired to two persons jointly and severally, separate notices must be served on each of them even though one of them may be authorized by the other to accept notice on his behalf.[220] Deviation[221] from a statutory prescribed form has a substantial effect or may mislead if such deviation causes the statement to convey less information than the statutory form requires or if it causes the statement to confuse or mislead the prospective Hirer on matters which the statutory form is designed to bring to his notice.[222] The form in the Fourth Schedule requires the date on or before which the Hirer must settle the arrears to avoid repossession to be stated. If the date

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[219] ***Re Davis; ex parte Rawlings (1888) 22 Q.B.D. 193; Chatterton v. Maclean [1951] 1 All E.R. 761; Drages Ltd. v. Inland Revenue Commissioners (1927) 6 A.T.C. 727.***

[220] ***Bennett v. Esanda Ltd. 1967*** (Tas. Sup. Ct. F.C.) not yet reported at the time.

[221] As to the effect of any deviation from prescribed forms, please see Section 62 of the Interpretation Acts 1948 & 1967 (Act 388); ***Jackson & Co. Ltd. v Seng Seng [1954] MLJ 238 c.f Low Yat v GC Grace [1947] MLJ 80.***

[222] ***Equipment Investments Pty. Ltd. v MJ Dowthwaite & Co. Pty. Ltd. (1969) 16 FLR 23*** (inclusion of additional items of expenditure not found in the prescribed form in the Schedule will render the notices served bad in law).

specified is less than the statutory minimum of twenty-one days, the notice would be illegal[223].

One scenario to explore here is whereby the Hirer has only paid the arrears but not the outstanding amount after the Hirer has received the Fourth Schedule notice. The question is whether the Owner has waived the Owner's rights to repossess, i.e., whether a fresh Fourth Schedule notice needs to be reissued? ***Leong Weng Choon v. Consolidated Leasing (M) Sdn. Bhd. [1998] 3 MLJ 860*** (hereinafter referred to as the "***Leong's case***") held that from the wordings of Sections 14 and 16 of the Act, it may seem that the hire purchase agreement still subsist even after the Fourth Schedule notice or Fifth Schedule notice is served unless there's a specific notice to terminate the hire-purchase (Section 40 of the Contracts Act 1960); or there's repossession (Section 16 of the Act) or the goods was returned (section 15 of the Act).

MBf Finance Bhd. (formerly known as Malaysia Borneo Finance Corporation (M) Bhd.) v Ting Kah Kuong & Anor. [1993] 3 MLJ 73 seemed to add destruction of goods beyond the control of any parties to be the fourth way to determine the agreement provided that the agreement does not stipulate otherwise. Therefore, we can argue that even if the Owner issued the Fourth Schedule notice to the Hirer after a successive default of two (2) instalments and the Hirer only paid one month's arrears which the Owner accepts, if there's no notice to terminate, the agreement still subsist.

Whether or not a fresh Fourth Schedule notice should be issued again? It is opined that a fresh Fourth Schedule notice must be issued only after two (2) successive defaults. However, if the Owner does not accept the one month's arrears then there's no time

[223] ***Pang Brothers Motors Sdn Bhd v Lee Aik Seng [1978] 1 MLJ 179.***

limit within which the Owner must repossess after the Fourth Schedule notice, as long as the arrears of instalments including arrears of interest due on overdue instalments remain payable and unpaid. Even if the Owner repossessed the goods two (2) years after the Fourth Schedule notice, the repossession is still valid, as held by Gunn Chit Tuan, J in the ***Sulaiman's case***.

Section 15 of the Act is one of the two provisions of the Act (the other being Section 16 of the Act) whereby the agreement shall be automatically terminated upon the goods being returned to the Owner by the Hirer or the goods being repossessed by the Owner, without a need for any notices of termination. An interesting point to note is that the word 'agreement' wherever found in Sections 15(1), (2) and (3) of the Act is amended by Section 11(a) of the Hire-Purchase (Amendment) Act 1992. Previously, the words amended read 'hiring'. It is submitted that this further supports the argument that the 'agreement' is terminated under Section 15 of the Act and not the 'hiring'.

Another related scenario would be whether the Hirer's action to enforce his rights by paying the arrears of instalments can be deemed as a reinstatement of the agreement (as per Gunn Chit Tuan, J) when the agreement has not been terminated in the first place? An interesting scenario is one where the Hirer was served with a Fourth Schedule; the Rule 3 notice and a Repossession Order.

It is opined that following ***Leong's case,*** it would seem that the agreement can only be terminated in three instances, i.e., notice to terminate (Section 40 of the Contracts Act, 1950); repossession (under Section 16 of the Act); and surrendering of vehicle (under Section 15 of the Act), and nothing more.

It was also decided in ***Rajandram's case*** that once the hire-purchase agreement is terminated under Section 16 of the Act by way of repossession, then the Hirer must issue a Section 18(1) notice in order to reinstate the agreement. Therefore, if only the above notices were in fact issued but no actual repossession took place, it is submitted that the agreement still subsist.

(ii) Failure to serve a Fourth Schedule Notice.

Where the Fourth Schedule notice is not served, the Owner will have no right of possession of a vehicle hired and the seizure of it, if effected, will be wrongful.[224] If the requisite notice is not served, the Hirer may claim damages for breach of contract on the basis that Section 16(1) of the Act is a necessary term of the agreement. Damages will be assessed by applying the principles in Section 74 of the Contracts Act 1950.[225] It is thus similar with Section 34(e) of the Act, which does affect the terms of the hire-purchase agreement. This should be contrasted with the Australian position where the repossession is not wrongful so as to expose the Owner to actions by the Hirer in trespass and conversion or so as to preclude him pursuing any remedies given by the hire-purchase agreement attendant upon repossession.[226] However, it may be wrongful to the extent that the Hirer has an action for breach of statutory duty.[227]

If the Owner issues a second or subsequent notice under Section 16(1) of the Act after having served one previously, he may in certain circumstances be taken to have waived the prior notice and will only be able to effect repossession based on the second or subsequent notice.[228]

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[224] ***Koh Siak Poo v Med-Bumikar Mara Sdn. Bhd. [1994] 3 MLJ 610.***
[225] ***Koh Siak Poo v Med-Bumikar Mara Sdn. Bhd. [1994] 3 MLJ 610.***
[226] cf. ***Hemmings v. Stoke Poges Golf Club*** [1920] 1 K.B. 720.
[227] ***Bowmaker Ltd. v. Tabor [1941] 2 K.B. 1***; cf. Goode and Ziegel, Hire-Purchase and Conditional Sale (1965), at page 133).
[228] ***Siew Nguong Hin & Ors v Mayban Finance Bhd Orignating Summons No 24-864-91, High Court (Penang) (digested in Mallal's Digest 1992 para 1072).***

(iii) The Fifth Schedule Notice.

Within 21 days after repossessing the goods, the Owner is required, under Section 16(3) of the Act, to serve on the Hirer a notice in the form set out in the Fifth Schedule. The Owner is also required, under Section 16(4) of the Act, to deliver to the Hirer a document acknowledging receipt of the goods. The document must set out a short description[229] of the goods, the date, time and place the goods were repossessed[230]. The use of the phrase "Possession or control" in this context appears to mean that something more than just actual physical possession, such as a right of the Hirer to call for goods to be delivered to him by a bailee is covered by the Section. Local decisions on these two phrases are mostly on their use in a criminal context (for e.g, dangerous drugs).[231] The general rule in cases where an act is to be done within a specified time is that the day from which it runs is not to be included.[232]

Since the Fourth Schedule Notice is not always necessary[233], the Fifth Schedule Notice may be the first notice relating to repossession which the Hirer receives. The details in the notice inform the Hirer of the Owner's estimate of the amount the Hirer must pay in order to finalise the agreement (under Section 14 of the Act) or to reinstate the agreement (under Section 18(1)(a) and Section 19 of the Act).[234] The details also include the Owner's estimate of the value of the goods and his calculation of the value, if any, of the Hirer's equity under Section 18(1)(b) of the Act or of the amount which,

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[229] Section 16(5) of the Act.

[230] There seems to be no civil or criminal penalty prescribed for the breach of these subsections.

[231] ***Public Prosecutor v Ang Boon Foo [1981] 1 MLJ 40; Ipoh Garden Sdn. Bhd. v Ismail Mahyuddin Enterprise Sdn. Bhd. [1975] 2 MLJ 241; Pan Kok Wah v Public Prosecutor [1966] 2 MLJ 141; Public Prosecutor v Jamaili Bin Adnan [1985] 2 MLJ 392, at page 396; Shaikh Sahied Bin Talip v Khoo Kang Chek [1934] MLJ 283, at page 288; Oliver v Goodger [1944] 2 All ER 481 & Towers & Co. Ltd.. v Gray [1961] 2 QB 351.***

[232] For e.g., "Within twenty-one days ... serve a notice, in writing". Please see the Interpretation Acts 1948 and 1967 (Act 388), Section 54(1)(a) and Halsbury's Laws (4th Edn.), para 1134. For computation of time generally, see the Interpretation Acts 1948 and 1967 (Act 388), Section 54. A court of a Magistrate however has power under this Act to extend time for the service or giving of any notice or other document pursuant to Section 41 of the said Act.

[233] Section 16(2) of the Act.

[234] Please refer to Clause 3.3 below.

under the terms of the agreement and Section 18(1)(c) of the Act, the Hirer is liable to pay the Owner.[235]

(iv) Failure to Serve the Fifth Schedule Notice

The main reason for the notice under the Fifth Schedule[236] is to inform the Hirer of his rights upon repossession. The Act also does not provide for a criminal penalty.[237] Section 16(6) of the Act provides a civil penalty in that "the rights of the Owner under the hire-purchase agreement thereupon cease and determine".

The concluding words of Section 16(6) of the Act introduce a qualification whose effect is to ensure that the agreement continue to subsist in the event that the Fifth Schedule notice was not issued but the Hirer chose to exercise his rights to recover[238] the goods so repossessed. The words "as if the notices had been duly given" relate, it would seem, only to the revival of rights and liabilities under the agreement. They cannot result in setting a time limit on the exercise by the Hirer of his rights under Section 18(1)(a) of the Act. It is very clear that the notice must be served on Hirers if the consequences in Section 16(6) of the Act are to be avoided. The concluding words of Section 16(6) of the Act i.e., "...if the notice[239] had been duly given" lend support to this construction.

3.2.3 Procedure for Repossession Under the Act

Under Section 16(7)[240], it is provided that before the Owner or his servant or his agent repossesses the goods, the Owner or his servant or his agent[241] must, in addition to

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[235] Please refer to Clause 3.3 below.
[236] Section 16(3) of the Act.
[237] Similar to Sections 16(1) and (1A) of the Act.
[238] Hirer exercises his rights under this Act to recover the goods – for such rights of the Hirer, see Sections 18 & 19 of the said Act.
[239] Section 13(5) of the NSW Act's flaw is thus corrected. Please see Else-Mitchell, R. and Parsons, R.W., Hire-Purchase Law : Being the Hire-Purchase Act, 1960-1965 : Annotated and Explained [1968] [4th Edition] Law Book Company [Australia], at page 115.
[240] Section 16(7) of the Act was inserted by Section 5(b) of the the Hire-Purchase Act (Amendment) Act 1976 (hereinafter referred to as "the 1976 Act").

complying with the provisions of the Act, comply with any regulations[242] as may be prescribed. It is important to fix the date of repossession because the date enters into the calculation of the statutory rebates.[243]

Under the Hire-Purchase (Recovery of Possession of Maintenance of Records by Owners) Regulations, 1976, the following procedure must be complied with, i.e., if the repossession is being carried out by the Owner's agent or servant, such agent or servant must likewise produce and show his identity card and also an authority card (as prescribed under the Regulations) to the Hirer, his servant or agent or person who is in possession of the goods.

If the repossession is being carried out by the Owner personally, the Owner must produce and show his identity card and provide the name and address of the company, firm, body or organization to which he belongs, to the Hirer, his servant or agent, or occupant or person who is in possession of the goods.

One area that needs to be looked into is the area of high-handed manner in which repossession is being conducted nowadays. Thug-like repossessors are being used to intimidate the Hirers, to relieve them of the goods. It is opined that thugs are a necessary evil against recalcitrant Hirers. Therefore, the Owner has the onus to check on the background of the Hirers before engaging the thugs to repossess, in order to

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[241] Whether one person is the servant of another is a question of fact (***Brady v Giles (1835) 1 Mood & R 494; Jones v Scullard [1898] 2 QB 565)***, but in general, a servant is a person who is subject to the commander of his master not only as to what work he is to do but also the manner in which it is to be done (***Yewen v Noakes (1880) 6 QBD 530, at page 532, per Bramwell, LJ; Simmons v Heath Laundry Co. [1910] 1 KB 543, at page 552, per Buckley, LJ; Mat Jusoh Bin Daud v Syarikat Jaya Seberang Takdir Sdn. Bhd. [1982] 2 MLJ 71).*** An agent is a person who is employed to do any act for another or to represent another in dealings with third persons (Section 135 of the Contracts Act 1950 (Act 136). The dealer in normal circumstances, does not act as agent for the Hirer (***Campbell Discount Co. Ltd.. v Gall [1961] 1 QB 431).***

[242] Primarily the Hire-Purchase (Recovery of Possession and Maintenance of Records by Owners) Regulations 1976 (PU (A) 1/77). Non-compliance with certain regulations may amount to offences against the Act, especially regulation 9 of the said Regulations. See also ***Chong Seng Yong t/a Chong Electric Engineering v Credit Corporation (M) Bhd [1982] CLJ 420.***

[243] Section 18 of the Act.

practise 'selective gangsterism'. Another instance where the Owner is justified is where the Hirer repeatedly dodged repossession or has a bad track record.

3.2.4 Retaining Possession

Under Section 17(1) of the Act, it is provided that where the Owner has taken possession of the goods under Section 16 of the Act, the Owner shall not, without the Hirer's written consent, sell or dispose[244] of them or part with possession thereof until the expiration of 21 days after the date of the service of the notice set out in the Fifth Schedule. Under Section 17(2) of the Act[245], an Owner who sells or disposes of any hired goods or parts with possession of such goods in contravention of Section 17(1) shall be guilty of an offence.[246] Section 17 of the Act ensures that the Hirer can exercise his rights towards the goods if the Hirer desires to do so.

Augustine Paul J held in ***Hong Leong Finance Bhd. v. Rajandram [1998] 7 MLJ 409*** that Section 17 of the Act prescribes the period of time for which the Owner must retain possession of the goods that have been repossessed.

3.3 RESTRICTIONS TO THE OWNER'S RIGHTS OF REPOSSESSION

The Act provided the Hirer with several rights after repossession by the Owner.[247] These are the restrictions to the Owner's right to repossession.

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[244] **Dispose** - This has yet to be interpreted by the courts in the context of this Act but would appear to include disposal by way of gift, re-letting or even destruction of the goods.

[245] A new provision inserted by Act A813.

[246] **Offence under this Act** - For the penalty for the offence committed under Section 42(2) of the Act, see Section 46 of the Act. Where the person committing the offence is a body corporate or an agent or servant, Sections 47 and 48 of the Act are applicable. Under Section 47 of the Act, where an offence under the Act has been committed by any company, any person who at the material time was a company director, manager or an officer concerned in the management of the company shall be deemed to be guilty of that offence unless he can prove to the court that the offence was committed without his consent or connivance and that he had exercised all such diligence to prevent the offence from being committed.

[247] C.f. the position in Common Law where no such rights exist unless provided for by the agreement.

3.3.1 Early Completion (Section 14 of the Act)

Under Section 14(1) of the Act, the Hirer may complete the purchase of the goods and acquire the title to the goods by paying or tendering to the Owner[248] the net balance due[249] under the hire-purchase agreement. A prerequisite notice[250] in writing[251] to the Owner shall be given by the Hirer to complete the hire-purchase agreement early.

The right to complete[252] under the Act cannot be excluded, modified or restricted by the terms of the hire-purchase agreement.[253] Any attempt to do so would be void.[254] Section 14[255] of the Act specifies in detail the circumstances in which the right to complete may be exercised, i.e., either the agreement must still be continuing; or the Owner must have taken possession of the goods. The Owner has not 'taken possession' where the goods have been voluntarily returned.

When the Owner has taken possession, payment–out must be made within a time limit set by Section 14(3)(b) of the Act. Section 14 forbids the Owner who has repossessed

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[248] Payment must be offered in "legal tender" – current Malaysian notes or coins. The exact amount due must be tendered unless the Hirer does not require return of any surplus. The money must actually be produced unless the Owner dispenses with production. The effect of a valid tender is to vest title to the goods in the Hirer. Thereafter in any action by the Owner the Hirer has a good defence on payment into court of the amount tendered. Please see Clause 3.2.2 for the definition of 'cash'. The definition used the word 'includes' which suggests that it is not exhaustive. Arguably 'cash' may be interpreted to include payments by credit car, cash card or other modern electronic money transfer systems such EFTPOS or telegraphic transfer. However, a promissory note has been held not to be 'cash' under the NSW Hire-Purchase Act 1960 - ***Traders Finance Corp. Ltd. v Rourke (1960) 85 WN (Pt 1) (NSW) 739.***

[249] Under Section 14(2) of the Act, 'net balance due under the agreement' is defined as the balance originally payable under the agreement less any amounts (other than the deposit) paid by the Hirer; the rebate for the term charges fixed by the Act; and rebate for the insurance as stipulated by Section 2 of the Act in the event that the Hirer wish to terminate the said insurance. These rebates admit of precise arithmetical calculation in accordance with the provisions of Section 2 of the Act, in which 'terms charges'; 'insurance' and 'statutory rebate' are defined.

[250] **Given notice/Owner has served a notice.** For the modes of service or giving notice to a Owner or Hirer under the Act where no specific mode is prescribed, see Section 43 of the Act.

[251] **In writing** – this includes printing, lithography, typewriting, photography and any other mode of representing or reproducing words in a visible form - see the Interpretation Acts 1948 and 1967 (Act 388), Section 3. As the hire-purchase agreement is a prescribed document within Section 45(2) of the said Act, the additional requirements of Section 45 of the said Act would apply. See Section 4A of the said Act.

[252] The right is analogous to that conferred on mortgagors by Section 93 of the Australian Conveyancing Act, 1919-1964, whereby a mortgagor may discharge his liability at any time by paying the full amount of the principal and interest for the unexpired balance of the term of the mortgage.

[253] R. Else-Mitchell and R. W. Parsons, Hire-Purchase Law Being the Hire-Purchase Act, 1960-1965 (N.S.W.) Annotated and Explained, (4th Ed., 1968), The Law Book Company Limited [Australia], at pages 100-102.

[254] Section 34(a) of the Act.

[255] Section 14 of the principal Act was amended by Section 10 of the 1992 Act with effect from 1.4.1992 (vide PU(B) 219/92) as follows:- (i) for the word 'fourteen' in paragraph (b) of Subsection (3), the 'twenty-one' was substituted; (ii) for the full stop at the end of paragraph (b) of Subsection (3), a semicolon was substituted and immediately thereafter the word 'or' was inserted; and (iii) immediately after paragraph (h) of Subsection (3), the following new paragraph (c) was inserted.

to sell, dispose or part with possession of the goods until 21 days[256] after service of the Fourth Schedule notice. The Hirer must actually pay or tender before or during this period of 21 days. It is not enough that he has given notice of intention to do so.

3.3.2 Formalities and Procedure (Section 16 of the Act)

The Owner must, save in some specified circumstances[257], serve a Fourth Schedule Notice[258] on the Hirer before exercising any power to take possession given by the hire-purchase agreement for a breach relating to non-payment of instalments and must not take possession until the period fixed by the notice has expired. The period must be not less than 21 days.[259] Failure to give notice or repossessing before expiration of the period is not an offence.[260] However, failure to give a regulation 3 notice amounts to an offence.[261]

Where the requisite notice is not issued to the Hirer, the Owner will have no power of repossession of the vehicle hired and the seizure will be wrongful.[262] Any wrongful seizure will be a breach of the hire-purchase agreement. The provision as to service of the Fourth Schedule notice is an express provision of the law and is a necessary term of the hire-purchase agreement. In the event, of wrongful seizure, the Hirer is entitled to sue for damages for breach of contract under Section 74 of the Contracts Act 1950.[263]

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[256] **Within twenty-one days** - The general rule in cases where an Act is to be done within a specified time is that the day from which it runs is not to be included; see the Section 54(1)(a) of the Interpretation Acts 1948 and 1967 (Act 388) and 45 Halsbury's Laws (4th Edn) para 1134. For computation of time generally, see Section 54 of the Interpretation Acts 1948 and 1967 (Act 388).

[257] Section 16(2) of the Act.

[258] Section 16(1) of the Act.

[259] Section 16(1) of the Act.

[260] Contrast with the Australian position, where it is an offence under Sections 13(1); 13(2); and 50 of the Act - Else-Mitchell, R. and Parsons, R.W., Hire-Purchase Law : Being the Hire-Purchase Act, 1960-1965 : Annotated and Explained [1968] [4th Edition] Law Book Company [Australia], at page 110.

[261] Regulation 9 of the 1976 Regulations.

[262] ***Koh Siak Poo v Med-Bumikar Mara Sdn. Bhd. [1994] 3 MLJ 610.***

[263] ***Koh Siak Poo v. Med-Bumikar Mara Sdn. Bhd. [1994] 3 MLJ 610*** (HC: KC Vohrah J)]; as to the principles to be followed in assessing damages, reference was made to Section 74 of the Contracts Act 1950 and to the following cases; ***Teoh Kim Keong v. Tambun Mining Co. Ltd*** [1968] ***1 MLJ 39***; ***Hadley v. Baxendale (1854) 9 Ex 341; Victoria Laundry (Windsor) Ltd .v Newman Industries Ltd. (1949)1 All ER 997; Koufos v. Czarnikow (1967) 3 All ER 686*** and ***Aruna Mills v. Dhanrajmal Gobindram (1968) 1 All ER 113.***

If the date specified is less than the statutory minimum of twenty-one days, the notice would be bad in law and if the goods are repossessed, such repossession would be illegal.[264] It is opined that repossessing before the expiration of the period shall have the same effect.

The words "not less than"[265] indicate that the date of expiry of the Fourth Schedule notice under Section 16(1) of the Act must be 21 clear days from the day on which the notice is served.

As long as the requirements of the Fourth Schedule notice have been complied with, the Owner may repossess the goods. The Fourth Schedule notice served does not cease to be effective merely because repossession takes place at a much later time.[266]

When the Owner takes possession of goods that were comprised in a hire-purchase agreement the Owner must give the Hirer a document acknowledging receipt.[267] There appears to be no civil or criminal penalty for failure to give an acknowledgement.[268]

After taking possession of goods that were comprised in a hire purchase agreement the Owner must, within 21 days, serve a Fifth Schedule Notice[269] on the Hirer. Failure to serve the notice shall render the Owner's rights under the hire-purchase agreement to

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[264] ***Pang Brothers Motor Sdn. Bhd. v Lee Aik Seng [1978] 1 MLJ 179.***

[265] The words 'not less than, indicate that the date of expiry of the notice under Section 16(1) of the Act must be 21 clear days from the day on which the notice is served. There is, however, no time limit within which repossession by the Owner must take place once the date stated in the Section 16(1) notice has passed. As long as the requirements of Section 16(1) have been complied with, the Owner may repossess the goods. The notice served does not cease to be effective merely because repossession takes place at a much later time: ***United Manufacturers Sdn Bhd v Sulaiman bin Ahmad & Anor [1989] 1 MLJ 482*** (repossession took place two years after notice was served).

[266] ***United Manufacturers Sdn. Bhd. v Sulaiman Bin Ahmad & Anor [1989] 1 MLJ 482*** (where repossession took place two years after the notice was served).

[267] Section 16(4) of the Act.

[268] Contrast with the Australian position, where it is an offence under Sections 13(4); and 50 of the Act - Else-Mitchell, R. and Parsons, R.W., Hire-Purchase Law : Being the Hire-Purchase Act, 1960-1965 : Annotated and Explained [1968] [4th Edition] Law Book Company [Australia], at page 110.

[269] Section 16(3) of the Act.

cease and determine, though they may be revived.[270] The Act is silent on the criminal penalty.[271]

3.3.3 Hirer who returns goods not liable to pay costs (Section 16A of the Act)

Under Section 16A[272], a Hirer who returns the goods to the Owner within twenty-one (21) days of receiving the notice[273] in the form set out in the Fourth Schedule is not liable to pay the cost of repossession, the cost incidental to taking possession and the cost of storage.

The requirements provided under Sections 16(1) and 16(1A) of the Act can be likened to a 'toothless tiger' as the Act does not penalise (civil or criminal) the Owners for failing to comply with the above requirements. However, regulation 9 of the Regulations provided that in the event that the Owner failed to comply with regulation 3 of the Regulations, the Owner would have committed a crime. Unfortunately, no civil remedy is provided under the Regulations. Even though the Act and Regulations are silent on the civil remedies available to the Hirer, the courts have decided that the Hirers are entitled to damages if the Owners breached Section 16(1) of the Act.[274]

3.3.4 Owner to retain possession of goods repossessed for 21 days (Section 17 of the Act)

The Owner must not sell or dispose of the goods or part with possession, without the written consent of the Hirer, until the expiration 21 days from service of the Fifth

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[270] Section 16(6) of the Act.

[271] C.f the Australian position, where it is an offence under Sections 13(3); 13(5); and 50 of the Act - Else-Mitchell, R. and Parsons, R.W., Hire-Purchase Law : Being the Hire-Purchase Act, 1960-1965 : Annotated and Explained [1968] [4th Edition] Law Book Company [Australia], at page 110.

[272] A new provision inserted by Section 13 of the 1992 Act with effect from 1-4-1992 (vide PU(B) 219/92).

[273] **Notice** - This would be the notice within s 16 (1) of the said Act.

[274] ***Pang Brothers Motors Sdn. Bhd. v Lee Aik Seng [1978] 1 MLJ 179;*** and ***Koh Siak Poo v Med-Bumikar Mara Sdn. Bhd. [1994] 3 MLJ 610.***

Schedule Notice.[275] An Owner who sells or disposes of any goods or parts with possession of any goods in contravention of Section 17(1) of the Act shall be guilty of an offence.[276]

3.3.5 Reinstate the Agreement (Section 18(1)(a)(i) of the Act)

Under Section 18(1)(a)(i) of the Act[277], it is provided that within 21 days after the goods have been repossessed by the Owner, the Hirer can reinstate the hire-purchase agreement, if the Hirer so desires by sending a notice[278] in writing to the Owner requiring the Owner to redeliver to the Hirer, or to the Hirer's order[279], the goods that have been repossessed.

If the Hirer intends to regain possession of the hired goods, i.e, where the Hirer has sent a notice to the Owner (as abovementioned) to deliver the goods to him, the Hirer must pay or tender to the Owner any amount due under the hire-purchase agreement in respect of the period of hiring up to the date of payment or tender.

In addition, the Hirer is required to remedy any breach of the agreement, any pay or tender to the Owner the reasonable costs and expenses incurred in taking possession of the goods and redelivering them to the Hirer.[280] If the Hirer is able to do all that, the law then requires the Owner to 'forthwith return' the goods to the Hirer, and thereafter the relationship between the Hirer and the Owner shall be as if the breach had not occurred and the Owner had not repossessed the goods.

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[275] Section 17(1) of the Act.

[276] Similar to the Australian position, where it is an offence under Sections 13(3); 13(5); and 50 of the Act - Else-Mitchell, R. and Parsons, R.W., Hire-Purchase Law : Being the Hire-Purchase Act, 1960-1965 : Annotated and Explained [1968] [4th Edition] Law Book Company [Australia], at pages 110-111.

[277] Also, Section (a) of the Fifth Schedule.

[278] **Giving ... notice; serve or cause to be served** - For the modes of service or giving notice to an owner or Hirer under this Act where no specific mode is provided for, see Sections 43 *et seq*. **Extension of time** - A court of a Magistrate, however, has power under this Act to extend time for the service or giving of any notice or other document pursuant to s 41 of the Act.

[279] Subject to the compliance by the Hirer with the provisions of Section 19 of the Act.

[280] Section 19 of the Act.

Augustine Paul J held in ***Hong Leong Finance Bhd. v. Rajandram [1998] 7 MLJ 409*** (hereinafter referred to as the "***Rajandram's case***") that it is incorrect to claim that Section 18(1)(a) of the Act is only directory and that non compliance with those provisions will not be fatal.[281] In resolving this issue the use of the word "may" in Section 18 of the Act is important. The word may appear to suggest that the provision is directory.

However, the use of the word "may" in a statute is not decisive and other relevant provisions which can throw light on its interpretation have to be looked into in order to find out whether the character of the provision is mandatory or directory.[282]

It was held in ***Rajandram's case*** that no notice in writing as required by Section 18(1)(a) of the Act was given when the motor car was re-delivered to the first defendant. Thus the right conferred by Section 19(1) of the Act does not accrue with the result that the first defendant did not hold the motor car pursuant to the terms of the agreement as if the breach had not occurred and the appellant had not taken possession thereof. The liability of the guarantor/respondent was therefore discharged when the motor car was redelivered to the Hirer/first defendant.

Rajandram's case further held that the need to give the notice in writing depends on the intention of the parties once the goods hired have been repossessed. The Hirer need not give the notice if the Hirer does not wish to proceed under Sections 18(1)(a)(i) or (ii) of the Act. That is obvious as in such circumstances there will be no purpose in

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[281] Augustine Paul, J distinguished the case of ***Harris & Anor. v. Lombard New Zealand Ltd. & Anor. (1974) 2 NZLR 161*** as it was not concerned with the issue involved in this case.

[282] In ***Rajandram's*** case, Augustine Paul J also dealt with the interpretation of Section 18 of the Act, reference was made to the following cases, ***Hukam Singh v. State of Punjab (1976) Cr LT (FB); State of Punjab v. Kartar Singh Grewal (1977) 79 Punj LR 311; Uttar Pradesh v. Yogendra Singh (1964) 2 SCR 197; Kekatong Sdn. Bhd. v. Bank Bumiputera (M) Bhd. (1998) 2 MLJ 440; Nichol v. Thompson (1976) 12 ALR 528***.

giving the notice as the Owner may proceed to sell or dispose of the goods 21 days after service of the Fifth Schedule Notice as provided by Section 17(1) of the Act.

Where the Hirer wishes to compel the Owner to act under Sections 18(1)(a)(i) and (ii) of the Act and/or if it is intended to treat the hire-purchase agreement as continuing pursuant to Section 19(1) of the Act then the notice in writing as required by Section 18(1)(a) of the Act must be given. This construction flows from reading Section 18(1)(a) of the Act with Section 19(1) of the Act both of which are inter-dependent. Section 19(1) of the Act provides a time period of 21 days after giving the notice in writing prescribed by Section 18(1)(a) of the Act during which the Hirer may redeem the goods. It is superfluous to state that this time period cannot begin to run unless the notice specified in Section 18(1)(a) of the Act has been given.

Thus the giving of the notice in writing is a condition precedent for the activation of Section 19(1) of the Act. Section 19(1) of the Act cannot therefore function without the aid of Section 18(1)(a) of the Act. If the Section is not activated any right conferred by it cannot accrue. It is also a rule of construction that conditions attached to a statutory right or benefit, which did not exist at common law as in this case, are mandatory.

The notice under Section 18(1)(a) of the Act must be given if it is desired to have the hire-purchase agreement treated as continuing as if the breach had not occurred and the Owner had not taken possession thereof as provided by Section 19(1) of the Act. To that extent the requirement to give the notice in writing is mandatory in order to secure the right conferred by Section 19(1) of the Act. The need to give the notice in writing is therefore part directory and part mandatory.

In that event, the Owner is not concerned with the period specified in Section 18(1)(a) of the Act as Section 17(1) of the Act says that this period is to be taken into account only if notice under Section 18(1)(a) [of the Act (Fifth Schedule notice)] has been given.

The notice is also not required if the Owner and the Hirer act under Sections 18(1)(a)(i) and (ii) of the Act through a private arrangement resulting in the Owner renouncing certain benefits in the Owner's favour. To that extent the obligation to give the notice in writing is directory. Any private arrangement would mean that the parties have contracted out of a statutory provision and that is permissible. Compliance with the relevant provisions of the Act will ensure continuance of the hire-purchase agreement to the benefit of the Owner as the liability of the Guarantor will continue.

Sections 18(1)(a) and 19 of the Act are analogous to Sections 15(1)(a) and Section 16 of the NSW Act[283], in that they enable the Hirer to obtain relief against forfeiture on remedying his default. The breach or breaches complained of should be specified with particularity so that the Hirer may know what he is required to do, though it is not necessary to tell him how to do it[284] Nor is it sufficient if the notice merely specifies the condition or clause of the agreement of which a breach is alleged to have been committed[285] It was submitted by Else-Mitchell that the effect of requiring the Owner to state the breaches alters the general law by restricting him to the breaches alleged.[286]

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[283] Which in turn are analogous to the Section 129 of the Conveyancing Act, 1919-1964 of Australia.
[284] ***Fox v. Jolly [1916] 1 A.C. 1.***
[285] cf. ***Gerraty v. McGavin (1914) 18 C.L.R. 152; Dogan v. Morton (1935) 35 S.R. (N.S.W.) 142; 52 W.N. (N.S.W.) 28.***
[286] Else-Mitchell, R. and Parsons, R.W., Hire-Purchase Law : Being the Hire-Purchase Act, 1960-1965 : Annotated and Explained [1968] [4th Edition] Law Book Company [Australia], at page 113. Also, ***Shepherd v. Felt & Textiles of Aust. Ltd. (1931) 45 C.L.R. 359*** at 377-8.

3.3.6 Recommend Buyer (Section 18(1)(a)(ii) of the Act)

Under Section 18(1) (a) of the Act[287], it is provided that within 21 days after the goods have been repossessed by the Owner, the Hirer can reinstate the hire-purchase agreement, if the Hirer so desires by sending a notice in writing to the Owner requiring the Owner to sell the goods to any person[288] introduced by the Hirer who is prepared to buy the goods for cash at a price not less than the estimated value of the goods as set out in the notice under the Fifth Schedule.[289]

3.3.7 Refund (Section 18(1)(b) of the Act)

Alternatively, under Section 18(1) (b) of the Act,[290] the Hirer may opt for early completion[291] and claim a refund from the Owner, in the event that the value of the goods exceeds the net amount payable.

For the purpose of Section 18 of the Act, the expression "value of the goods" means "the best price that could be reasonably obtained by the Owner" at the time of taking possession of the goods, or if the Hirer had introduced a person who has bought the goods for cash or other consideration, the amount paid by that person, less such reasonable costs incurred by the Owner in taking possession of the goods; costs of storage, repair or maintenance; and reasonable expenses incurred in selling the goods.

The expression "net amount payable" means the "total amount payable less the statutory rebates[292] for terms charges and insurance".[293] The time limit for the Hirer to exercise this right to early completion is 21 days as provided by the Act.

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[287] Also, Section (a) of the Fifth Schedule.
[288] **Person** – Unless the context otherwise requires, this includes a body of persons, corporate or incorporate. See Interpretation Acts 1948 & 1967 (Act 388), Section 3.
[289] Please see Clause 3.3.4 for further discussion.
[290] Also, Section (b) of the Fifth Schedule.
[291] Section 14(3)(b) of the Act.

There is nothing at this stage to prevent the Owner putting less than a market value on the goods. The Hirer is, however, given some protection against undervalue by the provisions of Section 18(1)(a)(ii) and Section 18(2)(b) of the Act. The Hirer may require the Owner to sell the goods to any person introduced by the Hirer who is prepared to buy the goods at the value put upon them by the Owner in his Fifth Schedule Notice. That value is the basis of the calculations which Section 18(1)(b) and (c) of the Act prescribes for the purpose of ascertaining on repossession the refund payable to the Hirer or the amount recoverable by the Owner.

If the Owner undervalues he runs the risk that the Hirer will introduce a purchaser and the Owner will thus lose some of the value of his security. In truth the Owner is posed with a dilemma. If the Owner puts a substantial value on the goods in order to discourage an introduction, the Owner will find it difficult to prove some less value when the Owner seeks later to recover from the Hirer or if the Hirer asserts his statutory right to recover the value of his equity under Section 18(1)(b) of the Act. However, in ***Custom Credit Corporation Ltd. v. Van Delft [1965] W.A.R. 237***, the Supreme Court of Western Australia held that there will be no estoppel which will prevent the Owner establishing some less value.

3.3.8 Notice of Auction (Section 18(4)(a) of the Act)

Under Section 18(4), a new provision inserted by Act A813 and replacing the earlier provision, where the Owner intends to sell the goods by public auction, the Owner must

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[292] **Statutory rebates for terms charges and insurance** - See Sections 2, 4C (1)(c)(vii) of the Act.
[293] Section 18(3) of the Act.

serve on the Hirer a copy of the notice of such public auction not less than 14 days[294] from the date the said auction is to be held.

3.3.9 Acceptance of Option (Section 18(4)(b) of the Act)

If the Owner intends to sell the goods otherwise than by public auction, the Owner must give the Hirer an option to purchase the goods at the price which he intends to sell if the price is less than the Owner's estimate of the value of the goods repossessed as shown in the Fifth Schedule. If the Owner fails to comply with this requirement, the Owner shall be guilty of an offence.

3.3.10 Power of Hirer to regain possession of goods in certain circumstances (Section 19 of the Act)

On repossession, if within 21 days of the service of the Fifth Schedule Notice giving notice in writing to the Owner requiring the Owner to redeliver,[295] the Hirer pays or tenders to the Owner any amount due under the agreement[296]; or remedies any breach of the agreement or pays or tenders to the Owner the reasonable and actual costs and expenses necessary to remedy the breach;[297] or pays or tenders to the Owner the reasonable costs and expenses incidental to the repossession and redelivery,[298] the Owner shall forthwith return the goods to the Hirer as if the breach had not occurred and the Owner had not repossessed the goods.

Where the goods are returned to the Hirer pursuant to Section 19(1) of the Act and any breach has not been remedied, the Owner has no right to repossess unless the Owner

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[294] **Not less than fourteen days** - The words 'not less than' indicate that this number of clear days must intervene between the day on which the copy of the notice is served and the day the auction is held; see 45 Halsbury's Laws (4th Edn.), para 1134.
[295] Section 18(1)(a)(i) of the Act.
[296] Section 19(1)(a) of the Act.
[297] Section 19(1)(b) of the Act.
[298] Section 19(1)(c) of the Act.

specifies the breach and requires it to be remedied in a notice in writing to the Hirer;[299] and the Hirer fails to remedy the breach after receiving the notice.[300]

3.3.11 Avoidance of certain provisions (Section 34 of the Act)

It will now, however, be important in drafting the terms of the repossession clause to ensure that it does not provide for repossession in the circumstances specified in Section 34(f) of the Act (relating to the bankruptcy of the Hirer or execution of a deed of assignment), or in a manner involving entry on premises without permission given on the occasion of the entry (Section 34(e) of the Act). If an agreement purports to avoid the above provisions then it shall be void and of no effect.[301]

Section 34(e) of the Act affect the terms of the hire-purchase agreement. It would seem to follow that the repossession is not wrongful so as to expose the Owner to actions by the Hirer in trespass and conversion or so as to preclude him pursuing any remedies given by the hire-purchase agreement attendant upon repossession.[302] It may, however, be wrongful to the extent that the Hirer has an action for breach of statutory duty.[303]

A clause may be void under Section 34(f) of the Act notwithstanding that none of the events (bankruptcy, act of bankruptcy, execution of deed of assignment or deed of arrangement) is named in the clause, provided that the clause would justify repossession in any of those events. It would seem to follow that a clause which gives the Owner discretion to repossess is void. A clause which provides for repossession where the Hirer does anything "whereby the Owner's rights may be prejudiced" is open

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[299] Section 19(2)(a) of the Act.
[300] Section 19(2)(b) of the Act.
[301] Contrast with the Australian position, where if it does, it will, to this extent, be void and the Owner will be guilty of an offence (Section 36(2) of the NSW Act).
[302] *cf. Hemmings v. Stoke Poges Golf Club [1920] 1 K.B. 720.*
[303] *Bowmaker Ltd. v. Tabor [1941] 2 K.B. 1*; cf. Goode and Ziegel, Hire-Purchase and Conditional Sale (1965), page 133.

to question. The repossession clause should not purport to empower the Owner to repossess for non-payment of instalments save subject to the conditions as to notice imposed by Section 16(1) of the Act. If it does, it may be void under Section 34(g) of the Act. Where that part of the repossession clause which is made void by Section 34 of the Act cannot be severed the whole clause will fail.

3.4 EXTENSION OF TIME

The Act prescribed time limits[304] for the service or giving of any notice[305] or other document or for the commencement of proceedings, for e.g., the service of the Fifth Schedule by the Owner and the exercise of certain rights by the Hirer after repossession by the Owner.

There is also a time limit fixed by the Act for the Hirer to dispute the amounts or figures stated in the Fifth Schedule. The Hirer will not be able to recover anything from the Owner unless the Hirer acts fast, as required under Section 18(5) of the Act. The Hirer must, within 21 days of receiving the notice under the Fifth Schedule, give to the Owner a notice in writing, setting out the amount which the Hirer claimed under this Section. The notice can either be signed[306] by the Hirer himself or by his solicitor or agent.

After sending the notice to the Owner, the Hirer must then commence action in court not later than three months after the notice had been sent to the Owner. At any time before proceedings against him have been commenced by the Hirer, the Owner can make an offer in writing to the Hirer any amount in satisfaction of the Hirer's claim. If

[304] See inter alia, Sections 5(1), (2), (3), 9(1), 16(3), 18(1), (4), (5)(a), (5)(b) of the Act. See also ***Khoo Thau Sui v United Engineers (Malaysia) Sdn Bhd [1977] 2 MLJ 204.***

[305] Certain sections in this Act prescribe particular modes of service or giving of notice (as in Sections 4(2) and 16(4) of the Act).

[306] **Signed** – 'Sign' includes the making of a mark or affixing of a thumb print. See Section 3 of the Interpretation Acts 1948 & 1967 (Act 388).

this offer is accepted by the Owner, the dispute ends there; but if the offer is rejected by the Hirer, the Owner is entitled to pay the amount into court.

The above time limits can be extended. Section 41 of the Act stipulated that an application[307] may be made to the Magistrate, either before or after the expiration of the time limits, to extend the said time limits and it is entirely at the discretion of the relevant Magistrate whether or not to grant such extension.

3.5 SPECIAL PROVISIONS FAVOURING THE OWNER

3.5.1 Section 37 of the Act (Hirer Required to State where goods are)

Under Section 37(1) of the Act, the Owner may, at any time by notice in writing served on the Hirer, require the Hirer to state in writing where the goods are or if the goods are not in the Hirer's possession, to whom the Hirer delivered the goods to or circumstances in which the goods are lost. The Section stipulated that the Hirer shall be guilty of an offence under the Act if the Hirer does not give the Owner such a statement within 14 days after the receipt of the Owner's notice or who gives a statement containing any information that is to the knowledge[308] of the Hirer false.[309]

The Hirer shall inform the Owner in writing or state in the presence of the Owner if the Hirer removes the goods from the address specified[310] in the hire-purchase agreement; or the goods are lost or are taken out of the Hirer's possession.[311] Any Hirer who does not within 14 days of the removal or loss comply with the provisions of this subsection shall be guilty of an offence under this Act.

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[307] Application must be made by way of originating application in Form 137 (Subordinate Court Rules 1980); Subordinate Court Rules 1980 Order 46 rule 2.

[308] **Knowledge** - Section 26 of the Act.

[309] **False**. A statement may be false on account of what it omits even though it is literally true; see ***R v Lord Kylsant [1931] All ER Rep 179*** and ***R v Bishirgian [1936] 1 All ER 586; c.f Curtis v Chemical Cleaning and Dyeing Co. Ltd. [1951] 1 All ER 631***. Whether or not gain or advantage accrues from the false statement is irrelevant; see ***Jones v Meatyard [1939] 1 All ER 140; Stevens & Steeds Ltd. And Evans v King [1943] 1 All ER 314; Clear v Smith [1981] 1 WLR 399.***

[310] The address is required to be specified in the hire-purchase agreement; see Section 4C(1(a)(vi) of the Act.

[311] Section 37(2) of the Act.

3.5.2 Section 38 of the Act (Fraudulent Sale or Disposal of goods)

Tan Ah Cheow v. Public Prosecutor (1952) MLJ 79, a case decided prior to the date of coming into force of the Act, a Hirer of a bicycle under an agreement pledged it with a pawn broker. The Hirer who was charged with the offence of criminal breach of trust was acquitted by the Magistrate. The Magistrate also ordered the bicycle to be restored to the pawn broker. On revision, the cycle was ordered to be restored to the true owner that is the Hirer.

Eu Tong Sen Finance Ltd. v. Public Prosecutor [1965] 2 MLJ 29 is a case where the vehicle was used for committing an offence was ordered to be restored to the Owner.

In ***Public Prosecutor v. Ong Keng Seong [1967] 1 MLJ 40***, a motor vehicle which was used as a public service vehicle with the knowledge of the Owner. In such cases, where the vehicle is forfeited, the Owner will not be entitled to be heard.

Section 38 of the Act prescribed a heavy criminal penalty on the Hirer or anyone else who, by the disposal or sale of any goods comprised in a hire-purchase agreement, or by the removal of the goods, or by any other means, defrauds[312] or attempt[313] to defraud the Owner. The wrongdoer shall be guilty of an offence under the Act and shall, on conviction, be liable[314] to a fine[315] not exceeding Ringgit Malaysia Ten Thousand

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[312] Contrast with the definition of 'fraudulently' in the Penal Code (Act 574) Section 25 and judicial comments on the definition in ***Seet Soon Guan v Public Prosecutor [1955] MLJ 223***. See also ***Loo Wee Wan v Regina [1955] MLJ 73***; ***Mohamed Taiyob v Public Prosecutor [1947] MLJ 101*** and ***Public Prosecutor v Li Chuan Pin [1965] MLJ 133.***

[313] See ***Munah bte Ali v Public Prosecutor [1958] MLJ 159; Thiangiah & Anor. v Public Prosecutor [1977] MLJ 79*** and ***Tan Weng Kang v Public Prosecutor [1962] MLJ 47.*** See also ***R v Laitwood (1910) 2 Cr App Rep 248; R v Miskell [1954] 1 All ER 137.***

It is however, difficult to determine what acts are sufficient to constitute an attempt; see ***Abhayanand Mishra v State of Bihar AIR (1961) SC 1698; Harishchandra Narayah Kardape v State of Maharashtra (1983) 2 Crimes 98; State of Maharashtra v Mohd Yakub (1980 SCC (Cri) 513; Arjan Singh v Public Prosecutor [1948] MLJ 73; Public Prosecutor v Kee Ah Bah [1979] 1 MLJ 26.***

See also Penal Code (Act 574) Section 511 – "...in such attempt does not any act towards the commission of such offence..."

[314] Where the person committing the offence is a body corporate or an agent or servant. See Sections 46-48 of the Act. For matters relating to enforcement, please see Part VIII of the Act.

[315] See also the Criminal Procedure Code (Act 593) Section 283 for the power of the court to make additional orders upon passing the sentence of a fine.

(RM10,000-00) only or to imprisonment for a term not exceeding three years or to both.

3.5.3 Section 42 of the Act (The Power of Court to Order Delivery of Goods Unlawfully Detained)

Section 42 of the Act also gives power to the Magistrate to order the delivery of goods unlawfully detained by the Hirer or any other persons. This power is essential in the following three situations :-

(i) where the Owner fails to repossess the goods because the Owner could not locate the whereabouts of the goods;

(ii) where the Owner fails to enter the Hirer's premises to repossess;

(iii) where the goods are in the possession of a third party who refuse to deliver possession of the goods to the Owner.

In ***Arab-Malaysian Finance Bhd v Hasliza bte Hasan [2001] 3 MLJ 52*** (HC), the court in allowing the appeal, distinguished the case of ***Arab Malaysian Finance Bhd v Suhaimi bin AW Mohamed [2001] 1 MLJ 149*** with the present case. The latter held that the summons was rightly struck out as the statement of claim did not contain statements relating to whether the vehicle in question had been repossessed or not, including the date of repossession. The issue if actual repossession of the vehicle was not the judge's reason for upholding the striking out of the summons. The observations on repossession made by the judge were merely obiter. Whether the vehicle was actually repossessed or not, the fact must be so stated in the statement of claim.

In the present case, all the relevant particulars as laid down in ***Suhaimi's case*** had been

fulfilled and sufficiently pleaded in the statement of claim. The repossession of the hired vehicle was not *sine quo non* (without which not) for the Plaintiff/Owner to file his suit against the Defendant/Hirer to recover moneys due under the hire purchase agreement. The Plaintiff/Owner had also clearly pleaded that they had attempted to repossess the hired vehicle but the vehicle could not be found and as such repossession was genuinely not possible. Section 42 of the Act was not applicable to the Plaintiff/Owner as the Plaintiff/Owner had no information that the hired vehicle was still 'in the possession of the Hirer' or any other identified person.

Section 42(2) of the Act stipulated that any person who neglects or refuses to comply with any order made under Section 42 of the Act shall be guilty of an offence under the Act. This is the criminal remedy for the Owner.

Under the NSW Act, it has been held that there can be no refusal or failure to deliver up possession of the goods by a person who did not have possession of them and so was physically incapable of handing them over and a person also could not be said to be detaining goods without just cause if he does not have possession of those goods.[316] In such a situation, Section 37(2) of the Act is applicable.

3.5.4 Section 33(5) of the Act (The Power of Court to Reopen Transactions)

Under Section 33(5) of the Act, a Hirer under a hire-purchase agreement is not entitled to institute proceedings under Section 33 of the Act in a case where the Owner has taken possession of the goods after the expiration of a period of 4 months after the date on which the Owner serves on the Hirer the Fifth Schedule notice under Section 16(3)

[316] ***Goodwin v Bousfield [1977] 2 NSWLR 733.***

of the Act; or in any other case, after the expiration of a period of 4 months from the time when the transaction is closed.

Section 33 of the Act is a provision whereby the court has the power to reopen certain harsh and unconscionable hire-purchase transactions or where it will be just for the court to give relief, at the behest of the Hirer.

3.5.5 Section 55A of the Act (Court May Order Disposal of Goods)

Section 55A of the Act provides that at the conclusion of the trial, regardless whether the person is convicted or not, order that any goods or documents seized from that person be delivered to the rightful owner.

3.6 AMENDMENTS BY THE 1992 ACT

One of the specific problems arising from the old provisions was that of a Hirer who died during the continuance of the agreement. A situation could arise where the Owner could not repossess the goods without first obtaining Letters of Administration (which was often a protracted process) nor would he be receiving payments if the beneficiaries of the Hirer failed to continue paying the instalments. The new provision (Section 16(1A)) allows for the Owner to repossess the goods where there are four successive defaults in payment. This was thought to be sufficient time for the beneficiaries to decide to continue with or terminate the hiring.

The Hire Purchase Act 2005 does not warrant any discussion as the 2005 Act did not touch on repossession.

A new Section 16A was enacted to protect the Hirer from the costs of repossession and storage if he returned the goods within 21 days of the Owner serving notice of intention to repossess on him.

Section 18 (4) was inserted to prevent the case where the Hirer would not have an opportunity to repurchase the repossessed goods. In a sale other than by public auction the Owner is required to give the Hirer an option to purchase the goods before a sale to another party can be made. This is to prevent a sale by the Owner at an undervalue to connected parties to the prejudice of the Hirer.

Section 2(1)(a) of the Hire-Purchase (Amendment) Act 1992 (Act A813) and brought into force with effect from 1-4-1992 vide PU(B) 219/92. With the definition of 'consumer goods' being given a very wide content, the Act now covers a large variety of goods. The Act does not prohibit hire-purchase transactions in respect of goods other than those covered by the First Schedule of the Act thereto. The only limitation is that the provisions of the Act cannot be invoked to enforce the statutory rights and protection if the goods are not covered by the First Schedule. Even a bicycle could have been the subject matter of a hire-purchase agreement prior to the coming into force of the Act.[317] It may now come within the provisions of the Act, in view of the wide definition of the words 'consumer goods'.

This definition appears to have caused a shift in the scope of the Act. Before the amendments to the First Schedule, there was no distinction made between the status of the Hirer as a consumer (in the sense of the present definition) and as a 'business' Hirer. Business firms often take goods on hire-purchase for 'personal' use (for e.g., a

[317] ***Tan Ah Cheow v Public Prosecutor (1952) MLJ 79*** – a case decided prior to the date of coming into force of the Act.

firm taking a refrigerator on hire-purchase to be used by the staff in the office pantry). Under the old First Schedule such Hirers would be protected. Arguably, with the new definition of 'consumer goods', such Hirers would now fall outside the Act, unless 'personal' purposes is to be interpreted to include 'personal' use in a business environment.

3.7 CONCLUSION

The writer is of the opinion that the rights after repossession available to the Hirer far outweighs the protection accorded to the Owner by the Act, as shown above. This is due to the fact that the Act seeks to eradicate the draconian nature of the Common Law position on repossession. However, it is opined that the drafters have been too liberal in according protection to the Hirers that the Owners are short changed. The fact that the Owners have deep pockets does not mean that they be accorded minimal protection. Nowadays, the so-called 'victims', that is, the Hirers abuse the protection accorded to them on grounds of technicalities. For example, the restrictions as enumerated and elaborated Section 3.3 above.

It is therefore prudent to reinvent the Act in order to strike a balance by amending the Act to allow the courts to intervene in repossession matters.

Section 42 of the Act is still underused and should be amended to encompass more than the three situations where the court can intervene, as shown above. Else-Mitchell was of the opinion that Section 42 of the Act opens the door of Common Law rights of

repossession[318] to the Owner. It is submitted that Section 42 of the Act should be amended to reflect Else-Mitchell's contention.

Section 16(7) of the Act should be amended to clarify the regulations that can be deemed related to repossession. The effect of such vagueness is that the Owner shall be deemed to have committed a crime[319] if any of the regulations are breached, as it is not clear as to which regulations are related.

Sections 18 and 19 of the Act was meant to create a situation whereby the Owner is compelled to redeliver the goods to the Hirer, if the Hirer gave the Section 18 notice to the Owner of the Hirer's intention to recover the goods and satisfied the conditions in Section 19 of the Act.

However, this can lead to abuse as in the ***Rajandram's case*** where the failure of the Hirer to issue the Section 18 notice caused the agreement to be not valid as against the Hirer and guarantor. This is so despite the fact that the Hirer has earlier paid up the arrears and accepted the goods back. Section 18 of the Act should be amended that when the ***Rajandram's case*** situation arises, the need for Section 18 notice shall be dispensed with if the Owner redelivers the goods to the Hirer and the Hirer accepted the goods.

[318] Please refer to Chapter 2 for the discussion on Money Claims under the Common Law, which is much wider.
[319] Regulation 9 of the Regulations.

CHAPTER 4

OTHER REMEDIES AVAILABLE TO THE OWNERS

4.1 PREFACE

We shall now consider the other remedies available to the Owner upon determination[320] of the hire-purchase agreement, in Common Law and under the Act. This chapter shall only deal with those remedies other than repossession (Chapter 2) and money claims (Chapter 5)

4.2 POSITION UNDER THE COMMON LAW

In this section, we shall consider the remedies available at Common Law to the Owner outside the Act in the event of a breach by the Hirer of his obligations, whether the obligations arise under the agreement itself as express or implied terms or from some facts outside the agreement, such as a representation not forming the term of the contract.

If an agreement is not subject to the Act and contains an express undertaking to redeliver the goods in the event of determination, the Owner could sue for damages for breach of contract without any demand for their return. Even though the Owner has resumed possession of the goods, the Owner can still sue for arrears of rent, which had accrued under the terms of the agreement.[321] Conversely, if the Owner has recovered judgment for arrears of rent due, the Owner is still able to bring an action for possession of the goods.[322]

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[320] Please refer to Chapter 1 on termination of the agreement.
[321] ***Brooks v. Beirnstein, [1909] 1 K.B. 98.***
[322] ***South Bedfordshire Electrical Finance Co. Ltd. v. Bryant, [1938] 3 All E.R. 580, C.A.***

Upon determination of the agreement, the hire rent ceases to accrue and the Owner should therefore proceed to enforce the Owner's rights forthwith. The Owner can either seize the goods or bring an action against the Hirer, and in certain cases against the Guarantor or a third party. The Owner may be entitled to pursue both remedies of repossession and money claims.

The rights of the Owner will in practice be governed by the terms of the agreement. The most common form of breach is default by the Hirer in making payments. The Owner is at liberty to sue for arrears of instalments without determining the agreement. If the Owner, in the event of a breach, determines the hiring under an express clause in the agreement, the Owner will be entitled at Common Law to resume possession of the goods. If the Hirer repudiates the agreement by dealing with the goods in a way which is entirely inconsistent with the nature of the transaction, the Owner may accept such repudiation and at Common Law the Owner is entitled to resume possession of the goods. The Owner is in both cases entitled to recover any sums due under the agreement such as arrears of instalments. Under the Common Law, the hire-purchase terms are in accordance with the agreement between the Hirer and the Owner. If the Act does not apply, then the transaction shall be governed by the hire-purchase law at Common Law of England.[323] The Owner's rights in Common Law to repossess and money claims are discussed extensively in Chapter 2 and Chapter 5, respectively.

4.2.1 Types of Remedies Under the Common Law

We shall discuss in this chapter the Owner's other remedies in Common Law, besides Repossession and Money Claims.

[323] P. Balan, "The Hire-Purchase Order" [1980] JCML 277-283.

4.2.1.1 Retention of Monies Paid

The agreement may provide that upon a breach by the Hirer the Owner shall be entitled to retain all payments made by the Hirer under the agreement. This is ordinarily a reasonable provision, since the Hirer has had use of the goods during the period of which the Hirer has been paying hire-rent.

However, in some cases it may bear harshly on the Hirer, particularly where the Hirer has made a large initial payment and the agreement is terminated by the Owner for some comparatively minor breach. The question whether in these circumstances the Hirer is entitled to recover any part of the payments the Hirer has made despite the provision in question is a matter of some difficulty.

The provision cannot properly be regarded as a penalty clause since it is not the Owner who is seeking to enforce payment of a prescribed sum but the Hirer who is endeavouring to recover a payment already made. It is possible, however, that the court has power in equity to order the Owner to return part of the payments made by the Hirer if the circumstances are such that it would be unconscionable to allow the Owner to retain the payments in full.

In ***Stockloser v Johnson***[324] a case on a repudiated contract of sale, Somervell, L.J. and Denning L.J. were firmly of the opinion the court possessed this power. On the other hand, Romer L.J. felt equally clear that since the parties had made their own bargain and no question of a penalty in the proper sense of the term arose the court could not interfere. In the case itself it was held as a matter of fact that there was nothing unconscionable in the [Owner] retaining the payments made to [the Owner], so that the

[324] *[1954] 1 All ER 630.*

point did not have to be decided. In view of the divergence of opinion among the members of the Court of Appeal in their obiter dicta the matter cannot be regarded as settled.

4.2.1.2 Recaption/Repossession

Where the Owner has become entitled to resume possession and the agreement is outside the Act, the Owner may enforce his right to possession by physical seizure of the goods from the Hirer, as discussed in Chapter 2.

4.2.1.3 Action in Detinue or Conversion

Where the Owner sues in detinue, judgment is for the return of the goods or their value,[325] and damages for the detention. The damages awarded are such as will compensate the Owner for all loss he has suffered as a direct consequence of the loss of use of the goods during the period of detention.[326] This is discussed in detail in Chapters 2 and 5.

4.2.1.4 Action for hire-rent accrued and due

The date when hire-rent accrues due is normally regulated by the express provisions of the agreement. Where the agreement is outside the Act and the Hirer wrongfully returns the goods before the expiration of the period of hire, the Hirer remains liable to pay the rent for the entire hire period,[327] as shall be discussed in Chapter 5.

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[325] ***Rosenthal v Alderton & Sons Ltd [1946] 1 All ER 583*** – normally the value at the date of judgment. ***Munro v Willmott [1948] 2 All ER 983*** – where the Hirer has increased the value of the goods by his own labour and expenditure, he is entitled to be credited with the increase.

[326] ***Strathfillan (Owners) v Ikala (Owners), the Ikala [1929] A.C. 196***
Liesbosch, Dredger v S.S. Edison [1933] A.C. 449.

[327] ***Wright v. Melville (1828), 3 C. & P. 542.***

4.2.1.5 Action on minimum payment or depreciation clause

The enforcement of clauses of this nature and the vexed question of penalties in the law of contract generally and in hire-purchase law in particular; the remedies for action in conversion; action for hire-rent due; and action on minimum payment or depreciation clause shall be discussed at length in Chapter 5.

4.2.1.6 Replevin

This remedy is only available in case of illegal distress. This remedy is available only to a party from whose possession goods are removed in circumstances amounting to a trespass.[328] Ordinarily, this remedy is not open to the Owner against the Hirer. This is due to the fact that the Hirer's original possession is lawful and in general, any retention of the goods by the Hirer after the termination of the agreement amounts to at most a detention, not to trespass. However, replevin would be available to the Owner where the Hirer repossesses the goods which were lawfully seized by the Owner, without the Owner's consent.

It is a somewhat complicated matter and it is not often resorted to if there is another and simpler remedy. However, it may be of use where it is desired to secure the preservation of the goods themselves and the time available is short. In substance, it consists of an order of the court to deliver up the goods forthwith to the Owner/claimant, he having given security. Then at a later date the right to the goods is tried.

The power of approving replevin bonds and of granting replevins lies exclusively with the registrar of the county court whatever the value of the goods. The Owner/claimant,

[328] *Mennie v Blake (1856) 6 E. & B. 842.*

known as the replevisor, must commence his action of replevin promptly and prosecute it with effect and without delay.[329] For details of this procedure reference should be made to the standard works.[330]

4.2.1.7 Specific Performance

This remedy is rarely granted, since in the ordinary way the Owner has an adequate remedy in damages. Moreover, if the Hirer refuses to accept delivery of the goods the court will not allow the Owner to recover the instalments of hire-rent which would have accrued due if delivery had been accepted, for this would be an indirect way of ordering specific performance of the agreement.[331] The Owner's remedy in such a case is to sue for damages for breach of contract.

4.2.1.8 Injunction

This is also an unlikely choice. The principles applicable to the granting of an injunction to the Owner under a hire-purchase agreement are similar to those which operate where an injunction is claimed by the Hirer.

Further, a distress may be restrained on the ground that it is prima facie wrongful, but it is a remedy rarely sought and rarely given. The plaintiff would almost certainly have to bring the money in dispute into court.[332]

[329] Sections 104, 105 and 106 of the County Courts Act 1959.
[330] For e.g., Bullen on Distress; Hill & Redman, 12th Edn., Foa, 8th Edn.
[331] ***National Cash Register Co. v Stanley [1921] 3 K.B. 292.***
[332] ***Shaw v Jersey (Earl) (1879) 4 C.P.D. 359.***

4.2.1.9 Double Value

The action for double value is given by Section 4 of the Distress for Rent Act 1689 (hereinafter referred to as "the UK DRA"). It can only be brought by the Owner of the goods and can be resorted to in cases where no rent was in fact due and the goods have been sold. Party and party costs may also be recovered.

4.3 THE POSITION UNDER THE ACT

The provisions of the Act are in general designed for the benefit and protection of the Hirer, and apart from the additional rights and/or protections given to the Owner under Sections 14; 33(5); 37; 38; 42; and 55A of the Act, such provisions as relate to the Owner's remedies are restrictive of the Owner's rights and do not confer upon the Owner any advantages additional to which the Owner enjoys at Common Law. The writer shall endeavour to extract as much of the Owner's rights as the writer can from the Act. If the writer's endeavour seems futile, it is due to the fact that the Act is biased towards the Hirer.

The Owner's right to rescission and restitution for misrepresentation, where available,[333] remains unaffected by the Act. Similarly, the Owner's contractual and Common Law rights of repudiation[334] are not in any way restricted by the Act. The Owner remains free to terminate the agreement for breach of condition or in accordance with express powers of termination conferred by the agreement. In just the same way as if the agreement is outside the Act. However, the enforcement of the rights vested in the Owner consequent upon the repudiation is in certain circumstances restricted.

[333] See Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], at page 146.
[334] Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], at page 146.

In particular, restrictions are imposed by the following :-

(i) General Restrictions - Sections 4(4); 4A(2); 4B(3); 4C(2); 4D(2); 5(1A); and 9(2)(a) of the Act on the enforcement of any rights against the Hirer, where the Owner is in default under Sections 4(1); 4A(1); 4B(1) & (2); 4C(1); 4D(1); 5(1); and 9(1) of the Act.; and

(ii) Restrictions on Money Claims - Sections 14 and 34 of the Act on the amount recoverable from the Hirer upon the termination of the agreement;

(iii) Restrictions on Repossession - Section 16 on recovery of possession of the goods, as contrasted with the curious position of the Fourth Schedule whereby the Act is silent on the effect of a breach under Section 16(1). However, ***Pang Brothers Motor Sdn Bhd v Lee Aik Seng [1978]*** held that if the date specified in the Fourth Schedule notice is less than the statutory minimum of 21 days, the notice would be bad in law and if the goods are repossessed, such repossession would be illegal. Also, the case of ***Koh Siak Poo v Med-Bumikar Mara Sdn Bhd [1994] 3 MLJ 610*** held that where the notice is not served, the Hirer may claim damages for breach of contract on the basis that Section 16 of the Act is a necessary term of the agreement. Damages will be assessed by applying the principles in Section 74 of the Contracts Act 1950;

Moreover, where the Owner institutes proceedings for the recovery of the goods the Owner is in certain circumstances prohibited from taking any step to enforce payment of any sum due under the hire-purchase or under any contract of guarantee relating thereto except by claiming such sum in those proceedings.[335] Further, in any such proceedings the Court is given wide powers to deal with payments arising on the

[335] Section 12(1). See Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], at page 172. The same Section also specifies in detail the various orders the Court is empowered to make.

termination of the hire-purchase agreement[336]; and additional restrictions are placed on the rights of the Owner, where the Court makes a postponed order for specific delivery of the goods to the Owner.[337]

4.3.1 Types of Remedies

4.3.1.1 Section 14 of the Act

Under Section 14 of the Act, a Hirer can, by giving notice[338] in writing[339] to the Owner, at any time before the specified day, complete the purchase of the goods by paying or tendering to the Owner the "net balance due" under the hire-purchase agreement. The "net balance due" is described in Section 14(2) of the Act as being the balance payable under the agreement less any amount already paid; statutory rebate for term charges; and statutory rebate for insurance (if any).

The right to an early completion conferred by Section 14(3) of the Act is exercisable at any time "during the continuance of the agreement". In other words, if the hire-purchase agreement has been properly terminated by the Owner due to the Hirer's default, Section 14 of the Act no longer applies.

Can the Hirer exercise this right when the Owner has already taken possession[340] of the goods? According to Section 14(3)(b)[341] of the Act, the Hirer can still do so provided

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[336] Section 14.

[337] Section 13 of the Act.

[338] **Given notice/Owner has served a notice** - For the modes of service or giving notice to a Owner or Hirer under this Act where no specific mode is prescribed, see Section 43 of the Act.

[339] **Writing** - This includes printing, lithography, typewriting, photography and any other mode of representing or reproducing words in a visible form; see Section 3 of the Interpretation Acts 1948 and 1967 (Act 388). As the hire-purchase agreement is a prescribed document within Section 45(2) of the Act, the additional requirements of Section 45 of the Act would apply.

[340] **Possession** - The use of the phrase in this context appears to mean that something more than just actual physical possession, such as a right of the Hirer to call for goods to be delivered to him by a bailee is covered by the Section. Local decisions on these two phrases are mostly on their use in a criminal context (for example, dangerous drugs); see ***Public Prosecutor v Ang Boon Foo [1981] 1 MLJ 40; Ipoh Garden Sdn Bhd v Ismail Mahyuddin Enterprise [1975] 2 MLJ 241 at 243; Pan Kok Wah v Public Prosecutor [1966] 2 MLJ 141; Public Prosecutor v Jamali bin Adnan [1985] 2 MLJ 392*** at 396; ***Shaikh Sahied bin Talip v Khoo Kang Chek [1934] MLJ 283*** at 288. See also ***Oliver v Goodger [1944] 2 All ER 481*** and ***Towers & Co. Ltd v Gray [1961] 2 QB 351.***

[341] Section 14(3)(b) of the Act was amended by Sections 10(a) and 10(b) of the Hire-Purchase (Amendment) Act 1992.

that the Hirer can pay whatever sums still due and outstanding to the Owner, together with such reasonable costs charged by the Owner, within 21 days[342] after the Owner has served the form prescribed in the Fifth Schedule.

Likewise, under Section 14(3)(c) of the Act, when the Hirer has returned the car to the Owner after having been served with the Fourth Schedule notice, the Hirer can make early completion of the hire-purchase, provided the Hirer does so within 21 days after the Owner has served the Hirer with the form prescribed in the Fifth Schedule.[343] This is basically a Money Claim under the Act which shall be further discussed in Chapter 6. One may ask whether it is appropriate to discuss Section 14 of the Act as it is a Hirer's right. However, the writer opines that even though Section 14 of the Act is the Hirer's right to early completion, Section 14 of the Act also contains a smattering of the Owner's rights.

4.3.1.2 Section 33(5) of the Act

Under Section 33(5) of the Act, a Hirer under a hire-purchase agreement is not entitled to institute proceedings under Section 33[344] of the Act in a case where the Owner has taken possession of the goods after the expiration of a period of 4 months after the date on which the Owner serves on the Hirer the Fifth Schedule notice under Section 16(3) of the Act; or in any other case, after the expiration of a period of 4 months from the time when the transaction is closed. This is not a remedy per se but more like a protection for the Owner against tardy Hirers.

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[342] **Within twenty-one days** - The general rule in cases where an act is to be done within a specified time is that the day from which it runs is not to be included; see Section 54(1)(a) of the Interpretation Acts 1948 and 1967 (Act 388) and 45 Halsbury's Laws (4th Edn) para 1134. For computation of time generally, see Section 54 of the Interpretation Acts 1948 and 1967 (Act 388).

[343] Section 14(3)(c) of the Act was inserted by Section 10(c) of the Hire-Purchase (Amendment) Act 1992.

[344] Section 33 of the Act is a provision whereby the court has the power to reopen certain harsh and unconscionable hire-purchase transactions or where it will be just for the court to give relief, at the behest of the Hirer.

4.3.1.3 Section 37 of the Act

Under Section 37(1)[345] of the Act, the Owner may, at any time by notice in writing[346] served on the Hirer[347], require the Hirer to state in writing where the goods are or if the goods are not in the Hirer's possession, to whom the Hirer delivered the goods to or circumstances in which the goods are lost. Section 37(2) of the Act stipulated that the Hirer shall be guilty of an offence[348] under the Act if the Hirer does not give the Owner such a statement within 14 days[349] after the receipt of the Owner's notice or who gives a statement containing any information that is to the knowledge of the Hirer false.

A statement may be false on account of what it omits even though it is literally true.[350] Whether or not gain or advantage accrues from the false statement is irrelevant.[351]

Knowledge is an essential ingredient of the offence and must be proved by the prosecution.[352] Knowledge includes the state of mind of a person who shuts his eyes to the obvious.[353] There is also authority for saying that where a person deliberately refrains from making inquiries the results of which he might not care to have, this

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[345] Prior to revision, this was Section 36 of the Act. Originally the words that now form Section 37(1) of the Act existed as an undivided Section 36 of the Act. It was amended by Section 7 of the Hire-Purchase (Amendment) Act 1969 which added the old Section 37(2). Section 37(2) of the Act was subsequently amended into its present form by Section 21 of the Hire-Purchase (Amendment) Act 1992.

[346] **In writing** - This includes printing, lithography, typewriting, photography and any other mode of representing or reproducing words in a visible form; see Section 3 of the Interpretation Acts 1948 and 1967 (Act 388). As the hire-purchase agreement is a prescribed document within Section 45(2) of the Act, the additional requirements of Section 45 of the Act would apply.

[347] **Served on the Hirer**. For the modes of service on an Owner or Hirer under this Act where no specific mode is provided for, see Section 43 of the Act. The onus is on the Owner of the goods to show that notices were served in accordance the Section. Affidavits or oral evidences of an Owner or Hirer, or his servant or agent, as to the service of the notice is admissible as prima facie proof of the service of the notice; see ***Koh Siak Poo v Med-Bumikar Mara Sdn Bhd*** [1994] 3 MLJ 610.

[348] Under Section 46 of the Act, any person guilty of an offence under the Act or any regulations made thereunder for which no other penalty has been expressly provided shall, on conviction, be liable to a fine not exceeding Ringgit Malaysia Three Thousand (RM 3,000), imprisonment not exceeding 6 months or to both.

[349] **Computation of days** - The general rule in cases where an Act is to be done within a specified time is that the day from which it runs is not to be included; see Section 54(1)(a) of the Interpretation Acts 1948 and 1967 (Act 388) and 45 Halsbury's Laws (4th Edn) para 1134. For computation of time generally, see Section 54 of the Interpretation acts 1948 and 1967 (Act 388).

[350] ***R v Lord Kylsant [1931] All ER Rep 179*** and ***R v Bishirgian [1936] 1 All ER 586; c.f Curtis v Chemical Cleaning and Dyeing Co. Ltd. [1951] 1 All ER 631***

[351] ***Jones v Meatyard [1939] 1 All ER 140; Stevens & Steeds Ltd. And Evans v King [1943] 1 All ER 314; Clear v Smith [1981] 1 WLR 399.***

[352] ***Gaumont British Distributors Ltd v Henry [1939] 2 KB 711, [1939] 2 All ER 808.***

[353] ***James & Son Ltd v Smee [1955] 1 QB 78 at 91, [1954] 3 All ER 273 at 278,*** per Parker J and ***Westminster City Council v Croyalgrange Ltd & Anor [1986] 2 All ER 353***.

constitutes in law actual knowledge of the facts in question.[354] Mere neglect to ascertain what could have been found out by making reasonable inquiries is not tantamount to knowledge.[355]

Under Section 37(2) of the Act, the Hirer shall inform the Owner in writing or state in the presence of the Owner if the Hirer removes the goods from the address specified[356] in the hire-purchase agreement; or the goods are lost or are taken out of the Hirer's possession. Any Hirer who does not within 14 days of the removal or loss comply with the provisions of this subsection shall be guilty of an offence under this Act.[357] This is the criminal remedy for the Owner but the Act is silent on the civil remedy for the Owner.

4.3.1.4 Section 38 of the Act

Section 38 of the Act prescribed a heavy criminal penalty on the Hirer or anyone else who, by the disposal[358] or sale of any goods comprised in a hire-purchase agreement, or by the removal of the goods, or by any other means, defrauds[359] or attempt[360] to defraud the Owner. It is however, difficult to determine what acts are sufficient to constitute an attempt.[361]

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[354] ***Knox v Boyd 1941 JC 82 at 86, Taylor's Central Garages (Exeter) Ltd v Roper (1951) 115 JP 445 at 449, [1951] WN 383*** and ***Westminster City Council v Croyalgrange Ltd & Anor [1986] 2 All ER 353.***

[355] ***Taylor's Central Garages (Exeter) Ltd v Roper (1951) 115 JP 445 c.f. London Computator Ltd v Seymour [1944] 2 All ER 11***. See also ***Suthon Kavsonthi v Public Prosecutor [1975] 1 MLJ 154; Public Prosecutor v Kedah & Perlis Ferry Services Sdn Bhd [1978] 2 MLJ 221.***

[356] The address is required to be specified in the hire-purchase agreement; see Section 4C(1(a)(vi) of the Act.

[357] **Guilty of an offence** - For the penalty for the offence committed under Section 37 of the Act, please see Section 46 of the Act. Where the person committing the offence is a body corporate or an agent or servant, see also Sections 47 and 48 of the Act, respectively.

[358] **Disposal** - This has yet to be interpreted by the courts in the context of this Act but would appear to include disposal by way of gift, reletting or even destruction of the goods.

[359] Contrast with the definition of 'fraudulently' in the Section 25 of the Penal Code (Act 574) and judicial comments on the definition in ***Seet Soon Guan v Public Prosecutor [1955] MLJ 223***. See also ***Loo Wee Wan v Regina [1955] MLJ 73***; ***Mohamed Taiyob v Public Prosecutor [1947] MLJ 101*** and ***Public Prosecutor v Li Chuan Pin [1965] MLJ 133.***

[360] See ***Munah bte Ali v Public Prosecutor [1958] MLJ 159; Thiangiah & Anor. v Public Prosecutor [1977] MLJ 79*** and ***Tan Weng Kang v Public Prosecutor [1962] MLJ 47.*** See also ***R v Laitwood (1910) 2 Cr App Rep 248; R v Miskell [1954] 1 All ER 137.***

[361] ***Abhayanand Mishra v State of Bihar AIR (1961) SC 1698; Harishchandra Narayah Kardape v State of Maharashtra (1983) 2 Crimes 98; State of Maharashtra v Mohd Yakub (1980 SCC (Cri) 513; Arjan Singh v Public Prosecutor [1948] MLJ 73; Public Prosecutor v Kee Ah Bah [1979] 1 MLJ 26.***

The wrongdoer shall be guilty of an offence under the Act and shall, on conviction, be liable[362] to a fine[363] not exceeding Ringgit Malaysia Ten Thousand (RM10,000-00) only or to imprisonment for a term not exceeding three years or to both. The Act is yet again silent on the Owner's civil remedy.

In ***Tan Ah Cheow v Public Prosecutor (1952) MLJ 79,*** a case decided prior to the date of coming into force of the Act, a Hirer of a bicycle under an agreement pledged it with a pawn broker. The Hirer was charged with the offence of criminal breach of trust and was acquitted by the Magistrate. The Magistrate also ordered the bicycle to be restored to the pawn broker. On revision, the bicycle was ordered to be restored to the true owner, that is, the Hirer.

Also, in ***Eu Tong Sen Finance Ltd. v Public Prosecutor [1965] 2 MLJ 29,*** a motor vehicle which was used for committing an offence was ordered to be restored to the Owner; and in ***Public Prosecutor v Ong Seng Keong [1967] 1 MLJ 40,*** a motor vehicle which was used as a public service vehicle with the knowledge of the Owner was ordered to be restored to the Owner. In such cases where the vehicle is forfeited, the Owner will not be entitled to be heard.

4.3.1.5 Section 42 of the Act

Under Section 42 of the Act, where complaint has been made by the Owner (who is entitled to take possession of the goods) that goods comprised in a hire-purchase agreement are unlawfully detained by the Hirer or any other person, the Magistrate has

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See also Section 511 of the Penal Code (Act 574) – "...in such attempt does not any act towards the commission of such offence..."

[362] Where the person committing the offence is a body corporate or an agent or servant. See Sections 46-48 of the Act. For matters relating to enforcement, please see Part VIII of the Act.

[363] See also the Section 283 of the Criminal Procedure Code (Act 593) for the power of the court to make additional orders upon passing the sentence of a fine.

the power to order the delivery of goods unlawfully detained by the Hirer or any other persons.

Proceedings for relief under Section 42 of the Act must be begun by originating application in Form 137 of the Subordinate Courts Rules, 1980 supported by an affidavit setting out the facts and the grounds on which the application is made.[364]

The Act does not confer a general right on the Owner to repossess the goods. Such right must be provided for in the agreement between the parties.[365] This is basically a civil remedy of repossession for the Owner which has been discussed in Chapter 3.

4.3.1.6 Section 55A of the Act

Section 55A of the Act deals with the powers of the court regarding the disposal of goods or documents seized from a person accused of an offence under the Act. Section 55A of the Act provides that at the conclusion of the trial, regardless whether the person is convicted or not, order that any goods or documents seized from that person be delivered to the rightful owner.

4.3.2 Statutory Restrictions in Malaysia

4.3.2.1 General Restrictions

The writer shall endeavour to show here that there are more restrictions to the Owner's rights as compared to the rights available to the Owner. This exercise shall end up looking like an exposition of the rights available to the Hirer. However, the purpose of such endeavour in the less trodden path is to show that the Owner's rights are limited compared to the Hirer's.

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[364] Order 46 rule 2 of the Subordinate Courts Rules, 1980.
[365] Section 16 of the Act.

General restrictions are imposed on an Owner who fails to comply with the requirements of Sections 4; 4A; 4B; 4C; 4D; 5; and 9 of the Act as follows :-

(a) Breach of requirements relating to hire-purchase agreements under Sections 4[366]; 4A[367]; 4B[368]; 4C[369] and 4D[370] of the Act.

It is absolutely vital that in order for the hire-purchase agreement to be valid and enforceable, Section 4(1) of the Act must be complied with. The Act before the Hire-Purchase (Amendment) Act 1992 (hereinafter referred to as "the 1992 Act") was silent as to the effect of non-compliance of Section 4(1) of the Act. The catalyst for the 1992 Act was the decision of ***Affin Credit (Malaysia) Sdn Bhd v Yap Yuen Fui [1984] 1 MLJ 169*** (hereinafter referred to as the ***"Yap Yuen Fui's case"***). It was decided before the 1992 Act. The ***Yap Yuen Fui's case*** was touted as the decision that filled the glaring "gap" in the Act.[371] The 1992 Act made significant changes to this area of law[372] by substituting the old Section 4(1) with elaborate new provisions.[373]

Section 4(1) of the Act can be divided into two parts. Firstly, Section 4(1)(a) of the Act stipulated that before any hire-purchase agreement is entered into in respect of any goods, the Owner and/or any person other than the Dealer shall serve on the intending Hirer a written statement duly completed and signed by the Owner and/or any person other than the Dealer in accordance with the form set out in Part I of the Second Schedule (hereinafter referred to as "the Part I notice"), if the negotiations leading to

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[366] Prior to revision in 1978 this was Section 3 of the Act. It had previously been amended in 1969 by Section 2 of the Hire-Purchase (Amendment) Act 1969. After the Act was revised, it was amended into its present from by Section 4 of the Hire-Purchase (Amendment) Act 1992.
[367] This Section was inserted by Section 5 of the Hire-Purchase (Amendment) Act 1992.
[368] This Section was inserted by Section 5 of the Hire-Purchase (Amendment) Act 1992.
[369] This Section was inserted by Section 5 of the Hire-Purchase (Amendment) Act 1992.
[370] This Section was inserted by Section 5 of the Hire-Purchase (Amendment) Act 1992.
[371] P. Balan, "Affin Credit (Malaysia) Sdn Bhd v Yap Yuen Fui : The Denoument of a Hire-Purchase Mystery?" [1985] JCML 225.
[372] i.e Formation, contents and service of the hire-purchase agreement.
[373] P. Balan and Nik Ramlah Mahmood, "The Hire-Purchase (Amendment) Act 1992" [1991] JMCL 37.

the making of the hire-purchase agreement was carried out by the Owner and/or by any person other than the Dealer.

Despite the use of the words 'any goods' without qualification in Section 4(1)(a) of the Act, the Act would not apply to the hire of goods that are not listed in the First Schedule[374] (see Section 1(2) of the Act) c.f. Section 4A(1) of the Act where the words are qualified as such.

Deviation[375] from a statutory form has substantial effect or may mislead if such deviation causes the statement to convey less information than the statutory form requires or if it causes the statement to confuse or mislead the prospective Hirer on matters which the statutory form is designed to bring to his notice.[376]

In the second part, under Section 4(1)(b) of the Act, if the negotiations leading to the making of the hire-purchase agreement was carried out by the Dealer then the Dealer shall serve on the intending Hirer the Part I notice and at any time after the service of the Part I notice but before the hire-purchase agreement is entered into, serve on the intending Hirer a written statement duly completed and signed both by the Dealer and the prospective Owner in accordance to the form set out in Part II of the Second Schedule (hereinafter referred to as "the Part II notice"). This is in order to differentiate between a bipartite transaction (Owner-Hirer) and a tripartite transaction (Owner-Dealer-Hirer).[377]

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[374] Section 1(2) of the Act) c.f. Section 4A(1) of the Act where the words are qualified as such.
[375] **In accordance with the form set out/in the form set out** - As to the effect of any deviation from prescribed forms, see Section 62 of the Interpretation Acts 1948 and 1967 (Act 388); ***Jackson & Co Ltd v Seng Seng [1954] MLJ 238 at 239***. C.f. ***Low Yat v GC Grace [1947] MLJ 80*** at 82.
[376] ***Equipment Investments Pty Ltd v MJ Dowthwaite & Co Pty Ltd (1969) 16 FLR 23.***
[377] P. Balan and Nik Ramlah Mahmood, "The Hire-Purchase (Amendment) Act 1992" [1991] JMCL 37, at page 40.

Section 4(2) of the Act stipulated that the service of the Part I notice and/or the Part II notice are to be effected by delivering the notices to the intending Hirer or his agent who is required to acknowledge receipt by signing on the said notices. It was lamented that there should have been a time-frame or minimum period which must lapse between the serving of the notices and the signing of the hire-purchase agreement.[378]

Section 4(4) of the Act stipulated that a hire-purchase agreement entered into in contravention of Section 4(1) of the Act shall be void. This has the effect of preventing the Owner from enforcing payment of any monies due under the hire-purchase agreement, whether in respect of hire-rent or by way of damages for breach of contract. The wide terms of this provision will be noted. The effect is to disable the Owner from enforcing a right of recovery in any manner whatsoever, unless the Court exercises its discretion in his favour. The Owner cannot recover the goods by action, nor can the Owner secure their return by physical seizure. This is the civil remedy for breach of Section 4(1) of the Act.

From the definition of 'void' in Sections 2(g) and 66 of the Contracts Act 1950 (Act 136), there is a possible right of restitution or restoration of benefit for the use of goods under a void contract.[379] In the English and Australian cases, where a Hirer who has had the benefit of the use of the goods before the agreement was discovered to be void may still reclaim moneys paid under the agreement, the Owner not being able to claim

[378] P. Balan and Nik Ramlah Mahmood, "The Hire-Purchase (Amendment) Act 1992" [1991] JMCL 37, at page 40.

[379] ***Menaka v Lum Kum Chum [1977] 1 MLJ 91; Wong Yoon Chai v Lee Ah Chin [1981] 1 MLJ 219 at 220, 221; Suu Lin Chong v Lee Yaw Seong [1979] 2 MLJ 48; Soh Eng Keng v Lim Chin Wah [1979] 2 MLJ 91; Yeep Mooi v Chu Chin Chua & Ors [1981] 1 MLJ 14.***

for compensation for the time the Hirer had enjoyed such use.[380] It would appear the principle stated in these cases is applicable.[381]

Affin Credit (Malaysia) Sdn Bhd v Yap Yuen Fui [1984] 1 MLJ 169 held that the words used in Section 4(1) of the Act are clear. *Absoluta sentential expositare non indigent.* The words mean what they say, and they plainly require a written statement in the form set out in the Second Schedule to be given and caused to be given to the prospective Hirer before any hire-purchase agreement is entered into. The court was so clear even though the Act was silent at that time.

Now, under Section 4(4) of the Act, failure to give the Hirer the statement in writing required, duly completed and signed by the Owner, in accordance with the form set out in Part I of the Second Schedule[382], before the agreement is entered into, precludes the Owner from enforcing the hire-purchase agreement or any right to recover the goods from the Hirer. Such failure also renders unenforceable any security given by the Hirer in respect of money payable under the hire-purchase agreement.

Under Section 4(5) of the Act, an Owner who enters into a hire-purchase agreement and a Dealer who carries out negotiations leading to the making of a hire-purchase agreement that does not comply with Section 4(1) of the Act, irrespective of whether such hire-purchase agreement is void or otherwise, shall be guilty of an offence[383]. This

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[380] ***Warman v Southern Counties Car Finance Corporation [1949] 2 KB 576 at 582 and MacLeod v Traders Finance Corporation Ltd (1967) 67 SR (NSW) 275 at 277.***

[381] ***Finnemore J in Warman v Southern Counties Car Finance Corporation [1949] 2 KB 576 at 582 at 581-583.***

[382] Part I of the Second Schedule is a summary of the Hirer's financial obligations under the proposed hire-purchase agreement, and must set out, inter alia, a short description of the goods; whether the goods to be hired are new or second-hand; the address where the goods will be kept; the cash price of the goods; the deposit; etc.

[383] **Offence under this Act -** For the offences under this Act where no other penalty is expressly provided, for e.g., Sections 4(5), (6), 4A(3), 4B(4), 26(4), (8), 31(1), 32(3), 36A-36D, 37(1), (2) and 42(2) of the Act, the punishment is spelt out in Section 46 of the Act.
Where the person committing the offence is a body corporate or an agent or servant, see also Sections 47 and 48 of the Act.
For matters relating to enforcement etc, see Part VIII of the Act.

is the criminal remedy for breach of Section 4(1) of the Act. Both these remedies were sorely missed before the ***Yap Yuen Fui's case*** and the 1992 Act.

Furthermore, it is opined that Section 4 of the Act is divided into two parts, that is, firstly, Section 4(1) of the Act which is a pre-contractual condition of service and secondly, Section 4(3) of the Act, which stipulated that any person who has been served with the Part I and/or the Part II notice shall not be under any obligation to enter into any hire-purchase agreement and no payment or other consideration[384] shall be required from the person in respect of the preparation or service of such statement.

The Act seems to be silent on the civil remedy for breach of Section 4(3) of the Act. For cases like these, it can be argued that under Section 5 of the Civil Law Act, the English Common Law or English legislation shall be applicable.[385]

Under Section 4(6) of the Act where the Hirer after having been served the Part I and/or Part II notice is subject to any obligation to enter into any hire-purchase agreement or is required to make any payment, any person who imposed such obligation or requirement shall be guilty of an offence[386]. This is the criminal remedy for breach of Section 4(3) of the Act.

The old Section 4(2)[387] which dealt with the form of a hire-purchase agreement has been substituted by four new sections, namely Section 4A, 4B, 4C and 4D of the Act.

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[384] **Consideration** - For the definition of 'consideration', see Section 2(d) of the Contracts Act 1950 (Act 136). See the discussion of the definition by Sharma J in ***Guthrie Waugh Bhd v Malaippan Muthucumaru [1972] 1 MLJ 35 at 39.*** See also ***Macon Works & Trading Sdn Bhd v Phang Hon Chin & Anor [1976] 2 MLJ 177 at 181***, per Hashim Yeop A Sani J (MLJ Words and Phrases Judicially Defined page 117).

[385] P. Balan, "The Hire-Purchase Order 1980" [1980] JMCL 277, at page 281.

[386] **Offence under this Act** - The punishment is spelt out in Section 46 of the Act.
Where the person committing the offence is a body corporate or an agent or servant, see also Sections 47 and 48 of the Act.
For matters relating to enforcement etc, see Part VIII of the Act.

[387] Before the 1992 Act.

Section 4A(1) of the Act requires a hire-purchase agreement in respect of any goods specified in the First Schedule to be in writing. Section 4A(2) of the Act provided a civil remedy to the Hirer by stating that a hire-purchase agreement that does not comply with Section 4(1) of the Act shall be void.[388] Section 4A(3) of the Act provided the criminal remedy by stating an Owner who enters into a hire-purchase agreement that does not comply with Section 4A(1) of the Act shall, notwithstanding that the hire-purchase agreement is void, be guilty of an offence.[389]

It is not totally clear whether a blank hire-purchase form signed by the Hirer would be in 'writing'. In ***Ming Lian Corp Sdn Bhd v Haji Noordin [1974] 1 MLJ 52***, a case concerning an agreement entered into before the Act came into force, the court held that the agreement was valid despite the Hirer signing blank forms if the parties had been aware of the nature and terms of the agreement and there was neither fraud nor misrepresentation. Such an agreement would apparently not be 'duly completed' within Section 4B(2) of the Act.[390]

Under Sections 4B(1) and (2) of the Act, every duly completed hire-purchase agreement shall be signed by or on behalf of all the parties to the agreement.

Section 4B(3) of the Act provided the civil remedy in that a hire-purchase agreement that does not comply with Sections 4B(1) and (2) of the Act shall be void.

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[388] This in effect denies the Hirer an option to treat the agreement as enforceable.

[389] **Offence under this Act** - For the penalty for the offence committed under Section 4A of the Act, see Section 46 of the Act. Where the person committing the offence is a body corporate or an agent or servant, see also Sections 47 and 48 of the Act. For matters relating to enforcement etc, see Part VIII of the Act.

[390] See also Section 4C of the Act where certain details of the agreement have to be 'contained', 'set out' or 'specified'. It would appear these are to be in 'writing'.
Registration of hire-purchase agreements - Apart from Sarawak where the Hire-Purchase Registration Ordinance (Cap 71) imposes such a requirement, there is no requirement for hire-purchase agreements to be registered. See also the requirement of stamping under the Stamp Act 1949 (Act 378).

Section 4B(4) of the Act provided the criminal remedy in that an Owner, Dealer or person[391] acting on behalf of the Owner who enters into a hire-purchase agreement in contravention of Sections 4B(1) and (2) of the Act shall, notwithstanding that the hire-purchase agreement is void, be guilty of an offence.[392]

Section 4B(2) of the Act stated not only the "hire-purchase agreement" but also 'form' or 'document'. 'Document' means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used or which may be used for the purpose of recording that matter.[393]

However, Section 4B of the Act must be read in the light of the decision of ***MBf Finance Bhd. (formerly known as Malaysia Borneo Finance Corporation(M) Bhd.) v. Ting Kah Kuong & Anor. [1993] 3 MLJ 73*** (hereinafter referred to as "***the Ting Kah Kuong's case***"). It was held that where the hire-purchase agreement contains all the terms relating to payment of initial deposit, monthly instalments, and interest on overdue rental or other payments form part and the parties had signed on the last page of the agreement, it was considered to be vexatious on the Hirer's part to say that just because no signatures or initials appeared against the respective clauses, they did not form part of the hire-purchase agreement.

Also, in ***Ming Lian Corp. Sdn. Bhd. v Haji Noordin,*** a case decided[394] prior to the insertion of section 4B of the Act, the Owners/Financiers under the terms of a hire-

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[391] **Person** - Unless the context otherwise requires, this includes a body of persons, corporate or unincorporated; see Section 3 of the Interpretation Acts 1948 and 1967 (Act 388).

[392] **Offence under this Act** - For the penalty for the offence committed under Section 4B of the Act, see Section 46 of the Act. Where the person committing the offence is a body corporate or an agent or servant, see also Sections 47 and 48 of the Act. For matters relating to enforcement etc, see Part VIII of the Act.

[393] Section 3 of the Interpretation Acts 1948 and 1967 (Act 388)]. C.f. the wider definitions under Section 3 of the Evidence Act 1950 (Act 56) and Section 29 of the Penal Code (Act 574).

[394] ***[1974] 1 MLJ 52*** (OCJ: Pawan Ahmad J); reference was made to ***Gallie v. Lee & Anor. (1969) 1 All ER 1062.***

purchase agreement, in view of the default of the Hirer in paying the instalments due, recovered possession of the motor car after the termination of the agreement. In an action by the Owners/Financiers for the recovery of the amounts due, the Hirer sought to challenge the agreement *inter alia* as fictitious. The Hirer claimed that the hire-purchase agreement contained certain portions which were blank at the time of his signing the said agreement. It was held that unless fraud or misrepresentation is pleaded and proved by the Defendant/Hirer, the Defendant/Hirer cannot come to court and say it was not an offer. In the present case neither fraud nor misrepresentation was pleaded or proved by the Defendant/Hirer.

Section 4C(1) of the Act stipulated that every hire-purchase agreement shall inter alia, specify certain information like the date on which the hiring shall be deemed to have commenced and etc. For e.g., the number of instalments; amounts of each instalments & the person to whom & the place at which the payments are to be made; the time for the payment; description of the goods; the address where the goods are (Section 37 of the Act); and where any part of the consideration is provided otherwise than in cash, shall contain a description of that part of the consideration; shall set out in tabular form, the cash price; the deposit; the freight charges; vehicle registration fees; insurance charges; term charges;[395] annual percentage rate; balance originally payable under the agreement.

[395] There is no definition of the term charges in the Act. Arguably, by reading Section 4C(1)(c)(vii) of the Act together with the rest of the Section, the term would impliedly mean charges imposed by the Owner other than:-
(a) freight charges;
(b) vehicle registration fees (where applicable); and
(c) insurance premiums.
The Act prescribes a limit on the amount of terms charges for hire-purchase agreements subject to it; see Section 30 of the Act.

'Specify' means expressly stated. It is not sufficient that the details can be determined by implication in the agreement.[396]

When a thing is 'deemed' something else, it is to be treated as that something else with the attendant consequences but it is not that something else.[397] To deem means simply to judge or reach a conclusion about something, and the words 'deem' when used in a statute thus simply state the effect or meaning which some matter or thing has-the way in which it is to be adjudged.[398]

Linggi Plantations Ltd v Jagatheesan [1972] 1 MLJ 89 held that as there is no specific definition of the word 'deposit' in the Act, the ordinary meaning would appear to be applicable.[399]

Section 4C(2) of the Act provided the civil remedy in that a hire-purchase agreement that contravenes Section 4C(1) of the Act shall be void.

Section 4C(3) of the Act provided the criminal remedy by stating that an Owner who enters into a hire-purchase agreement in contravention of Section 4C(1) of the Act shall be guilty of an offence.[400]

Supreme Leasing Sdn. Bhd. v. Lee Gee & Ors. [1989] 1 MLJ 129 (hereinafter referred to as "***the Lee Gee's case***") was a case of hire-purchase of a tractor (which is not one

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[396] ***Equipment Investments Pty Ltd v MJ Dowthwaite & Co Pty Ltd (1969) 16 FLR 23.***

[397] per Ong J (quoting Cave J in ***R v Norfolk County Court 60 LJQB 380)*** in ***A Omnibus Co Ltd v Government of the Federation of Malaya [1961] MLJ 92*** at 97.

[398] per Windener J in ***Hunter Douglas Australia Pty v Perma Blinds (1970) 44 ALJR 257***. See also ***Equipment Investments Pty Ltd v MJ Dowthwaite & Co Pty Ltd*** (1969) 16 FLR 23 at 38, per Gibbs J.

[399] See also the expression 'earnest money' which has a similar meaning (MLJ Words and Phrases Judicially Defined pp 189-190). As to matters relating to the minimum amount of deposit under this Act, see Sections 31 and 32 of the Act.

[400] **Offence under this Act** - For the penalty for the offence committed under Section 4C(3) of the Act, see Section 46 of the Act. Where the person committing the offence is a body corporate or an agent or servant, see also Sections 47 and 48 of the Act. For matters relating to enforcement etc, see Part VIII of the Act.

of the items specified in the Schedule to the Act), The chassis number and the engine number of the tractor were not set down in the agreement. In an action by the Financier/Owner against the Hirer for the dues under the agreement, it was inter *alia* contended that there were a number of triable issues, one of which was there was no certainty of subject matter of the agreement, since the serial number and the engine number of the tractor had not been stated in the agreement.

However, the court dismissed the Hirer's contention and it was held that the agreement was not void as the subject matter of the hire-purchase agreement was a tractor of a particular make of a particular cubic capacity manufactured in a particular year and which was duly delivered. That being so, there was a certainty of the subject matter.

Section 4D(1) of the Act stipulated that there shall be a separate hire-purchase agreement in respect of every item of good s purchased under the Act. However, Section 4D(3) of the Act clarified that any goods which are essentially similar or complementary to each other and sold as a set shall be regarded as an item.[401]

Under Section 4D(2) of the Act, a hire-purchase agreement that does not comply with Section 4D(1) of the Act shall be void. An Owner who enters into a hire-purchase agreement that does not comply with Section 4D(1) of the Act notwithstanding that the hire-purchase agreement is void, shall be guilty of an offence. For the penalty for the offence committed under Section 4D of the Act, see Section 46 of the Act. Where the person committing the offence is a body corporate or an agent or servant, see also Sections 47 and 48 of the Act. For matters relating to enforcement etc, see Part VIII of the Act.

[401] **Essentially similar, complementary, sold as a set** - These phrases have yet to be considered judicially.

Therefore, Section 4(1) is the provision most severe on the Owner as compared to Sections 4A-4D of the Act because Section 4(1) happens at the pre-contractual stage, basically cutting off the Owner's right to enforce at the outset. Section 4(1) of the Act is self-contained. It modifies the law of offer and acceptance as provided by Section 2 of the Contracts Act 1950 (revised 1974).

The right to freedom of contract as expounded by Jessel, M.R. in ***Printing and Numerical Registering Co. v. Sampson (1875) LR 19Eq 462 and Wallis v. Smith (1882) 21 ChD 243*** has, consistent with modern tendency of statute law, been interfered with by the Act. An offer to enter into a hire-purchase agreement either by the Owner or the Hirer is subject to a condition precedent imposed by Section 4(1) of the Act.[402]

The Federal Court in ***Yap Yuen Fui's case*** further made the following differentiation. Section 4(1) of the Act deals with entering into and formation of a contract; whereas Sections 4(2) (now Sections 4A-4D) and also 5(2) and 6 (now repealed) of the Act 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 and therefore still not legally in existence, what is the purpose of the legislature dealing with it in sections 4(3) [now Sections 4A(3), 4B(4), 4C(3) & 4D(3)] of the Act and Section 6(2) (now repealed) as to the consequences of non-compliance? To do so would be totally futile, The exclusion of Section 4(1) of the Act from the provisions of Section 4(3) [now Sections 4A(3), 4B(4), 4C(3) & 4D(3)] of the Act and Section 6(2) (now repealed) supports the view that Section 4(1) of the

[402] As expounded by Mohamed Azmi, FJ in the ***Yap Yuen Fui's case***.

Act 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.

(b) Breach of requirements as to the service of the hire-purchase agreement (supply of information and documents) under Sections 5[403] and 9[404] of the Act

Under Section 5(1) of the Act, it is provided that within 14 days after the hire-purchase agreement is made, the Owner must serve on the Hirer a copy of the hire-purchase agreement. Under Section 5(1A) of the Act, failure to comply with this requirement would render the hire-purchase agreement unenforceable by the Owner, a civil remedy. However, no criminal remedy is provided under Section 5(1A) of the Act.

Another restriction on the Owner's rights is Section 5(1) of the Act. Where Section 5(1) of the Act is breached by the Owner, the Hirer may still enforce the agreement.[405] The agreement in these circumstances would be a 'voidable contract' as defined in the Section 2(i) of the Contracts Act 1950 (Act 136). If the Hirer chooses to 'treat the agreement as void', Sections 65 & 66 of the Contracts Act 1950 may be brought into operation.

Section 65 of the Contracts Act 1950 provides that when a party rescinds a voidable contract, if he or she has received any benefit thereunder from another party to such

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[403] Prior to revision in 1978, this was Section 4 of the Act.
Section 5(1) of the Act was amended by the Section 6(a) of the Hire-Purchase (Amendment) Act 1992.
Section 5(1A) of the Act was inserted by Section 6(b) of the Hire-Purchase (Amendment) Act 1992.
Section 5(2) of the Act was originally inserted as Section 4(1A) by Section 3 of the Hire-Purchase (Amendment) Act 1969. Section 5(2)(b) of the Act was amended by Section 6(c) of the Hire-Purchase (Amendment) Act 1992.
[404] Prior to revision, this was Section 8 of the Act.
Section 9(1)(a) of the Act was amended by Section 4 of the Hire-Purchase (Amendment) Act 1969.
The words omitted from Section 9(1)(b) of the Act were deleted by Section 8(a) of the Hire-Purchase (Amendment) Act 1992.
The word 'and' within square brackets in Section 9(1)(c) of the Act was inserted by Section 8(b) of the Hire-Purchase (Amendment) Act 1992.
Section 9(1)(d) of the Act was inserted by Section 8(c) of the Hire-Purchase (Amendment) Act 1992.
The proviso to Section 9(1) of the Act was amended by Section 4 of the Hire-Purchase (Amendment) Act 1969.
[405] Contrast with Sections 4-4D of the Act, where failure to comply with the provisions of those Sections will render the agreement void.

contract, the party rescinding the contract shall restore the benefit, so far as may be, to the person from whom it was received.

The position under the Common Law is different. ***Warman v Southern Counties CAR Finance Corporation [1949] 2 KB 576*** held that as the right to sell is an implied condition, if there is a breach, the Hirer is entitled to put an end to the contract and to recover payments made in pursuance of the hiring without any adjustment for the time he enjoyed the use of the goods. This is because the sole purpose of the agreement is to ultimately transfer property in the goods to the Hirer.[406]

Under Section 5(2) of the Act, at any time before the final payment has been made under a hire-purchase agreement the Owner shall, within 14 days after he has received a request in writing from the Hirer, supply to the Hirer a copy of any memorandum or note of the agreement, on payment by the Hirer of the prescribed fee or where no fee is prescribed, one free copy, and thereafter a fee as may be prescribed shall be charged for the supply of a second and subsequent copy thereof.

Under Section 5(3), if the total amount payable includes the payment for insurance, the Owner must. Within 7 days of the receipt of the policy, serve[407] a copy of the insurance policy or a statement in writing setting out the terms, conditions and exclusions of the policy by the Owner, to the Hirer.

Under Section 9(1) of the Act, at any time before the final payment has been made under a hire-purchase agreement the Owner shall, within 14 days after he has received

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[406] ***MacLeod v Traders Finance Corporation Ltd (1967) 67 SR (NSW) 275.***

[407] **Serve or caused to be served** - For the modes of service on an Owner or Hirer under this Act where no specific mode is provided for, see Sections 43 of the Act.

a request in writing from the Hirer, supply[408] to the Hirer a statement signed by the said person or his agent showing inter alia, the amount paid to the Owner; the amount which has become due but remains unpaid; the amount derived from interest on overdue instalment[409] etc. The proviso to Section 9(1) of the Act stipulated that the Owner need not comply with such a request if the Owner has sent a statement within a period of 3 months[410] immediately preceding the receipt of the request.

In the event of a failure without reasonable cause to comply with Section 9(1) of the Act then, while the default continues, under Section 9(2)(a) of the Act, the Owner shall not be entitled to enforce the agreement against the Hirer; any right to recover the goods from the Hirer; any contract of guarantee relating to the agreement. Section 9(2)(b) of the Act stipulated that any security given by the Hirer in respect of money payable under the agreement in respect of money payable shall not be enforceable against the Hirer by any holder thereof. These are the civil penalties against the Owner.

What is a reasonable cause is a question of fact.[411] Yet it is clear that ignorance of the statutory provisions provides no reasonable excuse or cause[412], nor does a mistaken view of the effect of those provisions.[413]

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[408] **Supply…a statement.** This would have to be in writing. As the statement in Section 9(1) of the Act is a prescribed document within Section 45(2) of the Act, the additional requirements of that Section would apply; see Section 45 of the Act.

[409] **Amount derived from interest on overdue instalments** - See also Section 34(c) of the Act on limits on which such interest may be charged.

[410] **Months** - 'Month' means a month reckoned according to the Gregorian calendar; see Section 3 of the Interpretation Acts 1948 and 1967 (Act 388).
The context suggests that 'month' here means 'calendar month'. For the meaning of a 'calendar month', see ***Setali Development Sdn Bhd & Anor v Lim You Keng [1984] 1 MLJ 26 at 28***, per Hashim Yeop A Sani FJ and ***General Ceramics Manufacturers Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union & Anor [1988] 3 MLJ 474 at 477***, per Mohamed Azmi SCJ.

[411] c.f. ***Leck v Epsom RDC [1922] 1 KB 383, [1922] All ER Rep 784***.

[412] c.f. ***Aldridge v Warwickshire Coal Co Ltd (1925) 133 LT 439, CA***).

[413] ***R v Philip Reid [1973] 3 All ER 1020.*** Quare whether reliance on the advice of an expert can amount to reasonable excuse or cause; see ***Saddleworth UDC v Aggregate & Sand Ltd (1970) 69 LGR 103***, The Digest Vol 39 (1) (1985 Reissue) 3971.

Section 9(3) of the Act further states that if the default continues for a period of one month, the Owner shall be guilty of an offence and shall be liable[414] to a fine[415] not exceeding RM 1,000-00. This the criminal sanction against the Owner.

4.3.2.2 Restrictions on money claims

This shall be dealt with in Chapter 6.

4.3.2.3 Restrictions on the right to possession

This has been dealt with in Chapter 3.

4.4 CONCLUSION

There are a few anomalies caused by the 1992 Act, which it is submitted augurs well for the Owner. Firstly, there is no civil remedy provided under Section 4(3) of the Act. Secondly, the duty of the Owner to serve the Third Schedule notice under the old Section 5(1)(b) to inform the Hirer as to some of his statutory rights under the principal Act has been repealed. Hence, there is no need to serve a notice in the form of a Third Schedule.[416] Thirdly, there appears to be an oversight in the case of a breach of Sections 5(2) and (3) of the Act. Under the principal Act a civil remedy was provided for a breach of the whole of Section 5 in Section 6(2). Section 5 as amended creates a new Section 5(1A) which provides a civil penalty for a breach of Section 5(1). No civil

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[414] **Shall...be liable** - The formula used connotes that the court has discretion in imposing the sentence on conviction of the person prosecuted. It would not be possible to impose a custodial sentence on a body corporate to incur personal liability and face such punishment.
There are also the alternatives of discharging the person prosecuted pursuant to Section 173A of the Criminal Procedure Code (Act 593) if the circumstances stated in that Section are made out and a conviction is not recorded or 'binding over' such person under Section 294 of the Code where the court is minded to impose a custodial sentence. It is unclear if 'binding over' is available in these circumstances. Earlier cases suggest that it is not available for offences carrying alternative or other punishments to imprisonment; see ***Public Prosecutor v Idris [1955] MLJ 234***; ***Public Prosecutor v Loo Choon Fatt [1976] 2 MLJ 256*** and ***Re Eng Chong Lam [1964] MLJ 10***. C.f. the more recent cases of ***Public Prosecutor v Yeong Yin Choy [1976] 2 MLJ 267*** and ***Public Prosecutor v Lim Hong Chin [1993] 3 MLJ 736.***
Where an agent or servant is involved in the commission of an offence under this Act, see Section 48 of the Act.
See also Part VIII of the Act for the powers of investigation and matters relating to the enforcement of the Act.
Where the person committing the offence is a body corporate or an agent or servant, see also Sections 47, 48 respectively post.
For enforcement etc, see Part VIII post.

[415] **Fine** – See Section 283 of the Criminal Procedure Code (Act 593) for the power of the court to make additional orders upon passing the sentence of a fine.

[416] By Section 34 of the 1992 Act.

or criminal penalty is created by the 1992 Act for a breach of Section 5(2) and (3). With the repeal of Section 6(2) the civil consequence stated therein can no longer be utilised for a breach of Section 5(2) or (3).

There seems to be a dearth of authorities on the other remedies available to the Owners other than Repossession and Money Claims. For example, in Common Law, there are Replevin; Specific Performance; and Injunction. The statutory remedies available are provided for in Sections 37; 38; 42; and 55A of the Act. It is opined that Section 42 of the Act, which invokes the power of the courts, should be very useful for the Owners. However, the downside of Section 42 of the Act is that it is not as convenient as Money Claims and Repossession. The Owner has to file an originating application together with an affidavit setting out the facts and grounds of the application. This is relatively more troublesome than churning out notices of demands and filing Summons.

Sections 37 and 38 of the Act do not provide the Owner with the economic relief that is paramount for any financial institution. By merely sending the recalcitrant Hirers to jail or fining them may not be the top of the priorities of the Owner. This is where Section 55A of the Act comes in handy to salvage the goods or whatever's left of the goods, provided that the Owner can prove that he is the rightful owner.

Furthermore, it can be observed also that the number of statutory restrictions on the statutory remedies of the Owner far outweigh the statutory remedies of the Owner. Whereas the Owner's remedies in Common Law can be said to be far less restrictive. One cannot help but explore the possibility that the reason that the other remedies were not utilised were due to the inadequacies of the other remedies. Hire-purchase common

law started way back in the late 19th century and the Act was first enacted in 1938 in the UK. Therefore, the "invisible hand" of the legal world has caused the wide usage of the remedies of Repossession and Money Claims instead of the other remedies. In other words, it is a result of the process of evolution of the free market.

CHAPTER 5

MONEY CLAIMS UNDER THE COMMON LAW

5.1 PREFACE

If the Act does not apply, then the hire-purchase transaction shall be governed by the hire-purchase law at Common Law of both Malaysia and England and even statute (where applicable) of England.[417] This was affirmed by the Court of Appeal in ***MBf Finance Bhd v Low Ping Ming [2005] 1 CLJ 305*** which held that Section 3(1)(a) of the Civil Law Act 1956 provides that the court shall apply the Common Law of England and the rules of equity as administered in England on 7 April 1956 "save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia". Therefore, in the case of goods not listed in the First Schedule of the Act, the common law principles will continue to be applied to such goods subject to the terms of the agreement between the Hirer and the Owner.

The rights of the Owner are contained within the four corners of the hire-purchase agreement. The Owner has the right to sue for arrears of instalment without determining the agreement due to the Hirer's breach. In addition, the Owner will be entitled at Common Law to resume possession of the goods.[418]

We shall now consider the Money Claims available to the Owner in situations when the agreement is terminated and/or in the event of breach by the Hirer of the Hirer's obligations (implied or express) under the hire-purchase agreement at Common Law outside the Act.[419]

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[417] P. Balan, "The Hire-Purchase Order" [1980] JCML 277-283.
[418] Please see Chapter 2 for repossession under the Common Law.
[419] Please refer to Chapter 1 for discussion of termination and Chapter 4 for discussion of the types of breaches by the Hirer.

The Owner can claim damages against the Hirer if the Hirer breached the hire-purchase agreement provided that the Owner suffered damages. In most instances, the Owner has the right to repossess the goods and to claim for damages. Upon determination of the agreement the hire rent ceases to accrue and the Owner should immediately proceed to enforce his rights. The Owner can either seize the goods[420] or bring an action against the Hirer. The Owner may be entitled to pursue both remedies.

5.2 TYPES OF MONEY CLAIMS AT COMMON LAW

If the Hirer repudiates the agreement by dealing with the goods in a way which is entirely inconsistent with the nature of the transaction, the Owner may accept such repudiation or repossess the goods. The Owner is in both cases entitled to recover any sums due under the agreement such as arrears of instalments.

If an agreement is not subject to the Act and contains an express undertaking to redeliver the goods in the event of determination, the Owner could sue for damages for breach of contract without any demand for their return. Even though the Owner has resumed possession of the goods, the Owner can still sue for arrears of rent, which had accrued under the terms of the agreement.[421] Conversely, if an Owner has recovered judgment for arrears of rent due, the Owner is still able to bring an action for possession of the goods.[422]

5.2.1 On Misrepresentation

Where the Owner has been induced to let goods on hire-purchase to the Hirer by the reason of some misrepresentation on the part of the Hirer at or prior to the formation of

[420] Please see Chapters 2 & 3 for the law on repossession under the Common Law and the Act, respectively.
[421] ***Brooks v. Beirnstein, [1909] 1 K.B. 98.***
[422] ***South Bedfordshire Electrical Finance Co. Ltd. v. Bryant, [1938] 3 All E.R. 580, C.A.***

the agreement, which the Owner might have otherwise declined, the Owner is entitled to avoid the agreement and recover possession of the part goods.[423] In certain circumstances the Owner may also be entitled to damages, as discussed below.[424]

Misrepresentation by a Hirer normally takes the form of a false statement as to facts on which the assessment by the Owner of the Hirer's financial standing is based. It can arise in other ways, as where the Hirer tenders goods in part exchange and misrepresents the condition of the goods or his title to them.[425] It is essentially a breach antecedent to the hire-purchase agreement and outside it altogether so what is broken is not the contract itself but the duty to refrain from procuring a contract by false statements.[426]

Where the misrepresentation is fraudulent, the Owner is not restricted to a remedy by way of rescission but may in addition claim damages in tort for deceit.[427] A misrepresentation is fraudulent if made by a Hirer who knows the statement to be untrue; or does not believe in its truth; or reckless whether it be true or false.[428] It makes no difference that the statement, though made with intent to deceive, was not intended to defraud or cause injury to the Owner. If the Owner has acted on the fraudulent statement and thereby suffered damage the Owner is entitled to damages despite the fact that the Owner's loss was not intended by the Hirer.

In ***United Motor Finance Co. v Addison & Co. Ltd. [1937] 1 All ER 425,*** the Dealer misrepresented to the finance company that the stated deposit was taken when in fact

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[423] Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], at page 129.
[424] Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], at page 130.
[425] Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], at page 92.
[426] The representation may also, of course, be incorporated as a term of the contract and if false will constitute either a breach of condition or warranty, depending on whether or not the term goes to the root of the contract.
[427] ***Refuge Assurance Co. Ltd. v Kettle well [1909] A.C. 243.***
[428] ***Derry v Peek (1889) 14 App. Cas. 337.***

this was achieved by falsely inflating the cash price; and that the vehicles sold to the finance company were new when in fact that they had become second hand and had depreciated in value through substantial use by intending Hirers.

The law pertaining to innocent misrepresentation is quite different as we can see from the case of ***Redgrave v Hurd (1881) 20 Ch. D. 1.*** which held that an innocent misrepresentation, though giving rise to no right of action at Common Law, entitles the injured party in Equity to apply for rescission of the contract and restoration of the parties as far as possible to the condition in which they were before the contract. This is not a remedy by way of damages but involves simply the return of money paid and goods delivered under the contract. It follows that if owing to a change in circumstances restitution is impossible, as where the goods to be returned have accidentally been destroyed, the Court cannot order rescission and the injured party is left entirely without remedy. However, this rule has two exceptions, namely :-

(a) where the misrepresentation constitutes a breach of warranty by an agent as to his authority to contract on behalf of his principal (***Collen v Wright (1857) 7 E. & B. 301***); and

(b) in certain circumstances, where the misrepresentation is contained in a company prospectus and is one which has induced a person to subscribe for shares in the company (Section 43 of the Companies Act, 1948).

The misrepresentation may, of course, amount also to a breach of condition or warranty in which event the injured party may waive his equitable right to rescission and pursue his Common Law remedies for breach of condition or warranty. The remedies of the Owner in such cases, and his entitlement to damages, are governed by the same

principles as those applicable to claims by the Hirer against the Owner on ground of misrepresentation.[429]

A misrepresentation cannot be relied on by the Owner as entitling the Owner to apply for rescission unless the Owner was influenced by it and acted on it in the belief that it was true. Accordingly, if the Owner knew that the representation was false and elected to proceed with the contract just the same or if the representation was in no way material in inducing the Owner to enter into the contract, the Owner cannot complain and will not be entitled to rescission or damages.[430]

5.2.2 On Renunciation

Where the Hirer expressly or by implication renounces his obligations under the agreement before the time for performance falls due the Owner may elect to treat the agreement as terminated by the Hirer's renunciation and immediately sue the Hirer for breach of the contract.

Renunciation by the Hirer takes the form of an intimation given to the Owner before the goods are due to be delivered that the Hirer does not propose to accept delivery. Such intimation entitles the Owner to treat the agreement as at an end, and the measure of damages which the Owner can recover is the same as upon refusal to accept delivery[431] actually tendered except that expenses of delivery will not of course form an item of the claim.

[429] Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], at page 135.
[430] ***Smith v Chadwick (1882) 20 Ch. D 27.***
[431] Please see 5.2.3 below.

However, where the Hirer's renunciation consists of an intimation that the Hirer will refuse delivery when tendered, and in fact the Hirer does refuse delivery, the Owner gains no increase in damages by waiting for hire-rent to accrue due. This is due to the fact that the hiring does not commence until delivery. The Owner's remedy is to claim damages and not to sue for hire-rent. Hence unless the Owner is prepared to wait indefinitely for the Hirer to change his mind and accept the goods, the Owner has little choice but to treat the agreement as at an end and claim damages accordingly.[432]

5.2.3 On Refusal to Accept Delivery by the Hirer

The Hirer is under the implied obligation to accept delivery of goods which the Hirer has agreed to take under a hire-purchase agreement but the Owner must tender delivery at the prescribed time and at a reasonable hour, otherwise the Hirer may treat it as ineffectual.[433]

The hiring does not commence until the goods have been delivered.[434] Accordingly, if the Hirer refuses to accept delivery, no hire-rent can accrue due under the agreement. Therefore, the Owner is not entitled to sue for any of the instalments stipulated, even though the Owner waits until the date when such instalments would have become payable under the provisions of the agreement if delivery had been accepted. The Owner's remedy is to claim damages for breach of contract.[435] If the rule were otherwise the Owner would in effect be obtaining specific performance, which is rarely granted. Taking constructive possession is sufficient to make the Hirer liable to pay the hire-rent under the agreement.[436]

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[432] Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], at page 120.
[433] 'Reasonable hour' was discussed in Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], at page 74.
[434] ***National Cash Register Co. v Stanley [1921] 3 K.B. 292.***
[435] Please see 5.3 below.
[436] ***Chester and Cole Ltd. v Wright (1930) (reported in Jones and Proudfoot, Notes on Hire-Purchase Law, 2nd edition , 1937, page 124).***

5.2.4 On Breach of Other terms

An Owner who terminated the hire-purchase agreement due to the Hirer's breach becomes entitled not merely to damages for the specific breach complained of but also to the loss the Owner suffered in consequence of the termination, the amount of which is customarily crystallised by a depreciation or minimum payment clause[437].

The confluence of these two overlapping heads of damages tends to cause confusion as to the Owner's exact rights. Particularly, as to the extent the Owner is entitled to recover the damage caused by the Hirer's failure to take reasonable care of the goods the question. This difficulty is readily resolved if it is borne in mind that the whole foundation of damages in contract is to compensate the injured party for the loss he has suffered and not to penalise the guilty party for his breach.

Unless otherwise provided by the agreement, the Owner can repudiate only for breach of condition not for breach of warranty or of an independent promise such as the obligation to repair. This is to ensure that the Hirer's failure to comply with a minor obligation would not entitle the Owner to terminate the agreement. However, modern hire-purchase agreements almost invariably empower the Owner to terminate the agreement upon the breach of any of its provisions.

Accordingly, in practice upon the Hirer committing a breach which entitles the Owner to terminate the agreement, the Owner upon terminating may retain all payments made by the Hirer under the agreement[438] and may in addition recover :-

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[437] This duality of claims was the focal point of the decision in ***Yeoman Credit Ltd v Waragowski [1961] 3 All ER 145***, a case the effect which is often misunderstood and which is sometimes wrongly cited as an authority on the question of penalty. See Section 5.3.2 for further elaboration.

[438] Kindly see Section 5.2.4.1 for further elaboration.

(a) possession of the goods, either by recaption (repossession)[439] or by action in tort for detinue. Alternatively, the Owner can recover damages in contract for breach of the obligation to redeliver or in tort for detinue or conversion;

(b) all hire-rent due and unpaid at the date of termination of the agreement;

(c) the sum due under the minimum payment clause or depreciation clause provided that such sum is reasonable pre-estimate of the liquidated damages and not a penalty.

However, the Owner need not terminate the agreement. The Owner may instead elect to keep it alive and merely claim damages for breach complained of, in which event his damages will be restricted to the loss resulting from that breach and no question of loss occurring on termination of the agreement will arise. Hire-rent cannot be recovered as such for a party after the termination of the agreement. A provision entitling the Owner to recover such hire-rent, for e.g., a clause purporting to render the Hirer liable for the full balance of the hire-purchase price, would almost be unenforceable as a penalty.[440] Where there is no such clause or the clause is unenforceable as imposing a penalty, the Owner may sue for damages for loss of profit resulting from the termination. Each of these remedies merit further consideration.

5.2.4.1 Retention of monies paid

As we have already discussed in Chapter 4.2.1.1, the members of the Court of Appeal in ***Stockloser v. Johnson*** (hereinafter referred to as the "***Stockloser's case***"),[441] could not agree on whether Equity can be invoked to allow the Hirer to recover the payment already made to the Owner. It is hence proposed for us to look at the Malaysian

[439] Please see Chapter 2 for repossession under Common Law.
[440] ***Cooden Engineering Co. Ltd. v Stanford [1952] 2 All ER 915.***
[441] ***[1954] 1 All E.R. 630; [1954] 1 Q.B. 476, C.A.***

position. In this particular action the dispute was between a seller and a purchaser under a contract of sale, but the principle (if it exists at all) seems equally applicable to hire-purchase agreements.

The difficulty is to know what are the circumstances which give rise to this equity, but Augustine Paul, JC in ***Au Yong Kun Min v. Tractors Malaysia Bhd [1997] 5 CLJ 31*** agreed with all that Somervell LJ has said about it, differing herein form the view of Romer LJ in the ***Stockloser's case***. Two things are necessary: first, the forfeiture clause must be of a penal nature, in this sense, that the sum forfeited must be out of all proportion to the damages, and, secondly, it must be unconscionable for the seller to remain the money[442].

Gopal Sri Ram, JCA in the latest Court of Appeal case ***Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd [2005] 2 CLJ 914*** held that Section 75 of the Contracts Act 1950 does not apply to a true deposit and that in order for the innocent party to forfeit any sums more than the true deposit then the innocent party must prove actual damages. The learned judge also held that an innocent party against whom the contract is repudiated has 3 options, namely, accept the repudiation and sue for damages[443]; treat the contract as continuing and sue for specific performance[444]; or rescind the contract and forfeit the deposit[445]. Most importantly, the learned judge held that the ***Stockloser's case*** is not applicable for breach of contract simpliciter, that is, the innocent party cannot retain all the monies paid.

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[442] Please see also ***Elson v. Prices Taylor Ltd. [1963] 1 WLR 287; Hyundai Heavy Industries Co. Ltd. v. Papadopoulos [1980] 1 WLR 1129; Jagatheesan v. Linggi Platations Ltd. [1969] 2 MLJ 253; Chen Chow Lak v. Tan Yew Lai [1983] 1 MLJ 170; K Umar Kandha Rajah v. EI Magness [1985] 1 MLJ 116.***

[443] Section 40 of the Contracts Act 1950.

[444] Section 40 of the Contracts Act 1950.

[445] Common law right of rescission which is akin but much narrower than its equitable counterpart.

Augustine Paul, JC (as he then was) in the High Court case of ***Au Yong Kun Min v. Tractors Malaysia Bhd [1997] 5 CLJ 31*** held that the circumstances in which the remedy of recovering instalments already paid by a defaulting purchaser when the vendor elects to discharge the contract are neatly summarised by Denning LJ in ***Stockloser v. Johnson***[446] as follows :- (1) **When there is no forfeiture clause.** If money is handed over in part payment of the purchase price, and then the buyer makes default as to the balance, then, so long as the seller keeps the contract open and available for performance, the buyer cannot recover the money; but once the seller rescinds the contract or treats it as at an end owing to the buyer's default, then the buyer is entitled to recover his money by action at law subject to a cross-claim by the seller for damages;[447] and (2) **Where there is a forfeiture clause or the money is expressly paid as a deposit (which a equivalent to a forfeiture clause).** The buyer who is in default cannot recover the money at law at all. He may, however, have a remedy in equity, for, despite the express stipulation in the contract, equity can relieve the buyer from forfeiture of the money and order the seller to repay it on such terms as the Court thinks fit.[448]

5.2.4.2 Action in Detinue or Conversion[449]

Where the Owner sues in detinue, judgment is for the return of the goods or their value,[450] and damages for the detention. The damages awarded are such as will

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[446] [1954] 1 QB 476 at pages 489-490.

[447] Augustine Paul, JC referred to ***Palmer v. Temple [1839] Ad & Ed 508; Mayson v. Clouet [1924] AC 980; Dies v. British and International Co. [1939] 1 KB 724; Williams on Vendor and Purchaser, 4th Edn., p. 1006.***

[448] Augustine Paul, JC referred to the decision of the Privy Council in ***Steedman v. Drinkle [1916] 1 AC 275*** where the Board consisted of a strong three, Viscount Haldane, Lord Parker and Lord Sumner.

[449] Clauses 5.2.1.1-5.2.1.4 are extracted taken from Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], pages 151-162, with a few adaptations to the Malaysian local usage.

[450] ***Rosenthal v Alderton & Sons Ltd [1946] 1 All ER 583*** – normally the value at the date of judgment. ***Munro v Willmott [1948] 2 All ER 983*** – where the Hirer has increased the value of the goods by his own labour and expenditure, he is entitled to be credited with the increase.

compensate the Owner for all loss the Owner has suffered as a direct consequence of the loss of use of the goods during the period of detention.[451]

Thus, if the goods are of a profit-earning nature, the Owner can recover the loss of profits consequent upon the absence of the goods from the date on which the goods ought to have been returned by the Hirer to the date on which the Owner obtains or ought reasonably to have obtained the use of other goods, together with hiring charges reasonably incurred by the Owner for those other goods after the latter date.[452]

The Owner is entitled to a reasonable hiring charge where the goods are of a profit-producing kind even though the Owner has suffered no loss through not having them during the period of detention. Thus, the fact that the Owner might not have been able to re-let the goods if they had been redelivered on the due date is relevant to the assessment of damages if the Owner bases his claim on loss of profits. However, it has no significance if the Owner chooses instead to claim a sum representing a proper hire charge for the period in which the Hirer wrongfully continued in possession of the goods.[453]

It is uncertain whether this principle applies where the goods are not of a profit-earning character or are not applied by the Owner to profit-earning uses. However, there seems to be no reason why even in this case the Hirer should not be charged a reasonable sum for his wrongful use or possession of the goods. This is because if the Hirer had returned the goods on the due date and required the use of similar goods, the Hirer would have had to pay for them.

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[451] ***Strathfillan (Owners) v Ikala (Owners), the Ikala [1929] A.C. 196***
Liesbosch, Dredger v S.S. Edison [1933] A.C. 449.
[452] ***Davis v Oswell (1837) 7 C. & P. 804*** – in computing the loss, allowance will be made for running expenses saved.
[453] ***Strand Electric and Engineering Co. Ltd. v Brisford Entertainment Ltd. [1952] 1 All E.R. 796.***

The Hirer is not entitled as of right, if the Owner sues in detinue, elect whether to return the goods or pay their assessed value, since the court is empowered by statute, on the application of the Owner, to order the return of the goods without giving the Hirer an option to pay their value.[454]

Conversely, the Owner cannot insist on an order for specific delivery. The matter is entirely within the discretion of the court, which can, against the wishes of the Hirer or the Owner,[455] make the following orders :-

(A) Specific delivery to the Owner without giving the Hirer the option of paying the value of the goods. In making this order, the court may impose such terms as may be just to do equity between the parties; and if the Defendant/Hirer has, since the date of his refusal to deliver the goods, increased their value by his own labour and expenditure, the court may make it a term of the order that the Plaintiff/Owner shall make a fair allowance to the Defendant/Hirer in respect of the value of the goods.[456]

(B) Delivery of the goods to the Owner unless payment of their assessed value is made by the Hirer within a specified time.

(C) Payments to the Owner of the value of the goods without giving the Hirer the option of returning them.

The effect of order (A) is to enable the Owner to recover the goods by execution without having to accept a tender by the Hirer of the value of the goods; for this form of order gives the Hirer no option. Order (B) allows the Hirer to prevent the issue of a writ or warrant for delivery of the goods by paying the assessed value before the time

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[454] In UK, Section 78 of the Common Law Procedure Act 1854. This section was repealed as a result of various Statute Law Revision Acts, but those Acts made general provision for the saving of any jurisdiction conferred by the various Acts repealed, so that notwithstanding the repeal of Section 78, the jurisdiction which it conferred remains. Further, the High Court is by rules of procedure given power to order specific return of the goods (R.S.C. Order 48) and it has been held that a similar power is vested in the County Court (***Winfield v Boothroyd (1886) 54 L.T. 574).*** C.f. Section 42 of the Act.

[455] However, if the Owner and the Hirer both agree to the form of order they desire, the court must presumably give effect to this.

[456] ***Peruvian Guano Co. v Dreyfus Brothers & Co. [1892] A.C. 166.***

allowed for payment expires. Even after the time for payment has expired the court has power to stay execution of the order for delivery.[457] Under order (C), the Owner is entitled to recover the value of the goods as assessed by the court, but the Owner is not given any right under the order to recover the goods themselves.

The mere fact that the Owner has obtained judgment for the value of the goods does not in itself vest the property in the goods in the Hirer;[458] the Owner retains his Ownership until the judgment has been satisfied. This is so whether the judgment is for the value of the goods or for the return of the goods with an option to pay their value.[459]

Notwithstanding the judgment, the Owner is entitled to enforce any extra-judicial remedies against the goods which may be available to him for e.g. seizure and may also sue in detinue, any third party into whose hands the goods come before judgment against the Hirer is satisfied. Once the sum is awarded by the judgment or order has been paid, the Owner's title to the goods is forthwith transferred to the Hirer (or any person to whom he may previously have assigned them) and the Owner's proprietary interest *ipso facto*[460] determines.

Similarly, if the Owner succeeds in securing the recovery of the goods, the judgment in his favour for their value becomes inoperative, for by accepting the goods the Owner is deemed to have waived his right to their value until judgment.

If the Owner, instead of suing in detinue, brings his action in conversion, the Owner has a presumptive right to damages which is not lost by the subsequent acceptance by the

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[457] The UK R.S.C. Order 42 r. 19 (High Court); ss. 99(2) & 123 of the UK County Courts Act 1959 (county court). The Malaysian equivalent to can be found in Order 47 of the Rules of High Court 1980 and Order 32 of the Subordinate Court Rules 1980.
[458] ***Brinsmead v Harrison (1872) L.R. 7 C.P. 547.***
[459] ***Ellis v John Stenning & Son [1932] 2 Ch. 81.***
[460] By that very act.

Owner of a tender of the goods by the Hirer. The effect of such acceptance is merely to reduce *pro tanto*[461] the amount of damages to which the Owner is entitled.[462] This is so whether the tender is made or accepted before or after the institution or proceedings for conversion. Further, the Hirer is not entitled as of right to reduce the damages recoverable by the Owner by tendering the goods.

Conversely, it would appear that the Owner cannot as of right refuse the tender and recover damages in full for conversion. The Court has an equitable jurisdiction to stay proceedings on such terms as it considers just, if the Hirer makes a tender of the goods; and the Owner can therefore be compelled by the Court to accept restitution of his converted property in reduction of the amount of his claim.[463]

However, if the Owner has suffered no other damages and insists on proceeding with his action he may be ordered to pay the costs even though he recovers nominal damages.[464]

5.2.4.3 Action for Hire-rent Accrued And Due

The claim for damages for breach of contract most frequently made by the Owner against the Hirer is that which arises on a failure by the Hirer to pay the instalments due under the hire-purchase agreement. This is particularly so now that the minimum payment clause has fallen into such bad odour.[465]

Seeing that they can no longer rely with any confidence on the minimum payment clause the Owners have reverted recently to a claim of damages under the general

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[461] Partially fulfilled until a better solution comes by.
[462] ***Moon v. Raphael (1835), 2 Bing. N.C. 310.***
[463] ***Fisher v. Prince (1762), 3 Burr. 1363; Tucker v. Wright (1826), 3 Bing. 601, 130 E.R. 645.***
[464] ***Hiort v. London and North Western Rail. Co. (1879), 4 Ex.D. 188, C.A.***.
[465] Please see Clause 5.2.3 below.

law[466]. This is done even though the agreement may contain a minimum payment clause[467] and a right to damages is not mentioned in the agreement unless there is something which expressly or impliedly excludes the right to damages.

It does need any special provision in a contract to entitle the injured party to recover damages for its breach where the contract has been broken. If a claim is made under the minimum payment clause which the court holds to be a penalty the Owner is still entitled to such damages under the general law as are proved.[468]

A distinction is made between cases where the Hirer's failure to pay the instalments amounts to, or is the result of, a repudiation of the contract by the Hirer and cases where there is no repudiation by the Hirer.[469] The question of repudiation is one of fact in each case. In some cases it is to be inferred from the complete failure of the Hirer to pay instalments over a long period. The Hirer may tell the Owner orally or in writing that the Hirer can no longer continue paying. If the Hirer is only slightly in arrear and there is no other evidence to show that the Hirer does not intend to go on with the contract the Hirer will not be treated as having repudiated the agreement.

In ***Financings Ltd. v Baldock [1963] 2 Q.B. 104*** ("**Baldock's case**"), Lord Denning MR criticised the method of assessment of damages in ***Yeoman Credit Ltd v Waragowski [1961] 3 All ER 145*** ("***Waragowski's case***"). As the case decided that there is no repudiation if a Hirer does not pay two instalments whereupon the Owners repossess the vehicle. The damages are limited to the unpaid instalments with interest. However, if the Hirer had been more courteous and had written "I cannot pay anymore

[466] ***Financings Ltd. v Baldock [1963] 1 All ER 443.***
[467] ***Overstone Ltd v Shipway [1962] 1 All ER 52.***
[468] ***Bridge v Campbell Discount Co. Ltd. [1962] 1 All ER 385.***
[469] Please see 5.3 under "Measure of Damages" below.

instalments", that would have been a repudiation and the damages multiplied ten-fold. Lord Denning was of the opinion that whether or not there has been a repudiation cannot depend on a question of manners. It is a question of the Hirer's intention, not how the Hirer expresses it.[470] Thus if, in ***Baldock's case***, the Hirer who was only two instalments in arrear had been courteous enough to write a letter he would have asked for more time to pay, otherwise it would have been a repudiation.[471]

The date when hire-rent accrues due is regulated by the express provisions of the agreement. At Common Law, the Hirer remains liable to pay the rent for the entire hire period if the Hirer wrongfully returns the goods before the expiration of the period of hire.[472] However, if the Owner elects to determine the agreement before the period expires, the hire-rent can be claimed only up to the date of termination.[473] If the hire-rent is payable in advance, and the day for payment for a particular period arrives before the agreement is terminated the Owner is entitled to claim payment of the rent for the whole period. This is so even though as a result of non-payment on the due date the Owner has seized the goods so that the Hirer in fact enjoys the use of the goods for only a fraction of the period in question.

In ***National Telephone Co. v. Griffen, [1906] 2 I.R. 115,*** the Defendant rented telephone from Plaintiffs on yearly hiring, rent being payable in advance. Upon the Defendant refusing to pay second year's rent in advance, Plaintiffs disconnected telephone. Held, the Plaintiffs were entitled to recover full year's rent for second year

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[470] For e.g., a Hirer who does not intend to pay instalments and who at once informs the Owner of his intention has repudiated the contract as much as a Hirer who merely sits back and does nothing.
[471] An Owner may also wish to claim damages against a Hirer for failure to keep the goods hired in good order repair and condition. Please see Clause 5.2.6 below.
[472] ***Wright v. Melville (1828), 3 C. & P. 542.***
[473] If it is payable in arrear.

although the Defendant had only had telephone for 40 days in that year before it was disconnected.

Alternatively, the Owner may upon return of the goods, elect to treat the agreement as at an end. Hence, the Owner cannot sue the Hirer for hire-rent accruing subsequently. In ***Brooks v. Beirnstein, [1909] 1 K.B. 98***, a provision in the agreement purporting to allow the Owner to recover on termination not only the arrears but also the entire balance of the hire-purchase price has been held void as a penalty.[474]

However, the Owner is entitled to recover instalments due up to the date of redelivery of the goods by the Hirer, together with damages for breach of contract.[475] The Owner's right to recover arrears of hire-rent is not prejudiced by his retaking possession of the goods in accordance with the provisions of the agreement. Conversely, it was held in ***South Bedfordshire Electrical Finance, Ltd. v. Bryant, [1938] 3 All E.R. 580, C.A*** that the fact that the Owner obtains judgment against the Hirer for arrears of rent and the judgment is satisfied does not preclude the Owner from recovering possession of the goods.

In this connection, it is important to distinguish between a judgment for arrears of hire-rent and a judgment for the value of the goods in an action for detinue or conversion. The former is in respect of a sum due for the use of the goods only, even though the judgment is satisfied the title to the goods remains in the Owner.

However, where the entire period of hire expires without the Owner having previously elected to terminate the agreement on the ground of the Hirer's breach the arrears of

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[474] Also, ***Cooden Engineering Co., Ltd. v. Stanford, [1952] 2 All E.R. 915***.
[475] As to the measure of damages, see Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], at page 149.

hire-rent will (unless a separate sum for the option is payable at the end of the period of hire) amount to the unpaid balance of the hire-purchase price. Accordingly, it would seem that satisfaction of a judgment for this amount must vest the property in the goods in the Hirer, for the Owner has in effect elected to enforce payment of the full hire-purchase price.[476] The latter is intended to confer on the Owner the cash equivalent of the capital value of the goods against a Hirer who has wrongfully converted or detained them.

Accordingly, although the judgment itself does not operate to transfer the title in the goods to the Defendant/Hirer whilst it is unsatisfied,[477] once the amount due under the judgment in respect of the value of the goods has been paid by the Defendant/Hirer the property in the goods automatically passes to him. The agreement may provide that upon the Owner terminating the agreement by reason of a breach or default on the part of the Hirer a stipulated sum additional to the arrears of hire-rent shall become payable by the Hirer. The recoverability of this sum by the Owner depends on whether it is a penalty or a genuine pre-estimate of liquidated damages[478]. This question is discussed further in the next section.

5.2.4.4 Action on Minimum Payment or Depreciation Clause

Unless otherwise provided in the agreement the Hirer is not responsible for depreciation of the goods caused by fair wear and tear. In order to protect themselves against loss in value through depreciation of goods repossessed or returned to them, it is the Owner's practice to insert clauses in their hire-purchase agreements imposing a liability upon the Hirer to make a payment over and above the arrears of hire-rent in the

[476] See further Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], at page 127.
[477] See Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London] [London], at pages 127 and 153.
[478] Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], at pages 67 and 154.

event of the agreement or the hiring being determined before the property in the goods has passed to the Hirer. The payment may be expressed to be for depreciation of the goods or by way of liquidated damages or compensation for loss of profit or the provision may be silent as to the nature of the payment. Where depreciation is mentioned the provision is usually known as a depreciation clause, in other cases simply as a minimum payment clause, though the terms tend to be used interchangeably.

At this juncture we may briefly note the distinction between a true depreciation clause and a clause which, while purporting to provide for depreciation, is in fact designed to give the Owner compensation for the overall loss, including loss of profit that the Owner will suffer upon termination of the agreement.

(a) A True Depreciation Clause

Loss suffered by depreciation represents simply the diminution in the value of the goods through fair wear and tear and this will normally increase with the passage of time. One convenient rule of thumb method of pre-estimating depreciation is a sliding scale providing for a payment based on a percentage of the hire-purchase price, the percentage increasing as the agreement progresses. Goode was of the opinion that a clause which contains other factors such as a reference to the sums paid and due by the Hirer precluded the clause from being a true depreciation clause.[479]

What normally happens is that payments are stipulated as being for depreciation when in fact the basis of calculation used is that which provides compensation for loss of profit[480]. A depreciation clause which obliges the Hirer to pay an arbitrary percentage

[479] As is the case in ***Phonographic Equipment (1958) Ltd. and Another v Muslu, [1961] 3 All E.R.626.***
[480] ***Phonographic Equipment (1958) Ltd. And Another v Muslu, [1961] 3 All E.R.626.***

of the hire-purchase price, unrelated to the condition of the goods at the date of termination of the agreement, is particularly prone to attack.[481]

(b) A Loss of Profit Clause

A clause providing for damages or compensation for loss of profit is unobjectionable as long as the formula used is one which indicates that the Owner has made a genuine pre-estimate of the damage likely to flow from the Hirer's breach. However, a stipulation for payment of a fixed percentage of the hire-purchase price is just as open to attack as if contained in a depreciation clause.

It is a well established principle of contract law that where a contract stipulates that a named sum shall become payable by a party upon his committing a breach of the contract that stipulation will only be enforced if the sum in question is a genuine pre-estimate of liquidated damages and is not a penalty fixed *in terrorem*[482] of the offending party.[483]

The earliest hire-purchase case recorded in which the application of the penalty rule to a minimum payment clause fell to be considered is ***Elsey & Co. , Ltd. V. Hyde.***[484] It was held by Salter, J. that since no question of penalty would arise if the sum claimed had become payable by reason of the Hirer's termination of the agreement, it followed that the sum claimed should not be regarded as giving rise to questions of penalty when it became payable upon the Owner retaking the goods.[485]

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[481] ***Landom Trust, Ltd. v. Hurrell [1955] 1 All E.R.839.***

[482] In order to frighten.

[483] ***Dunlop Pneumatic Tyre Co. , Ltd. V. New Garage and Motor Co. , Ltd., [1915] A.C. 79, H.L.***

[484] ***(1926) unreported*** but recorded in Jones and Proudfoot, Notes on Hire-Purchase Law, page 107.

[485] First limb. In the words of the learned Judge, " It appears to me to be a strange conclusion, if this money is to be regarded as a penalty where it was payable in one event and not regarded as a penalty where it was payable in another event. I think, therefore, as it is to my mind not a penalty where it is payable on the return of the article by the Hirer, it ought not to be regarded as a penalty where it was payable on the re-taking of the article by the Owner."

He further held that the sum claimed became payable by reason of the termination of the hiring and not by reason of the Hirer's breach[486]. Lastly, he held that even if the question of penalty did arise, the amount claimed was reasonable as a genuine pre-estimate of liquidated damages, having particular regard to the fact that the sum due under the clause was not a fixed sum but took account of the amount already paid under the agreement.[487]

However, an entirely opposite view of the law was taken by the majority of the Court of Appeal in the later case ***Cooden Engineering Co., Ltd . v. Stanford***[488] in which the Court held[489] that the Court would go behind the fact of termination and examine the reason for it although the sum claimed on termination by the Owner on the ground of the Hirer's breach did become payable as a result of the termination.

If the agreement was terminated on account of the Hirer's breach then the sum claimed must be regarded as being payable by reason of the breach. The Court further held that if a sum is claimed on the ground of a breach (or on termination in consequence of a breach) then the mere fact that it would also have been payable on the occurrence of some other event not amounting to a breach does not relieve the Court of its duty to decide whether the stipulated sum is a penalty. Conversely, if the sum claimed becomes payable on an event not amounting to a breach the mere fact that other events constituting a breach would also have rendered the sum payable if those events had occurred does not raise the issue of a penalty.[490] It therefore seems clear that the first

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[486] Second limb.
[487] Third limb. This decision was approved by the Court of Appeal in ***Chester and Cole, Ltd. v. Wright (1930) (reported in Jones and Proudfoot, Notes on Hire-Purchase Law, 2nd edition , 1937, page 124)*** in which the same form of agreement was in question.
[488] ***(1952) 2 All E.R. 915; (1953) 1 Q.B. 86, C.A.***
[489] Jenkins, L.J., dissenting.
[490] ***Bridge v. Campbell Discount Co., Ltd, [1962] 1 All E.R. 385, H.L.*** infra.

and second limbs of the decision in ***Elsey & Co. , Ltd. v. Hyde***[491] are no longer good law.

5.2.4.5 Failure to take Care of the Goods

An Owner may claim damages against a Hirer for failure to keep the goods hired in good order repair and condition. The precise obligations of the Hirer, and the damages for any breach, will depend on the terms of the particular agreement. It has been said that an obligation to keep in repair does not involve putting in repair at the outset.[492] In ***Brady v St. Margaret's Trust Ltd***[493] the Hirer was obliged to keep the motor car in good order repair and condition.

The damages should not be assessed by reference to the price or value of the goods. There should be evidence by the Owner to show the condition of the goods at the time the agreement was made and to show how far the Hirer has defaulted under it. The Hirer is under an implied obligation to take reasonable care of the goods during the currency of the hire-purchase agreement.[494] The Hirer is liable for his own negligent acts[495] and for those of his servants or agents acting within the scope of their authority.[496] The Hirer is not liable for the acts of third parties over whom the Hirer cannot reasonably be expected to exercise control.[497]

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[491] ***(1926), unreported*** but recorded in Jones and Proudfoot, Notes on Hire-Purchase Law, page 107.
[492] ***Yeoman Credit Ltd. v Apps [1961] 2 All ER 281.***
[493] ***[1963] 2 All ER 275.***
[494] ***Coggs v. Bernard (1703), 2 Ld. Raym. 909; Tilling v. Balmain (1892), 8 T.L.R. 517, D.C.***
[495] ***Dean v. Keate (1811), 3 Camp. 4.***
[496] ***Sanderson v. Collins, [1904] 1 K.B. 628; Coupe Co. v. Maddick, [1891] 2 Q.B. 413, D.C.*** But he is not liable for the acts of servants or agents acting outside the scope of their authority (***Sanderson v. Collins, [1904] 1 K.B. 628***).
[497] ***Walkev v. British Guarantee Association (1852), 18 Q.B. 277.***

Thus, he is not liable where the goods are stolen and he has not been negligent regarding their safe custody but in such a case he must take all reasonable steps to recover them.[498]

The exception is where damage is caused by such third parties as a result of the Hirer using the goods in a manner not authorised by the agreement, or in consequence of an unauthorised transfer of possession or custody by the Hirer to another.[499] In the latter event, the Hirer will be held responsible for loss or damage sustained by the Owner even if the damage to the goods occurred through no fault of the person with whom they were deposited by the Hirer.[500]

The Hirer's obligation to take proper care of the goods would appear to be merely an independent promise and not a condition precedent to the Owner's obligation to leave the Hirer in quiet possession of the goods during the currency of the agreement. Accordingly, a breach by the Hirer of his duty of care will not justify the Owner in seizing the goods and terminating the agreement unless the agreement itself empowers the Owner to do so. The Owner's remedy is to sue for damages either for breach of contract or in tort for injury to his reversion.[501]

In ***Bullen v. Swan Electric Engraving Co. (1906), 22 T.L.R. 275,*** it was held that an independent promise is one which binds a party independently of performance by the other party of his obligations. A distinction is drawn between the following :-

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[498] ***Mintz v. Silverton (1920), 36 T.L.R. 399***; ***Coldman v. Hill, [1919] 1 K.B. 443; [1918-19] All E.R. Rep. 434, C.A.***).

[499] ***Edwards v. Newland (E. Burchett, Ltd., Third Parties), [1950] 1 All E.R. 1072; [1950] 2 K.B. 534, C.A.***; ***Lilley v. Doubleday (1881), 7 Q.B.D. 510***. These are cases of simple bailment, but the principle is the same. If the Hirer puts the goods to an unauthorized use and in so doing damages them he renders himself liable for damages in tort independently of any contractual liability (***Burnard v. Haggis (1863), 14 C.B. N.S. 45.***

[500] ***Edwards v. Newland (E. Burchett, Ltd., Third Parties), [1950] 1 All E.R. 1072; [1950] 2 K.B. 534, C.A.; Lilley v. Doubleday (1881), 7 Q.B.D. 510.***

[501] Damages will normally be the cost of repairs but cannot exceed the unpaid balance of the hire-purchase price. Also, Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], at page 195.

(a) a promise given by one party in consideration of actual performance of an obligation by the other (performance of the obligation is the condition precedent to the first party's liability on his promise);

(b) a promise given in consideration of a mere counter-promise to perform an obligation (in which case the promises are independent, so that a breach of his promise by one party does not entitle the other party to refuse to perform his own promise but merely enables him to recover damages for the first party's breach.

The tendency of the courts is to treat promises as dependent.[502] A breach of a minor obligation (for e.g., failure of the Owner to service the goods as frequently as stipulated) would probably be held not to excuse performance of a major obligation (for e.g., the Hirer's duty to pay the hire-rent).

However, where the Hirer not merely fails to take proper care of the goods but does an Act which is quite inconsistent with the bailment, as by purporting to sell the goods, the matter is different altogether, and the Owner is justified in resuming possession[503].

Modern hire-purchase agreements almost invariably provide that the Owner shall have power to seize the goods in the event of any breach by the Hirer (i.e. whether of a condition or otherwise), so that the position at Common Law rarely applies in practice. To give the Owner full protection, the power to determine should be expressed to be exercisable on breach of implied and/or express terms.

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[502] ***General Billposting Co. Ltd. v Atkinson [1909] A.C. 118.***

[503] Goode, R.M., Hire-Purchase Law And Practice: [1962] Butterworths [London], at page 268).

5.2.4.6 User Inconsistent with the Terms of the Hiring

The Hirer is under an implied obligation not to do any act in relation to the goods which is totally repugnant to the terms of the hiring. If the Hirer commits an act which is inconsistent with the nature of the hiring, as by selling the goods,[504] pledging them[505] or using them for a purpose different from that stipulated in the agreement,[506] the hiring ipso facto determines and the Owner becomes entitled to immediate possession of the goods.[507] Moreover, such a breach by the Hirer entitles the Owner to terminate the agreement as a whole, if the Owner so desires.[508]

However, the agreement itself, unlike the hiring, is not automatically terminated by the breach,[509] so that the Owner may choose to keep the agreement alive despite the termination of the hiring. In such a case, although the Owner is entitled to resume possession of the goods (the hiring having come to an end) the Hirer remains entitled to exercise his option to purchase by paying the balance due under the agreement[510]; and this right can be exercised by any person to whom the Hirer's interest in the agreement has been lawfully assigned.

If the Owner does not affirm the agreement and reserves his power of termination, the assignee takes subject to the Owner's right to determine. It is on this ground that the decision in ***Belsize Motor Supply Co. v. Cox, [1914] 1 K.B. 244***, is questionable.[511]

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[504] As in ***Whiteley, Ltd. v. Hilt,*** [1918] 2 K.B. 808; ***[1918-19] All E.R. Rep. 1005, C.A.; North Central Wagon and Finance Co., Ltd. v. Graham, [1950] 1 All E.R. 780; [1950] 2 K.B. 7, C.A.***

[505] As in ***Belsize Motor Supply Co. v. Cox, [1914] 1 K.B. 244;*** cf. ***Singer Manufacturing Co. v. Clark (1879), 5 Ex. D. 37.***

[506] As in ***Burnard v. Haggis (1863), 14 C.B. N.S. 45.***

[507] ***Fenn v. Bittleston (1851), 7 Exch. 152; Whiteley, Ltd. v. Hilt, [1918] 2 K.B. 808; [1918-19] All E.R. Rep. 1005, C.A.*** However, please note Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], at page 289, note 15.

[508] ***Belsize Motor Supply Co. v. Cox, [1914] 1 K.B. 244; Whiteley, Ltd. v. Hilt, [1918] 2 K.B. 808; [1918-19] All E.R. Rep. 1005, C.A.***

[509] Unless, of course, the agreement itself provides for automatic termination.

[510] ***Belsize Motor Supply Co. v. Cox, [1914] 1 K.B. 244; Whiteley, Ltd. v. Hilt, [1918] 2 K.B. 808; [1918-19] All E.R. Rep. 1005, C.A.***

[511] Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], at pages 275 et seq.

There is no implied obligation on the part of the Hirer to repair the goods hired save to the extent necessary to comply with the obligation to take reasonable care. If the agreement expressly provides that the Hirer shall keep the goods in repair during the hiring this amounts to an implied authority to the Hirer to arrange for the execution of repairs. The Hirer's obligation to repair under the agreement did not commence until the Owner had fulfilled the Owner's obligation by rendering the goods reasonably fit for the purpose for which they were supplied before the Owner effected delivery.

5.2.4.7 Failure to Redeliver

Where the option to purchase is not exercised by the Hirer within the time stipulated, the Hirer is under an obligation to redeliver the goods at the end of the period of hire.[512] However, the Hirer will be discharged from his obligation to return the goods should redelivery become impossible through no fault of the Hirer, for e.g., through accidental destruction of the goods.[513] This is so provided that the terms of the agreement indicate that the risk of accidental destruction or loss is to be borne by the Hirer and that the obligation to redeliver is a strict liability independent of negligence.[514]

The Hirer is also under a duty to return the goods where the Owner exercises a right to determine the hiring; where the agreement or hiring is effectively terminated by the Hirer himself; where some event occurs which under the provisions of the agreement causes an automatic termination of the agreement or the hiring or entitles the Owner to resume possession of the goods; and where the hiring is automatically determined at

[512] ***Mills v. Graham (1804), 1 Bos. P.N.R. 140.***
[513] See Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], at page 128. However, if the goods are destroyed after the date for redelivery has passed (***Shaw & Co. v. Symmons & Sons, [1917] 1 K.B. 799; [1916-17] All E.R. Rep. 1093***).
[514] See Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], at page 128.

Common Law[515] as a result of the Hirer doing some act repugnant to the nature of the hiring, as by selling[516] or pledging[517] the goods hired.

To determine a hiring is different from to determine an agreement. It would seem that the Owner can determine an agreement only if so empowered by the agreement. In the absence of an express provision conferring this power on the Owner, the Owner must either affirm the agreement as a whole or repudiate it as a whole. The Owner cannot elect to terminate part of the agreement whilst leaving the rest subsisting. It is true that if the Hirer commits an act repugnant to the hiring, as by selling the goods, the hiring apparently ipso facto determines at Common Law, although the remainder of the agreement is unaffected. However, this consequence is automatic (subject to the provisions of the agreement) and does not depend on the whim of the Owner.[518]

Failure to return the goods when bound to do so renders the Hirer liable for damages for breach of contract or alternatively, at the Owner's option, in tort for detinue or conversion.[519]

If the Owner chooses the remedy in tort for detinue or for conversion by wrongful detention he must show that before action he made a demand for the return of the goods and the Hirer has expressly or by implication refused to return them.[520]

Moreover, the Owner's right to institute proceedings at all for return of the goods may be limited by the terms of the agreement.[521]

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[515] If in fact it is, Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], page 289, note 15.
[516] ***Whiteley, Ltd. v. Hilt, [1918] 2 K.B. 808; [1918-19] All E.R. Rep. 1005, C.A.***
[517] ***Belsize Motor Supply Co. v. Cox, [1914] 1 K.B. 244.***
[518] Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], page 289, note 15.
[519] ***Bryant v. Wardell (1848), 2 Exch. 479; Plasycoed Collieries Co., Ltd. v. Partridge, Jones & Co., Ltd., [1912] 2 K.B. 345, D.C.; Alexander v. Railway Executive, [1951] 2 All E.R. 442; [1951] 2 K.B. 882.***
[520] see Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], page 115.

Unless the agreement otherwise expressly or impliedly provides, the Owner is not obliged to give notice to the Hirer terminating the hiring before instituting proceedings for conversion or detinue. The agreement became voidable at the Owner's option as a result of the breach by the Hirer and not automatically terminated.[522] In the absence of a provision requiring notice, the Owner is entitled to possession immediately the breach occurs and his entitlement to possession is all that is required to found an action for conversion or detinue against the Hirer or other person wrongfully in possession of the goods.[523] If the claim against the Hirer is founded not on his wrongful disposition of the goods but on the Hirer's unlawful detention of them the Owner must prove that the Owner has made demand for the return of the goods.

However, a claim in conversion cannot be founded on demand and refusal unless at the time of demand the Hirer had it in his power to return the goods.[524] Thus, if at that time the Hirer had sold them the Hirer cannot be sued in conversion for his failure to return them (it being impossible for him to comply with the demand for their return), though a claim will lie in detinue or in conversion for wrongful disposition of the goods.

The demand must be unconditional, and a refusal by the Hirer to comply with a demand to return the goods in the same good condition as they were delivered to him is not in itself sufficient evidence of conversion or wrongful detention.[525] The demand must also

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[521] see ***Hertman Pianos, Ltd. v. Kent, [1940] 8 L.J.N.C.C.R. 148***, and Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], page 175, note 8). For an unusual example of conversion see *Moorgate Mercantile Co., Ltd. v. Finch and Anor, Times, 28th March, 1962.*

[522] ***Reliance Car Facilities, Ltd. v. Roding Motors, [1952] 1 All E.R. 1355; [1952] 2 Q.B. 844, C.A.*** The agreement may itself make provision for automatic termination in the event of a breach.

[523] ***North Central Wagon and Finance Co., Ltd. v. Graham, [1950] 1 All E.R. 780; [1950] 2 K.B. 7, C.A.***

[524] ***Featherstonhaugh v. Johnston (1818), 8 Taunt. 237.***

[525] ***Rushworth v. Taylor (1842), 3 Q.B. 699.***

designate the goods to be returned in a manner sufficient to enable them to be identified.[526]

Where the agreement expressly provides for the mode of termination by the Owner, for e.g., by notice to the Hirer, the Common Law rule is excluded and the Owner's repudiation will not be effective to terminate the agreement unless the method stipulated in the agreement is followed.[527] A provision that in certain events the Owner should have power "to declare the hiring terminated" implies that notice is to be given to the Hirer.[528] It is otherwise, if the agreement states merely that the Owner "may terminate the hiring".[529]

Where notice of termination is not required by the agreement all that is necessary to bring the agreement to an end is some unequivocal Act by the Owner indicating his intention to treat the agreement as terminated. Repossession of the goods will normally suffice for this purpose. But where the agreement states that the Owner is to have the right to repossess after termination this implies that the Act of repossession cannot itself constitute the means of termination and that there must be some prior and independent Act[530], where the Court of Appeal held that any ambiguity in a hire-purchase agreement drawn up by a finance company must be construed in favour of the Hirer).

[526] *Abington v. Lipscomb (1841), 1 Q.B. 776.*
[527] *North Central Wagon and Finance Co., Ltd. v. Graham, [1950] 1 All E.R. 780; [1950] 2 K.B. 7, C.A.*
[528] *Reliance Car Facilities, Ltd. v. Roding Motors, [1952] 1 All E.R. 1355; [1952] 2 Q.B. 844, C.A.*
[529] *North Central Wagon and Finance Co., Ltd. v. Graham, [1950] 1 All E.R. 780; [1950] 2 K.B. 7, C.A.*
[530] *Abingdon Finance Co. Ltd. v. Champion (1961), Guardian, November 6th*

5.2.4.8 Double Value

The action for double value is given by Section 4 of the Distress for Rent Act 1689[531] (hereinafter referred to as "the UK DRA"). It can only be brought by the Owner of the goods and can be resorted to in cases where no rent was in fact due and the goods have been sold. Party and party costs may also be recovered.

5.3 MEASURE OF DAMAGES

The ordinary rules of contract and tort for determining damages apply to question of damages arising in hire-purchase cases. The measure of damages for breach of contractual obligations as imposed on a party to a hire-purchase agreement follows the rule in ***Hadley v Baxendale***[532] which lays down that the injured party recover the following :-

(a) such damages as may fairly and reasonably be considered to arise naturally from the breach; and

(b) such further damages as may be reasonably supposed to have been in the contemplation of both parties, at the time they made the agreement as the probable result of the breach.

For breach of contract, the measure of damages, following the rule for contracts of sale, will usually be :-

(a) the hire-purchase price, less

(i) the market value of the goods at the date of the breach,[533]

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[531] 6 Halsbury's Statutes (2nd Edn.) 146.

[532] ***(1854) 9 Exch. 341.***

[533] On breach of a contract of sale this is so even though the sum at which the Owner resells the goods proves to be higher or lower than the market price (***Slater v Hoyle and Smith Ltd. [1920] 2 K.B. 11)*** and presumably the same applies for hire-purchase.

(ii) any option fee payable under the agreement (since the Hirer need not exercise the option), and

(iii) a deduction for the acceleration of payment;[534] and

(b) any special damages, such as the expenses of tendering delivery.

The Hirer in the case of ***Interoffice Telephones v Robert Freeman Co. Ltd. [1957] 3 All ER 479,*** (overruled ***British Automatic Co. v Haynes [1921] 1 K.B. 377)*** had repudiated after accepting delivery but the position is the same in the case of non-acceptance, as is shown by the fact that in reaching its decision the court felt constrained to disapprove ***British Automatic Co. v Haynes [1921]*** where the breach was refusal to accept delivery.

The measure of damages will normally be the unpaid balance of the hire-purchase price less :-

(i) the value (or if sold, the proceeds of sale) of any goods repossessed;

(ii) any fee payable for the exercise of the option to purchase (since the Hirer was not obliged to exercise the option); and

(iii) a discount for the acceleration of payment (rebate), that is, a deduction to take account of the fact that the Owner has become entitled immediately to a lump sum in damages instead of having to accept instalment payments as he would have done if the agreement had run its proper course.[535]

Sometimes a breach of contract also constitutes a tort, so that the injured party has a choice whether to sue in contract or in tort. Thus a Hirer who refuses to return the

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[534] ***Interoffice Telephones v Robert Freeman Co. Ltd. [1957] 3 All ER 479*** c.f. the position where the Hirer commits a breach after acceptance.

[535] ***Yeoman Credit v McLean 1961, Ties, 16th November,*** approved and applied in ***Overstone Ltd. v Shipway [1962] 1 All ER 145).***

goods to the Owner on demand upon termination of the hiring breached the contractual obligation to redeliver and is also guilty of the tort of detinue. Until recently it was regarded as established that the measure of damages in tort was more generous than in contract in that under the rule in ***Re Polemis***[536] the party at fault was responsible for all direct consequences of his wrongful act, whether reasonably foreseeable or not.

This decision has now been reversed by the Judicial Committee of the Privy Council in the ***Overseas Tankship (U.K.) Ltd. v Morts Dock and Engineering Co. Ltd.***[537]; but that decision though of the highest persuasive force, is not binding on English courts and it would therefore seem that ***Re Polemis*** [538] must still be regarded as declaring the law for the purpose of proceedings in England until overruled by the House of Lords.

The basis on which damages for breach are assessed varies, within the limits of ***Hadley v Baxendale***[539] and ***Re Polemis***[540], according to the nature of the breach committed. The Owner's right of Money Claims upon the Hirer's breach in Common Law are as follows :-

(i) If the Hirer's breach does not tantamount to repudiation then the Owner's money claims are limited to the arrears of instalments only. The Owner cannot claim for loss of profits.[541]

(ii) If the Hirer's breach tantamount to a repudiation then the Owner can claim for loss of profits.[542]

(iii) If the hire-purchase agreement contains minimum payment clauses which is activated when the Hirer breached the agreement, that clause is considered to be

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[536] *Re Polemis and Furness, Withy & Co. Ltd. [1921] 3 K.B. 560.*
[537] *[1961] 1 All ER 404.*
[538] *Re Polemis and Furness, Withy & Co. Ltd. [1921] 3 K.B. 560.*
[539] *(1854) 9 Exch. 341.*
[540] *Re Polemis and Furness, Withy & Co. Ltd. [1921] 3 K.B. 560.*
[541] *Financings v Baldock [1963] 1 All ER 443.*
[542] *Yeoman Credit v Waragowski [1963] 3 All ER 145* and *Overstone v Shipway [1962] 1 All ER 52.*

penal in nature. The principles of law governing penalty clauses shall be used to determine the Owner's claims.[543]

5.3.1 Hirer's Breach Does Not Tantamount to Repudiation

Baldock's case [544] established that where the Owner exercises a right to terminate the hiring and repossesses the goods for a breach which does not amount to a repudiation by the Hirer, the Owner's damages will in most cases confined to any instalments which had become due but were unpaid at the date of the termination, and any depreciation in the value of the goods resulting from a breach of express or implied promise of the Hirer to keep the goods in repair.

Baldock's case [545] has given special significance to the question whether the breach by the Hirer in any case amounts to repudiation. Where the breach by the Hirer is failure to pay instalments, the breach will apart from any express provision in the hire-purchase agreement, amount to repudiation only if it evinces an intention not to pay future instalments and/or an intention to be no longer bound by the contract. For e.g., the Hirer's own statement of such an intention or it may be inferred from a long non-payment of instalments.[546] Non-payment is most likely a repudiation if, by a clause in the agreement, time is of the essence, unless such a clause was held to be avoided by Section 34(a) of the Act.

5.3.2 Hirer's Breach Tantamount to Repudiation

In ***Waragowski's case,*** a distinction is made between cases where the Hirer's failure to pay the instalments amounts to, or is the result of, a repudiation of the contract by the

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[543] ***Bridge v Campbell Discount Co. [1962] AC 600*** and Section 75 of the Contracts Act 1950.
[544] Followed in ***Brady v St. Margaret's Trust Ltd. [1963] 2 Q.B.494*** and ***Charterhouse Credit Co. Ltd. v Tolly [1963] 2 Q.B. 683.***
[545] ***[1963] 2 Q.B. 104.***
[546] ***Financings Ltd. v Baldock [1963] 2 Q.B. 104*** per Lord Denning M.R. at pages 112-113 c.f ***Downey (1963) 26 Mod. L.R. 706, at pages 707-708.***

Hirer and cases where there is no repudiation by the Hirer. If a Hirer wrongfully repudiates a hire-purchase agreement, the basic measure of damages to which the Owner is entitled is the total hire-purchase price from which must be deducted the total of the instalments already paid, any arrears of instalments due and unpaid at the date of repudiation, the proceeds of sale of the goods, any sum payable on the exercise of the option to purchase, and a sum representing a rebate of charges in respect of the proceeds of sale.[547]

On the other hand, where the Hirer has failed to pay the instalments when due but has not repudiated the contract and the Owner exercises the right to determine the hiring, the Owner is entitled to damages in respect of breaches of contract which occurred before the date of determination.

An Owner is entitled to terminate the hire-purchase agreement by reason of some breach on the part of the Hirer which amounts to a repudiation. The Owner becomes entitled not merely to damages for the specific breach complained of but also to the loss the Owner suffered in consequence of the termination, the amount of which is customarily crystallised by a depreciation or minimum payment clause.

This duality of claims was the focal point of the decision in ***Yeoman Credit Ltd v Waragowski [1961] 3 All ER 145***, a case the effect which is often misunderstood and which is sometimes wrongly cited as an authority on the question of penalty.

[547] ***Yeoman Credit Ltd v Waragowski [1961] 3 All ER 145.***

Where the damages are left at large, the Owner is entitled to claim for loss of profits on the transaction[548] despite the fact that this might not have arisen but for his voluntarily exercising his power of termination. In such a case, the Hirer's breach is regarded as the effective cause of the loss[549], so that the Owner's termination of the agreement will not normally be regarded as a *novus actus interveniens* (new act breaking the chain of causation). However, both Holroyd Pearce, L.J. and Davies, L.J. indicated that there might be circumstances where seizure of the goods by the Owner "might not be the reasonable solution of the situation", as where the Hirer is only slightly in arrear and did not show that he was not going on with the contract; and in that event the loss following upon termination of the agreement might well be regarded as caused not by the Hirer's breach but the Owner's decision to exercise his right to retake possession.

In consequence of hire-purchase being a credit transaction, it is accepted as being in the interests of both finance house and customer that the customer should be responsible for payment of the credit and agreed interest.[550] It is a legitimate, and expected, allocation of responsibility.

5.3.3 Minimum Payment Clause

Hire-purchase agreements under Common Law usually contain a "minimum payment clause". Example of such clause is "If the hiring is terminated by the Hirer then the Hirer shall pay the Owner 60% of the hire-purchase price minus the total instalments paid by the Hirer". The sum of 60% stated is merely an example. The Owner at times may insert a higher or lower percentage. The Court of Appeal in ***Associated Distributors v Hall [1938] 2 KB 83*** held that the minimum payment clause is only

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[548] Calculated on the basis adopted by Master Jacob in ***Yeoman Credit, Ltd. v McLean1961, Ties, 16th November.***

[549] ***Overstone, Ltd. v Shipway [1962] 1 All E.R. 52.***

[550] See numerous reported cases, in particular ***Yeoman Credit v Waragowski [1961] 3 AER 145 Court of Appeal and Overstone v Shipway [1962] 1AER 52 Court of Appeal***

binding on the Hirer who makes a voluntary early completion. The question of whether or not the clause is a penalty clause does not arise because it is a voluntary completion and not a breach of contract by the Hirer.[551]

The decision of the House of Lords in ***Bridge v. Campbell Discount Co. Ltd. [1962] A.C. 600*** indicates that a minimum hiring clause will in most cases be held to be a penalty clause.[552]

Whether the question of a penalty can arise where the agreement is terminated by the Hirer in pursuance of some power to terminate conferred on the Hirer by the agreement has not yet been settled. The traditional view is that in such a case the sum claimed cannot be a penalty since there was no breach. The Hirer is merely exercising a contractual right to buy himself out of the agreement and even if the purchase price of this right is high the Court will not interfere.[553]

In ***Bridge v. Campbell Discount Co. Ltd. [1962] A.C. 600*** (“***Bridge's case***”),[554] the Court of Appeal, following ***Associated Distributors, Ltd.*** **v.** ***Hall,***[555] held that since the sum claimed had become payable as the result of the Hirer exercising his right to terminate the hiring under the agreement no question of penalty could arise. This

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[551] ***Bridge v Campbell Discount Co. [1962] A.C. 600.***

[552] C.f. ***Anglo-Auto Finance Co. Ltd. v. James [1963] 1 W.L.R. 1042; Lombank Ltd. v. Excell & Anor. [1964] 1 Q.B. 415.***

[553] This principle, adverted to by Salter, J., in ***Elsey & Co., Ltd.v. Hyde (1926), unreported*** but recorded in Jones and Proudfoot, Notes on Hire-Purchase Law, page 107 was applied in ***Associated Distributors, Ltd. v Hall [1938] 1 All E.R. 5II ; [1938] 2 K.B. 83*** and again in Re Apex Supply Co., Ltd. ***[194I] 3 All E.R. 473; [1942] Ch. 108***. and Bridge v. Campbell Discount Co. , Ltd. ***[1962] All E.R. 385, H.L.***

[554] The facts of the ***Bridge's case*** are as follows : -
The defendant hired a car from the plaintiffs under a hire-purchase agreement. Clause 6 of the agreement provided that the Hirer may at any time terminate the hiring by giving notice of termination to the Owners and that thereupon the provisions of Clause 9 should apply. Clause 9 stipulated that if the agreement or the hiring should be terminated before the vehicle became the property of the Hirer, the Hirer was to return the vehicle and pay all arrears of hire-rent with interest and “by way of agreed compensation for depreciation of the vehicle ” such further sum as would make the rentals paid and payable equal two-thirds of the hire-purchase price, together also with such further amounts as represented the expenses incurred by the Owners. Later, the Defendant/Hirer, having paid the initial sum and one instalment, wrote to the Plaintiff/Owner in the following terms : - “ Owing to unforeseen personal circumstances I am very sorry but I will not be able to pay any more payments ... Will you please let me know when and where I will have to return the car. I am very sorry regarding this but I have no alternative.” The Plaintiff/Owner did not reply to that letter and subsequently the Defendant/Hirer returned the car to the Dealers through whom the transaction had been effected.

[555] ***[1938] 1 All E.R. 511 ; [1938] 2 K.B. 83, C.A.***

decision was reversed by the House of Lords[556] on the ground that in writing his letter of termination the Hirer neither purported not intended to avail himself of Clause 6 but indicated that he felt reluctantly constrained to break his contract; and that accordingly the sum claimed became payable on the Hirer's breach and was on the facts a penalty and not a genuine pre-estimate of liquidated damages.

The decision of the House of Lords can be interpreted as meaning that an act expressly permitted by a contract is nonetheless a breach unless the party committing the act realized that it was lawful. This is indeed a remarkable proposition. It would seem to follow that if the Hirer gives a notice of termination which is not clearly referable to an intention to exercise what the Hirer knows to be his contractual power of termination, the Owner may refuse to accept the notice as effective to terminate the agreement. Also, the Owner may hold the Hirer to the agreement until such time as an unequivocal notice is received showing that the Hirer intends to invoke his contractual rights.

Since the House of Lords concluded in the ***Bridge's case*** that the agreement had in fact come to an end by reason of the Hirer's breach it became unnecessary to decide the wider question whether a penalty issue can arise if the agreement is terminated otherwise than by reason of the Hirer's breach. The House of Lords was thus not called upon to determine whether ***Associated Distributors, Ltd. v. Hall***[557] was correctly decided.

In fact, their Lordships were equally divided in their views. Simonds, L.C. and Lord Morton thought that case was rightly decided and that in the absence of a breach no question of penalty could arise. Lords Denning and Devlin reached the opposite

[556] Simonds, L.C., dissenting.
[557] *[1938] 1 All E.R. 511 ; [1938] 2 K.B. 83, C.A.*

conclusion, though for different reasons, whilst Lord Radcliffe preferred to express no firm view on the point. Lord Denning considered that equity could grant relief not only against penalties for breach of contract but also against penalties for non-performance of a condition, into which category he placed the payment claimed by the respondents.

Sed quaere (to enquire further), Lord Devlin preferred to base his view on the narrower ground that the description of the payment as being for depreciation was demonstrably false and that the clause imposing the obligation was therefore ineffective regardless of how the agreement came to an end. Since true depreciation would increase with the passage of time whereas the minimum payment in standard form decreases, it would seem safer to make no reference to depreciation and instead either to describe the payment quite openly as compensation for loss of profit or to omit a description altogether.

Hence the common law remains as stated[558] in ***Associated Distributors, Ltd.* v. *Hall,***[559] so that until the House of Lords decides to the contrary it must be taken that no question of penalty can arise where the agreement is lawfully terminated by the Hirer or by the Owner (or by its terms automatically) on the occurrence of some event other than a breach, such as the Hirer's liquidation.[560]

This has prompted some finance companies, when repossessing goods on default, to procure the Hirer's signature to a document purporting to show that the Hirer has voluntarily terminated the agreement and surrendered the goods. Such a document would seem to be ineffective if the finance company concerned has prior to the Hirer's

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[558] However, Minimum Payment clauses are no longer effective and cannot override provisions of Sections 15(5) and (6) of the Act. Please see Chapter 6.

[559] *[1938] 1 All E.R. 511 ; [1938] 2 K.B. 83, C.A.*

[560] See *Re Apex Supply Co., Ltd. , [1941] 3 All E.R. 473 ; [1942] Ch. 108.*

signature elected to treat the agreement as at an end or if the Hirer is misled as to the nature of the document and appends his signature without addressing his mind to the purport of the document.

As was pointed out by Lord Denning in ***Bridge's* case**[561] and by the Court below, this leads to the illogical and unjust situation that a Hirer who honours his obligations by terminating the agreement in a lawful manner stands to lose considerably more than the irresponsible Hirer who breaks his agreement and whose liability is in consequence limited by the rules relating to penalties.

Similarly, from the Owner's viewpoint the matter can be unsatisfactory. This is because his *ad hoc* (formed or used for specific or immediate problems or needs) consent to what would otherwise be an unlawful termination by the Hirer does not prevent the termination from constituting a breach of contract at any rate for the purpose of a penalty question. Moreover, a letter of termination by the Hirer not referring specifically to the clause empowering the Hirer to determine the agreement may raise an understandable doubt in the Owner's mind as to whether the Owner is obliged to regard the letter as effective to terminate the agreement.

Once the Court has decided that the stipulated sum is capable of being a penalty, it will follow certain established principles in determining whether the sum is in fact a penalty. In particular, the Court will have regard to the true intention of the parties at the time the agreement was made. If the payment stipulated is found to have been fixed *in terrorem* (in order to frighten) of the offending party, the mere fact that it proves to

[561] *[1962] 1 All E.R. 385, H.L.*, at p. 399.

be less than the damage actually suffered will not prevent it from being a penalty.[562] In such a case, if the Owner sues on the penalty the Owner cannot recover more than the penal sum even though the Owner's damage proves to be greater[563] but the Owner is entitled to disregard the penalty and sue for damages for breach of contract. If the Owner does this, the amount recoverable by the Owner is not limited to the amount of the penalty.[564]

The odd situation may thus arise that by reason of the sum fixed being a penalty, the Owner can recover greater damages than if the sum in question were a genuine pre-estimate of liquidated damages. This is due to the fact that in the former case (responsible Hirer) the Owner can disregard the penalty and sue for the damage the Owner has actually suffered, whereas in the latter (irresponsible Hirer), the Owner is bound by the agreement to limit his claim to the stipulated sum. Accordingly, if the minimum payment is less than the damage suffered by the Owner and the Owner elects to claim unliquidated damages, the Hirer would definitely plead that the minimum payment was not a penalty. For this reason it is prudent for the Owner to plead his claim in the alternative.[565]

The mere fact that a sum is expressed to be payable as liquidated damages does not preclude the Court from holding that it is a penalty, since the Court looks to the substance of the matter.[566] Conversely, a sum described as a penalty may be found to have in fact been intended as liquidated damages.[567] However, where a party seeks to

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[562] ***Landom Trust, Ltd. v. Hurrell, [1955] 1 All E.R. 839*** ; ante, p. 68.
[563] ***Wall v. Rederiakt Luggude, [1915] 3 K.B. 66.***
[564] ***Lowe v. Peers (1768), 4 Burr. 2225.***
[565] Please refer to Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], at page 412, for a sample of the pleading.
[566] ***Bridge v. Campbell Discount Co., Ltd. , [1962] 1 All E.R. 385 ; Kemble v. Farren (1829), 6 Bing. 141.***
[567] ***Sainter v. Ferguson (1849), 7 C.B. 716.***

show that the nature of the stipulated sum is not what it is expressed to be the onus lies on him to establish his contention.[568]

The Owner may, when damages come to be assessed, be called upon to establish that the Owner took reasonable steps to minimise his loss where the Owner does not rely on a minimum payment clause and sues for unliquidated damages for loss of profit on termination. Where the Owner has repossessed and sold the goods, this rule requires that the Owner should have sold for the best price reasonably obtainable.

5.4 CONCLUSION

Money Claims under the Common Law is much wider than Money Claims under the Act. We can discover this as Money Claims under the Act is discussed in the next chapter. This is partly due to the former's earlier existence since the 1920's. It is hardly surprising because under the Common Law, the Owner has the advantage of a set of laws that has taken nearly a century to develop. Money Claims under the Common Law is more flexible and in tune with the times, provided that the subject matter does not fall within the purview of the Act.

However, ever since the amendment of the Act to virtually include all consumer goods and all vehicles albeit with a few exceptions, there is hardly any opportunity for the Common Law to be resorted to by the Owner unless the goods were used for business purposes.

[568] *Willson v. Love, [1896] 1 Q.B. 626, C.A.*

CHAPTER 6

MONEY CLAIMS UNDER THE ACT

6.1 PREFACE

The Owner can claim damages against the Hirer if the Hirer breached the hire-purchase agreement provided the Owner suffered damages. The Owner has the right to repossess the goods and also to claim for damages.

The Act also provided for several specific provisions pertaining to the hire-purchase price. The relevant Sections are Sections 4C(1)(c), 30, 31, 32 and the Sixth and Seventh Schedules of the Act.

6.2 TYPES OF MONEY CLAIMS AVAILABLE

On face value, there seems to be no money claims specifically provided under the Act for the Owner. They may be 'hidden' in the Sections 15; 16 & 18 of the Act. The provisions of the Act are in general designed for the benefit and protection of the Hirer. Apart from the additional rights given to the Owner as discussed in Chapter 4, i.e Sections 14[569]; 33(5); 37[570]; 38; 42; and 55A of the Act, such provisions as relate to the Owner's remedies are restrictive of his rights and do not confer upon him any advantages additional to those which the Owner enjoys at Common Law.[571]

The Owner's right to rescission and restitution for misrepresentation, where available,[572] remains unaffected by the Act. By claiming rescission, the Owner is not

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[569] Relating to sums payable by the Hirer on exercising his statutory right to terminate the agreement. See Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], at page 112.

[570] Imposing a duty on the Hirer to supply information as to the whereabouts of the goods, on request. See Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], at page 115.

[571] As to which, see Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], Chapter 7.

[572] See Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], page 146.

seeking to enforce the agreement but on the contrary is electing to treat it as void *ab initio*.

Similarly, the Owner's contractual and Common Law rights of repudiation[573] are not in any way restricted by the Act, so that the Owner remains free to terminate the agreement for breach of condition or in accordance with express powers of termination conferred by the agreement, in just the same way as if the agreement were outside the Act.

However, the enforcement of the rights vested in the Owner consequent upon the repudiation is in certain circumstances restricted. In particular, restrictions are imposed by Sections 15(5)(b) (c); 16A; 18(2); 30(2); 34; and 40(b) of the Act on the amount recoverable from the Hirer upon the termination of the agreement; and by Sections 4(4); 4A(2); 4B(3); 4C(2); 4D(2); 5(1A); 8(2); 9(2)(a); 16(6) and 30(2) of the Act on the enforcement of any rights against the Hirer, whether for liquidated sums, unliquidated damages or recovery of the goods, where the Owner is in default under Sections 4(1); 4A(1); 4B(1) & (2); 4C(1); 4D(1); 5(1); 8(1); 9(1); 16(3) and 30 of the Act.

Moreover, where the Owner institutes proceedings for the recovery of the goods the Owner is in certain circumstances prohibited from taking any step to enforce payment of any sum due under the hire-purchase except by claiming such sum in those

[573] Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], page 146.

proceedings.[574] Further, in any such proceedings the Court is given wide powers to deal with payments arising on the termination of the hire-purchase agreement.[575]

6.2.1 Section 15 (Power of Hirer to Determine Hiring)

The Owner may have money claims against the Hirer in circumstances mentioned in Section 15(5)(c) of the Act. Where such a claim arises, the mode of computation is prescribed by Sections 15(5) and 15(6) of the Act. Minimum payment clauses[576] in the context of ***Associated Distributors Ltd v Hall [1938] All ER 511***[577] are no longer effective and cannot override the provisions of Sections 15(5)[578] and 15(6)[579] of the Act.

For hire-purchase agreements governed by the Act, Section 15(5)(c) of the Act stipulated the manner in which to calculate the amount claimable by the Owner. Hence the Act implicitly prevented the minimum payment clauses to be included into the Agreement. The fact that a clause providing for recovery is avoided by the operation of Section 34(b) of the Act, that relief is granted against a penalty clause[580], does not prevent the Owner recovering damages for breach of contract which will, in some cases, be assessed in the same manner as the ceiling is determined under Section 15(1)(c) of the Act.

By Section 15(1) of the Act, the Hirer may terminate the hiring by returning the goods to the Owner and Section 15(5) of the Act provides that when a hire-purchase

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[574] Section 42(1) of the Act. See Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], page 172. The same Section also specifies in detail the various orders the Court is empowered to make.
[575] Section 20 of the Act. Also, Section 14 of the UK 1938 Act. In UK, additional restrictions are placed on the rights of the Owner, where the Court makes a postponed order for specific delivery of the goods to the Owner under Section 13 of the UK 1938 Act.
[576] Please see Chapter 5.2.4.4 and 5.3 for the meaning of minimum payment clause.
[577] For the Common Law position, please see Chapter 5.
[578] Section 15(5) of the Act was amended by Section 11(b) of the 1992 Act.
[579] Section 15(6) of the Act was inserted by Section 11(c) of the 1992 Act.
[580] ***Bridge v. Campbell Discount Ltd.*** [1962] A.C. 600, esp. per Lord Denning at page 632, a case which decided on Section 36(1)(c) of the NSW Act.

agreement is determined by the Hirer pursuant to Section 15, the Owner is entitled to recover from the Hirer the amount the Owner would have been entitled to recover if the Owner had taken possession of the goods at the date of the termination of the hiring.[581]

It was held in ***Leong Weng Choon v Consolidated Leasing (M) Sdn. Bhd. [1998] 3 MLJ 860*** (CA : N. H. Chan JCA, K.C. Vohrah and Mohd. Noor Ahmad JJ) that goods that was confiscated by the customs does not fall under Section 15 of the Act (as the Hirer did not terminate the hire-purchase agreement by surrendering the goods). The judges further held that the hire-purchase agreement was still subsisting since the Owner did not determine it (Section 40 of the Contracts Act 1950) or repossess the goods (Section 16 of the Act). However, the Owner still has the right to recover the instalments due under the agreement. The court elaborated further that even where the Hirer had repudiated or refused to perform the agreement in its entirety by refusing to pay at all any further rental instalments, that in itself would not have terminated the agreement. It is only the Owner who has the right to terminate the agreement by electing to treat the contract as at an end by accepting the repudiation and terminating the contract and recover damages under Section 76 of the Contracts Act. Alternatively, the Owner could elect to treat the agreement as alive and continuing.

These Sections are in marked contrast with Section 24 of the previous Australian Act, i.e. the NSW Act, under which the Hirer could determine the agreement simply by giving a notice of termination. The determination was effective whether the goods are actually returned to the Owner or not.

[581] ***Lau Hee Teah v Hargill Engineering Sdn. Bhd. & Anor. [1980] 1 MLJ 145, Wan Hamzah J.***

Under Section 15(3) of the Act, it is provided that where the parties fail to agree, the Hirer who proposes to return the goods to the Owner may apply[582] to a court of a Magistrate[583], for an order fixing the place to which the goods may be returned. Section 15(4) of the Act provides that notice[584] of the application under Section 15(3) of the Act shall be given to the Owner by the Hirer.

The Hirer can exercise certain rights under Section 15(5) of the Act in the event that the Hirer determined the hiring by returning the goods.[585] The Hirer may require the Owner to sell the goods to any person introduced by the Hirer for cash at a price agreeable to the Owner.[586] The Hirer is entitled to the difference (where the value of the goods at the time when it is returned to the Owner is more than the balance outstanding under the hire-purchase agreement) which is recoverable as a debt due.[587]

Section 15(5)(c) of the Act provided a method to calculate the outstanding amount claimable by the Owner. This would mean that the Act impliedly prohibit minimum payment clause to be incorporated into the hire-purchase agreements. Under the Section 15(5)(c) of the Act, the Owner is entitled to claim if the balance outstanding under the hire-purchase agreement is more than the value of the goods returned to the Owner.

Section 15 of the Act, it is generally assumed, by giving the Hirer a privilege to determine the hiring which cannot be excluded by the hire-purchase agreement (Section

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[582] **Apply** – As no specific mode is prescribed under the Act, application may be made by way of summons or originating application : Subordinate Court Rules 1980, Ord. 4 r.4.

[583] **Court, Magistrate** - See Interpretation Acts 1948 and 1967 (Act 388), Section 3 and the Subordinate Courts Act 1948 (Act 92), Section 2 and Part VII (includes an ex-officio Magistrate).

[584] **Notice** – For modes of giving notice to the Owner or Hirer under this Act where no specific mode is prescribed, see Sections 43 et seq. The Act does not state the consequences of failure to give such notice.

[585] After the Hire-Purchase (Amendment) Act 1992 (Act 813), the Hirer may be entitled to a part of the Hirer's payments to the Owner in circumstances mentioned in subsection (5). C.f The Hirer does not possess any rights at all under the Common Law - R. Else-Mitchell and R. W. Parsons, Hire-Purchase Law Being the Hire-Purchase Act, 1960-1965 (N.S.W.) Annotated and Explained, (4th Ed., 1968), The Law Book Company Limited [Australia], at pages 100-102.

[586] Section 15(5)(a) of the Act.

[587] Section 15(5)(b) of the Act.

34(a) of the Act) converts every hire-purchase agreement, whatever its form, into a ***Helby v Mathews [1895] A.C. 471*** type of agreement.

Under Section 15(1) of the Act the Hirer may terminate[588] the hire-purchase agreement[589] at any time. The Hirer may do so by returning the goods to the Owner during ordinary business hours[590] at the place where the Owner ordinarily carries on business[591] or to the place specified for that purpose in the agreement. The Act does not require any written notice to be given to the Owner. However, the Hirer is still bound by the terms of the agreement that stipulates such a procedure. The Hirer must return the goods in order to 'terminate the hiring'. The Hirer, on surrendering the goods, has statutory right to recover the Hirer's equity against the Owner.[592]

MBf Finance Bhd. (formerly known as Malaysia Borneo Finance Corporation (M) Bhd.) v Ting Kah Kuong & Anor. [1993] 3 MLJ 73 held that if the Hirer refuses to deliver up the goods following his own breach of the agreement and the Owner is not in a position to repossess the goods for the reason that they are not found in the place stated in the agreement, then the Owner cannot be faulted for non-mitigation of its losses when the Owner claims damages.

Where complete or substantial performance of the agreement become impossible by reason of some act or event occurring subsequent to the formation of the agreement, the

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[588] This right is irrevocable and any attempts to contract out is void and of no effect; see Section 34 (a) of the Act.

[589] The words 'agreement' within square brackets wherever found in Sections 15(1), (2) and (3) of the Act were amended by Section 11(a) of the 1992 Act. Previously, the words amended read 'hiring'. This is different from the Common Law position (see Chapter 5) whereby the hiring can be terminated but the agreement can still subsist unless the Owner terminates it. Therefore, it can be argued that for cases falling within the Act, once the hiring is terminated, the agreement is terminated as well. It may cause some problems in that the Owner may not be able to reinstate the agreement once the Section 15 of the Act has been activated. Therefore, the parties need to enter into a fresh agreement.

[590] This would be a question of fact depending on the type of business involved.

[591] The question as to which is the place the Owner ordinarily carries on business is a question of fact depending upon a scrutiny of the course of business and trading. C.f 'Principal place of business'; see ***De Beers Consolidated Mines Ltd v Howe [1906] AC 455.***

[592] Section 15(5)(b) of the Act. C.f. Section 12 of the NSW whereby the Hirer, on surrendering the goods, has no statutory right to recover the Hirer's equity against the Owner. The Hirer's right to recover the Hirer's equity is limited to repossession situations as in Section 15 of the NSW. The Hirer will have only such right as the Hirer may be given by the hire-purchase agreement.

supervening impossibility will in certain circumstances automatically determine the agreement and discharge the parties from further liabilities. Thus in the absence of any contractual provision bearing on the point, this result will occur where the goods are accidentally destroyed during the currency of the hire-purchase agreement without negligence on the part of the Hirer or of any third party over whom the Hirer can reasonably have been expected to exercise control. However, the terms of the agreement may be such as to indicate that destruction of the subject matter is not to be a frustrating event and that the Hirer's obligation to redeliver is absolute.[593]

Section 15(3) of the Act provided that where the parties fail to agree, the Hirer who proposes to return the goods to the Owner may apply[594] to the court of a Magistrate for an order fixing the place which the goods may be returned. Section 15(4) of the Act stipulated that the notice[595] of an application under Section 15(3) of the Act shall be given to the Owner by the Hirer. The court will not generally award damages which are too remote. The Hirer cannot claim reimbursement for the lorry drivers' wages for the wrongful repossession by the Owner, even though a tractor under hire-purchase was used in conjunction with other vehicles like lorries. The court will decline to award damages on such account unless there is clear evidence to show that the Owner was aware of such loss that the Hirer might incur if the hired vehicle is wrongfully repossessed.[596] However, the Hirer has a right to claim by way of damages any hire charges paid for an alternate vehicle, provided there is evidence to prove the same.[597]

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[593] Goode, R. M., Hire-Purchase Law And Practice, (1962), 2nd Ed, page 337; ***Ka Yin Credit & Leasing Sdn. Bhd. v. Pang Kim Cha & Bros Development Sdn. Bhd. [1989] 2 MLJ 61*** (HC: Shankar J).

[594] As no specific mode is prescribed under the Act, application may be made by way of summons or originating application; see Order 4 rule 4 of the Subordinate Courts Rules 1980.

[595] For the modes of giving notice to the Owner or Hirer under this Act where no specific mode is prescribed, see Sections 43 et. seq. (the others following) and notes thereto post. The Act does not state the consequences of failure to give such notice.

[596] ***Koh Siak Poo v. Med-Bumikar Mara Sdn. Bhd. [1994] 3 MLJ 610*** (HC: KC Vohrah J).

[597] ***Koh Siak Poo v. Med-Bumikar Mara Sdn. Bhd. [1994] 3 MLJ 61.***

6.2.2 Section 16[598] (Notices to be Given to Hirer When Goods Repossessed).[599]

If a Owner sues the Hirer for arrears of the instalments after due compliance with Section 16 of the Act and seeks a summary judgment against the Hirer, following the Owner's lawful termination of the hire-purchase agreement, the court will not entertain a bare denial of the claims by the Hirer as disclosing any triable issue. This is especially so where the Hirer does not lay out the particulars as to the unsustainability of the Owner's claim.[600]

Where the Owner repossesses a vehicle under hire-purchase and sells it below the market price, it will be considered to be unfair to the Hirer. In such cases, the Hirer will be entitled to mitigation of damages purportedly due from the Hirer to the Owner. The Owner is duty bound to act reasonably and responsibly as otherwise the Owner would be actionable at the instance of the Hirer.[601]

6.2.3 Section 18[602] (Hirer's Rights and Immunities When Goods Repossessed)

Under Section 18 of the Act, the Owner's Money Claim against the Hirer is limited to the "net amount payable". Section 18(3)(a) of the Act defined the "net amount payable" as the total amount payable less the statutory rebates[603] for terms charges and insurance as at the time of the Owner taking possession of the goods. Basically, Section 18(2) of the Act sets a limit for the total sum claimable by the Owner against the Hirer.

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[598] Prior to revision, this was Section 15 of the Act. Section 16 of the Act was amended by Section 12 of the 1992 Act with effect from 1-4-1992 (vide PU(B) 219/92).
[599] Section 16 of the Act was extensively discussed in Chapter 3.
[600] ***United Manufacturers Sdn. Bhd. v. Sulaiman bin Ahmad & Anor. [1989] 1 MLJ 482*** (HC: Gunn Chit Tuan J) where reference was made to ***Wallingford v. Mutual Society (1880) 5 AC 685***.
[601] ***Hong Leong Finance Berhad v. Lee Cheng Heng t/a Lee Cheng Heng Earthworks & Anor. [1987] 2 MLJ 266*** (ACJ : Yusoff Mohamed J).
[602] Section 18 of the Act was extensively discussed in Chapter 3 and also in Clause 6.3.4 below.
[603] This shall be further discussed in Clause 6.3.6 below.

Under Section 18(2) of the Act, where the Owner takes possession of the goods then the Owner is not entitled to recover any sum (whether under a judgment or order or otherwise) which if added together with the value of the goods at the time of the Owner so taking possession thereof; and the amount paid by the Hirer under the agreement, exceeds the net amount payable in respect of the goods.

If A is the net amount payable, V is the value of the goods at the time of the Owner so taking possession thereof and M is the amount of money already paid by the Hirer, the Owner's maximum claim is limited to A – (M + V).[604]

Section 18(3) of the Act defined "the net amount payable" as the total amount payable less the statutory rebates for terms charges and insurance as at the time of the owner taking possession of the goods.

Section 18(3) of the Act defined "the value of any goods at the time of the Owner taking possession" as the best price that could be reasonably obtained by the Owner at that time; or if the Hirer has introduced a person who has bought the goods for cash, the amount paid by that person, less the reasonable costs incurred by the Owner of and incidental to his taking possession of the goods; any amount properly expended by the Owner on the storage, repair or maintenance of the goods; and (whether or not the goods have subsequently been sold or disposed of by the Owner) the reasonable expenses of selling or otherwise disposing of the goods.

What is deemed to be "reasonable costs", "properly expended", and "reasonable expenses"? One of the criticisms of the Act that was not addressed by the

[604] Please refer to Section 18(3)(a) of the Act for the meaning of net amount payable and Section 18(3)(b) of the Act for the meaning of the value of the goods at the time of repossession. Also, ***Arab Malaysian Finance v Suhaimi [2000] 3 AMR 3231.***

amendments[605] was that there were no guidelines in calculating these costs and no provision for the Hirer to protest where the costs were considered too high. In practice, the consequences of default of payment of instalments are that the Hirer normally has to bear the Owner's costs of bringing an action, the arrears and the costs of repossession. The costs of repossession could be burdensome to the Hirers as the Owners usually charged a large sum.[606]

6.3 RESTRICTIONS ON OWNER'S RIGHTS TO MONEY CLAIMS

6.3.1 Section 14

The Owner's Money Claims are restricted by Section 14(2) of the Act, whereby the "net balance due under the agreement" is defined as the balance originally payable under the agreement less any amounts (other than the deposit) paid by the Hirer; the rebate[607] for the term charges fixed by the Act; and rebate for the insurance as stipulated by Section 2 of the Act in the event that the Hirer wish to terminate the said insurance.

Where it is agreed in a hire-purchase that the term charges have been calculated on a simple interest basis at a rate specified in the agreement on the amount outstanding from month to month, statutory rebate[608] in relation to terms charges means the amount of interest attributable to the period of complete months still to go under the agreement.

The statutory rebate for insurance is only allowable when the Hirer requires any contract for insurance to be cancelled. The word 'paid' in the definition of statutory rebate in relation to insurance seems inappropriate. The insurance premiums have gone

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[605] The 1976 Act and the 1992 Act.
[606] Please refer to Clause 6.3.4 below for the anti-thesis.
[607] This shall be further discussed in Clause 6.3.6 below.
[608] This shall be further discussed in Clause 6.3.6 below.

into the calculation of the total amount payable by the Hirer but it can hardly be said that he has paid them, at any rate when the hire-purchase agreement is subject to Section 30 of the Act, until the Hirer has completed the agreement.

Where the Hirer does not require cancellation of any contract of insurance, the obligation of the Owner to insure for the agreed period will continue. Payment-out completes the purchase. It does not mean that there cannot be continuing obligations under the agreement.

No provision is made for statutory rebate of "vehicle registration fees". If the total amount payable includes a sum in respect of registration fees yet to become payable to the traffic authority or insurance company (in respect of third party insurance) the Owner's obligation to pay will continue.

6.3.2 Section 15

As we have seen in Clause 6.2.1 above, the Owner may have money claims against the Hirer in circumstances mentioned in Section 15(5)(c) of the Act. However, the Owner's money claims are restricted in the following manner as the Act provided several rights to the Hirer upon early completion. The Hirer's rights are stated in Section 15(5) of the Act.

Under Section 15(1) of the Act[609], the Hirer has the power to determine or terminate the hire-purchase agreement by returning the goods to the Owner during ordinary business

[609] For the position of the NSW Act, please refer to Else-Mitchell, R. and Parsons, R.W., Hire-Purchase Law : Being the Hire-Purchase Act, 1960-1965 : Annotated and Explained [1968] [4th Edition] The Law Book Company Limited [Australia], at page 108.

hours[610] at the place at which the Owner ordinarily carries on business[611] or to the place specified for that purpose in the agreement. Further provisions on the manner, time and place to surrender the goods are laid out in Sections 15(2)-(4) of the Act. The Hirer's right to terminate is irrevocable and any attempts to contract out are void and of no effect (Section 34(a) of the Act).

Firstly, under Section 15(5)(b) of the Act, the Hirer may be entitled to the difference which is recoverable as debt due if the value of the goods at the time when it is returned to the Owner is more than the balance outstanding under the agreement.

Secondly, where a money claim arises, the mode of computation is prescribed by Sections 15(5) and 15(6) of the Act. Minimum payment clauses in the context of ***Associated Distributors Ltd v Hall [1938] All ER 511***[612] are no longer effective and cannot override the provisions of Sections 15(5)[613] and 15(6)[614] of the Act.

The expression "value of goods at the time when it is returned to the Owner" is defined in Section 15(6)(b) of the Act.[615] This means either the best price which could reasonably be obtained by the Owner; or if the Hirer had introduced a person who had bought the goods for cash, the amount paid by that person.

The expression "balance outstanding under the hire-purchase agreement" is defined in Section 15(6)(a)[616] of the Act. This means the total sum payable by the Hirer to complete the purchase of the goods (together with interest on overdue instalments) less

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[610] **Ordinary business hours** - This would be a question of fact depending on the type of business involved.
[611] **Place at which the Owner ordinarily carries on business** – This is also a question of fact depending upon a scrutiny of the course of business and trading. C.f 'principal place of business' : ***De Beers Consolidated Mines Ltd. v Howe [1906] AC 455.***
[612] For the Common Law position, please see Chapter 5.
[613] Section 15(5) of the Act was amended by Section 11(b) of the 1992 Act.
[614] Section 15(6) of the Act was inserted by Section 11(c) of the 1992 Act.
[615] A new provision inserted by the 1992 Act.
[616] A new provision inserted by Act A813.

the amount already paid; and statutory rebate[617] for term charges; and statutory rebate for insurance, if any.

For hire-purchase agreements governed by the Act, Section 15(5)(c) of the Act stipulated the manner in which to calculate the amount claimable by the Owner. Hence the Act implicitly prevented the minimum payment clauses to be included into the Agreement.

Under Section 15(5)(c) of the Act, the Owner has the right to claim from the Hirer if the balance outstanding under the hire-purchase agreement is more than the value of the goods returned to the Owner. The Owner is entitled to recover from the Hirer the amount that the Owner would have been entitled to recover if he had taken possession of the goods at the date of termination of the hiring.[618]

Thirdly, it is provided under Section 15(5)(a) of the Act that the Hirer can require the Owner to sell the goods to any person introduced[619] by the Hirer who is prepared to purchase the goods for cash at a price agreed to by the Owner. Where the "value of the goods at the time when it is returned to the Owner" is more than the "balance outstanding under the hire-purchase agreement", the Hirer is entitle to the difference (this sum is recoverable as debt due). Under Section 15(5)(b) of the Act, the Hirer is entitled to the difference which is recoverable as debt due. This right only exist if the value of the goods at the time when it is returned to the Owner is more than the balance outstanding under the hire-purchase agreement.

[617] This shall be further discussed in Clause 6.3.6 below.
[618] ***Lau Hee Teah v. Hargill Engineering Sdn. Bhd. & Anor [1980] 1 MLJ 145.***
[619] Section 15(5)(a) of the Act.

Fourthly, Section 15 of the Act, it is generally assumed, by giving the Hirer a privilege to determine the hiring which cannot be excluded by the hire-purchase agreement (Section 34(a) of the Act[620]) converts every hire-purchase agreement, whatever its form, into a ***Helby v Matthews*** type of agreement. That is, one under which the Hirer has an option to determine the hiring before the property in the goods; so named in consequence of the leading case of ***Helby v. Mathews 1895 A.C. 471***, a case which decided that a Hirer under such an agreement was not a person who had "agreed to buy" the goods within the meaning of Section 9 of the Factors Act, 1889.

This case finally settled the form of hire-purchase agreements, which are now drawn with a clause giving an option of purchase and permitting the Hirer to determine the hiring at any time, and thus the Owner is protected from the risk of a wrongful disposal by the Hirer giving a good title to a third person.

The significance of this in relation to the title to goods is discussed below.

In ***Leong Weng Choon v. Consolidated Leasing (M) Sdn. Bhd. [1998] 3 MLJ 860*** (CA: NH Chan JCA, KC Vohrah and Mohd Noor Ahmad JJ), the Owner/Respondent by a hire-purchase agreement let on hire a luxury air conditioned coach to the Hirer/First Defendant. The Appellant guaranteed the payment of all sums of money at any time from the Hirer to the Owner. The Hirer breached the hire-purchase agreement by defaulting on the payment of the monthly instalments. The Owner issued a notice indicating its intention to repossess the vehicle.

However, unknown to the Owner, the bus was earlier seized by the customs officials as it was used as a vehicle to smuggle tin ore into Malaysia. Where a Hirer had disabled

[620] Section 36(1)(a) of the NSW Act.

himself from performing the agreement in its entirety, say by losing the bus to the customs authorities that fact would not mean that the Hirer had terminated the hire-purchase agreement. Section 40 of the Contracts Act, 1950 gives to the Owner (that is, the promise) the right to elect to terminate the agreement and recover damages under Section 76 of the Act or to treat the agreement as alive and continuing.

The Owner did not take any further action to repossess the vehicle. The Owner thereafter commenced action to recover the entire amount due under the hire-purchase agreement. The Owner pleaded that the Hirer, by defaulting on the payment of the monthly instalments had terminated the agreement and obtained judgment against the Appellant. The Appellant who was a guarantor appealed.

It was held, allowing the appeal with costs, that the Hirer did not terminate the hire-purchase agreement by returning the bus. Section 15 of the Act gives a right to the Hirer to terminate hire-purchase agreement ahead of time by returning the goods. Therefore, since the Hirer did not terminate the agreement, there was no liability of the Hirer that was revealed in the statement of claim for the Appellant to guarantee or make good. Under the terms of his guarantee, the Appellant in no circumstances was under any liability to do so.

In ***Leong's case***, as the hire-purchase agreement was still subsisting since the Owner did not determine it (under Section 40 of the Contracts Act) or repossess the bus (under Section 16 of the Act) nor did the Hirer return it to the Owner (under Section 15 of the Act), the Owner still has the right to recover instalments due under the agreement. Unfortunately for the Owner, there was no claim for arrears of instalments in its

statement of claim. Therefore, as the Owner did not claim for arrears of instalments against the Hirer, there was no liability of the Hirer for the Appellant to make good under the terms of this guarantee.

According to ***Leong's case***, the only way under the Act for a Hirer to determine the agreement ahead of time, that is before all the instalments have been paid up, to return the goods (in the instant case, it was the bus) to the Owner under Section 15(1) of the Act. Section 15 of the Act gives a Hirer the rights to terminate the agreement. Where it was not possible to return the bus to the Owner, the agreement could not be terminated by the Hirer. Based on the cause of action as pleaded in the statement of claim, the Owner's claim against the Hirer was unsustainable.

Even where the Hirer had repudiated (that is to say, 'refused to perform') the agreement 'in its entirety' by refusing to pay at all any further rental instalments, (as a matter of contract law) that would not have terminated the agreement. It is only the Owner who has the right to terminate the agreement. Put in another way, the Owner could elect to treat a contract as at an end by accepting the repudiation and terminating the contract (Section 40 of the Contracts Act).

However, it is opined that Section 15 of the Act is not the only way per se. There are possibly three other methods whereby the agreement can be determined ahead of time albeit indirectly by the Hirer. Firstly, under Section 40 of the Contracts Act 1960, where the Owner terminates the agreement due to the Hirer's breach. Secondly, where the Owner repossessed the goods due to the Hirer's default. Thirdly, where the goods are inadvertently destroyed during the currency of the agreement therefore frustrated

the agreement.

In ***Public Finance Bhd. v Ehwan Bin Saring [1996] 1 MLJ 331*** (HC : Mohd Ghazali J), it was held that the Hirer's letter of indemnity to the Owner was void. It formed part of the hire-purchase agreement, but it has been worded as such to exclude the provisions of law which are implied under the Act. It was void under Sections 34(a), (b) and (c) of the Act. The right of the Hirer to seek relief under the provisions of the Act and also at Common Law has been wrongfully precluded by that letter of indemnity. The agreement has become impossible to perform, and the Hirer could not have and enjoy quiet possession of the vehicle.

The Federal Court in ***Affin Credit (Malaysia) Sdn. Bhd. v Yap Yuen Fui [1984] 1 MLJ 169*** (FC : Abdul Hamid, Mohamed Azmi and Syed Agil Barakbah FJJ) by way of obiter held that "Although we are not referred to it, we also note that non-compliance with Section 4(1) cannot by its very nature be brought within the ambit of Section 34 so as to render the agreement void.".

Fifthly, the Owner has to follow the time frame stipulated under the Act. In ***Pang Brothers Motors Sdn. Bhd. v. Lee Aik Seng [1978] 1 MLJ 179***, the Hirer/Respondent received a repossession notice from the Owner/Appellant after the Hirer's default in payment of instalments. The Hirer/Respondent filed a writ against the Owner/Appellant claiming that repossession was illegal, *inter alia* on the ground that Section 15 of the Act was not complied with. The Sessions Court gave judgment in favour of the Hirer/Respondent and the Owner/Appellant appealed. It was held that Section 15 of the Act clearly specifies that the period of notice shall be not less than 21 days after the

service of the notice before seizure could take place. It meant that the period specified in the notice for the Owner to call upon the Hirer to make final payment before seizure must be 21 days. However, the date specified in the instant case was short of 2 days for the statutory minimum number of days. The notice was therefore bad in law even if served and its effect was therefore null and void.

6.3.3 Section 16A[621] (Hirer Who Returns Goods Not Liable to Pay Cost of Repossession, etc)

The Owner's Money Claim is restricted in a sense that a Hirer who returns goods comprised in a hire-purchase agreement within twenty-one days after the service on him of the notice in the form set out in the Fourth Schedule shall not be liable to pay the cost of repossession; the cost incidental to taking possession; and the cost of storage.

6.3.4 Section 18 (Rights of Hirer after repossession)

The Owner's Money Claim is limited by Section 18(2) of the Act. Section 18(2) of the Act sets a limit for the total sum claimable by the Owner against the Hirer.

Under Section 18(2) of the Act, where the Owner takes possession of the goods then the Owner is not entitled to recover any sum (whether under a judgment or order or otherwise) which if added together with the value of the goods at the time of the Owner so taking possession thereof; and the amount paid by the Hirer under the agreement, exceeds the net amount payable in respect of the goods. The limitation on the Owner's rights prescribed by Section 18(2) of the Act is to be effective despite any

[621] Section 16A was inserted by the Section 13 of the Hire-Purchase (Amendment) Act 1992.

previous judgment or order and a court making a final adjustment of the rights of the parties to a hire-purchase transaction may set aside or modify a prior judgment or order.

If A is the net amount payable, V is the value of the goods at the time of the Owner so taking possession thereof and M is the amount of money already paid by the Hirer, the Owner's maximum claim is limited to A – (M + V).[622]

Under Section 18(1)(a) of the Act, it is provided that within 21 days after the goods have been repossessed by the Owner, the Hirer can, if the Hirer so desires, send a notice in writing to the Owner requiring him to re-deliver to the Hirer, or to the Hirer's order, the goods that have been repossessed; or to sell the goods to any person introduced by the Hirer who is prepared to buy the goods for cash at a price not less than the estimated value of the goods as set out in the notice under the Fifth Schedule.

Alternatively, under Section 18(1)(b) of the Act, the Hirer may claim a refund from the Owner, in the event that the value of the goods exceeds the net amount payable. For the purpose of this Section, the expression "value of the goods" means "the best price that could be reasonably obtained by the Owner" at the time of taking possession of the goods, or if the Hirer had introduced a person who has bought the goods for cash, the amount paid by that person, less such reasonable costs incurred by the Owner in taking possession of the goods; costs of storage, repair or maintenance; reasonable expenses incurred in selling the goods.

The expression "net amount payable" means the "total amount payable less the statutory rebates[623] for terms charges and insurance".[624]

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[622] Please refer to Section 18(3)(a) of the Act for the meaning of net amount payable and Section 18(3)(b) of the Act for the meaning of the value of the goods at the time of repossession. Also, ***Arab Malaysian Finance v Suhaimi [2000] 3 AMR 3231.***

Under Section 18(4) of the Act, a new provision inserted by Act A813 and replacing the earlier provision, where the Owner intends to sell the goods by public auction, the Owner must serve on the Hirer a copy of the notice of such public auction not less than 14 days from the date the said auction is to be held. If the Owner intends to sell the goods otherwise than by public auction, the Owner must give the Hirer an option to purchase the goods at the price which the Owner intends to sell if the price is less than the Owner's estimate of the value of the goods repossessed. If the Owner fails to comply with this requirement, the Owner shall be guilty of an offence.

The Hirer will not be able to recover anything from the Owner unless the Hirer acts fast, as required under Section 18(5) of the Act. The Hirer must, within 21 days of receiving the notice under the Fifth Schedule, give the Owner a notice in writing, setting out the amount which the Hirer claimed under this Section. The notice can either be signed by the Hirer himself or by his solicitor or agent. After sending the notice to the Owner, the Hirer must then commence action in court not later than three months after the notice had been sent to the Owner. At any time before proceedings against the Owner have been commenced by the Hirer, the Owner can make an offer in writing to the Hirer any amount in satisfaction of the Hirer's claim. If this offer is accepted by the Owner, the dispute ends there; but if the offer is rejected by the Hirer, the Owner is entitled to pay the amount into court.

As to the calculation of reasonable cost incurred by the Owner in taking possession of the goods as provided in Section 18(3)(b)(iii) of the Act, it was held in ***Nik Rohani binti Abdullah & Anor v Mayban Finance Bhd,*** Civil Appeal No 11-12 of 1994 High

[623] This shall be further discussed in Clause 6.3.6 below.
[624] Section 18(3) of the Act.

Court, Kuantan (unreported) that this was a question of fact to be determined having regard to all the circumstances of the case. The court laid down the following non-exhaustive guidelines in determining the question :- (a) the place where the goods were recovered; (b) the cost of transport or removal of the goods to the place of the Owner; (c) the expenses incurred in locating the goods in the event that the Hirer could not, or refused to, provide the Owner with the location of the goods; (d) the value of the goods. The fact that the Hirer had been in default for many instalments is an extraneous factor and is not to be taken into account. The burden of proof is on the Owner to show that the cost of repossession was reasonable and not for the Hirer to prove that it was unreasonable.

If the Hirer intends to regain possession of the hired goods, i.e, where the Hirer has sent the said notice to the Owner to deliver the goods to the Hirer, the Hirer must pay or tender to the Owner any amount due under the hire-purchase agreement in respect of the period of hiring up to the date of payment or tender. In addition, under Section 19 of the Act, the Hirer is required to remedy any breach of the agreement, and pay or tender to the Owner the reasonable costs and expenses incurred in taking possession of the goods and redelivering them to the Hirer. If the Hirer is able to do all that, the law then requires the Owner to "forthwith return" the goods to the Hirer, and thereafter the relationship between the Hirer and the Owner shall be as if the breach had not occurred and the Owner had not repossessed the good.

6.3.5 Section 20 (Power of Court to Vary Existing Judgments or Orders When Goods Repossessed)

Sections 18(2) and 20 of the Act do not operate to estop an Owner who had obtained

judgment[625] against the Hirer for failure to pay the instalments under a hire-purchase agreement from later repossessing the goods if he had not done so prior to obtaining the judgment.[626]

The Owner must for the purpose of his civil claim to recover money under a hire-purchase agreement to take steps to repossess the vehicle first insofar as repossession is practically possible, and notwithstanding the absence of any specific provision under the Act requiring him to do so.[627]

However, in ***Arab-Malaysian Finance Bhd v Hasliza bte Hasan [2001] 3 MLJ 52, [2001] 6 CLJ 137 (HC),*** the courts were of the view that an Owner could still sue the Hirer for money due under the hire purchase agreement if the repossession is practically possible. It is misconceived to say that the Owner could not sue the Hirer unless he had taken possession of the vehicle first.

In fact, Section 20 of the Act makes it very clear that the Owner may sue for money due under the hire purchase agreement and if upon obtaining a judgment thereon, the court may vary the judgment if the vehicle was subsequently repossessed and sold. It would be contrary to public policy if a Defendant in a hire-purchase action could come before a court of law to plead a defence that notwithstanding that he had not paid his hire purchase instalments and notwithstanding that he had not returned the hired goods to the plaintiff (Owner) although being served with a notice of termination of the hire

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[625] The terms 'judgment' or 'order' may be said to include any decision given by a court on a question or questions at issue between the parties to a proceeding properly before the court" - ***Kheng Cwee Lian v Wong Tak Thong [1983] 2 MLJ 320 at 323,*** per Seah FJ (MLJ Words and Phrases Judicially Defined, at page 293).

[626] ***Butterworth Used Cars Sdn Bhd v Mayban Finance [1991] 3 CLJ 1721.***

[627] ***Arab Malaysian Finance Bhd v Suhaimi bin AW Mohamed [2000] 3 AMR 3231 (HC).***

purchase agreement and/or a Fourth Schedule Notice (for repossession) under the Act, he could not be sued as the Plaintiff had not succeeded in repossessing the hired goods.

6.3.6 Section 30 (Limitation on Term Charges Calculation)

Term charges are the most pertinent matter in the calculation of the hire-purchase price. In order to protect the Hirer, the Act set a limitation on the calculation of the term charges.

Section 30(1) of the Act provided that the term charges (R, as above) cannot exceed the limit set by the regulations gazetted under the Act. In 1968, the Hire-Purchase (Term Charges) Regulations 1968 (hereinafter referred to as "the 1968 Regulations") were gazetted. The 1968 Regulations set 10% per annum as the maximum rate for term charges.

Section 30(2) of the Act provided for a remedy to the Hirer if the limitation above is contravened. The Hirer can elect to treat the hire-purchase agreement as void (Section 30(2)(a) of the Act) or the Hirer can elect to have the Hire's liability reduced by the amount included in the agreement for term charges (Section 30(2)(b) of the Act). Please refer to Sections 30(1) and 30(2) of the Act.

Where there any hire-purchase agreement is made in contravention to Section 30 of the Act, there would be a 'voidable contract' under Section 2(i) of the Contracts Act 1950 (Act 136). If the Hirer chooses to 'treat the agreement as void', Sections 65 and 66 of the CA may be brought into operation.

Where there are joint-hirers, the election must be made by all the joint-hirers.[628]

6.3.7 Section 34 (avoidance of certain provisions) [34(a) Hirer's right to determine; 34(b) greater liability; 34(c) interest exceeding 8% per annum; 34(d) same as Section 4(1); 34(e) Owner authorised to enter Hirer's premises otherwise than in accordance to Act; 34(f) Hirer becomes bankrupt etc.]

In ***Public Finance Bhd. v. Ehwan bin Saring*** [1996] 1 MLJ 331, the Hirer had given a letter of indemnity in favour of the Owner/financier in respect of a motor vehicle covered by a hire-purchase agreement. The letter of indemnity was to the effect that the Hirer had satisfied himself as to the title of the Owner to the vehicle. Further, that in consideration of the Owner agreeing to purchase the vehicle from one Tan, the erstwhile Owner, the Hirer would indemnify the financier against all actions, claims, loss, damages and costs. Provided that it was caused by of any party other than the present registered Owner and the legal Owner claiming title to or any interest in the vehicle.

The vehicle was later confiscated by the customs authorities and subsequently forfeited. The financier claimed that he was entitled to be indemnified by the Hirer and that the indemnity was outside the purview of the Hire-Purchase Act 1967.

It was held that the letter was void. It formed part of the hire-purchase agreement, but it had been worded as such to exclude the provisions of law which are implied under the Act. The deed of indemnity was against the provisions of the Act which is meant to provide protection to Hirers, and the document, being part and parcel of the agreement,

[628] ***Mercredits Finance Ltd v Ramsey & Anor [1979] 1 NSWLR 96.***

was void under Sections 34(a), (b) and (g) of the Act. The right of the Hirer/respondent to seek relief under the provisions of the Act and also at Common Law had been wrongfully precluded by that letter of indemnity. The agreement had become impossible to perform, and the respondent, as Hirer could not have and enjoy quiet possession of the vehicle.

In ***Affin Credit (Malaysia) Sdn. Bhd. v. Yap Yuen Fui*** [1984] 1 MLJ 169, the Federal Court by way of obiter stated that "Although we are not referred to it, we also note that non-compliance with Section 4(1) [of the Act] cannot by its very nature be brought within the ambit of Section 34 [of the Act] so as to render the agreement void."

The meaning of the word 'bankrupt' is not defined in this Act and does not appear to have been considered judicially in the context of this Act. In law, the Hirer only becomes bankrupt or commits an act of bankruptcy[629] or executes a deed of assignment or a deed of arrangement[630] upon the court making an adjudication order to that effect.[631]

6.3.8 Section 40 (Second-hand Goods)

Where the goods comprised in a hire-purchase agreement are second hand goods then liability of the Hirer shall be reduced by the amount included in the agreement for term charges. The amount may be set off by the Hirer against the amount that would otherwise be due or become due to the Owner under the agreement and, to the extent to which it is not so set off may be recovered by the Hirer from the Owner as a civil debt.

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[629] As to what acts constitute acts of bankruptcy, see Section 3(1) of the Bankruptcy Act 1967 (Act 360).
[630] This appears to have the same meaning as in Section 2 of the Bankruptcy Act 1967 (Act 360). See also ***Re Kong Mun Cheong & Anor [1975] 1 MLJ 224*** at 226, per Abdul Hamid J.
[631] see the Bankruptcy Act 1967 (Act 360); c.f the definitions in Section 2 of the Bills of Exchange Act 1949 (Act 204) and Section 2 of the Partnership Act 1961 (Act 135).

This provision restricts the Owner's money claim against the Hirer in the event that the goods is later found to be second hand instead of first hand as depicted in the agreement. The Hirer's liability shall be reduced by the amount included in the agreement for the term charges. The amount may be set off by the Hirer against the amount that would otherwise be due to the Owner under the agreement and to the extent to which it is not set off may be recovered by the Hirer as a civil debt.

6.3.9 Section 8 (Can the Hirer Claim Damages under Section 8(1) of the Act Against the Owner?)

According to Section 8(1)(a) of the Act, every false representation, warranty or statement made by the dealer or its employees or its agents in connection with or in the course of negotiations leading to the entering into of a hire-purchase agreement shall confer on the Hirer the right to rescind the agreement against the Owner. Such representation, warranty or statement is deemed to have been made by the Owner's agents provided it is in connection with or in the course of negotiations leading to the entering into of a hire-purchase agreement.

Section 8(1)(b) of the Act gave the Hirer a right to claim damages against the person who made representation, warranty or statement. Therefore, the Hirer has two remedies if the dealer made false or incorrect representation, warranty or statement. The Hirer can either opt to rescind the agreement under Section 8(1)(a) of the Act or if the Hirer does not want to rescind, he may claim damages against the Owner. The Hirer need not prove privity of contract.

As illustrated above, the Hirer may rescind the agreement against the Owner under Section 8(1)(a) of the Act. However, if the Hirer does not fall within the said Section or chooses to sue the Owner for damages under Section 8(1)(b) of the Act, then the Hirer must prove the existence of such ad hoc agency relationship between the person who made the false representation and the Owner. Therefore, the Owner's money claim is restricted if the Hirer is successful in proving the existence of such ad hoc relationship.

6.4 HIRE-PURCHASE PRICE UNDER THE ACT

The Act provided for several specific provisions pertaining to this matter. The relevant sections are Sections 4C(1)(c), 30, 31, 32 and the Sixth and Seventh Schedules of the Act.

6.4.1 Calculation of the hire-purchase price (Section 4C(1)(c) of the Act).

The balance cash price (i.e the cash price minus the deposit) shall be added to the following :-

(a) freight (if any);

(b) vehicle registration fees (if any);

(c) insurance premium.

The total amount of (a), (b) & (c) above shall be hereinafter be referred to as "the said costs". The total amounts of balance cash price and the said costs shall be added to the term charges and referred to as "the balance originally payable under the agreement".

However, the Act did not provide a proper definition of "term charges". Nevertheless,

The definition of 'void' can be found in Sections 2(g) and 66 of the Contracts Act 1950 (Act 136) as to the possible right of restitution under a void contract.[633] Once there is a total failure of consideration, the Owner cannot claim any sum by way of instalments from the Hirer. Furthermore, if the Hirer had already paid certain sums by way of deposit or as instalments, the Owner cannot retain such sum. However, where there has been a total failure of consideration, though the agreement is unenforceable, the parties may seek restitutionary remedies.[634] For a more detailed discussion on restitutionary remedies please refer to Chapter 2.

The above position can be likened to the English and Australian position where a Hirer who has had the benefit of the use of the goods before the agreement was discovered to be void may still reclaim moneys paid under the agreement. This results in the Owner not being able to claim for compensation for the time the Hirer had enjoyed such use.[635]

6.4.2 Limitation on the term charges calculation

Term charges are the most pertinent matter in the calculation of the hire-purchase price. In order to protect the Hirer, the Act prescribed[636] a limitation on the calculation of the term charges.

Section 30(1) of the Act provided that the term charges (R, as above) cannot exceed the limit set by the regulations gazetted under the Act. In 1968, the Hire-Purchase (Term Charges) Regulations 1968 (hereinafter referred to as "the 1968 Regulations") were

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[633] See also ***Menaka v Lum Kum Chum [1977] 1 MLJ 91; Wong Yoon Chai v Lee Ah Chin [1981] 1 MLJ 219 at 220, 221; Suu Lin Chong v Lee Yaw Seong [1979] 2 MLJ 48; Soh Eng Keng v Lim Chin Wah [1979] 2 MLJ 91; Yeep Mooi v Chu Chin Chua & Ors [1981] 1 MLJ 14.***

[634] Goff and Jones, The Law of Restitution (2nd Edn) referred to in ***Hong Leong Leasing Sdn. Bhd. v. Tan Kim Cheong*** [1994] 1 MLJ 177 (HC: Visu Sinnadurai J).

[635] ***Warman v Southern Counties Car Finance Corporation [1949] 2 KB 576 at 582 and MacLeod v Traders Finance Corporation Ltd (1967) 67 SR (NSW) 275 at 277.*** It would appear the principle stated in these cases are applicable; see especially Finnemore J in ***Warman v Southern Counties Car Finance Corporation [1949] 2 KB 576 at 582 at 581-583.***

[636] **Prescribed by any regulations** - For meaning of 'prescribed', see Section 2 of the Act. The power of the Minister to make regulations is provided in Section 57 of the Act. For the relevant regulations made under this Act, please see the Hire-Purchase (Terms Charges) Regulations 1968 (PU 151/68).

gazetted. The 1968 Regulations set 10% per annum as the maximum rate for term charges.

Section 30(2) of the Act provided for a remedy to the Hirer if the limitation above is contravened. The Hirer can elect to treat[637] the hire-purchase agreement as void (Section 30(2)(a) of the Act) or the Hirer can elect to have the Hire's liability reduced by the amount included in the agreement for term charges (Section 30(2)(b) of the Act).

6.4.3 Minimum Deposits (Section 31 of the Act) and Certain Payments Not Considered As Deposits (Section 32(1) of the Act).

Under Section 31(1) of the Act, the Owner is required to demand a deposit not less than 10% of the cash value of the goods. Section 32(1) of the Act defined what deposit means. The rationale for the above provisions is to limit credit facility and to avoid inflation. Sections 31(1) and 32(3) of the Act stipulated that if the minimum deposit requirement is not adhered to, there shall be a criminal penalty[638]. However, the Act does not provide for a civil remedy. It is proposed that a hire-purchase agreement that breached Sections 31 and 32 of the Act shall be void under Section 24 of the Contracts Act 1950.

6.4.4 Insurance (Sections 26-29 of the Act)

Insurance is compulsory for the goods on hire-purchase (Section 26(1) of the Act) and the obligations of the Owner and the Hirer are spelt put clearly in Sections 26(1) and

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[637] **Where the Hirer elects to treat the agreement as void** - This would be a 'voidable contract' [see Section 2(i) of the Contracts Act 1950 (Act 136)]. If the Hirer chooses to 'treat the agreement as void', Sections 65 and 66 of the Contracts Act 1950 may be brought into operation.
Where there are joint-hirers, the election must be made by all the joint-hirers: ***Mercredits Finance Ltd v Ramsey & Anor [1979] 1 NSWLR 96.***

[638] For the penalty for the offence committed under this Section, see Section 46 of the Act. Where the person committing the offence is a body corporate or an agent or servant, see also Sections 47 and 48 of the Act, respectively. For matters relating to enforcement etc, see Part VIII post.

26(2) of the Act. The Owner shall cause to be insured in the name of the Hirer the goods comprised in the hire-purchase agreement.[639]

In ***Malaysian Australian Finance Co Ltd v The Law Union & Rock Insurance Co Ltd [1972] 2 MLJ 10***, the Court considered whether the Owner had rights 'co-extensive ' with those of the insured Hirer and could institute claims in its own name against the insurers. It was held that where by an endorsement to the policy the insurer had undertaken to pay the insurance money directly to the Owner, the policy was for the benefit of the Owner as well as the protection of the Hirer. The Owner could therefore enforce the policy against the insurer.[640]

Under Section 26(4) of the Act, the Owner who fails to comply with Section 26(1) of the Act and the Hirer who fails to comply with Section 26(2) of the Act, shall be guilty of an offence under the Act. According to Section 26(3) of the Act, the Owner cannot compel the Hirer to insure under any particular registered insurers. However, the Act does not provide for civil penalty if Section 26(3) of the Act is contravened. Under Section 26(8) of the Act, the Hirer is entitled to the benefit of any commissions or rebates given by the insurers. Any person who knowingly[641] pays any such commission or rebate to the Owner and any Owner who receives such commission or rebate shall be guilty of an offence under the Act.

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[639] For motor vehicles, for the first year only and for all other goods, for the duration of time that the goods remain under hire-purchase. By reference to Section 1(2) of the Act and Section 1 of the First Schedule of the Act, this would mean 'all consumer goods'. See the definition of 'consumer goods' in Section 2 of the Act.

[640] See also ***IRB Finance Bhd v Borneo Insurance Sdn Bhd [1995] 3 CLJ 617.***

[641] **Knowingly** - Knowledge is an essential ingredient of the offence and must be proved by the prosecution; see eg, ***Gaumont British Distributors Ltd v Henry [1939] 2 KB 711, [1939] 2 All ER 808***.
Knowledge includes the state of mind of a person who shuts his eyes to the obvious; see ***James & Son Ltd v Smee [1955] 1 QB 78 at 91, [1954] 3 All ER 273*** at 278, per Parker J and ***Westminster City Council v Croyalgrange Ltd & Anor [1986] 2 All ER 353***. There is also authority for saying that where a person deliberately refrains from making inquiries the results of which he might not care to have, this constitutes in law actual knowledge of the facts in question; ***see Knox v Boyd*** 1941 JC 82 at 86, ***Taylor's Central Garages (Exeter) Ltd v Roper (1951) 115 JP 445*** at 449, ***[1951] WN 383*** and ***Westminster City Council v Croyalgrange Ltd*** (supra). Mere neglect to ascertain what could have been found out by making reasonable inquiries is not tantamount to knowledge; see ***Taylor's Central Garages (Exeter) Ltd v Roper*** (supra) cf ***London Computator Ltd v Seymour [1944] 2 All ER 11***. See also ***Suthon Kavsonthi v Public*** **Prosecutor [1975] 1 MLJ 154;** ***Public Prosecutor v Kedah & Perlis Ferry Services Sdn Bhd [1978] 2 MLJ 221.***

6.5 CONCLUSION

The provisions of the Act are in general designed for the benefit and protection of the Hirer, and apart from the additional rights given to the Owner under Sections 14; 15; 16A; 18;[642] and 37[643] of the Act, such provisions as relate to the Owner's remedies are restrictive of his rights and do not confer upon the Owner any advantages additional to those which the Owner enjoys at Common Law.[644]

The Owner's right to rescission and restitution for misrepresentation, where available,[645] remains unaffected by the Act.[646] For by claiming rescission, the Owner is not seeking to enforce the agreement but on the contrary is electing to treat it as void ab initio.

Similarly, the Owner's contractual and Common Law rights of repudiation[647] are not in any way restricted by the Act, so that the Owner remains free to terminate the agreement for breach of condition or in accordance with express powers of termination conferred by the agreement. In just the same way as if the agreement is outside the Act. However, the enforcement of the rights vested in the Owner consequent upon the repudiation is in certain circumstances restricted.

In particular, restrictions are imposed by the following :-

(iii) Sections 14; 15; 16A and 18 and 34 on the amount recoverable from the Hirer upon the termination of the agreement; and

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[642] Relating to sums payable by the Hirer on exercising his statutory right to terminate the agreement. See Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], page 112.

[643] Imposing a duty on the Hirer to supply information as to the whereabouts of the goods, on request. See Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], page 115.

[644] For the Common Law position, please see Chapters 2; 4 and 5..

[645] Please see Chapters 4 and 5.

[646] In UK, This would seem to be the position even where the Hirer, having paid at least one-third of the hire-purchase price, would otherwise have become entitled to the protection of Sections 11 and 12 of the UK 1938 Act. See Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], page 174.

[647] Please see Chapters 4 and 5.

(iv) Sections 4, 4A-D; 5 and 9 on the enforcement of any rights against the Hirer, whether for liquidated sums, unliquidated damages or recovery of the goods, where the Owner is in default under Sections 2 and 6(1).

Moreover, where the Owner institutes proceedings for the recovery of the goods the Owner is in certain circumstances prohibited from taking any step to enforce payment of any sum due under the hire-purchase or under any contract of guarantee relating thereto except by claiming such sum in those proceedings.[648] Further, in any such proceedings the Court is given wide powers to deal with payments arising on the termination of the hire-purchase agreement.[649]

The Act is extremely restrictive of the Owner's right to Money Claims even though the Act does provide for the Owner's right to Money Claims. As we can see from above, the restrictions imposed by the Act on the Owner far outweighs the Owner's rights. It is opined that the restrictions are there in order to commensurate with the arbitrary and secretive manner in which the term charges are imposed on the Hirer.

Now, the Singapore government[650] is phasing out the old method of calculation and to be replaced by a calculation more akin to the housing loans. The benefits of the latter are that one is allowed to make prepayments and the calculation shall be based on the outstanding amount. There's more transparency and predictability. It is hence proposed that we follow the Singapore amendments albeit more suited to our country.[651] Therefore, with the amendments in place, it is proposed that the restrictions be toned down.

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[648] Section 12(1). See Goode, R.M., Hire-Purchase Law And Practice; [1962] Butterworths [London], page 172. The same Section also specifies in detail the various orders the Court is empowered to make.
[649] Section 20 of the Act.
[650] The amendments took effect since September 2004.
[651] There is a Hire-Purchase Bill 2004 which was tabled last year and came into force on the 15th of April, 2005.

CHAPTER 7

CONCLUSION AND REFORMS

7.1 PREFACE

The Act has now operated without significant amendment for over 11 years until recently. The recent amendment on the variable interest rates is definitely a step forward for the law of hire-purchase, albeit long overdue. Chapters 2 and 4 discussed repossession and money claims under the Common Law. Chapters 3 and 5 discussed repossession and money claims under the Act. It is the intention of the writer to juxtapose the Owner's remedies under the Common Law and the Act in order to make a comparison. The Act has shown to be more protective of the Hirers from the above study.

Therefore, the most pressing issue now to be addressed by the Parliament is the over-protection of the Hirers. It is therefore proposed that we re-examine the relationship between the Owners and the Hirers. It is proposed to revert to the Common Law which augured well for the Owners before the advent of over zealous "Consumer Protectors". Consumer protection came in all shapes and sizes and curbed the progress of the economy by stifling the Owner's rights and increasing the already 'over-protected' Hirers. It is opined that there should be a more liberal approach as a form of fiscal stimulus. Fiscal stimulus[652] (as opposed to monetary policies[653]) has been touted as the cure for recession.[654] There must be a middle ground between the Keynesian model and free market so that we would not end up like the 2007 subprime[655] meltdown in the

[652] A macroeconomic policy tool used by the **government** to regulate the total level of economic activity within a nation. Examples of fiscal policy include setting the level of government expenditures and the level of taxation.
[653] **Central Bank** actions to influence the availability and cost of money and credit, as a means of helping to promote economic growth and price stability. Tools of monetary policy include open market operations, the discount rate and reserve requirements.
[654] Koo, Richard C., "The Holy Grail of Macroeconomics: Lessons from Japan's Great Recession".
[655] Rick Brooks & Ruth Simon, "Subprime Debacle Traps Even Very Credit-Worthy: As Housing Boomed, Industry Pushed Loans To a Broader Market", *Wall Street Journal*, December 3, 2007, at A1 - The subprime mortgage crisis is an ongoing financial crisis triggered by a significant decline in housing prices and related mortgage payment delinquencies and foreclosures in the United States.

USA[656] recently. One may argue that hire purchase is too small to be in the scheme of things but it can be if it is less regulated.

With the advent of the Hire-Purchase Act 2005 which took effect from 15-4-2005[657], the statutory Money Claims by the Owner are drastically changed due to the availability of the option of a variable rate of interest like a housing loan replacing the archaic fixed rate that has been landing the Hirers in hot soup. However, Singapore amended their Hire-Purchase Act to allow the Banks to charge variable interest rates since August, 2004.

Even though Hire Purchase Act came to effect on 15-4-2005, the Act is still in its infant stage and may experience teething problems which has yet surfaced. The problems spotted by the writer are as follows :-

1. The variable rate, even though is a good change, is not effective due to the fact that it is too high compared to the fixed rate. For e.g, the prevailing fixed rate is around 2-3%, of which the effective rate is around 4-6% whereas the variable rate is fixed at Base Lending Rate ("BLR") plus 1%, which works out to be around 7.25% as the current BLR is 6.25%;
2. The Act is silent on the problems faced by the Owners; and
3. The Act could be a knee-jerk reaction by the government to keep up with Singapore's changes.

In the writer's mind, the Act is not only archaic and out of date, it is also haphazard due to the piecemeal manner in which the amendments were done throughout the years.

[656] Thomas, Tommy, "The Return of the State", The Star, 15-11-2008 - The greatest proliferation of debt occurred in the US. By 2007, the total credit market debt was US$48 trillion, which was more than 3 times the gross domestic product (GDP) of the US. That sum was made up of US$11 trillion by way of public debt (owed by federal, state and local governments), and US$37 trillion owed by the private sector. In 2007, total US mortgage debts amounted to 105% of her GDP.

[657] The Hire-Purchase Act Bill was scheduled to be tabled in September 2004.

Further, the blue print for the Act came from Australia, a country whose market condition was considerably different from our country. It started on the wrong premises and gone down the drains as the years go by leading to a complete incoherent piece of confusing legislation that is repetitive and filled with gaps everywhere. Further, the Act purports to protect the Hirer too much.

It is hence proposed that a complete overhaul of the Act, quite different from the 2005 Act, which is merely a cosmetic touch up of the Act. A complete overhaul means to do away with the archaic practice of hire-purchase and replace it with a commercially viable and user-friendly Consumer Credit Act that is being used in UK and Australia. This Act must not be overly protective of the Hirers and yet it must create a system whereby the Owners are not allowed to abuse their powers due to their deep pockets. This Act must also promote market efficacy.

7.2 COMPARATIVE LAW

7.2.1 UK Position[658]

Pip Giddins, a Solicitor and also a Director of the Centre for Instalment Credit Law in UK came out with an investigation of the history of the right of voluntary termination under the Consumer Credit Act 1974 ("**1974 Act**"), and its historic antecedents. This paper considers the reasons for the historic antecedents to those sections and demonstrates why they are no longer relevant in modern consumer credit law.

[658] The article by Pip Giddins can be found in the UK's Department of Trade and Industry website : http://www.dti.gov.uk.

7.2.1.1 Hire Purchase ("HP") is a form of credit

The paper noted the importance of understanding that HP is a form of credit analogous to a loan. It provides for a fixed amount of credit to be repaid with an agreed amount of finance charge (interest) over an agreed term.

It stated that it has long been accepted that a finance company is entitled to provide credit with "security" in the goods being financed by that credit. If such security was not available, as is the case with an unsecured loan, then both consumers and industry would be deprived of credit finance.

Finance company use HP because it is impractical to use a loan and take security in the form of a Bill of Sale over the goods purchased with the loan. It has long been suggested that the Bills of Sale legislation[659] should be repealed and replaced with a modern chattel mortgages register.[660]

In consequence of HP being credit, it is accepted as being in the interests of both finance company and Hirer that the Hirer should be responsible for payment of the credit and agreed interest[661]. It is a legitimate, and expected, allocation of responsibility.

7.2.1.2 The Minimum Payment Clause

The paper went on to discuss Minimum Payment Clause. From at least the 1930s[662], finance companies adopted a term in HP agreements providing that, upon early

[659] Bills of Sale Act 1878, Bills of Sale Act 1878 (Amendment) Act 1882

[660] The Crowther Committee in 1971 and the Law Commission in 2002-4. Law Commission consultation paper No 164 "Registration of security interests: company charges and property other than land" June 2002; Law Commission consultation paper No 176 "Company security interests" August 2004.

[661] see numerous reported cases, in particular ***Yeoman Credit v Waragowski [1961] 3AER 145,*** Court of Appeal and ***Overstone v Shipway [1962] 1AER 52,*** Court of Appeal

[662] see precedent HP agreements in Notes on Hire Purchase Law by Jones & Proudfoot 2nd ed 1937 and terms of HP agreements in various reported cases

termination of the HP agreement, the Hirer must be responsible for any shortfall in the value of the goods below the capital balance outstanding. Such a term, known as a "Minimum Payment Clause" ("**MPC**"), protected the finance company if, by reason of early termination following the Hirer's default, the repossessed goods should be worth less than the capital balance outstanding. The underlying concept was and remains legitimate. A Hirer who defaults should be in no better position than the Hirer who performs its obligations.

Early forms of MPC were structured as being compensation for depreciation in value of the goods because they took effect where the value of the goods had depreciated beyond the reducing capital balance under the credit agreement. A typical MPC would provide that, upon early termination, the Hirer must pay at least one half of the HP Price. If the agreement was terminated early in its life, then there was a greater likelihood that the value of the goods would not cover the capital balance outstanding. The MPC provided that the Hirer must pay an additional sum. Conversely, if the agreement were terminated late in the repayment period then it was more likely that the value of the goods would cover the capital balance outstanding. In such case, the Hirer did not have to pay anything further (having already paid more than one half of the HP Price).

For many years the courts upheld such MPCs[663]. The problem was that some finance companies abused the MPC by providing for an excessive level of minimum payment. Clearly, this was wrong and unfair to the Hirer. The courts countered this unfairness by

[663] see, for example, ***Elsey & Co Ltd v Hyde 1926 Div Ct of KBD on appeal; Chester & Cole Ltd v Avon 1929 High Ct KBD; United Dominions Trust Limited v Scott-Bowen (1957) 73 Sh Ct Rep 293 (Scotland).***

holding a MPC void as being a penalty where the relevant clause was not a genuine pre-estimate of the loss likely to be suffered upon early termination[664].

Following this, the practice changed to the modern form of MPC. One which provides that the further liability payment is to be based on the "true measure of loss" suffered by the finance company. Typically, a modern MPC will provide that, upon early termination, the Hirer must pay the balance of instalments outstanding, less a discount of future interest, and also less the resale value of the goods. It follows that the Hirer's liability is based upon the capital balance outstanding. The Hirer receives full credit for the resale proceeds of the goods, and a fair rebate of future interest. The courts have long upheld such MPCs as being valid and enforceable[665].

7.2.1.3 History of the Statutory Legislation

The paper later stated that just as the courts responded to the mischief of unfair Minimum Payment Clauses, so did Parliament. The first legislation on the matter in England & Wales was the Hire Purchase Act 1938. This provided that, upon early termination, the Hirer's liability should not exceed one half of the Hire-Purchase price. This provision was the forerunner of Section 100 of the Consumer Credit Act 1974.

In addition, the 1938 Act provided that the Hirer should have a right to terminate the Hire-Purchase agreement at any time by notice to the finance company. This provision was the forerunner of Section 99 of the 1974 Act. No one could reasonably object to Section 99 and its predecessors as any well drawn hire-purchase agreement should

[664] ***Cooden Engineering Co Ltd v Stanford [1953] 1QB 86 Ct of Appeal; Landom Trust Ltd v Hurrell [1955] 1WLR 191,*** Court of Appeal.
[665] See ***Waragowski's case*** and ***Overstone's case*** and various subsequent cases.

provide for such a right in any event, to distinguish it from a conditional sale[666]. Both sections 99 and 100 of the 1974 Act shall be discussed further later.

From the outset, Parliament recognized that setting the limit on liability at one half of the HP Price was arbitrary and unscientific[667], achieving a certain rough justice[668]. Members considered whether the limit should be set at some other percentage, but overall acknowledged that no given percentage could achieve fairness between finance company and Hirer in all cases.

In time, it was recognized that the inherent basis of setting further liability by reference to a percentage of the hire-purchase Price was flawed. The courts recognized this in the early 1950s. This is why the courts struck down most "% of HP Price" Minimum Payment Clauses as being inherently incapable of being a genuine pre-estimate of loss and so a penalty.

Likewise, parliamentarians could see the inherent deficiency of the "% of HP Price" approach . During debate prior to the passing of the Hire Purchase Act 1964 there was vigorous opposition to such a provision, with the majority of Standing Committee members in the Commons opposing it and members from all political parties speaking against the inherent unfairness to consumer and lender[669].

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[666] ***Helby v Matthews [1895] AC 471 HL***

[667] Hire Purchase Bill 1937: Standing Committee House of Commons 10-12-1937 reported at Hansard Columns 759, 1177-1198; Consumer Credit Bill 1973: Standing Committee D 24-01-1974 reported at Hansard columns 467 and 469 per Michael Heseltine MP

[668] Hire Purchase Bill 1963: Standing Committee House of Lords 10-12-1963 reported at Hansard Column 1174

[669] Hansard HL Second Reading 10-12-1963 Columns 1140-1181. See, for example, the following extracts from these debates: -

"One thing is certain. We must remove from the law the offensive provision which is now there under which the Hirer who defaults on his agreement is better off than the Hirer who honestly gives notice to terminate it. We must get rid of the equally absurd situation in which, as now happens, there are three different interpretations of damages, depending on who ends the agreement or whether the Hirer defaults." - George Darling, MP (Hansard HC 18-02-1964 Column 1059).

"This settlement of 50 per cent is a sort of judgment of Solomon. It is legally ice, but who finds half the baby fair? It may be all right perhaps when it is "only a little one", but surely that is not so with today's huge infant. This must be modified." - Dr Reginald Bennett, MP (Hansard HC 18-02-1964 Column 1075).

"It seems to me that this provision can be very unfair to the Hirer in certain circumstances. ..... I think the balance of hardship ... will fall on the Hirer in most circumstances." - George Darling, MP (Hansard HC 18-02-1964 Column 1057).

Such members advocated replacement of the "% of HP Price" limit with a limit based on the "true measure of loss". Many bodies also recommended such reform, including, the Law Society[670], finance company, trade bodies[671], the financial press[672]. Consumer bodies, such as the National Citizens Advice Bureaux Committee and the Consumer Council[673], also recognised the potential for unfairness to the consumer. Government spokesmen resisted such reform by reference to the recommendation of the Molony Committee[674] that the "One Half Rule" should be retained. However, it is notable that from its report,[675] only very superficial consideration was given to the respective merits of liability being based upon a limit of a % of HP Price or a true measure of loss respectively.

Much of the debate, when commenting on the unfairness of a limit of a % of HP Price, focused on restricting the application of such measures by reason of the financial limit under the relevant Act[676]. At that point of time, consideration was being given to removal of any financial limit (for consumers, sole traders and small partnerships), that concern was relevant again.

"One of the most extraordinary features of the present situation is that ... the Hirer who determines his agreement lawfully is actually in a worse position than one who terminates the agreement unlawfully..... This really is a quite ridiculous situation.... .....On the whole, I believe that most experienced lawyers consider that it would be better to repeal section 4 [of the 1938 Act], and to leave the question of compensation generally to be settled according to the normal common law rules." - Lord Chorley (Hansard HL 10-12-1963 Column 1182).

"The National Citizens Advice Bureaux Committee ... commended proposals on these lines [i.e. replacement with a "True measure of loss" basis] to the Board of Trade as being worthy of consideration. The Consumer Council ..... were in no doubt at all on this matter. They state that the Council agreed with the "true measure of damage" principle" - Baroness Burton of Coventry (Hansard HL 16-01-1964 Column 734).

[670] Memorandum on Hire Purchase for the Board of Trade dated May 1963 at paras 12-14

[671] ibid columns 1154, 1174

[672] Financial Times 03-01-1964 reported at Hansard 16-01-1964 Column 730

[673] as reported by Baroness Burton of Coventry in HL Standing Committee Hansard 16-01-1964 Column 734

[674] Final Report of the Committee on Consumer Protection Cmnd 1781 dated July 1962

[675] see paras 547-8

[676] For e.g. debate on the Hire Purchase Bill 1954 Hansard HL 15-06-1954 Column 1175 et seq.

7.2.1.4 Crowther Committee

Subsequently, the Crowther Committee in its report[677] simply recommended wholesale repeal of the statutory provisions[678].

7.2.1.5 The UK Consumer Credit Act 1974

During debate on what was the Consumer Credit Bill, Standing Committee members again advocated replacement of the "% of HP Price" limit with a limit based on the "true measure of loss" but again uninformed inertia prevailed[679]. And, of course, the relevant provisions now appear in Sections 99 and 100 1974 Act.

7.2.1.6 Proposals for Reform

The paper then provided some proposals for reform. The paper commented that it is remarkable that the statutory limit continues to be based on a concept rejected by the courts over 50 years ago. Until recent years, it was rare for a Hirer to exercise a right of voluntary termination. The practice has grown in recent years as a result of an unfair practice by some motor traders by suggesting to a Hirer seeking to trade in an old vehicle (held on hire purchase) that he or she should terminate under Section 99 rather than pay off the agreement.

The provisions of Sections 99-100 of the 1974 Act should NOT be seen as measures helping Hirers who have difficulty with their repayments. The Finance & Leasing

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[677] Cmnd 4596 March 1971.

[678] Again, the following extracts are relevant: -

"We have shown in an early stage of our report that hire purchase is based on a fiction, [and] that what the parties really intend is a sale and that concepts of "termination" are according out of place": see Chapter 6.7.15.

"...the debtor will be recognized as having a general property in the goods, and the secured party's "Ownership" will be treated as limited to a security interest. The new rule will thus give the debtor what he does not enjoy at the moment, namely a genuine equity in the goods from the outset and a right to receive any surplus remaining after repossession and sale. Just as there is no good reason why the secured party should be permitted to make a profit out of the debtor's default by retaining the surplus arising from the sale of the repossessed goods, so also there is no justification for permitting the debtor to limit his liability on the basis of an outmoded and unrealistic concept of a hiring with power of termination" : see Chapter 6.7.15.

"We consider that all lenders should have the right recover the full amount of their advance with agreed charges, whatever label may be attached to the agreement.": see Chapter 6.7.16.

[679] In contrast to the debates prior to the Hire Purchase Act 1964, the debates on the Consumer Credit Bill were thin and lacking in detailed knowledge of the provisions.

Association has evidence that over 80% of Hirers who voluntarily terminate are not even in arrears at the date of termination. There is a firm indication that the voluntary termination rule, coupled with the "One Half Rule", is being abused to enable Hirers to avoid their expected liability to pay the capital balance outstanding.

The paper has demonstrated[680] that the "One Half Rule" in section 100, or any other limit based on a % of the HP Price, is unfair to consumer and finance company alike. Sections 99-100 do not help the Hirer in arrears, and are merely (ab)used by well-informed Hirers to avoid their reasonable liability.

7.2.1.7 The Challenge and Opportunity

The paper then stated that there's a rare opportunity for them (the British) to reform a discredited provision that is largely useless for genuine Hirers in financial difficulty. They can introduce reform to bring the statutory law in line with the court made law, and further remove some of the inevitable inconsistencies in that common law. They can address the mischief that their predecessors identified in the 1930s. They can achieve genuine fairness of liability as between the Hirer and the financier. They should not waste this opportunity.

7.2.1.8 The UK Consumer Credit Act 2006 (hereinafter referred to as the "2006 Act")

Based on the extensive review done by the UK's Department of Trade and Industry, the UK Consumer Credit Bill ("**CCB**") went through its second reading in the UK Parliament on 24-10-2005. The CCB most astutely and timely proposed for the "one-half" rule to be amended to three-fourth. This is indeed recognition of the fact that

[680] Also the courts, parliament, and Crowther for the past 55 years.

Owners are the victims here. However, the Consumer Credit Act 1974 ("1974 Act") (as amended by the 2006 Act) maintained the one-half rule.

The 2006 Act principally amends the 1974 Act, which is the statute governing the licensing of, and other controls on, traders concerned with the provision of credit or the supply of goods on hire or hire-purchase to individuals and with the regulation of transactions concerning that provision or that supply. The 1974 Act lays down rules which covers the form and content of all agreements, credit advertising, method of calculating Annual Percentage Rate (APR) and the procedures which will be adopted in the event of early settlements, defaults or even termination.

The 2006 Act is the most significant change since Consumer Credit Act 1976. Although it received the Royal Assent on March 30th 2006, the key implementation dates set out are 6th April 2007 and 6th April 2008.

The key changes to the Consumer Credit Law along with its implementation dates are as follows, (i) Removal of £25,000 financial limit (6th April 2008); (ii) Retention of £25,000 financial limit for business lending (6th April 2008); (iii) Interest on default sums (6th April 2008); (iv) Minimum standard of post contract information (6th April 2008); (v)Unfair relationships (6th April 2007); (vi) Consumer Credit Appeals Tribunal (6th April 2008); and Enforcing credit agreements (6th April 2007). It is proposed to examine the relevant sections of the 1974 Act and 2006 Act for the purpose of our studies. The relevant sections in the 1974 Act on repossession and money claims remain largely intact except for some amendments pertaining to the form and substance of the notices of default and termination.

(a) NOTICES

The 1974 Act lays down rules about the information to be given to Hirers during the lifetime of a regulated consumer credit agreement.[681] Certain information must be given at periodic intervals, whilst other information like the statement of account or a copy of the credit agreement must be provided on request. Further, if the Owner varies the agreement, notice must be given to the Hirer before the variation takes effect. A Owner wishing to terminate an agreement, or to take certain enforcement actions, for example, must serve a notice containing specified information when the Hirer is in breach of the agreement.

The 2006 Act amends some of the existing requirements and introduces new requirements on post-contract transparency such as annual statements under fixed-sum credit agreements; additional information in statements for running-account credit; notices of sums in arrears; notices of default sums; additional information in default notices; and notices relating to post-judgment interest. The new requirements came into force on the 1st of October 2008. There are transitional provisions for pre-existing agreements.[682]

The Consumer Credit (Information Requirements and Duration of Licences and Charges) Regulations 2007 ("**the 2007 Regulations**")[683] set out the information and forms of wording to be included in the above statements and notices. The Regulations also prescribe the form of the statements and notices,[684] including that required

[681] Office of Fair Trading, "Consumer Credit Act 1974 - Post-contract information requirements", [July 2008] OFT1002, Crown copyright 2008.

[682] Schedule 3 to the 2006 Act.

[683] SI 2007/1167 – see www.opsi.gov.uk/si/si2007/uksi_20071167_en_1.

[684] Regulations 36-40.

information must be easily legible, and in plain intelligible language, and (with certain limited exceptions) must be no less prominent than other wording in the document. Certain prescribed wording must be shown together as a whole, without interspersing.

The 2007 Regulations have been amended by the Consumer Credit (Information Requirements and Duration of Licences and Charges) (Amendment) Regulations 2008,[685] for the purposes of correction and clarification. The amending Regulations also come into force on the 1st of October 2008.

Sections 8-13 of the 2006 Act added new Sections 86A-86F of the 1974 Act, which basically deal with default and termination. Sections 86B and 86E deal with arrears notices and default sums notices, respectively.

(i) Notice of Sum in Arrears

Section 86B(2) of the 1974 Act provides that the creditor or owner shall, within the period of 14 days beginning with the day on which the conditions mentioned in section 86B(1)[686] are satisfied, give the Debtor or Hirer a notice[687] of sum in arrears; and after the giving of that notice, shall give him further notices under this section at intervals of not more than six months.

Section 86B(3) provides that the duty of the creditor or owner to give the Debtor or Hirer notices under this section shall cease when either of the conditions mentioned in

[685] SI 2008/1751 – see www.opsi.gov.uk/si/si2008/uksi_20081751_en_1.

[686] Section 86B(1) provides that the conditions are that the Debtor or Hirer under an applicable agreement is required to have made at least two payments under the agreement before that time; and that the total sum paid under the agreement by him is less than the total sum which he is required to have paid before that time; and that the amount of the shortfall is no less than the sum of the last two payments which he is required to have made before that time; and that the creditor or owner is not already under a duty to give him notices under this section in relation to the agreement; and if a judgment has been given in relation to the agreement before that time, that there is no sum still to be paid under the judgment by the Debtor or Hirer.

[687] Section 86B(6) provides that a notice under section 86B shall include a copy of the current arrears information sheet under section 86A.

section 86B(4)[688] is satisfied; but if either of those conditions is satisfied before the notice required by section 86B(2)(a) is given, the duty shall not cease until that notice is given.

Section 86B(5) provides that for the purposes of section 86B(4)(a), the Debtor or Hirer ceases to be in arrears when no sum, which he has ever failed to pay under the agreement when required, is still owing; no default sum, which has ever become payable under the agreement in connection with his failure to pay any sum under the agreement when required, is still owing; no sum of interest, which has ever become payable under the agreement in connection with such a default sum, is still owing; and no other sum of interest, which has ever become payable under the agreement in connection with his failure to pay any sum under the agreement when required, is still owing. The Debtor or Hirer shall have no liability to pay any sum in connection with the preparation or the giving to him of a notice under this section[689].

From the 1st of October 2008, Owners will be required by Section 86B of the 1974 Act[690] to give Hirers a notice of sums in arrears under fixed-sum credit agreements, where the Hirer is in arrears by more than a certain amount. The notice must include the information and forms of wording prescribed by the 2007 Regulations.[691] An initial arrears notice will be triggered if the Hirer is required to have made at least two payments under the agreement before that time; the total sum paid under the agreement is less than the total sum required to be paid; and the amount of the shortfall is no less than the sum of the last two required payments.[692]

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[688] Section 86B(4) provides that the conditions referred to in section 86B(3) are that the Debtor or Hirer ceases to be in arrears; or that a judgment is given in relation to the agreement under which a sum is required to be paid by the Debtor or Hirer.
[689] Section 86B(7).
[690] As inserted by section 9 of the 2006 Act.
[691] Regulations 19-23 and Schedule 3 as amended.
[692] Unless there is a court judgment in relation to sums under the agreement.

The proposed Legislative Reform Order ("**LRO**"),[693] subject to Parliamentary approval, will amend the provisions to make clear that payments for these purposes mean payments to be made at pre-determined intervals under the terms of the agreement. In the case of agreements under which payments are required at intervals of one week or less, the trigger will apply if the shortfall is no less than the sum of the last four required payments, provided that the arrears relate to payments within the previous 20 weeks. Once triggered, an initial arrears notice must be served within 14 days. Further notices must be given at intervals of not more than six months until the Hirer ceases to be in arrears or a judgment is made in relation to the agreement.

The initial notice must indicate among other things,[694] the balance under the agreement at the date on which the duty to give the notice arose and the amount of the shortfall which gave rise to the duty. The Hirer is entitled to request information about the shortfall, including the amounts of the sums in question, the dates on which they became due, and the amounts and dates of any part payments, unless this information is already included in the notice. Such information must be provided within 15 working days.[695]

Subsequent arrears notices must indicate among other things,[696] the opening balance at the date on which the duty to give the notice arose (corresponding to the closing balance in the last notice); the amount of the shortfall in the opening balance; the amount and date of any payment to the account during the period; the amount and date of any interest or other charges falling due during the period; the amount and date of

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[693] The Department for Business, Enterprise and Regulatory Reform (BERR) is proposing to make a Legislative Reform Order (LRO) which, subject to Parliamentary approval, will amend the 1974 Act to clarify that statements must cover a period of not more than one year, and must be
given within 30 days of the end of the period to which they relate.

[694] Schedule 3 Parts 1 and 2.

[695] Regulation 19(2) as amended.

[696] Schedule 3 Parts 1 and 3 as amended.

any other movement in the account during the period; the closing balance at the end of the period, and the amount of the shortfall at that date. In addition, all arrears notices must indicate whether default sums or interest may be payable on the arrears, and that further notices will be given at least every six months while the Hirer continues to be in arrears.

There are also transitional provisions for agreements made before 1 October 2008, permitting the inclusion of pre-commencement information.[697] Each arrears notice must be accompanied by a copy of the current OFT arrears information sheet, and must include a prescribed statement referring to this.[698] The OFT is required by the 2006 Act to prepare, and give general notice of, an arrears information sheet and a default information sheet.[699] These must include information to help Hirers who are in arrears or default, including a summary of their key rights and responsibilities and where to go for help or advice. The current information sheets can be downloaded from the OFT website.[700]

(ii) Notice of Default Sums

From the 1st of October 2008, Owners will be required by section 86E of the 1974 Act[701] to give the Hirer a notice in a specified form where a default sum becomes payable under a regulated agreement. A 'default sum' means a sum (other than interest) which is payable by the Hirer in connection with a breach of the agreement.[702] Section 86E(2) provides that the creditor or owner shall, within the prescribed period after the

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697 Regulation 50 as amended.
698 Schedule 3 Part 5.
699 Section 86A of the 1974 Act as inserted by section 8 of the 2006 Act.
700 www.oft.gov.uk/advice_and_resources/resource_base/legal/cca/CCA2006/information/
701 As inserted by section 12 of the 2006 Act.
702 Section 187A of the 1974 Act as inserted by section 18 of the 2006 Act.

default sum becomes payable, give the Debtor or Hirer a notice[703] under this section. The notice must be given to the Hirer within 35 days of the default sum becoming payable.[704] The notice may be incorporated in any other statement or notice under the 1974 Act.

The Owner may not charge interest in connection with a default sum before the 29th day after the day on which the default sum notice was given to the Hirer.[705] In addition, such interest must be simple interest, and may not be compounded.[706] The 2007 Regulations specify the information and forms of wording to be included in notices of default sums.[707] In particular, the notice must include the amount and nature of each default sum payable; the date on which it became payable; and the total amount of default sums covered by the notice.

(iii) Need for Default

Section 87 of the 1974 Act requires Owners to give the Hirer a default notice in a specified form if, following any breach of a regulated agreement by the Hirer, the Owner wishes to terminate the agreement, demand earlier payment of any sum, recover possession of any goods or land, treat any right conferred on the Hirer as terminated, restricted or deferred, or enforce any security.

The requirements are set out in the Consumer Credit (Enforcement, Default and Termination Notices) Regulations 1983.[708] In particular, the default notice must

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[703] Section 86B(3) provides that the notice under this section may be incorporated in a statement or other notice which the creditor or owner gives the Debtor or Hirer in relation to the agreement by virtue of another provision of this Act.
[704] Regulation 28 of the 2007 Regulations.
[705] Section 86E(4) of the 1974 Act.
[706] Section 86F of the 1974 Act as inserted by section 13 of the 2006 Act. ***"Section 86F Interest on default sums***
(1) This section applies where a default sum becomes payable under a regulated agreement by the Debtor or Hirer.
(2) The Debtor or Hirer shall only be liable to pay interest in connection with the default sum if the interest is simple interest."
[707] Regulations 29-32 and Schedule 4.
[708] SI 1983/1561 as amended.

indicate[709] the nature of the alleged breach of the agreement; the action needed to remedy the breach or to compensate the Owner, and the date by which this must be done; the consequences of failure to comply with the notice; the action intended to be taken by the Owner in the event of non-compliance; the procedures relating to the recovery of goods under a hire purchase or conditional sale agreement; a statement indicating the Hirer's right to apply to the court for a time order, giving more time to repay the debt; and prescribed wording regarding sources of help or advice.

The date specified in the notice must be not less than 14 days after the date of service.[710] (This period was increased from seven days by the 2006 Act).[711] The Owner is precluded from taking enforcement action until this period has elapsed.

The 2006 Act also broadens the power to prescribe the contents of default notices.[712] The 2007 Regulations amend the 1983 regulations by requiring (from the 1st of October, 2008) prescribed statements in the case of hire-purchase or conditional sale agreements (regarding the consumer's right to end the agreement and the procedures involved) and in cases where the agreement provides for the charging of post-judgment interest.[713] Owners will be required, from the 1st of October 2008, to include a copy of the current OFT default information sheet with each default notice.

(iv) Enforcement And Termination Notices

The 1974 Act also requires service of a notice in a specified form if the Owner wishes to terminate a regulated agreement, or to take other enforcement actions (in cases other than involving breach by the debtor). Under section 76 of the 1974 Act, the Owner is

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[709] Schedule 2 to the 1983 regulations.
[710] Section 88(2) of the 1974 Act, as amended by section 14(1) of the 2006 Act.
[711] From the 1st of October, 2006.
[712] Section 88(4) of the 1974 Act as amended by section 14(2) of the 2006 Act.
[713] Regulation 33.

not entitled to enforce a term of a regulated agreement by demanding earlier payment of any sum, or recovering possession of any goods or land, or treating any right conferred on the debtor as terminated, restricted or deferred, unless he provides the debtor with a notice of his intention to take such action at least seven days beforehand.[714]

Under section 98 of the 1974 Act, the Owner is not entitled to terminate a regulated agreement (in non-default cases) unless he provides the debtor with a notice of his intention to terminate at least seven days before taking such action.

Enforcement and termination notices are not needed where an agreement is for an indefinite duration or where notice is served at the end of the period specified in the agreement for its duration. The information and forms of wording required in enforcement and termination notices are laid down in the 1983 regulations,[715] and broadly parallel those applying to default notices.

(v) Notices Of Post-Judgment Interest

Section 17 of the 2006 Act inserted a new Section 130A of the 1974 Act pertaining to interest payable on judgment debts. Section 130A(1) provides that if the creditor or owner under a regulated agreement wants to be able to recover from the Debtor or Hirer post-judgment interest in connection with a sum that is required to be paid under a judgment given in relation to the agreement (the 'judgment sum'), the creditor after the giving of that judgment, shall give the Debtor or Hirer a notice under this section (the 'first required notice'); and after the giving of the first required notice, shall give

[714] This period was not altered by the 2006 Act.
[715] Schedules 1 and 3 to the 1983 regulations.

the Debtor or Hirer further notices under this section at intervals of not more than six months.

Section 130A(2) provides that the Debtor or Hirer shall have no liability to pay post-judgment interest in connection with the judgment sum to the extent that the interest is calculated by reference to a period occurring before the day on which he is given the first required notice.

Section 130A(3) provides that if the creditor or owner fails to give the Debtor or Hirer a notice under this section within the period of six months beginning with the day after the day on which such a notice was last given to the Debtor or Hirer, the Debtor or Hirer shall have no liability to pay post-judgment interest in connection with the judgment sum to the extent that the interest is calculated by reference to the whole or to a part of the period which begins immediately after the end of that period of six months; and ends at the end of the day on which the notice is given to the Debtor or Hirer.

From the 1st of October 2008, Owners will be required by section 130A of the 1974 Act[716] to notify the debtor if they intend to charge post-judgment interest under a regulated agreement in connection with a sum that is required to be paid under a court judgment. The Owner will not be entitled to charge interest on the judgment sum until the first required notice has been served. Further notices must be given at intervals of not more than six months for such time as the Owner wishes to charge post-judgment interest. The notice may be incorporated in any other statement or notice under the 1974 Act. The provisions do not apply in respect of post-judgment

[716] As inserted by section 17 of the 2006 Act.

interest which is required to be paid by virtue of a court order.

The 2007 Regulations set out the information and forms of wording to be included in notices of post-judgment interest.[717] The first required notice must include a prescribed statement indicating the Owner's intention to charge post-judgment interest, and the procedures involved. This must indicate the rate of interest payable, and the date from which it will be payable, and that further notices will be given at least every six months for so long as the Owner intends to charge post-judgment interest.[718] In addition, the notice must indicate the amount on which post-judgment interest will be charged. It must also include prescribed statements highlighting the debtor's right to apply to the court to vary the terms of the instalment order or to reduce the amount of interest payable, and that the debtor can obtain advice and information about dealing with the debt from a number of organisations (with contact details taken from the OFT default information sheet).[719] Subsequent notices must also indicate the total amount of post-judgment interest charged since the date of the last notice, the dates on which interest was charged, and the rate of interest (and whether this was variable).[720]

(vi) Information To Be Provided On Request

Under section 77(1) of the 1974 Act, the Owner has a duty to give information to the debtor on request in relation to fixed-sum credit agreements. The request must be made in writing and accompanied by a fee of £1, and the Owner must respond within 12 working days (unless a similar request was made within the previous month). The debtor can request a copy of the executed agreement (and any document referred to in it), together with a statement showing the total sum paid to date; the total sum which

[717] Regulations 34-35 and Schedule 5 as amended.
[718] Schedule 5 Part 3.
[719] Schedule 5 Part 1 as amended.
[720] Schedule 5 Part 2.

has become payable but remains unpaid, including the amounts in question and the date when each became due; the total sum which will become payable, including the amounts in question and the date when each will become due (or if not ascertainable, the basis on which this will be determined).

The Owner has a similar duty in relation to any person who acted as surety under the agreement, in relation to security provided such as a guarantee or indemnity. The surety must also be supplied with a copy of the security instrument.[721] The debtor can also request a copy of any security instrument, upon payment of a £1 fee, and this must again be provided within 12 working days.[722]

(vii) Settlement Information

Under section 97 of the 1974 Act, the debtor may request a statement, in a specified form, indicating the amount that would be required in order to settle the agreement early. The request must be in writing, but no fee may be charged. The Owner must provide the information within seven working days,[723] unless a similar request was made within the previous month. This is irrespective of whether the debtor actually intends to settle the agreement at that point. The content of the settlement statement is prescribed by the Consumer Credit (Settlement Information) Regulations 1983.[724] The required information includes the total amount payable by the debtor in order to discharge his indebtedness under the agreement, before deducting any rebate; whether the debtor will be entitled to a rebate on early settlement, whether under the agreement or by virtue of section 95 of the Act; the method of calculation of any rebate, and the

[721] Sections 107-109 of the 1974 Act.
[722] Section 110 of the 1974 Act.
[723] This period was reduced from 12 working days from 31 May 2005.
[724] SI 1983/1564 as amended by SI 2004/1483.

settlement date, and the minimum amount of the rebate; and the total amount payable less any rebate.

(viii) Statements To Be Binding On Owners

Under section 172 of the 1974 Act, a statement given by an Owner under sections 77(1), 78(1), 79, 97 or 107-109 is deemed to be binding on the Owner, subject to the right to apply to a court during proceedings for just relief for any incorrect statement.

(ix) Information To Be Provided After An Agreement Has Ended

Under section 103 of the 1974 Act, a debtor may serve notice on the Owner requesting written confirmation that he has discharged his indebtedness under the credit agreement and that the agreement has ceased to operate. The Owner must, within 12 working days of receiving such a notice, either provide the confirmation or serve a counter-notice disputing the claim and giving details.

(x) Breach of the Act or Regulations

If the Owner does not give the debtor an annual statement in respect of a fixed-sum credit agreement when he is required to do so, then he is not entitled to enforce the agreement during the period of non-compliance. In addition, the debtor is not liable to pay any interest calculated by reference to the period of non-compliance, or any default sum which would have become payable during that period or which relates to any breach occurring during the period.[725] Similar consequences apply if the Owner fails to give a notice of sums in arrears under a fixed-sum agreement.

[725] Section 77A(6) of the 1974 Act as amended.

Section 86D(1) of the 1974 Act applies where the creditor or owner under an agreement is under a duty to give the debtor or Hirer notices under section 86B[726] but fails to give him such a notice within the period mentioned in section 86D(2)(a)[727]; or within the period of six months beginning with the day after the day on which such a notice was last given to him[728].

Section 86D(2) provides that this section also applies where the creditor under an agreement is under a duty to give the debtor a notice under section 86C but fails to do so before the end of the period mentioned in section 86C(2).

Section 86D(3) provides that the creditor or owner shall not be entitled to enforce the agreement during the period of non-compliance. Section 86D(5) provides that 'the period of non-compliance' means, in relation to a failure to give a notice under section 86B or 86C to the debtor or Hirer, the period which begins immediately after the end of the period mentioned in (as the case may be) sections 86D(1)(a) or 86D(1)(b) or 86D(2); and ends at the end of the day mentioned in section 86D(6).

Section 86D(6) provides 'that day' is in the case of a failure to give a notice under section 86B as mentioned in section 86D(1)(a), the day on which the notice is given to the debtor or Hirer; or in the case of a failure to give a notice under that section as mentioned in section 86D(1)(b) of this section, the earlier of the following :- (i) the day on which the notice is given to the debtor or Hirer, or (ii) the day on which the condition mentioned in section 86B(4)(a) is satisfied; or in the case of a failure to give a notice under section 86C, the day on which the notice is given to the debtor.

[726] Notice of sums in arrears.
[727] Section 86D(1)(a) - 14 days beginning with the day on which the conditions mentioned in section 86B(1) are satisfied.
[728] Section 86D(1)(b).

Section 86D(4) of the 1974 Act provides that the debtor or Hirer shall have no liability to pay any sum of interest to the extent calculated by reference to the period of non-compliance or to any part of it; or any default sum which (apart from this paragraph) would have become payable during the period of noncompliance; or would have become payable after the end of that period in connection with a breach of the agreement which occurs during that period (whether or not the breach continues after the end of that period).

If the Owner fails to give a default sum notice, he is not entitled to enforce the agreement until the notice is given.[729] If the Owner fails to give a notice of post-judgment interest, he is not entitled to charge interest until a notice is given.[730]

Where an Owner fails, on request and upon payment of the appropriate fee by the debtor, to provide the information required by sections 77-79 and 97 of the 1974 Act, the Owner is not entitled to enforce the agreement whilst the default continues. If the Owner fails to provide information relating to any security, pursuant to sections 107-110, he is not entitled to enforce the security instrument. In addition, the OFT and Local Authority Trading Standards Services have powers under Part 8 of the Enterprise Act 2002 to take enforcement action where there is a breach of legislation which harms the collective interests of consumers.[731] Enforcement action may also be taken where appropriate under the Consumer Protection from Unfair Trading Regulations 2008.[732] Breach of the requirements may also reflect on fitness to hold a consumer credit licence under the credit licensing regime.[733]

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729 Section 86E(5) of the 1974 Act as amended.
730 Section 130A(2) and (3) of the 1974 Act as amended.
731 The OFT's general guidance on Part 8 may be found at www.oft.gov.uk/shared_oft/business_leaflets/enterprise_act/oft512.pdf
732 S.I. 2008/1277 – see www.opsi.gov.uk/si/si2008/pdf/uksi_20081277_en.pdf
733 See the OFT's general fitness guidance at www.oft.gov.uk/shared_oft/business_leaflets/credit_licences/oft969.pdf

(b) Repossession

Section 90(1) of the 1974 Act provides that at any time when the debtor is in breach of a regulated hire-purchase, and the debtor has paid to the creditor one-third[734] or more of the total price of the goods, and the property in the goods remains in the creditor, the creditor is not entitled to recover possession of the goods from the debtor except on an order of the court.

Section 90(5) provides that section 90(1) shall not apply, or shall cease to apply, to an agreement if the debtor has terminated, or terminates, the agreement. Section 90(7) provides that goods falling within this section are referred to as "protected goods".

Section 91 of the 1974 Act provides that if goods are recovered by the creditor in contravention of section 90, the regulated agreement, if not previous terminated, shall terminate, and the debtor shall be released from all liability under the agreement, and shall be entitled to recover from the creditor all sums paid by the debtor under the agreement.

Section 92 of the 1974 Act provides that except under an order of the court, the creditor or owner shall not be entitled to enter any premises to take possession of goods subject to a regulated hire-purchase agreement. An entry in contravention of section 92 is actionable as a breach of statutory duty.

[734] Section 90(2) – ***"Where under a hire-purchase the creditor is required to carry out any installation and the agreement specifies, as part of the total price, the amount to be paid in respect of the installation ("the installation charge") the reference in section 90(l)(b) to one third of the total price shall be construed as a reference to the aggregate of the installation charge and one third of the remainder of the total price."***

Section 93 of the 1974 Act provides that the debtor under a regulated consumer credit agreement shall not be obliged to pay interest on sums which, in breach of the agreement, are unpaid by him at a rate where the total charge for credit includes an item in respect of interest, exceeding the rate of that interest, or in any other case, exceeding what would be the rate of the total charge for credit if any items included in the total charge for credit by virtue of section 20(2) were disregarded.

(c) Money Claims

Section 99(1) of the 1974 Act provides that at any time before the final payment by the Debtor under a regulated hire-purchase falls due, the Debtor shall be entitled to terminate the agreement by giving notice to any person entitled or authorised to receive the sums payable under the agreement. Termination of an agreement under section 99(l) does not affect any liability under the agreement which has accrued before the termination.

Section 100 of the 1974 Act provides that where a regulated hire-purchase is terminated under section 99, the Debtor shall be liable, unless the agreement provides for a smaller payment, or does not provide for any payment, to pay to the creditor the amount (if any) by which one-half of the total price exceeds the aggregate of the sums paid and the sums due in respect of the total price immediately before the termination.

If in any action the court is satisfied that a sum less than the amount specified in section 100(1) would be equal to the loss sustained by the creditor in consequence of the termination of the agreement by the Debtor, the court may make an order for the payment of that sum in lieu of the amount specified in section 100(1).

If the Debtor has contravened an obligation to take reasonable care of the goods or land, the amount arrived at under section 100(1) shall be increased by the sum required to recompense the creditor for that contravention, and section 100(2) shall have effect accordingly.

Section 100(2) provides that where the Debtor, on the termination of the agreement, wrongfully retains possession of goods to which the agreement relates, then, in any action brought by the creditor to recover possession of the goods from the Debtor, the court, unless it is satisfied that having regard to the circumstances it would not be just to do so, shall order the goods to be delivered to the creditor without giving the Debtor an option to pay the value of the goods.

(d) Unfair Relationships

Sections 19-22 of the 2006 Act inserted a new Sections 140A-140D of the 1974 Act which is about the unfair relationship between Owners and Hirers. Section 140A(1) provides that the court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the Debtor arising out of the agreement is unfair to the Debtor because of one or more of the following any of the terms of the agreement or of any related agreement; or the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement; or any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).

Section 140A(2) of the 1974 Act provides that in deciding whether to make a

determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the Debtor). Section 140A(3) provides that for the purposes of this section the court shall (except to the extent that it is not appropriate to do so) treat anything done (or not done) by, or on behalf of, or in relation to, an associate or a former associate of the creditor as if done (or not done) by, or on behalf of, or in relation to, the creditor. Section 140A(4) provides that a determination may be made under this section in relation to a relationship notwithstanding that the relationship may have ended.

Section 140B(1) provides that an order under this section in connection with a credit agreement may require the creditor, or any associate or former associate of his, to repay (in whole or in part) any sum paid by the debtor or by a surety by virtue of the agreement or any related agreement (whether paid to the creditor, the associate or the former associate or to any other person); or require the creditor, or any associate or former associate of his, to do or not to do (or to cease doing) anything specified in the order in connection with the agreement or any related agreement; or reduce or discharge any sum payable by the debtor or by a surety by virtue of the agreement or any related agreement; or direct the return to a surety of any property provided by him for the purposes of a security; or otherwise set aside (in whole or in part) any duty imposed on the debtor or on a surety by virtue of the agreement or any related agreement; or alter the terms of the agreement or of any related agreement.

Section 140A(2) of the 1974 Act provides that an order under this section may be made in connection with a credit agreement only on an application made by the debtor or by a surety; or at the instance of the debtor or a surety in any proceedings in any

court to which the debtor and the creditor are parties, being proceedings to enforce the agreement or any related agreement; or at the instance of the debtor or a surety in any other proceedings in any court where the amount paid or payable under the agreement or any related agreement is relevant.

Section 140A(3) provides that an order under this section may be made notwithstanding that its effect is to place on the creditor, or any associate or former associate of his, a burden in respect of an advantage enjoyed by another person.

Section 140A(4) provides that an application under section 140A(2)(a) may only be made in England and Wales, to the county court.

Section 140A(8) provides that a party to any proceedings mentioned in section 140A(2) shall be entitled, in accordance with rules of court, to have any person who might be the subject of an order under this section made a party to the proceedings.

Section 140A(9) provides that if, in any such proceedings, the debtor or a surety alleges that the relationship between the creditor and the debtor is unfair to the debtor, it is for the creditor to prove to the contrary.

Section 140C of the 1974 Act defined 'credit agreement' to mean any agreement between an individual (the 'debtor') and any other person (the 'creditor') by which the creditor provides the debtor with credit of any amount.

The repealed Sections 137-140 of the 1974 Act[735] empowered the Court to reopen an 'extortionate credit bargain'. A bargain was 'extortionate', if at the time the agreement was made, it required the debtor to make payments which were grossly exorbitant or otherwise grossly contravened ordinary principles of fair dealing. In coming to its conclusions the court was required to consider evidence produced concerning specific factors relevant to prevailing interest rates, the debtor (e.g. age, experience or degree of financial pressure) and creditor (e.g. accepted risk having regard to value of security).

'Extortionate credit bargain' was replaced by 'fairness' under the 2006 Act. The amended provisions will enable a court to consider whether the relationship between the creditor and debtor arising out of that agreement is unfair to the debtor because of the terms of the agreement, the way in which the agreement is operated by the creditor or any other thing done or not done by or on behalf of the creditor before or after the agreement was made. The court may take into account all matters it thinks relevant (including matters relevant to the debtor and to the creditor) in determining whether a relationship is unfair. This may include anything done or not done on behalf of or in relation to the creditor's associates or former associates (as defined by section 184 of the 1974 Act). The court is provided with a broad range of remedies under new section 140B to address the unfairness.

(e) Time Order

Section 129(1) of the 1974 Act provides that if it appears to the court just to do so on an application for an enforcement order; or on an application made by a debtor or Hirer under this paragraph after service on him of a default notice, or a notice under section 76(1) or 98(1), or on an application made by a debtor or Hirer after he has been given a

[735] Repealed by Section 22(3) of the 2006 Act.

notice under section 86B or 86C; or in an action brought by a creditor or owner to enforce a regulated agreement or any security, or recover possession of any goods or land to which a regulated agreement relates, the court may make an order under this section (a "time order").

Section 129(2) stipulates that a time order shall provide for one or both of the following, as the court considers just, the payment by the debtor or Hirer or any surety of any sum owed under a regulated agreement or a security by such instalments, payable at such times, as the court, having regard to the means of the debtor or Hirer and any surety, considers reasonable; or the remedying by the debtor or Hirer of any breach of a regulated agreement (other than non-payment of money) within such period as the court may specify.

Section 16(1) of the 2006 Act inserted a new Section 129(1)(ba) of the 1974 Act. Section 129(1)(ba) provides that on an application made by a Debtor or Hirer after he has been given a notice under section 86B or 86C, the court may make a time order.

Section 16(2) inserted a new Section 129A of the 1974 Act. Section 129A(1) provides that a Debtor or Hirer may make an application under section 129(1)(ba) in relation to a regulated agreement only if following his being given the notice under section 86B or 86C, he gave a notice within section 86B(2) to the creditor or owner; and a period of at least 14 days has elapsed after the day on which he gave that notice to the creditor or owner.

Section 129A(2) of the 1974 Act provides that a notice is within this subsection if it

indicates that the Debtor or Hirer intends to make the application; and indicates that he wants to make a proposal to the creditor or owner in relation to his making of payments under the agreement; and gives details of that proposal .

The new section 129A provides that, having received a notice of sums in arrears, the Hirer may only make an application if he has given a notice to the owner (including certain required information[736]) and a period of 14 days has passed since he gave the notice to the owner. This requirement does not apply to Hirers who receive default notices under section 87 of the 1974 Act.

The Court will consider the Hirer's financial position. It is therefore vital that the Hirer send to the Court and the creditor as much information as possible about the Hirer's financial position and explain, with evidence, how it will get better. If there is little prospect of it doing so, the Court is unlikely after the decision in ***First National Bank plc v Syed [1991] 2 All ER 250*** to give the Hirer extra time to pay.

(f) Financial Relief for Hirer

Section 132(1) of the 1974 Act provides that where the owner under a regulated consumer hire agreement recovers possession of goods to which the agreement relates otherwise than by action, the Hirer may apply to the court for an order that the whole or part of any sum paid by the Hirer to the owner in respect of the goods shall be repaid, and the obligation to pay the whole or part of any sum owed by the Hirer to the owner in respect of the goods shall cease, and if it appears to the court just to do so, having

[736] A notice given under section 129A by a debtor or Hirer must indicate that the debtor or Hirer intends to make the application for a time order in relation to the agreement, indicate that he wants to make a proposal to the creditor or owner in relation to his making of payments under the agreement and give details of that proposal. Although the notice must be in writing, there are no specific requirements as to its form.

regard to the extent of the enjoyment of the goods by the Hirer, the court shall grant the application in full or in part.

Section 132(2) provides that where in proceedings relating to a regulated consumer hire agreement the court makes an order for the delivery to the owner of goods to which the agreement relates the court may include in the order the like provision as may be made in an order under section 132(1).

(g) Special Powers of the Court

Section 133(1) of the 1974 Act provides that if, in relation to a regulated hire-purchase agreement, it appears to the court just to do so on an application for an enforcement order or time order; or in an action brought by the creditor to recover possession of goods to which the agreement relates, the court may make an order ("return order") for the return to the creditor of goods to which the agreement relates; or make an order ("transfer order") for the transfer to the debtor of the creditor's title to certain goods to which the agreement relates ("the transferred goods"), and the return to the creditor of the remainder of the goods.

Section 133(2) of the 1974 Act provides that in determining for the purposes of this section how much of the total price has been paid ("the paid-up sum"), the court may treat any sum paid by the debtor, or owed by the creditor, in relation to the goods as part of the paid-up sum; or deduct any sum owed by the debtor in relation to the goods (otherwise than as part of the total price) from the paid-up sum, and make corresponding reductions in amounts so owed.

Section 133(3) provides that where a transfer order is made, the transferred goods shall be such of the goods to which the agreement relates as the court thinks just; but a transfer order shall be made only where the paid-up sum exceeds the part of the total price referable to the transferred goods by an amount equal to at least one-third of the unpaid balance of the total price.

Section 133(4) provides that notwithstanding the making of a return order or transfer order, the debtor may at any time before the goods enter the possession of the creditor, on payment of the balance of the total price and the fulfilment of any other necessary conditions, claim the goods ordered to be returned to the creditor.

Section 133(5) provides that when, in pursuance of a time order or under this section, the total price of goods under a regulated hire-purchase agreement is paid and any other necessary conditions are fulfilled, the creditor's title to the goods vests in the debtor.

Section 133(6) provides that if, in contravention of a return order or transfer order, any goods to which the order relates are not returned to the creditor, the court, on the application of the creditor, may revoke so much of the order as relates to those goods, and order the debtor to pay the creditor the unpaid portion of so much of the total price as is referrable to those goods.

Section 133(7) of the 1974 Act provides that for the purposes of this section, the part of the total price referable to any goods is the part assigned to those goods by the agreement or (if no such assignment is made) the part determined by the court to be reasonable.

(h) Summary

UK's Consumer Credit Act 1974 ("**1974 Act**") as amended by the UK's Consumer Credit Act 2006 ("2006 Act") was done in a piecemeal manner whereby most of the relevant parts on Money Claims and Repossession are left largely intact, except for some amendments pertaining to the form and substance of the notices of default and termination. However, the 2006 Act was hailed as the biggest overhaul of the UK hire purchase laws in 30 years. The 2006 Act removed the financial limit of £25,000 provided that the hire agreements entered into are not wholly or predominantly for the Hirer's or Hirer's business purposes (Section 16B of the 2006 Act). That means that all hire purchase agreements are regulated.

Sections 60-61 of the 1974 Act provides for the prescribed form and content of agreements. The Secretary of State shall make regulations as to the form and content of documents to ensure that the Hirer is made aware of the Hirer's rights and duties, the amount and rate of the total charge for credit, the remedies available to Hirer etc. OFT has power to waive the requirement of the said regulations upon application by creditors, by giving a notice to the creditors only if the OFT is satisfied that would not prejudice the interests of debtors or Hirers. A regulated agreement is not properly executed unless a document in the prescribed form is signed by the relevant parties etc.

The 2006 Act amended the existing requirements and introduced new requirements on post-contract transparency, including that the OFT information must accompany arrears and default notices. All, at no cost to the debtor. The Owner is not entitled to enforce against the debtor if the Owner fails to provide the above information. It is opined that there is emphasis on form over substance. The new requirements will lead to additional

work to be done by the creditors and the OFT, with very complicating and convoluted datelines that require the intellect of a mathematician. For example, Section 86D(3) provides that the creditor shall not be entitled to enforce the agreement during the period of non-compliance. Section 86D(5) provides that 'the period of non-compliance' means, in relation to a failure to give a notice under section 86B or 86C to the debtor or Hirer, the period which begins immediately after the end of the period mentioned in sections 86D(1)(a) or 86D(1)(b) or 86D(2); and ends at the end of the day mentioned in section 86D(6). Section 86D(6) then defined "that day".

Under Section 87 of the 1974 Act, service of a default notice[737] is necessary before the Owner can become entitled, by reason of any breach by the Hirer to terminate the agreement, or to demand earlier payment of any sum, or to recover possession of any goods. Section 88 of the 1974 Act provides that default notice must be in the prescribed form and specify the nature of the alleged breach; if the breach is capable of remedy, what action is required to remedy it and the date (which must not be less than 14 days after the service of the default notice) before which that action is to be taken; and if the breach is not capable of remedy, the sum required to be paid for the breach, and the consequences of failure to comply with it. The default notice must be accompanied by the current OFT information sheet.

Bearing in mind, the Owner cannot enforce against the Hirer if the additional information[738] is not provided to the Hirer. At any time when the Hirer is in breach, and the Hirer has paid to the Owner at least one-third[739] of the price of the goods, Section

[737] In accordance to Section 88 of the 1974 Act , which provides that the

[738] As per Sections 86A-86E of the1974 Act.

[739] Section 90(2) – ***"Where under a hire-purchase the Owner is required to carry out any installation and the agreement specifies, as part of the total price, the amount to be paid in respect of the installation ("the installation charge") the reference in section 90(l)(b) to one third of the total price shall be construed as a reference to the aggregate of the installation charge and one third of the remainder of the total price."***

90 of the 1974 Act states that the vehicle is 'protected' from repossession. The Owner is not entitled to recover possession of the goods[740] from the Hirer except on an order of the court.[741] The only exception is if the Hirer terminated the agreement.[742] If the vehicle is wrongly repossessed then, under section 91 of the 1974 Act, the Hirer is entitled to a return of all of the money the Hirer has paid to the creditor. It is irrelevant how long the Hirer has had the vehicle. If the Hirer has paid less than one third, the vehicle is not protected from repossession. The Owner shall not be entitled to enter any premises to take possession of goods without a court order[743]. To do so would be a breach of statutory duty.[744] However, the court has special powers to make transfer orders under Section 133 of the 1974 Act.

If the hire purchase agreement is for £25,000 or below[745], there are two ways of ending the agreement early. Firstly, the Hirer can terminate agreement, by a written notice and return the vehicle before payment of the last instalment.[746] If the Hirer has paid at least one half of the total price[747] and has taken reasonable care of the vehicle, the Hirer only has to return the vehicle and pay the arrears at the date of the Hirer's termination letter. If the Hirer has already paid more than this amount, the Hirer will not get a refund of the difference. If the Hirer has paid less than one half of the total price, the Hirer must pay the creditor the difference between one half of the total price and what the Hirer has paid. In the long run, it is cheaper for the Hirer to return the goods if the Hirer cannot afford to pay the instalments. Secondly, the Hirer can also pay off the loan

[740] Section 90(7) provides that goods falling within this section are referred to as "protected goods".
[741] Section 90(2) of the 1974 Act.
[742] Section 90(6) of the 1974 Act.
[743] Section 92 of the 1974 Act.
[744] Section 92(3) of the 1974 Act.
[745] Provided that the hire agreements entered into wholly or predominantly for the Hirer's or Hirer's business purposes (Section 16B of the 2006 Act).
[746] Section 99 of the 1974 Act.
[747] Section 100(1) of the 1974 Act.

early (including a rebate of insurance premium) and keep the goods. The Hirer will be entitled to a rebate[748] on future charges.

The Hirer can exercise the Hirer's right under section 99 of the 1974 Act (to terminate the agreement) even if the Hirer has received a default notice as long as the date in that notice has not passed. In ***First Response Finance Limited v Donnelly [2006] GCCR 5901*** the Court considered whether a debtor's termination after the date specified in the default notice would limit the amount payable to the creditor to the difference between one half of the agreement and what had been paid. It decided that it did not and the debtor was liable for the total amount payable under the agreement minus the amount paid by the debtor and the vehicle's net sale proceeds.

Owner who wishes to terminate a regulated agreement is required to serve a notice in a specified form under section 76 of the 1974 Act. The Owner is not entitled to enforce a term of a regulated agreement by demanding earlier payment of any sum or treating any right conferred on the Hirer as terminated, unless the Owner provides the Hirer with a notice of his intention to take such action at least seven days beforehand.[749]

Under section 98 of the 1974 Act, the Owner is not entitled to terminate a regulated agreement (in non-default cases) unless the Owner provides the Hirer with a notice of his intention to terminate at least seven days before taking such action.

One of the most significant changes introduced under the 2006 Act is the introduction of a new test of unfair relationships, designed to allow consumers to challenge the terms of unfair credit agreements. Under the new test a court may consider all the relevant circumstances of a credit relationship to determine its fairness like any of the

[748] Section 95 of the 1974 Act.
[749] This period was not altered by the 2006 Act.

terms of the credit agreement and any related agreement; or the way in which the Owner has exercised or enforced any of its rights; or any other thing done by or on behalf of the Owner either before or after the making of the agreement or any related agreement.

The intentional broad scope of this test gives sweeping powers to the court to examine every aspect of a credit relationship, not just the written terms of any credit agreement. However, of particular concern to Owners is that the provisions of the new test will have a retrospective effect and will apply to any existing agreements from April 2008. From this date, it will be open to the court to find that a relationship is unfair by reason of conduct or events that have occurred at any time before the provisions came into force and to order the repayment of any payments made. The unfair relationship provisions apply to any credit agreement between an Owner and an individual whether or not it is a CCA-regulated agreement.

7.2.2 Australian Position[750]

7.2.2.1 Introduction

The current law governing hire-purchase law in Australia is The Uniform Consumer Credit Code ("**UCCC**"). UCCC was introduced in 1996[751] to all states and territories save Tasmania, was an attempt to introduce consistent credit laws throughout the entire country and applicable to almost all businesses which provide credit, not just financial institutions. Hire purchase legislation has been abolished in all but two jurisdictions, namely, Queensland and Western Australia. The few exemptions to the UCCC include instalment payments for insurance premiums and credit provision of sixty-two days or less.

[750] Law Reform Commission, New South Wales – Issues Paper 5 (1988) – Sale of Goods (hereinafter referred to as the said Commission").
[751] UCCC commenced operation on 1-11-1996.

According to a study[752] done by Consumer Credit Legal Services Inc., although the UCCC was preceded in a number of jurisdictions by Credit Acts, the nature of the regulation imposed by the UCCC was in many respects new and untried. Since its implementation, there have been two rounds of review, a Post Implementation Review (PIR) in 1998, followed by a National Competition Policy Review (NCPR) in 2000. The most significant substantive amendments since 1996 are the closure of the short term lending loop-hole in December 2001, (which had allowed the proliferation of pay day lenders), and the introduction of the mandatory comparison rate regime in July 2003. The said report is not so optimistic about the effectiveness of the UCCC in the protection of consumers.

7.2.2.2 Uniform Consumer Credit Code (UCCC)

For the purposes of our study, the discussion on the UCCC shall be limited to matters relating to repossession and money claims. Part 5 of the UCCC is entitled "Ending and enforcing credit contracts, mortgages and guarantees".

(a) Ending of credit contract by debtor[753].

(i) Debtor's right to pay out contract

Section 75(1) of the UCCC provides that a debtor is entitled to pay out the credit contract at any time. Section 75(2) provides that the amount required to pay out a credit contract is the total of the amount of credit; and the interest charges and all other fees and charges payable by the debtor to the credit provider up to the date of termination; and reasonable enforcement expenses; and early termination charges, if provided for in

[752] The Operation of the Uniform Consumer Credit Code, David Niven and Tim Gough, August, 2004 : http://www.consumeraction.org.au/downloads/DL60.pdf.

[753] Division 1 of Part 5 of the UCCC (Sections 75-79).

the contract; less any payments made under the contract and any rebate of insurance premium.[754]

(ii) Statement of pay out figure

Section 76(1) of the UCCC provides that a credit provider must, at the written request of a debtor or guarantor, provide a written statement of the amount required to pay out a credit contract as at such date as the debtor specifies. If so requested, the credit provider must also provide details of the items which make up that amount.

Section 76(2) provides that the statement must also contain a statement to the effect that the amount required to pay out the credit contract may change according to the date on which it is paid. Section 76(3) provides that a credit provider must give a statement, complying with this section, within 7 days after the request is given to the credit provider.

(iii) **Court may determine pay out figure**

Section 77(1) of the UCCC provides that the court may determine pay out figure if credit provider does not provide a pay out figure if the credit provider does not provide a statement of the amount required to pay out a credit contract in accordance with this Part after a request is duly made by a debtor or guarantor, the Court may, on the application of the debtor or guarantor, determine the amount payable on the date of determination, the amount by which it increases daily and the period for which the determination is applicable. Section 77(2) provides that the credit contract is discharged if an amount calculated in accordance with the determination is tendered to the credit provider within the applicable period.

[754] Section 138 of the UCCC.

(iv) Surrender of goods

Section 78 of the UCCC provides for the surrender of mortgaged goods and goods subject to sale by instalments. Section 78(1) provides that if a credit contract takes the form of a sale of goods by instalments and title in the goods does not pass until all instalments are paid; or the credit provider has a mortgage over goods of the debtor; or the debtor may give written notice of an intention to return the goods to the credit provider or, if the goods are in the credit provider's possession, require the credit provider in writing to sell the goods.

Section 78(2) of the UCCC provides for the delivery of goods. A debtor may return the goods to the credit provider at the credit provider's place of business during ordinary business hours within 7 days of the date of the notice or within such other period or at such other time or place as may be agreed with the credit provider.

Section 78(3) provides for the notice of value. The credit provider must, within 14 days after a debtor or mortgagor returns the goods or requires the credit provider to sell the goods, give the debtor a written notice containing the estimated value of the goods and any other information required by the regulations.

Section 78(4) provides for the return or sale of goods. If the debtor, within 21 days after the notice under section 78(3) is given, requests by written notice return of the goods to the debtor or withdraws the requirement to sell the goods (and the debtor is not in default under the terms of the credit contract), the credit provider must return to the debtor any goods returned by the debtor and must not comply with the requirement.

Section 78(5) provides that the debtor may, within 21 days after the notice under section 78(3) is given, nominate in writing a person who is prepared to purchase the goods from the credit provider at the estimated value or at any greater amount for which the credit provider has obtained a written offer to buy the goods. The credit provider must offer to sell the goods to that person for the estimated value or, if there is a written offer to buy the goods for a greater amount, that amount.

Section 78(6) of the UCCC provides for the sale of goods by credit provider. The credit provider must, if the goods are not required to be returned under section 78(4), as soon as reasonably practicable (or at such other time as the credit provider and the debtor) sell the goods in accordance with section 78(5) or, if no buyer is nominated or the nominated buyer under that subsection does not buy the goods, for the best price reasonably obtainable.

Section 78(7) of the UCCC provides that the credit provider must credit the debtor with a payment equivalent to the proceeds of the sale less any amounts which the credit provider is entitled to deduct from those proceeds. On the sale of the goods, the amount required to pay out the contract becomes due.

Section 78(8) provides that a credit provider that sells mortgaged goods under this section is entitled to deduct from the proceeds of that sale only the amount currently secured by the mortgage in relation to the credit contract, not being more than the amount required to discharge the contract; and the amount payable to discharge any prior mortgage to which the goods were subject; and the amounts payable in successive discharge of any subsequent mortgages to which the goods were subject and of which

the credit provider had notice; and the credit provider's reasonable enforcement expenses; and the expenses reasonably incurred by the credit provider in connection with the possession and sale of the mortgaged goods.

Section 78(9) provides that the credit provider must give the debtor a written notice stating the gross amount realised on the sale, the net proceeds of the sale, the amount credited to the debtor and the amount required to pay out the credit contract. Section 78(10) of the UCCC provides that a credit provider that contravenes a requirement of this section is guilty of an offence.

(v) Compensation to debtor

Section 79(1) of the UCCC provides that the Court, on application by the debtor, may order a credit provider to credit the debtor with a payment, fixed by the Court, exceeding the net proceeds of sale if it is not satisfied that the credit provider sold the goods as soon as reasonably practicable (or at such other time as the credit provider and debtor) for the best price reasonably obtainable.

Section 79(2) provides that on application by the debtor, the Court, if not satisfied that the credit provider complied with section 78, may make an order requiring the credit provider to compensate the debtor for any loss suffered as a result. Section 79(3) provides that the onus of proving that section 78 was complied with is on the credit provider.

(b) Enforcement of Credit Contract[755]

(i) Requirements to be met by the credit provider

Section 80(1) of the UCCC provides that a credit provider must not begin enforcement proceedings against a debtor in relation to a credit contract unless the debtor is in default under the credit contract and the credit provider has given the debtor, a default notice, complying with this section, allowing the debtor a period of at least 30 days from the date of the notice to remedy the default; and the default has not been remedied within that period.

Section 80(3) of the UCCC provides that a default notice must specify the default and the action necessary to remedy it and that a subsequent default of the same kind that occurs during the period specified in the default notice for remedying the original default may be the subject of enforcement proceedings without further notice if it is not remedied within the period.

Section 80(4) provides that a credit provider is not required to give a default notice or to wait until the period specified in the default notice has elapsed, before beginning enforcement proceedings, if the credit provider believes on reasonable grounds that it was induced by fraud on the part of the debtor; or the credit provider has made reasonable attempts to locate the debtor but without success; or the Court authorises the credit provider to begin the enforcement proceedings; or the credit provider believes on reasonable grounds that the debtor has removed or disposed of mortgaged goods under a mortgage related to the credit contract, or intends to remove or dispose of mortgaged goods, without the credit provider's permission or that urgent action is necessary to protect the mortgaged property.

[755] Part 5, Division 2 (Sections 80-85).

Section 80(5) provides that if the credit provider believes on reasonable grounds that a default is not capable of being remedied the default notice need only specify the default; and the credit provider may begin the enforcement proceedings after the period of 30 days from the date of the notice.

(ii) Defaults may be remedied

Section 81(1) of the UCCC provides that if a default notice states that the credit provider intends to take action because the debtor is in default under the credit contract the debtor may remedy the default within the period specified in the notice, and the contract is then reinstated and any acceleration clause cannot operate.

Section 81(2) provides that a debtor does not remedy the default if, at the end of the period, the debtor is in default under the credit contract or mortgage because of the breach specified in the notice or because of a subsequent breach of the same type.

(c) Money Claims under the UCCC

Although the credit provider has wide powers to begin legal action to recover a debt, in regulated contracts certain conditions must be first be satisfied[756]:-

(i) the debtor is in arrears of their payments;

(ii) an appropriate notice has been posted to the last known address of the debtor;

(iii)the debtor has been given the appropriate period to pay the debt.

There are exceptions[757] to these rules. For instance, where the credit provider has made reasonable efforts to contact the debtor and has been unable to do so. If it is a second or

[756] Section 80(2) of the UCCC.
[757] Section 80(4) of the UCCC.

later default, the credit provider may have previously informed the debtor that no further notice will be given.

Section 84 of the UCCC provides for acceleration clauses. Under section 84(1), an acceleration clause is a term of a credit contract or mortgage providing that on the occurrence or non-occurrence of a particular event, the credit provider becomes entitled to immediate payment of all, or a part, of an amount under the contract that would not otherwise have been immediately payable; or whether or not on the occurrence or non-occurrence of a particular event, the credit provider has a discretion to require repayment of the amount of credit otherwise than by repayments fixed, or determined on a basis stated, in the contract; but does not include any such term in a credit contract that is an on demand facility.

Under section 84(2) of the UCCC, an 'on demand facility' is a credit contract or mortgage under which the total amount outstanding under the contract is repayable at any time on demand by the credit provider; and there is no agreement, arrangement or understanding between the credit provider and the debtor that repayment will only be demanded on the occurrence or non-occurrence of a particular event.

Section 85 provides for requirements to be met before credit provider can enforce an acceleration clause. Section 85(1) provides that an acceleration clause is to operate only if the debtor is in default under the credit contract and the credit provider has given to the debtor, a default notice under section 80; and the default notice contains an additional statement of the manner in which the liabilities of the debtor under the contract would be affected by the operation of the acceleration clause and also of the

amount required to pay out the contract (as accelerated); and the default has not been remedied within the period specified in the default notice (unless the credit provider believes on reasonable grounds that the default is not capable of being remedied).

Section 85(2) provides that a credit provider is not required to give a default notice under section 80 or to wait until the period specified in the default notice has elapsed before bringing an acceleration clause into operation, if the credit provider believes on reasonable grounds that it was induced by fraud on the part of the debtor to enter into the contract; or the credit provider has made reasonable attempts to locate the debtor but without success; or the Court authorises the credit provider not to do so; or the credit provider believes on reasonable grounds that the debtor has removed or disposed of mortgaged goods under a mortgage related to the credit contract concerned, or intends to remove or dispose of mortgaged goods, without the credit provider's permission or that urgent action is necessary to protect the goods.

(d) Repossession under the UCCC[758]

Section 83 of the UCCC provides for the requirements to be met before credit provider can repossess mortgaged goods.

Repossession can take place under the UCCC following the expiry of the appropriate notice period[759] (or following an exception to these rules as above) where the credit provider has a mortgage under the contract (usually a car). However, repossession cannot place if:-

[758] Section 83 of the UCCC.
[759] Section 80 UCCC as above.

(i) the amount still to be paid is less than 25% of the amount financed[760];

(ii) the goods are stored on private property[761], unless a court or tribunal has made an appropriate order or with the borrowers (or occupier of the premises) consent.

Section 83(1) provides that a credit provider must not, without the consent of the Court, take possession of mortgaged goods if the amount currently owing under the credit contract related to the relevant mortgage is less than 25% of the amount of credit provided under the contract or $10,000, whichever is the lesser.

Section 83(2) provides that the restriction does not apply to a continuing credit contract; or if the credit provider believes on reasonable grounds that the debtor has removed or disposed of the mortgaged goods, or intends to remove or dispose of them, without the credit provider's permission or that urgent action is necessary to protect the goods.

Section 83(3) provides that in any proceedings in which it is established that a credit provider has taken possession of mortgaged goods contrary to section 83(1), the burden of establishing that the possession of the goods was lawfully taken by virtue of section 83(2) lies on the credit provider. Section 83(4) provides that nothing in this section prevents a credit provider from accepting the return of goods under section 78.

[760] Section 83(1) provides that a credit provider must not, without the consent of the Court, take possession of mortgaged goods if the amount currently owing under the credit contract related to the relevant mortgage is less than 25% of the amount of credit provided under the contract or $10,000, whichever is the lesser.
[761] Section 91 of the UCCC.

Following repossession under contracts regulated by the UCCC, the borrower must be given notice of[762] :-

(i) the value of the goods;

(ii) the repossession expenses; and

(iii) the right to recover the goods by paying the debt or remedying the default.

It is still possible to negotiate a deferral of this procedure i.e, if the borrower can prove they are about to receive monies owed to them that will cover the costs.

The credit provider must get the best price possible for the sale of the goods[763]. On the other hand, it is possible for the original borrower to introduce a buyer to the credit provider.

If the best possible price has not been obtained (this may be difficult to prove if you did not have the goods valued prior to repossession), or the provider unreasonably refuses the person you introduced, the borrower has a right of action against the credit provider.

(e) Postponement of enforcement proceedings[764]

Section 86(1) of the UCCC provides that a debtor who has been given a default notice under Division 2 or a demand for payment under section 82 may, at any time before the end of the period specified in the notice or demand, negotiate with the credit provider a postponement of the enforcement proceedings or any action taken under such proceedings or of the operation of any applicable acceleration clause.

[762] Section 94 of the UCCC.
[763] Section 96 of the UCCC.
[764] Part 5, Division 3 (Sections 86-89) .

Section 86(2) provides that Division 3 does not apply to a credit contract in respect of which the maximum amount of credit that is or may be provided is more than $125,000 (or such other amount as may be prescribed by the regulations).

Section 87(1) provides that the default notice or demand for payment is taken, for the purposes of the UCCC, not to have been given or made if a postponement is negotiated with the credit provider and the debtor complies with the conditions of postponement.

Section 87(2) of the UCCC provides that it is a condition of any postponement negotiated with a credit provider after the credit provider has taken possession of property subject to a mortgage that the mortgagor pays the reasonable costs of the credit provider in taking possession of the property.

Section 87(3) provides that a credit provider must give written notice of the conditions of a postponement referred to in section 87(1) not later than 30 days after agreement is reached on the postponement. The notice must set out the consequences under section 87(5) if the conditions of the postponement are not complied with. Section 87(4) provides that a credit provider that is required to give notice under section 65[765] in relation to a postponement is not required to comply with section 87(3).

Section 87(5) provides that if any of the conditions of a postponement are not complied with, a credit provider is not required to give a further default notice under the UCCC to the debtor with whom the postponement was negotiated before proceeding with enforcement proceedings.

[765] Changes by agreement.

Section 88(1) provides that if the debtor is unable to negotiate a postponement, the debtor may apply to the Court for a postponement. Section 88(2) provides that the Court may, after allowing the applicant, the credit provider and any debtor concerned a reasonable opportunity to be heard, order or refuse to order the postponement to which the application relates and may make such other orders as it thinks fit. Section 88(3) provides that the Court may, if it thinks it appropriate in the circumstances, stay any enforcement proceedings under the credit contract until the application has been determined.

Section 89(1) of the UCCC provides that the credit provider may apply for variation of the postponement order. Section 89(2) provides that on such an application, the Court may vary the order to which the application relates as it thinks fit or may refuse to vary the order or may revoke the order.

(f) Enforcement procedures[766]

Section 90(1) provides that a credit provider may, by written notice to a mortgagor under a goods mortgage, require the mortgagor to inform the credit provider within 7 days where the mortgaged goods are and, if the mortgaged goods are not in the mortgagor's possession, to give the credit provider all information in the mortgagor's possession that might assist the credit provider to trace the goods. Section 90(2) provides that a mortgagor who contravenes a notice under this section is guilty of an offence.

Section 91(1) provides that a credit provider, or an agent of a credit provider, must not enter any part of premises used for residential purposes for the purpose of taking

[766] Part 5, Division 4 (Sections 90-98).

possession of mortgaged goods under a goods mortgage unless the Court has authorised the entry; or the occupier of the premises has, after being informed in writing of the provisions of this section, consented in writing to the entry.

Section 91(2) provides that the regulations may provide for procedures for the obtaining and giving of consent for the purposes of this section and may set out the circumstances in which consent is or is not taken to have been given. Section 91(3) provides that if premises are entered in contravention of this section by a credit provider or an agent of a credit provider, the credit provider is guilty of an offence.

Section 92 provides that the Court may, on the application of a credit provider that is entitled to take possession of mortgaged goods, authorise the credit provider to enter residential premises for the purpose of taking possession of mortgaged goods.

Section 93(1) provides that the Court may, on the application of a credit provider that is entitled to take possession of mortgaged goods, order a person who has possession of the goods to deliver them to the credit provider at a specified time or place or within a specified period. Section 93(2) provides that the Court may, on the application of a credit provider or other person required to deliver goods to a credit provider, by order vary the place at which or time or period within which goods must be delivered to the credit provider. Section 93(3) provides that a person who contravenes an order under this section is guilty of an offence.

Section 94(1) provides that the credit provider that has taken possession of goods under a mortgage must, within 14 days after doing so, give the mortgagor a written

notice containing information like the estimated value of the goods; the enforcement expenses incurred up to the date on which the goods were taken into the credit provider's possession and, if enforcement expenses are accruing while the goods remain in the credit provider's possession, the rate of accrual; a statement of the mortgagor's rights and obligations in the form set out in the regulations. Section 94(2) provides that a credit provider must not dispose of goods taken under the mortgage within 21 days after the date of the notice, unless the Court authorises the credit provider to do so.

Section 94(3) of the UCCC provides that if at the end of that 21-day period a stay of enforcement proceedings is in force under the UCCC or an application under section 70 has not been determined, the credit provider must not dispose of the goods until those proceedings have been determined and any period allowed for appeal has elapsed. Section 94(4) provides that the credit provider must return the goods if the amount in arrears (less any accelerated amount) and the credit provider's reasonable enforcement expenses are paid within that 21-day period and the debtor has not committed a further default of the same kind under the credit contract; or the credit contract is paid out. Section 94(5) provides that a credit provider that contravenes this section is guilty of an offence.

Section 95(1) provides that the mortgagor may, within 21 days after the date of the notice given under section 94, nominate in writing a person who is prepared to purchase the goods from the credit provider at the estimated value or at any greater amount for which the credit provider has obtained a written offer to buy the goods. Section 95(2) provides that the credit provider must offer to sell the goods to that

person for the estimated value or, if there is a written offer to buy the goods for a greater amount, that amount.

Section 96(1) of the UCCC provides that the credit provider must, if payment is not made within 21 days after the date of the notice given under section 94 and that section does not prevent the sale, as soon as reasonably practicable (or at such time as the credit provider and mortgagor agree) sell the goods in accordance with section 95 or, if there is no nominated buyer or the nominated buyer under that section does not buy the goods, for the best price reasonably obtainable.

Section 96(2) provides that the credit provider must credit the mortgagor with a payment equivalent to the proceeds of the sale less any amounts which the credit provider is entitled to deduct from those proceeds. On the sale of the goods, the amount required to pay out the contract becomes due.

Section 96(3) provides that a credit provider that sells mortgaged goods must give the mortgagor a written notice stating the gross amount realized on the sale, the net proceeds of the sale, the amount required to pay out the credit contract or the amount due under the guarantee, any further recovery action proposed to be taken by the credit provider against the debtor and any other information required by the regulations. Section 96(4) provides that a credit provider that contravenes a requirement of this section is guilty of an offence.

Section 97 provides that a credit provider that sells mortgaged goods under section 96 is entitled to deduct from the proceeds of that sale only the amount currently secured by

the mortgage in relation to the credit contract, not being more than the amount required to discharge the contract; the amount payable to discharge any prior mortgage to which the goods were subject; the amounts payable in successive discharge of any subsequent mortgages to which the goods were subject and of which the credit provider had notice; and the credit provider's reasonable enforcement expenses.

Section 98(1) of the UCCC provides that the Court, on application by a mortgagor, may order a credit provider to credit the mortgagor with a payment, fixed by the Court, exceeding the net proceeds of sale if it is not satisfied that the credit provider sold the goods as soon as reasonably practicable, or at a time agreed between the credit provider and the mortgagor, for the best price reasonably obtainable.

Section 98(2) provides that on application by a mortgagor, the mortgagee under any prior mortgage to which the goods are subject or the mortgagee under any subsequent mortgage of which the credit provider has notice, the Court, if not satisfied that the credit provider exercised its power of sale in accordance with this Division, may make an order requiring the credit provider to compensate the mortgagor or the relevant mortgagee for any loss suffered as a result. Section 98(3) provides that the onus of proving that a power of sale was exercised in accordance with Division 4 is on the credit provider that exercised it.

(g) Enforcement expenses[767]

Section 99(1) of the UCCC provides that a credit provider must not recover or seek to recover enforcement expenses from a debtor in excess of those reasonably incurred by

[767] Part 5, Division 5 (Section 99).

the credit provider. Enforcement expenses of a credit provider extend to those reasonably incurred by the use of the staff and facilities of the credit provider.

Section 99(2) provides that any provision of the credit contract that appears to confer a greater right is void. If enforcement expenses are in fact recovered in excess of this limitation, they may be recovered back. Section 99(3) provides that if there is a dispute between the credit provider and the debtor about the amount of enforcement expenses that may be recovered by the credit provider, the Court may, on application by any of the parties to the dispute,

determine the amount of that liability.

(h) Money owed after sale.[768]

If the amount obtained on the sale does not equal the amount owed under the contract, the credit provider may begin legal proceedings in a local or magistrates court to recover the balance.

(i) Summary

Australia's UCCC is a well drafted piece of legislation which has a systematic layout as compared to the UK's 1974 Act and 2006 Act. It is a complete new set of laws that are very comprehensive. It is more of consumer law than specifically hire purchase law. All hire purchase agreements are covered under the UCCC[769]. The relevant part is Part 5 (Ending and enforcing credit contracts) of the UCCC out of twelve parts. Part 5 is divided into five divisions, namely Division 1 (Ending of credit contract by debtor) (sections 75-79); Division 2 (Enforcement of credit contracts) (sections 80-85); Division 3 (Postponement of enforcement proceedings) (sections 86-89); Division 4

[768] Section 97 of the UCCC.
[769] Except for those stated in Section 7 of the UCCC.

(Enforcement procedure for goods mortgaged) (sections 90-98); and Division 5 (Enforcement Expenses) (section 99).

Sections 161-164A of the UCCC provides for the documentary provisions. Section 161 provides that the regulations may prescribe the form of any notices required. The notice must be in writing. Section 162 provides that the credit contract must be easily legible and the language must be clear. Section 163 provides that the Owner must, at the written request of a debtor, provide to the debtor, a copy of the credit contract. Most importantly, Section 164A provides that the uniform electronic transactions legislation applies to the UCCC. This is a progressive piece of legislation that encourages paperless notification.

The Owner must not begin enforcement proceedings against a Hirer unless the Hirer is in default and the Owner has given the Hirer, a default notice (under section 80(1) of the UCCC), allowing the Hirer a period of at least 30 days from the date of the notice to remedy the default; and the default has not been remedied within that period. No further default notice is required for subsequent defaults of the same kind.[770] The Owner is not required to give a default notice, if the Owner believes on reasonable grounds that it was induced by the Hirer's fraud; or the Owner believes on reasonable grounds that the Hirer has removed or intends to remove the vehicle, or that urgent action is necessary to protect the vehicle, etc.[771] If the Owner believes on reasonable grounds that a default is not capable of being remedied, the default notice need only specify the default; and the Owner may begin the enforcement proceedings after the period of 30 days from the date of the notice.[772]

[770] Section 80(3) of the UCCC.
[771] Section 80(4) of the UCCC.
[772] Section 80(5) of the UCCC.

An Owner must not, without the Court's order, take possession of the vehicle if the amount owing is less than 25% of the amount of credit provided under the contract or $10,000, whichever is the lesser.[773] The exception is when the Owner believes on reasonable grounds that the Hirer has removed or intends to remove the vehicle, without the Owner's permission or that urgent action is necessary to protect the vehicle.[774] In any proceedings in which it is established that an Owner has taken possession of goods unlawfully, the burden of establishing that the possession of the goods was lawfully taken lies on the Owner.[775]

The Owner, must not enter any premises to repossess the vehicle unless the Court has authorised the entry; or the occupier of the premises has consented in writing.[776] The Owner shall be guilty of an offence if premises are unlawfully entered.[777] The Court may authorise the Owner to enter residential premises to repossess the vehicle , on an application by the Owner.[778] The court also has special powers to order that the vehicle be delivered to the Owner.[779]

Within 14 days of the repossession under contracts regulated by the UCCC, the Hirer must be given notice of[780] the value of the goods; the repossession expenses; and the right to recover the goods by paying the debt or remedying the default. The Owner must not sell the repossessed vehicle within 21 days after the date of the notice, unless the Court authorises the Owner to do so.

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[773] Section 83(1) of the UCCC.
[774] Section 83(2) of the UCCC.
[775] Section 83(3) of the UCCC.
[776] Section 91(1) of the UCCC.
[777] Section 91(3) of the UCCC.
[778] Section 92 of the UCCC.
[779] Section 93 of the UCCC.
[780] Section 94 of the UCCC.

The Owner must get the best price possible for the sale of the vehicle[781]. On the other hand, it is possible for the original Hirer to introduce a buyer to the Owner.[782] If the best possible price has not been obtained, or the Owner unreasonably refuses the person the Hirer introduced, the Hirer has a right of action against the Owner.

Both the Hirer and the Owner can terminate the hire purchase agreement. The Hirer can have two options. Firstly, the Hirer is entitled to pay out the credit contract at any time[783] and keep the vehicle. The amount required to pay out a credit contract is the total of the amount of credit; and the interest charges and all other fees and charges payable by the Hirer to the Owner up to the date of termination; and reasonable enforcement expenses; and early termination charges; less any payments made under the contract and any rebate of insurance premium.

Secondly, a Hirer can surrender goods to the Owner.[784] The Hirer must write to the Owner stating that he intends to return the goods or may require the Owner, if it already has possession of the goods, to sell them. The Hirer then returns the goods within 7 days to the Owner during business hours.[785] The procedures that then follow are very similar to those that apply on repossession. Any Hirer who thinks that the sale raised an insufficient price can apply to the District Court for compensation.[786] The Owner has the onus for proving it was a sufficient price.[787]

Although the Owner has wide powers to begin legal action to recover a debt, certain conditions must be first be satisfied[788] i.e, the Hirer (the person who owes the money under the contract) is in arrears of their payments; or an appropriate notice has been

[781] Section 96 of the UCCC.
[782] Section 95 of the UCCC.
[783] Section 75(1) of the UCCC.
[784] Section 78 of the UCCC.
[785] Section 78(2) of the UCCC.
[786] Section 79 of the UCCC.
[787] Section 79 of the UCCC.
[788] Section 80(2) of the UCCC.

posted to the last known address of the Hirer; or the Hirer has been given the appropriate period to pay the debt. There are exceptions[789] to these rules. For instance, where the Owner has made reasonable efforts to contact the Hirer and has been unable to do so. If it is a second or later default, the Owner may have previously informed the Hirer that no further notice will be given.

A Hirer who has been given a default notice or a demand for payment may, negotiate with the Owner a postponement of the enforcement proceedings or any action taken under such proceedings or of the operation of any applicable acceleration clause.[790] The right to postponement does not apply to a credit contract in respect of which the maximum amount of credit is more than $125,000.[791] If the Hirer is unable to negotiate a postponement, the Hirer may apply to the Court for a postponement.[792]The Owner may apply for variation of the postponement order.[793]

7.2.3 Singapore Position

7.2.3.1 Introduction

Singapore's Hire Purchase Act 1969 ("**Singapore HPA**") has been amended by the Hire Purchase (Amendment) Act 2004 ("**Singapore HP (A)A**") with effect from 1-11-2004 principally to enhance disclosure and transparency requirements so that consumers have access to all material and relevant information to make an informed choice when deciding whether to enter into a hire-purchase agreement. One pertinent difference between the Singapore HPA and ours is the former is only applicable for consumer goods which do not exceeds S$ 20,000-00 (inclusive of any goods and

[789] Section 80(4) of the UCCC.
[790] Section 86(1) of the UCCC.
[791] Section 86(2) of the UCCC.
[792] Section 88(1) of the UCCC.
[793] Section 89(1) of the UCCC.

services tax) and for motor vehicles which does not exceed S$ 55,000-00 [excluding the cost of a certificate of entitlement ("COE") for the vehicle].

7.2.3.2 Latest Amendments

The use of the Rule 78 for the calculation of the Hirer's statutory rebate for early settlement is now no longer mandatory in Singapore as the formula for the computation of the statutory rebate in Section 2(1) of the Singapore HPA has been deleted. Section 13(2) of the Singapore HPA which previously provided for the computation of the net balance due, has been deleted.

Section 29(1) of the Singapore HPA is amended to omit the reference to the formula for the calculation of the rate of term charges which will no longer be prescribed. The Sixth Schedule which sets out the formula for term charges calculation has also been deleted. The Hire-Purchase (Term Charges) Regulations (Reg. 1) have also been revoked effective from 5-11-2004. Another interesting amendment is that there no longer a need for minimum deposit in Singapore as Sections 30 and 31 of the Singapore HPA has been deleted.

7.2.3.3 Summary

Singapore's Hire Purchase Act 1969 ("**Singapore HPA**") was first enacted in 1969 and except for some minor amendments since then, remained largely similar to when it was first enacted in 1969. The Singapore HPA has been amended by the Hire Purchase (Amendment) Act 2004 ("Singapore HP(A)A") with effect from 1-11-2004 principally to enhance disclosure and transparency requirements so that consumers have access to all material and relevant information to make an informed choice when deciding

whether to enter into a hire-purchase agreement. The Singapore HPA is only applicable for consumer goods which do not exceeds S$ 20,000-00 (inclusive of any goods and services tax) and for motor vehicles which does not exceed S$ 55,000-00 [excluding the cost of a certificate of entitlement ("COE") for the vehicle].

Singapore's HPA provides for prescribed notices and agreement. Sections 3(1)-(3) of the Singapore HPA provides for the prescribed notices that the Owners shall give to the Hirers, which includes a written statement to prospective Hirer. The agreement shall be in writing and in the English language; shall be signed by all relevant parties; shall specify a date on which the hiring shall be deemed to have commenced; specify the number of instalments to be paid under the agreement by the Hirer; specify the amounts of each of these instalments and the person to whom and the place at which the payments of these instalments are to be made; specify the time for the payment of each of those instalments; and contain a description of the goods sufficient to identify them; shall contain a description of the consideration; and shall set out in a tabular form, the price at which at the time of signing the agreement; deposit, etc.

The underlying belief of the latest amendments is that Hirers are better protected through disclosure and transparency as the Owners must provide the prospective Hirers with written statement of financial obligations as provided under the new Second Schedule (which includes, inter alia, the method of calculating the outstanding balance upon early settlement) before the execution of the hire-purchase agreement. The new Second Schedule lists the minimum information that the Owners should provide to the prospective Hirers in the written statement, which includes the method of calculating the outstanding balance upon early settlement; the effective interest rate charged by

Owners and the processing fees (if any). Another welcome change is that the written statement need not be in a prescribed form.

The general rule is that an Owner shall not exercise any power of taking possession of vehicle until the Owner has served on the Hirer a default notice in the form of the Fourth Schedule[794] notice in writing and the period fixed by the notice has expired, which shall not be less than 7 business days after the service of the notice. The exception is if there are reasonable grounds for believing that the vehicle will be removed or concealed by the Hirer, but the onus of proving the existence of those grounds shall lie upon the Owner.[795]

Within 7 business days after the Owner has taken possession of the vehicle, the Owner shall serve on the Hirer the Fifth Schedule notice[796]. Where the Owner takes possession of goods, the Owner shall deliver to the Hirer personally a document acknowledging receipt of the goods,[797] which sets out a short description of the vehicle, the date, time and place of the repossession.[798] If the Fifth Schedule notice is not served, the rights of the Owner under the hire-purchase agreement shall thereupon cease and determine.[799] Where an Owner has repossessed the vehicle, the Owner shall not, without the written consent of the Hirer, sell the goods until after the expiration of 7 business days after the date of the service on the Hirer; or if the Hirer's notice in reply[800] to the Fifth Schedule

[794] Section 15(1) of the Singapore HPA.
[795] Section 15(2) of the Singapore HPA.
[796] Section 15(3) of the Singapore HPA.
[797] Section 15(4) of the Singapore HPA.
[798] Section 15(5) of the Singapore HPA.
[799] Section 15(6) of the Singapore HPA.
[800] Section 17(1) - ***Where the Owner takes possession of any goods, the Hirer may, within 7 business days after the service on him of the Fifth Schedule notice, by giving to the Owner a notice in writing signed by the Hirer require the Owner to redeliver to the Hirer (subject to compliance by the Hirer with section 18) the goods that have been repossessed; or require the Owner to sell the goods to any person introduced by the Hirer who is prepared to buy the goods for cash at a price not less than the estimated value of the goods; or the Hirer may recover from the Owner, if the value of the goods at the time of the Owner so taking possession thereof is less than the net amount payable under the agreement but the total of that value and the amount paid or provided, whether by cash or other consideration, by or on behalf of the Hirer under the agreement exceeds the net amount payable — the difference between that total and the net amount payable; or if the value of the goods at the time of the Owner so taking possession thereof is equal to or greater than the net amount payable under the agreement — the total of that***

has been given, until the time for payment pursuant to that notice has expired, whichever is the later.[801]

The value of the goods shall be best price that could be reasonably obtained for the sale of the vehicle by the Owner;[802] or if the Hirer has introduced a person who has bought the goods, the amount paid by that person, less all reasonable costs incurred by the Owner to repossess, store, repair, and maintain the vehicle. Where the Owner has sold repossessed vehicles, the onus of proving that the price obtained was the best price shall lie upon the Owner.[803]

If, within 7 business days after giving the Hirer's notice in reply to the Fifth Schedule to the Owner, the Hirer pays to the Owner any amount due by the Hirer; remedies any breach; pays to the Owner the reasonable costs and expenses of the Owner, the Owner shall forthwith return the vehicle to the Hirer.[804] The vehicle shall be received and held by the Hirer as if the breach had not occurred and the Owner had not taken possession thereof.

The Hirer, if he has given notice in writing to the Owner of his intention to do so, on or before the day specified for that purpose in the notice, complete the purchase of the goods by paying to the Owner the net balance due under the agreement.[805] Section 13(2) of the Singapore HPA which previously provided for the computation of the net balance due, has been deleted. The rights conferred on the Hirer may be exercised by him at any time during the continuance of the agreement; or where the Owner has taken

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value and the amount paid or provided, whether by cash or other consideration, by or on behalf of the Hirer under the agreement, less the net amount payable.

[801] Section 16 of the Singapore HPA.
[802] Section 17(3) of the Singapore HPA.
[803] Section 17(4) of the Singapore HPA.
[804] Section 18(1) of the Singapore HPA.
[805] Section 13(1) of the Singapore HPA.

possession of the goods, upon payment to the Owner (within 7 business days after the Owner has served a notice in the form set out in the Fifth Schedule) in addition to the net balance due together with the reasonable costs incidental to the Owner's repossession the vehicle.[806]

The Rule 78 to calculate the Hirer's statutory rebate for early settlement is no longer mandatory. The formula for the calculation of the rate of term charges which will no longer be prescribed. These amendments augurs well for laissez faire as the Owners need not specify any particular approach to calculate the outstanding balance payable by Hirers upon early settlement of their hire-purchase. The underlying belief is that Hirers are better protected through disclosure and transparency as the Owners must provide the prospective Hirers with written statement of financial obligations as provided under the new Second Schedule (which includes, inter alia, the method of calculating the outstanding balance upon early settlement) before the execution of the hire-purchase agreement. The new Second Schedule lists the minimum information that the Owners should provide to the prospective Hirers in the written statement, which includes the method of calculating the outstanding balance upon early settlement; the effective interest rate charged by Owners and the processing fees (if any). Another welcome change is that the written statement need not be in a prescribed form.

The Hirer may terminate the hiring by returning the goods to the Owner during ordinary business hours at the place at which the Owner ordinarily carries on business or to the place specified for that purpose in the agreement[807] or to any place agreed to by the parties[808] or apply to a court for an order fixing the place to which the goods may

[806] Section 13(3) of the Singapore HPA.
[807] Section 14(1) of the Singapore HPA.
[808] Section 14(2) of the Singapore HPA.

be returned.[809] When the agreement is terminated, the Owner is entitled to recover from the Hirer the amount required to be paid; or the amount that the Owner would have been entitled to recover if he had taken possession of the goods at the date of termination of the hiring, whichever is the less.[810]

7.2.4 Malaysian Context

7.2.4.1 Introduction

Recent amendments to the Act came into force on 15-4-2005. By these amendments an obligation is imposed on the Owner of the goods on hire to provide an option to the Hirer for the term charges under the hire purchase agreement to be at a fixed rate or at a variable rate (the variable rate is quoted at a margin percentage above the base lending rate). The Owner has the right to revise the base lending rate at any time during the continuance of the hire purchase agreement. However, notice of such revision must be served on the Hirer. If the base lending rate is revised, the Hirer is then given the option of either retaining the existing number of instalments and varying the amount of instalments or retaining the existing amount of instalments and varying the number of instalments.

The Act confers upon both the Owner and the Hirer, the power to terminate the hire purchase agreement, subject to certain conditions. The most common reason for termination of the hire purchase agreement by the Owner is non-payment of the monthly rentals. For instance, should the Owner choose to terminate the hire purchase agreement due to a breach arising from or relating to the payment of the monthly hire rentals, the Owner cannot exercise his power of repossession unless there have been 2 successive defaults of payments or a default in respect of the last payment.

[809] Section 14(3) of the Singapore HPA.
[810] Section 14(6) of the Singapore HPA.

The steps that need to be taken by the Owner prior to repossession are as highlighted below :-

i) Fourth Schedule Notice - this is a notice in writing, stating the arrears due under the hire purchase agreement and of the Owner's intention to repossess the hired goods, after the expiry of 21 days from the date of service of the notice. This notice must be served either by way of personal service or by registered post. It was held in the case of ***Koh Siak Poo v MED-Bumikar Mara Sdn Bhd [1994] 4 CLJ 368*** that non-compliance with the 'service provision' would render the eventual repossession of the hired goods wrongful;

ii) Regulation 3 Notice - 14 days after issue of the Fourth Schedule notice, the Owner pursuant to the regulation 3 of the Act, has to send to the Hirer a notice informing the Hirer of the Owner's intention to repossess;

iii) Fifth Schedule Notice - Within 21 days after the Owner has taken possession of the hired goods, a notice in writing must be served on the Hirer and the guarantors, which allows the Hirer an opportunity to resume possession of the hired goods if within 14 days of the service of the Fifth Schedule Notice, the Hirer pays the balance due under the hire purchase agreement.

The Hirer is also given the power to terminate the hire purchase agreement by returning the hired goods to the Owner. If the value of the returned hired goods is more than the balance outstanding under the hire purchase agreement, the Hirer is entitled to the difference. Likewise if the value of the hired goods is less than the balance outstanding,

the Owner is entitled to the difference.

Failure to comply with any of the requirements under the Act or Regulations thereunder is an offence, where either a fine or a term of imprisonment may be imposed. However, all offences under the Act may be compounded[811].

Although the Act sets out in detail the legal rights and duties of parties to a hire purchase agreement, it is limited in its applicability as it only applies to hire purchase agreements relating to the goods specified in the First Schedule[812] of the Act[813].

7.2.4.2 Weaknesses of the Existing Hire-Purchase Law

The Act is over prescriptive and outmoded as a means of regulating consumer financing transactions. As can be seen in Chapters 3; 4; and 6, the provisions of the Act (especially Sections 14; 16; 16A; 17; 18; 19 and 34 in Chapter 3; Sections 4; 4A; 4B; 4C; 4D; 5; 6 in Chapter 4; and Sections 8; 14; 15; 16A; 18; 20; 30; 34; and 40 in Chapter 6) are drastic and harsh effect on the Owners.

Wilson v Secretary of State [2003] UKHL 40[814], is an interesting UK House of Lords' case which criticised the rigidity of the many requirements about the form and contents of regulated agreements, in particular Section 127(3) of the Consumer Credit Act

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[811] Hire-Purchase (Compounding of Offences) Regulation 1993, Section 2.

[812] List of Goods as contained in the First Schedule :-

(1) All consumer goods
(2) Motor vehicles, namely
(a) Invalid carriages
(b) Motor Cycles
(c) Motor Cars including taxi cabs and hire cars
(d) Goods Vehicles (where the maximum permissible laden weight does not exceed 2540 kilograms)
(e) Buses, including stage buses.

[813] Hire Purchase Act 1967, Section 1(2).

[814] The Court of Appeal ([2002] QB 74).

1974[815], resulting in automatic enforceability. The Owners loses their rights to enforce the Agreement or their rights to repossession are restricted or their rights to money claims are restricted, wherever applicable. Conversely, the Hirer unwittingly or otherwise acquires a windfall. The Hirer gets to keep the money and recovers his security. These consequences apply just as much where the Owner was acting in good faith throughout and the error was due to a mistaken reading of the complex statutory requirements instead of deliberate non-compliance. These consequences also apply where the Hirer suffered no prejudice as a result of the non-compliance.

The unattractive feature of this approach is that it will sometimes involve excessively punishing the blameless to serve as an example for the rest of the Owners.[816] Types of sanction having this effect are difficult to justify and impedes free market. The 1971 Crowther Report on Consumer Credit[817] expressed some sympathy with the industry (Owners) roundly condemned this approach[818] :- "It offends every notion of justice or fairness that because of some technical slip which in no way prejudices him, a borrower, having received a substantial sum of money, should be entitled to retain or spend it without any obligation to repay a single penny."

One may argue that the consumers in Australia and UK are much more well-informed than the consumers in Malaysia and that Malaysia is not ready for that kind of a drastic change. However, I opine that the majority of Malaysians who make use of the hire-

[815] Section 127(3) – "The court shall not make an enforcement order under section 65(1) if section 61(1)(a) (signing of agreements) was not complied with unless a document (whether or not in the prescribed form and complying with regulations under section 60(1)) itself containing all the prescribed terms of the agreement was signed by the debtor or Hirer (whether or not in the prescribed manner)".

[816] Voltaire's "pour encourager les autres".

[817] Report of the Committee on Consumer Credit, under the presidency of Lord Crowther, March 1971 (Cmnd 4596), vol 1, p 311, para 6.11.4.

[818] However, the Crowther Committee proposed that hire purchase contracts should be abolished and other forms of security introduced so that the loan could be secured on, for example, motor vehicles. The UK Government subsequently decided that as consumers and businesses were comfortable with the concept of hire purchase and conditional sales it was not necessary to abolish the contracts.

purchase mechanism are mostly educated ones. Our literacy rate is now one of the highest in South East Asia. In fact, the rural folks are slow to use this mechanism as they would usually purchase things in cash as they do not trust a system which they do not understand. Malaysia, a developing country strives to become a developed country and by opening up the market, this dream may be realised sooner. Restrictions stifle development. The caveat is of course, we should not take the Australian and UK reforms lock stock and barrel. We should pick and choose those that we feel are more suited to our local conditions. I trust that a parliamentary committee that is especially set up to propose such an overhaul of the hire-purchase law can be astute enough to adopt the Australian and UK reforms which are suitable.

7.2.4.3 Consumers' Protection Act 1999

The Malaysian Consumers Protection Act 1999 (hereinafter referred to as "the CPA") is applicable if the Hirer in a hire-purchase transaction is a consumer. The CPA came into effect on 15-11-1999. The CPA applies to areas of consumer protection that are not already covered by other statutes, such as the Contracts Act 1950, the Sale of Goods Act 1957, the Sale of Drugs Act 1952, etc. "Consumer"; "goods" and "supplier", are defined under Section 3 of the CPA. The CPA provided for several implied guarantees for the protection of the consumers. The implied guarantees shall take effect if goods are supplied to the consumers, whether in a sale transaction or a hire-purchase transaction.

The implied guarantees are stipulated in Sections 31-38 of the CPA. These guarantees cannot be excluded. Section 6(1) of the CPA stipulated that the CPA shall take effect regardless of any contrary terms in any agreements and that every supplier and every

manufacturer that purported to contract out from any provisions of the CPA shall be guilty of an offence under the CPA.

Under the CPA, the consumers' rights granted cannot be taken away notwithstanding conditions in any agreement signed. Consumers have the right to claim for damages from unfair practices from the supplier or manufacturer. It is opined that there is an urgent need to overhaul the CPA to make it more comprehensive, not unlike the Uniform Consumer Credit Code of Australia, as expounded above.

7.2.4.4 Summary

Malaysia's Hire-Purchase Act 1967's ("the Act") recent amendments came into force on 15-4-2005. The Owner is obliged to provide an option to the Hirer for the term charges under the hire purchase agreement to be at a fixed rate or at a variable rate. The Owner has the right to revise the base lending rate at any time during the continuance of the hire purchase agreement. However, notice of such revision must be served on the Hirer. If the base lending rate is revised, the Hirer is then given the option of either retaining the existing number of instalments and varying the amount of instalments or retaining the existing amount of instalments and varying the number of instalments.

The Act regulate all consumer goods and all motor vehicles as listed in Paragraphs 2(a)-(e) of the First Schedule to the Act. The Act defines "consumer goods" as goods purchased for personal, family or household purposes. However, even where the goods are not listed in the First Schedule and the Act does not apply, the parties may still agree to be bound by the provisions of the Act.[819]

[819] see *Kesang Leasing Sdn Bhd v Mohd Yusof Bin Ismail & Anor [1990] 1 MLJ 291; Siew Nguong Hin & Ors v Mayban Finance Bhd Originating Summons No 24-864-91, High Court (Penang) (digested in Mallal's Digest 1992 at para 1072).*

In Malaysia, the notices and agreement are not unlike the ones in Singapore but contain more information due to the latest amendments. Sections 4, 4A-4D, and 5 also require the Owner to issue prescribed notices, including Part I and II of the Second Schedule statements to prospective Owner. The agreement shall be in writing; duly completed and shall be signed by all parties to the agreement; every agreement shall specify a date on which the hiring shall be deemed to have commenced; specify the number of instalments; specify the time for the payment of each of those instalments; contain a description of the goods sufficient to identify them; specify the address where the goods under the hire-purchase agreement are; shall contain a description of the consideration; shall set out in a tabular form the price of the goods; deposit; etc. There shall be a separate agreement for every item of goods.

The Act confers upon both the Owner and the Hirer, the power to terminate the hire purchase agreement, subject to certain conditions. The most common reason for termination of the hire purchase agreement by the Owner is non-payment of the monthly rentals. For instance, should the Owner choose to terminate the hire purchase agreement due to a breach arising from or relating to the payment of the monthly hire rentals, the Owner cannot exercise his power of repossession unless there have been 2 successive defaults of payments or a default in respect of the last payment.

The Owner needs to issue default notice prior to repossession. The Owner shall first issue a Fourth Schedule[820] Notice in writing stating the arrears due and the Owner's intention to repossess the vehicle after the expiry of 21 days from the date of service of the notice. Non-compliance with the 'service provision' would render the eventual repossession wrongful. Then, the Owner shall issue a Regulation 3 Notice within 14

[820] Section 16(1) of the Act.

days after issuance of the Fourth Schedule, informing the Hirer of the Owner's intention to repossess. The Owner need not comply with the Fourth Schedule requirement where there are reasonable grounds for believing that the goods will be removed or concealed by the Hirer. If the Owner is prepared to accept the onus of proof, the Owner need not give notice or await the expiration of the period.[821] Within 21 days after the Owner has repossess the vehicle, a Fifth Schedule notice in writing must be served on the Hirer, which allows the Hirer an opportunity to resume possession of the vehicle if within 14 days of the service of the Fifth Schedule Notice, the Hirer pays the balance due under the hire purchase agreement.

The Hirer is also given the power to terminate the hire purchase agreement by returning the vehicle to the Owner. If the value of the returned vehicle is more than the balance outstanding under the hire purchase agreement, the Hirer is entitled to the difference. Likewise if the value of the hired goods is less than the balance outstanding, the Owner is entitled to the difference. Failure to comply with any of the requirements under the Act or Regulations thereunder is an offence, where either a fine or a term of imprisonment may be imposed. However, all offences under the Act may be compounded[822].

The Hirer may give a notice in writing to complete the purchase of the vehicle by paying the Owner the net balance due under the agreement. The net balance due is the balance originally payable less any amounts (other than the deposit) paid by the Hirer; and the statutory rebate for terms charges; and the statutory rebate for insurance. The rights conferred on the Hirer may be exercised by the Hirer at any time during the continuance of the agreement; or where the Owner has repossess the vehicle, upon

[821] Section 16(2) of the Act.
[822] Hire-Purchase (Compounding of Offences) Regulation 1993, Section 2.

payment to the Owner (within 21 days after the Owner has served a Fifth Schedule notice) in addition to the net balance due together with the reasonable costs incidental to the Owner's repossession of the vehicle; or where the Hirer has returned the goods to the Owner within 21 days after the service on him of the Fourth Schedule notice, upon payment to the Owner (within 21 days after the Owner has served a Fifth Schedule notice) the net balance due under the Act.

The Hirer may terminate the agreement by returning the vehicle to the Owner during ordinary business hours at the place at which the Owner ordinarily carries on business; or to any place agreed to by the parties to the agreement; or where the parties fail to agree, the Hirer may apply to a court for an order fixing the place to which the goods may be returned. Where an agreement is determined, the Hirer may require the Owner to sell the goods to any person introduced by the Hirer who is prepared to buy the goods for cash at a price agreeable to the Owner; and where the value of the goods at the time when it is returned to the Owner is more than the balance outstanding under the hire-purchase agreement, the Hirer is entitled to the difference which is recoverable as a debt due; and where the value of the goods at the time when it is returned to the Owner is less than the balance outstanding under the hire-purchase agreement, the Owner is entitled to the difference which is recoverable as a debt due.

Balance outstanding under the hire purchase agreement means the total sum payable by the Hirer to complete the agreement and the amount derived from interest on overdue instalments which has yet to be paid less the amount paid by the Hirer excluding deposit; statutory rebate for terms charges; and statutory rebate for insurance, if any. Value of the goods at the time when it is returned to the Owner means the best price

that could reasonably be obtained by the Owner; or if the Hirer had introduced a person who had bought the goods for cash, the amount paid by that person.

7.3 COMPARISON

A comparison can be made by juxtaposing all the four jurisdictions and their respective laws.

(a) Financial Limits.

UK has removed the financial limit of £25,000, making all hire purchase agreements not made wholly or predominantly for business purposes, regulated. Australia does not impose a financial limit. Therefore, all hire purchase agreements are regulated. In Singapore hire purchase agreements for vehicles $55,000-00 and above are not regulated. In Malaysia, agreements for vehicles under the First Schedule of the Act are regulated. It is opined that the Singapore position is the best as only the lower income bracket are needs extra protection.

(b) Default Notices.

All the jurisdictions need default notices. In UK, Australia, Singapore and Malaysia, default notices upon the Hirer's breach are in a prescribed form in Section 88 of the 1974 Act, Section 161 of the UCCC, Section 15 (Fourth Schedule) of the Singapore HPA and Section 16 (Fourth Schedule) of the Act, respectively. In Australia, regulations are given the powers to prescribe the form of notices. In Malaysia and Singapore, the default notice is in the form of a "Notice of Intention to Repossess" whereas in UK and Australia, the default notice gave the Owner wider options. In UK,

the Owner can terminate the agreement, or demand earlier payment, or recover possession[823]. In Australia, the Owner can begin 'enforcement proceedings' which covers more than repossession.

Whereas the default notice is mandatory in UK, there are exceptions in Australia, Singapore and Malaysia whereby notice of default need not be issued. In Australia, Singapore and Malaysia, it is when there is reasonable ground to believe that the vehicle will be removed by the Hirer. Australia has another three instances whereby the default notice is waived. For example, if there is reasonable ground that the Owner was induced by the Hirer's fraud to enter into the agreement or where the court authorises enforcement proceedings or if the Owner made reasonable attempts to locate the Hirer but in vain.

All the default notices give the Hirer time to remedy the breach. Australia even allows the default notice to be waived on the subsequent default of the same nature. Singapore only allows the Hirer seven business days to do so, as compared to UK (fourteen days), Australia (thirty days) and Malaysia (twenty one days). In Singapore, the notice period was changed from 14 days to 7-business days. It was felt that this was in line with the advent of almost instantaneous means of communication available today. However, surprisingly, the Singapore HPA does not have the equivalent of Section 176A of the 1974 Act and Section 164A of the UCCC, which allows for electronic transmission of documents. It is opined that the Australian law on default notice is the best as it is more efficient and flexible, especially the need for subsequent default notice of the same nature. However, the time to remedy the default should be reduced to the seven

[823] Sections 76 and 87 of the 1974 Act.

business days as one or two weeks extra would not make a lot of difference to the Hirer.

(c) Money Claims

In UK and Australia, the Owner can demand for earlier payments upon the Hirer's breach. Section 76 of the 1974 allows the Owner to give the Hirer at least seven days' notice of the Owner's intention to enforce the agreement, which includes demanding earlier payment. Section 76 of the 1974 Act is not applicable for cases of enforcement arising out of the Hirer's breach. Section 87 of the 1974 Act provides for enforcement arising out of the Hirer's default. Section 87 of the Act allows the Owner to demand for earlier payment at least fourteen days after the default notice.[824] In Australia, the Owner can demand for earlier payments under the acceleration clause,[825] upon the expiry of thirty days from the date of the default notice.[826] In Malaysia and Singapore, there are no similar provisions which allow the Owner to make money claims. It is opined that the Owners should be given more options to enforce besides repossession.

(d) Protected Goods

In UK, if the Hirer has paid at least one third of the total price of the vehicle, the Owner needs an order of the court to repossess the 'protected goods'. In Australia, the Owner needs a court order to repossess the vehicle if the amount owing is less than 25% of the amount of credit provided or $10,000-00, whichever is the lesser. There is no such requirement in Malaysia and Singapore. In Malaysia, as long as there are two successive defaults in the instalment payments, the Owner can repossess after the expiry of the Fourth Schedule notice. In Singapore, the Owner has the right to repossess

[824] Section 88 of the Act.
[825] Section 84 of the UCCC.
[826] Section 80 of the UCCC.

as long as there is a breach relating to instalment payments. It is opined that Australia's $10,000-00 threshold is the best as it is not fair to allow the Owner the right to repossess vehicle if the amount owing is so small.

(e) Notice to Hirers after Repossession.

Within twenty one days (Malaysia) and seven business days (Singapore) after the Owner has repossess the vehicle, the Owner shall issue a notice to Hirer after repossession (Fifth Schedule notice). In Australia, the Owner shall issue a notice within fourteen days after the repossession. In UK, there is no such requirement. However, the Owner needs to apply for a court order[827] before entering any premises to repossess and if there is a wrongful repossession, the Hirer shall be entitled to claim all the sums paid under the agreement. In Australia, a court order[828] is needed to enter residential premises to repossess vehicle. If there is a wrongful repossession, the Owner shall be guilty of an offence. In Malaysia, the Owner does not need to apply for a court order as long as the repossession procedure under Hire-Purchase (Recovery of Possession of Maintenance of Records by Owners) Regulations, 1976 is followed. It is opined that the notice after repossession is unnecessary as the Hirer would have access to the necessary information earlier and the Hirer has recourse to claim if the repossession is wrongful. However, the Owners should be made to apply for court order before entering any residential premises to repossess.

(f) One-Half Rule or Minimum Payment Clause.

In UK, there is a minimum payment clause in Section 100 of the 1974 Act whereby the Hirer (if the Hirer paid less than one half of the total price) must pay the Owner the difference between one half of the total price and what the Hirer has paid if the Hirer

[827] Section 92 of the 1974 Act.
[828] Section 91 of the UCCC.

exercised the Hirer's right to terminate the agreement early by surrendering the vehicle. In Australia, Singapore and Malaysia, the Hirer may terminate the agreement earlier by surrendering the vehicle under Section 78 of the UCCC, Section 14 of the Singapore HPA, and Section 15 of the Act, respectively. However, there is no minimum payment imposed on the Hirer. It is opined that there should be a minimum payment clause as this would prevent well-informed Hirers from avoiding their reasonable liability. The one half rule is sensible enough.

(g) Early Settlement by Hirer

Besides surrendering the vehicle, the Hirer can opt to pay off the loan early or early settlement. In UK, as hire purchase is a form of fixed sum credit, the Hirer is entitled to rebates in insurance premium and future credit charges[829]. In Australia, hire purchase is not a form fixed sum credit. The Hirer can pay out the contract (which includes interest charges up to the date of termination)[830] and is entitled to a rebate in insurance premium only.[831] In Singapore, the Owners need not specify any particular approach to calculate the outstanding balance payable by Hirers upon early settlement of their hire-purchase.[832] Owners must provide the prospective Hirers with written statement of financial obligations under the new Second Schedule (which includes, inter alia, the method of calculating the outstanding balance upon early settlement). Singapore amended their Act to allow the Banks to charge variable interest rates, like Australia, since August, 2004. The benefits of the variable rate (the calculation is more akin to housing loan) is that it Hirers to make prepayments and the calculation shall be based on the outstanding amount.

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[829] Section 95 of the 1974 Act.
[830] Section 75 of the UCCC.
[831] Section 138 of the UCCC.
[832] Sections 2 and 29 of the Singapore HPA are amended to omit the reference to the formula for the calculation of the rate of term charges. The Sixth Schedule which sets out the formula for term charges calculation has also been deleted.

In Malaysia, the Hirer may complete the purchase of the vehicle[833] by paying the Owner the net balance due under the agreement.[834] However, the Hire-Purchase Act 2005 which took effect from 15-4-2005, provided the Hirer with the option of a variable interest rates like a housing loan besides the fixed interest rates.

7.4 CONCLUSION AND PROPOSALS FOR REFORM[835]

The Singapore HPA is in many ways more progressive than the Malaysian HPA. However, the Singapore HPA has not even reached the level of progress that has been achieved by UK and Australia. Hence it is proposed to conduct a complete overhaul of the Act in order to streamline our Act with the other jurisdiction.

The Hire-Purchase Act was first enacted in 1967 and except for some minor amendments since then, remained largely similar to when it was first enacted in 1967. Our financial market has since evolved. As part of our efforts to promote a more pro-enterprise business environment, we are now moving away from prescribing rigid rules that could stifle innovation, towards promoting greater disclosure and transparency. Further, as the general public is better educated and more sophisticated, more emphasis is now placed on consumer education so that they can make informed choices. There is therefore a need to update the Act to align with these developments.

Time is now ripe for a complete overhaul of the Act. The writer is of the opinion that the latest amendments are insufficient and is merely a knee-jerk reaction from the amendments done by our neighbour, Singapore. Therefore, a parliamentary committee

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[833] Section 15 of the Act.

[834] The net balance due is the balance originally payable less any amounts (other than the deposit) paid by the Hirer; and the statutory rebate for terms charges; and the statutory rebate for insurance. 'Balance originally payable' is the cash price minus deposit added with costs (freight, vehicle registration fees and insurance premium) and added with term charges.

[835] The writer found that the Australian (Victoria) Review of the Hire-Purchase Act 1959 to be very helpful in this endeavour.

should be set up to review the sorry state of hire-purchase law in Malaysia. The committee's terms of reference should be as follows :-

1. to inquire into, consider and make recommendations as to Acts of Parliament and provisions of Acts of Parliament which are unnecessary or redundant; and legislative instruments made under an Act of Parliament and provisions of legislative instruments made under an Act of Parliament which are unnecessary or redundant;

2. to inquire into, consider and make recommendations as to Acts of Parliament and provisions of Acts of Parliament which are unclear, ambiguous or should be re-drafted; and legislative instruments made under an Act of Parliament and provisions of legislative instruments made under an Act of Parliament which are unclear, ambiguous or should be re-drafted;

3. to pursue the primary objects of reducing the number and complexity of hire-purchase Acts and legislative instruments, and ensuring that Acts and instruments are clearly expressed in accordance with modern drafting practices.

Looking at the above, it looks like we are lagging behind the other two jurisdictions in that our Act was modelled after a repealed New South Wales' HPA 1959 which was then replaced by the New South Wales Credit Act 1984 which was then replaced again by the Uniform Consumer Credit Code (UCCC).[836] Further, UK has also done away with their archaic HPA 1938 which was replaced by their Consumer Credit Act 1974 ("the 1974 Act") which implemented all the recommendations of the Molony Report 1962. The latest being the Consumer Credit Act 2006 ("the 2006 Act").

[836] A new scheme of uniform consumer credit laws has been introduced in all Australian states and became effective from the 1st of November 1996 (Except in Tasmania when the Code will become effective in March 1997). The uniform Consumer Credit Code arose from the intergovernmental Uniform Credit Laws Agreement 1993. The objectives of the scheme are to provide laws which apply uniformly and equally to all forms of consumer lending and to all lenders throughout Australia and are based on the principle of truth-in-lending.

Malaysia's proposed Consumer Credit Bill provides the best and realistic opportunity to modernise the hire purchase law. It is unthinkable that such an archaic law which followed an erstwhile Australian statute should be allowed to exist in what is otherwise a modern, progressive and competitive market. The logical place for updating the law here is with the package of reforms updating consumer credit legislation and achieving a fair balance for Owners (businesses) and Hirers (consumers). The proposed reforms should bolster but not further enhance consumer protections; ensure a modern laissez faire. Reform is long overdue.

EPILOGUE

For the purpose of this paper, the writer concentrated on two areas of the hire-purchase law in Malaysia. However, the writer is forced to look at the holistic picture as we will be falling into the vicious cycle of piecemeal legislation if we do not do so. The problem with the Act is not confined to Money Claims and Repossession alone, it is in the bigger picture of consumer protection. As there is already a CPA, albeit of limited and general application, it is opined that the Act should be abolished to be replaced by a Uniform Consumer Credit Act. The writer is of the opinion that the Act is too harsh and unrealistic towards the Owners. This has the grave effect of affecting the economy as a whole because the much "enlightened" Hirers can (ab)use the Act for their benefit.

Note after amendments

This paper was in its final stages when the latest amendments took place. However, it is opined that the amendments are not drastic and the essence of this paper is not diminished by the amendments.

Shakespeare so astutely said that "Neither a borrower nor a lender be". The best would be to follow the adage. However, commercial reality does not allow us the liberty to do so. Therefore, we shall make the best out of the situation by making life less complicated for both the Hirers and the Owners by eradicating the archaic Hire Purchase Act and to enact a modern Consumer Credit Act.

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