[HIGH COURT OF AUSTRALIA.]

JOHNSTON'S PROPRIETARY LIMITED . APPELLANT;
COMPLAINANT,

AND

NETTLETON . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *May* 12, 31.

Latham C.J., Rich and Starke JJ.

Hire-purchase Agreement—"Minimum-hire" clause—Default by hirer—Repossession of goods by owner—Right of owner to recover hire for period of actual possession by hirer—Hire-Purchase Agreements Act 1936 (*Vict.*) (*No.* 4428), *ss.* 3, 4.*

Section 4 of the *Hire-Purchase Agreements Act* 1936 (Vict.) limits the right of an owner who has retaken possession of goods the subject of a hire purchase agreement only where he seeks to enforce a clause which is within the description in par. *a* or *b* or *c* of the section, and does not limit his right (independently of such a clause) to recover hire for a period of actual possession.

So *held* by *Latham* C.J. and *Rich* J. (*Starke* J. dissenting).

Decision of the Supreme Court of Victoria (*Gavan Duffy* J.) varied.

* The *Hire-Purchase Agreements Act* 1936 (Vict.) provides:—By s. 3: "(1) Where goods . . . have been delivered to the hirer pursuant to a hire-purchase agreement and the owner subsequently takes possession thereof the hirer shall be entitled to recover from the owner the total amount of the moneys paid by him under the agreement in respect of such goods . . . less the difference between—(*a*) the purchase price of the goods . . . and (*b*) the value of such goods . . . at the time of the owner so taking possession thereof"; sub-ss. 2 and 3 prescribe how the purchase price and the value of goods shall be ascertained for the purposes of the section, and sub-s. 5 contains requirements as to the giving of notice and a limitation of time as to proceedings by the hirer to obtain the benefit of the section. By s. 4: "In any case where pursuant to a hire-purchase agreement the hirer is required (whether he actually exercises his option of purchase or not) to pay—(*a*) the total purchase price of the goods . . . comprised therein; or (*b*) not less than a stated amount or a stated proportion of the total purchase price; or (*c*) rent or hire in respect of a stated period irrespective of the actual period of his possession of such goods . . . the owner shall not be entitled if he has taken possession of the said goods . . . to recover any sum which would together with—the value of the goods . . . at the time of the owner so taking possession thereof (ascertained as provided in" s. 3 (3)); "and the moneys paid or other consideration provided by the hirer under the agreement or by any other person on his behalf—amount to more than the purchase price of the said goods . . . (ascertained as provided in" s. 3 (2)).

By an agreement dated 11th June 1941 Johnston's Pty. Ltd. (therein called the company) agreed to let and Evelyn K. Nettleton (therein called the hirer) agreed to hire certain goods of which the company was the owner. The hirer was to pay "instalments of" 18s. per week by way of hire so long as the hiring continued (clause 4), the goods were agreed to be of the value of £114 8s. 1d. (clause 5), and the hirer was given an option of purchase upon payment of such sum as with the amounts paid for hire equalled the agreed value of the goods. The agreement also provided that, if the hirer should make default in paying any hire instalment, the company might immediately put an end to the hiring and retake possession of the goods, and the expenses of retaking possession should be paid by the hirer to the company (clause 9), that the hirer might at any time terminate the hiring by delivering the goods to the company (clause 10), and that, in the event of the hiring being determined before the aggregate paid for hire amounted to a sum equal to one-half of the agreed value of the goods, the hirer should forthwith pay to the company, if the determination was by the company under clause 9, "(*a*) a sum which with the aggregate of the amounts paid for . . . hire shall equal one-half of the agreed value of the goods, or (*b*) a sum which with the aggregate of the amounts paid for . . . hire, and the value of the goods at the time the company takes possession of them, shall equal the purchase price of the goods as defined in the *Hire-Purchase Agreements Act* 1936, whichever shall be the less" (clause 11 (ii)).

The hirer made default in payment of the hire, and had not paid one-half of the agreed value of the goods, when the company retook possession of the goods. Upon a complaint in a Court of Petty Sessions the company sought to recover from the hirer the amount of £33 for hire as stipulated by clause 4 of the agreement for the period during which the hirer was in possession of the goods, together with the expenses of retaking possession. The Court decided that s. 4 of the *Hire-Purchase Agreements Act* 1936 (Vict.) applied, and, accordingly, that the company was not entitled to recover any sum which would, together with the value of the goods at the time of repossession and the moneys which had been paid by way of hire, amount to more than the purchase price of the goods; according to the Court's computation, the hirer had already paid a greater sum, and it dismissed the complaint.

Upon an order nisi obtained by the company from the Supreme Court of Victoria to review this decision, *Gavan Duffy* J. upheld the decision in so far as it determined that s. 4 of the Act was applicable, but disagreed with the computation of the amount; he

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found that there was a sum of £14 due to the company and made an order for that sum.

By special leave, the company appealed to the High Court.

Dean, for the appellant. The presence in the agreement in this case of a clause to which s. 4 of the Act would apply if the owner were seeking to rely on that clause is immaterial where the owner does not rely on the clause but merely seeks to recover hire for a period of actual possession by the hirer. It is conceded that s. 4, read literally and without reference to its context, would have a more extensive operation, but the reference to the provisions described in pars. *a*, *b* and *c* would be meaningless unless the section was directed, and directed only, to the enforcement of such provisions. If the section is given a wider meaning, the right of an owner to recover hire in respect of actual possession will depend—so far as the section limits it—on the accident of the presence or absence of a minimum-hire clause in the agreement. The words "the owner shall not be entitled," in s. 4, are equivocal unless one takes into account the preceding pars. *a*, *b* and *c*. In these circumstances the general words of the section can, and should, be given a restricted meaning (*Cox* v. *Hakes* (1); *Craies* on *Statute Law*, 4th ed. (1936), p. 168; *Ex parte Walsh and Johnson*; *In re Yates* (2), per *Isaacs* J.). The word "entitled" should be read as "entitled by reason of a provision described in par. *a* or *b* or *c*," or, more briefly, "thereby entitled."

Dethridge, for the respondent. It is clear from ss. 3 and 4 that the legislature intended to limit the amount which could be recovered or retained by an owner who had retaken possession of the goods. In s. 4 the word "required" clearly relates back to the word "agreement" and does not mean "required by the owner in proceedings to enforce a minimum-hire clause"; likewise, the natural meaning of "entitled" is "entitled by virtue of the agreement." Section 4 in its natural meaning constitutes with s. 3 a coherent—even if not a complete—scheme for limiting the rights of owners, and the Court would not be justified in assuming that the legislature meant something less than that which it has plainly expressed in s. 4. Accordingly, the Supreme Court was correct in holding that s. 4 applied to the present case.

Cur. adv. vult.

(1) (1890) 15 App. Cas. 506, at pp. 517, 518, 526, 529.

(2) (1925) 37 C.L.R. 36, at pp. 91 et seq.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal by special leave from the Supreme Court of Victoria (*Gavan Duffy* J.) which raises a question as to the interpretation of s. 4 of the *Hire-Purchase Agreements Act* 1936 (Vict.).

The appellant company let certain furniture to the respondent, Evelyn K. Nettleton, under a hire-purchase agreement dated 11th June 1941. The hire of the goods was 18s. per week so long as the hiring continued (clause 4), and the goods were agreed to be of the value of £114 8s. 1d. (clause 5). By clause 10 of the agreement it was provided that the hirer might at any time terminate the hiring by delivering the goods to the company and giving written notice. Clause 9 of the agreement provided (*inter alia*) that, if the hirer should make default in paying any hire instalment, the company might, by written notice or otherwise, immediately put an end to the hiring and retake possession of the goods. Clause 11 was a minimum-hiring clause. It provided that in the event of the hiring being determined before the aggregate paid for the option to purchase and for hire amounted to a sum equal to one-half of the agreed value of the goods as stated in clause 5 the hirer should forthwith pay to the company " (ii) if the determination was by the company under the power in clause 9 :—(*a*) a sum which with the aggregate of the amounts paid for the option to purchase and for hire shall equal one-half of the agreed value of the goods, or (*b*) a sum which with the aggregate of the amounts paid for the option to purchase and for hire, and the value of the goods at the time the company takes possession of them, shall equal the purchase price of the goods as defined in the *Hire-Purchase Agreements Act* 1936, whichever shall be the less." The hirer paid £12 10s. in hire and then fell into arrears, and the company retook possession of the goods. Thus she had not paid one-half of the agreed value (£114) of the goods. The company did not sue under clause 11, but sued under clause 4 in a Court of Petty Sessions for arrears of hire due for the period of actual enjoyment of the goods, together with costs of cartage, storing and handling the repossessed goods, amounting in all to £33. This sum, together with the value of the goods at the time when the company retook possession and with the moneys which had been paid by way of hire, was held by the police magistrate to amount to more than the purchase price of the goods and, applying s. 4 of the Act, he made an order dismissing the claim. *Gavan Duffy* J. held that the magistrate had made an error in taking into account certain prior agreements between the parties, and made an order in favour of the company for £14 and £9 8s. costs, but held that the

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magistrate was right in applying s. 4. The appeal relates to this latter question.

Section 3 of the Act enables a hirer, when the owner has retaken possession of goods subject to a hire-purchase agreement, to recover from the owner the amount by which the money already paid, plus the value of the goods retaken, exceeds the purchase price, subject to an allowance for certain costs. The section prescribes methods for ascertaining the purchase price and the value of the goods for the purposes of the section (and of s. 4). But the hirer can exercise the rights given to him by s. 3 only if he gives a written notice within twenty-one days after the owner has retaken possession, and takes the other steps specified in the section. In the present case the hirer did not take advantage of this provision.

Section 4 is as follows :—" In any case where pursuant to a hire-purchase agreement the hirer is required (whether he actually exercises his option of purchase or not) to pay—(*a*) the total purchase price of the goods or chattels comprised therein ; or (*b*) not less than a stated amount or a stated proportion of the total purchase price ; or (*c*) rent or hire in respect of a stated period irrespective of the actual period of his possession of such goods or chattels—the owner shall not be entitled if he has taken possession of the said goods or chattels to recover any sum which would together with—the value of the goods or chattels at the time of the owner so taking possession thereof (ascertained as provided in sub-section (3) of the last preceding section) ; and the moneys paid or other consideration provided by the hirer under the agreement or by any other person on his behalf—amount to more than the purchase price of the said goods or chattels (ascertained as provided in sub-section (2) of the last preceding section)."

The agreement in this case contains in clause 11 a clause whereby the hirer is required to pay not less than a stated proportion (namely one-half) of the total purchase price. This clause falls within par. *b* of the section. It was held by the Supreme Court that therefore the owner was not entitled to recover a larger amount than that specified in the section. This view allows the section to operate in every case where the agreement contains a minimum-hiring clause of the description set out in (*a*), (*b*) or (*c*) of the section, whether or not the proceeding in which the question arises is a proceeding for the purpose of enforcing such a clause.

The contention on the other side is that the section applies only when the owner is seeking to enforce a provision of the kind mentioned in pars. *a*, *b* or *c* of the section. In the present case the company was not suing for the purpose of enforcing the right given by clause 11 of the agreement to payment of at least one-half of the

agreed value. The company was suing to recover hire due under another provision of the agreement—clause 4.

A suggestion arose in the course of argument that the words "required to pay" in the initial sentence of s. 4 might refer to the amount of money which a hirer was "required to pay" because the owner was requiring him to pay it in a legal proceeding. But the word "required" is attached to the word "agreement." The section refers to any case where the terms of an agreement require the payment of a price, amount or proportion, or rent or hire, as specified in (*a*), (*b*) or (*c*) of the section.

Section 4 provides that, in the cases mentioned, the owner shall not be entitled, if he has retaken possession of the goods, to recover any sum which would exceed a specified maximum. This provision must at least be limited to proceedings under and by virtue of the agreement. It obviously is not an absolute provision which produces the effect that, because A is an owner under a hire-purchase agreement, and B is a hirer under such an agreement, A, the owner, can never be entitled to recover from B on any account a sum greater than that specified in the section. Some words must be understood after "entitled." The respondent's contention is that those words should be "by virtue of the agreement." The appellant's contention is that they should be "by virtue of any such provision as is referred to in (*a*), (*b*) or (*c*)." It is urged for the appellant that, unless this view is adopted, there is an absence of rational connection between the operative words of the section and the words specifying in (*a*), (*b*) and (*c*) the circumstances which bring the section into operation. In other words, it is argued that the section is intended to prevent more than a certain maximum sum being recovered by reason of the inclusion in a hire-purchase agreement of minimum-hiring clauses of the character specified in the section.

The effect of s. 3 is in substance to prevent the owner retaining more (in money and goods) than the agreed value of the goods. Section 3 is directed to a re-adjustment of rights after moneys have been paid "under the agreement" and the owner has taken possession of the goods. But, in order to carry out effectively the principle upon which s. 3 is based, it was necessary to restrict the enforcement by legal proceedings of rights in cases where such enforcement would, from the point of view of the Act, result in overpayment to the owner. Section 4 is an attempt to do this—an attempt which, upon any view, is not very successful. In some cases the money paid by way of hire and the depreciated value of the goods when repossessed may not together amount to the purchase price—the agreed value—of the goods, and the hirer may owe hire in respect of a

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period of actual enjoyment of the goods. In such a case the owner should be able to recover (in money or goods) moneys due, with a maximum limit of the purchase price (agreed value), but no more. Section 3 gives the hirer a right in some cases to recover back from the owner moneys paid "under the agreement," but not to recover moneys paid under an order of a court. Thus it was necessary, while allowing the owner to take legal proceedings, to prevent him from recovering by legal process plus repossession more than he would have been entitled to retain under s. 3 if moneys had been paid voluntarily. A minimum-hiring clause, if fully enforced, might have enabled the owner to recover, in all, more than the desired maximum. Whether it would do so or not would depend upon the moneys paid and the value of the repossessed goods in each particular case. Thus s. 4 limits the remedies under such a clause. Unless the section is limited to proceedings taken to enforce clauses of the nature described in (*a*), (*b*) and (*c*) of the section, there is no reason for referring to such clauses in the section. I confess that I share the difficulty which *Gavan Duffy* J. expressed in understanding why s. 4 should be limited to agreements containing provisions such as are mentioned in (*a*), (*b*) and (*c*). There is no reason why an agreement not containing a minimum-hiring clause should enable the owner to recover more than he could have recovered if such a clause had been in the agreement. But this is the result upon any view of the meaning of s. 4, because the section does not apply to any agreement which does not contain such a clause.

Some effect must, if reasonably possible, be attributed to the reference to (*a*), (*b*) and (*c*) in s. 4. I am of opinion, though not without doubt, that the section should be interpreted as applying only in cases where the agreement includes a provision such as (*a*), (*b*) or (*c*) by reason of which the owner is seeking to recover money. On the other interpretation of the section, the mere presence of such a provision in an agreement limits the right of an owner though he is not seeking to enforce it and though the law does not make such a provision illegal.

Accordingly, in my opinion, the appeal should be allowed and the order of the Supreme Court varied by increasing the amount to be recovered by the complainant to £33. The appellant will, in accordance with the undertaking given upon the granting of special leave to appeal, pay the respondent's costs of the appeal.

RICH J. The question raised for our decision in this appeal is whether s. 4 of the *Hire-Purchase Agreements Act* 1936 applies to cases where, as in the present case, the owner is suing the hirer in respect of arrears of hire due by the hirer at the date of repossession

of the goods by the owner and is not suing upon any of the clauses contained in the section.

This Court granted special leave to appeal as it appeared that the question was one of importance, of frequent occurrence in the Courts of Petty Sessions, and that no ruling on the question had been given by the Supreme Court of Victoria before the decision in this case. The Court of Petty Sessions having held that s. 4 applied to the claim an order nisi to review was obtained upon two grounds, the first of which only is material. That ground is that the magistrate was wrong in holding that s. 4 afforded any defence to the complainant's claim. On the hearing of the order nisi *Gavan Duffy* J. upheld the magistrate's decision. As I venture to differ from his Honour's decision I shall state briefly my reasons for so doing.

The complainant is suing for hire in respect of a period of actual possession under clause 4 of the agreement between the parties and is not suing under clause 11 of the agreement which, it is admitted, falls within s. 4 (*b*) of the Act in question. Section 4, in my opinion, limits the right of an owner who has retaken possession to recover from the hirer only where he seeks to enforce a clause similar to pars. *a* or *b* or *c* of s. 4, but does not limit his right to recover hire for a period of actual possession. The mischief to be remedied was that of "minimum-hire" clauses of which pars. *a*, *b* and *c* of s. 4 are examples. And the whole section was designed to control the operation of such clauses. It could hardly be intended that an owner could recover accrued hire where no such clause was contained in the agreement between the parties but could not so recover where the agreement included such a clause although the owner was not suing thereunder. At law an owner after retaking possession has a right to recover hire accruing up to the date of repossession (*Brooks* v. *Beirnstein* (1); *E. G. Eager & Son Ltd.* v. *Jaenke* (2)). This right should not be taken away without clear words. I agree, therefore, with Mr. *Dean* that the general words in s. 4 were not, having regard to the context, intended to be applied without some limitation (*Cox* v. *Hakes* (3); *Ex parte Walsh and Johnson*; *In re Yates* (4)). The generality of the words, "the owner shall not be entitled . . . to recover any sum," must be read down so as to accord with the intention of s. 4 as a whole. The generality of the words must be limited to cases where the claim in question is based upon a clause in the agreement falling within par. *a* or *b* or *c*. Section 4 does not, I think, apply where, as here, the action seeks to recover money for a period of actual possession and is not based on any of the

(1) (1909) 1 K.B. 98, at p. 102.
(2) (1931) Q.S.R. 257, at p. 262.
(3) (1890) 15 App. Cas. 506, at pp. 517, 518, 529.
(4) (1925) 37 C.L.R. 36, at pp. 90-92.

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sub-sections mentioned. Unless the section is applicable only to the limitation of claims or rights arising under a clause which falls within (*a*) or (*b*) or (*c*) of s. 4 the presence or absence of such a clause is wholly irrelevant. I think Mr. *Dean* suggested an appropriate limitation of the general words of the section if the word "thereby" be inserted after the word "not." The operative words would then read: "The owner shall not thereby be entitled . . . to recover any sum," and a meaning consistent with the scheme of the Act is given to the section.

For these reasons I am of opinion the appeal should be allowed.

STARKE J. The judgment of the Supreme Court is, I think, correct. The provisions of ss. 3 and 4 of the *Hire-Purchase Agreements Act* are complementary.

The provisions of s. 3 enable a hirer under a hire-purchase agreement, in cases in which the owner takes possession of the goods delivered under the agreement subsequently to delivery, to recover from the owner the total amount of the moneys paid under the agreement in respect of the goods delivered less the difference between the purchase price of the goods and the value of the goods, at the time of the owner taking possession thereof, ascertained in the manner prescribed by the section.

But in some agreements there are what have been called "minimum-hire clauses," set forth in clauses *a*, *b* and *c* of s. 4. The object of s. 4 is, I think, to preclude the owner who has taken possession of the goods from recovering any sum, notwithstanding the presence of any such clauses in the agreement, which would, together with the value of the goods at the time of the owner so taking possession, ascertained in the manner provided in s. 3 (3), and the moneys paid or other consideration provided under the agreement or by any person on behalf of the hirer, amount to more than the purchase price of the goods ascertained in the manner provided by s. 3 (2).

The parties compromised that amount before the Supreme Court, and the question whether it was a correct calculation according to the section cannot be canvassed on this appeal, which, in my opinion, should be dismissed.

Appeal allowed. Order of Supreme Court varied by substituting £33 *for* £14. *Appellant to pay respondent's costs of appeal.*

Solicitors for the appellant, *Edward Hart & Johnson.*
Solicitor for the respondent, *H. H. Howard.*

E. F. H.