HIRE-PURCHASE AGREEMENT — INITIAL PAYMENT IN CONSIDERATION OF "OPTION TO PURCHASE" — "OPTION TO PURCHASE" CONDITIONAL UPON PAYMENT OF ALL INSTALMENTS — CONTRACT VALIDLY TERMINATED BY OWNERS PRIOR TO PAYMENT OF FINAL INSTALMENT — ACTION FOR MONEY HAD AND RECEIVED ON A CONSIDERATION WHICH HAD TOTALLY FAILED.

In *Kelly* v. *Lombard Banking Co., Ltd.*, [1959] 1 W.L.R. 41, [1958] 3 All E.R. 713, the hirer agreed, inter alia, "to pay on the signing of the agreement the initial payment of £186-2s....in consideration of the option to purchase contained in clause 3(b) hereof." Clause 3(b) provided that if the hirer performed all the terms of the agreement on his part, he should have "the option to purchase the vehicle for the sum of 20s." One of the terms of the agreement was that the hirer should pay monthly instalments. Another term provided that in the event of execution being levied on the hirer's goods, the owners should have the right to terminate the contract forthwith. Before the payment of the final instalment, the owners duly terminated the contract after execution had been levied on the hirer at the instance of a judgment creditor.

The hirer thereupon brought an action to recover the initial payment of £186-2s. as money paid under a consideration which had wholly failed. His contention was that the consideration for the payment was an option to purchase which he had never had. The owners contended that the option had existed throughout, and could have been exercised at any time upon fulfilment of conditions.

At first instance, the County Court found for the owners. The hirer appealed.

On appeal to the Court of Appeal (Lord Denning and Hodson and Ormerod L.JJ.) the appeal was dismissed.

Delivering a judgment in which Hodson and Ormerod L.JJ. concurred, Lord Denning observed that this was the first time the Court of Appeal had had to consider the question whether a hirer could recover his initial payment. The question which really had to be decided was when the 'option' came into being. Counsel for the hirer suggested that "on the wording of the clause the option did not come into being until the end of the hiring when all the payments had been made. It never came into being in this case because the finance company terminated the hiring." Lord Denning could not agree with this interpretation. "It seems to me that the option to purchase is an existing right which exists as from the date of the agreement. It is true that it is subject to conditions: it is subject to the hirer fulfilling his obligations in order to be entitled under it. But, nevertheless, the option to purchase is an existing right as from the moment of signing the contract and the payment of the money. So he has got what he had paid for. He has to fulfil the conditions in order to exercise the option. But he has paid for an option which he has got."

The only difference between these two arguments is as to the content which it is sought to infuse into the word 'option.' There seems to have been no judicial statement on this point. The Court of Appeal did not seek to examine the analogous case of gifts on condition precedent or 'conditional sales.' There is, in fact, judicial authority for the proposition that the word 'option' is not a term of art and that its meaning must always depend upon its context.[4] The context in the present case would seem to be able to yield conflicting results. Lord Denning considered that clause 2 (a) of the agreement ("Credit for such payment [the initial payment] shall be given to the hirer only in the event of such option to purchase being exercised by him") supported his contention. This clause clearly contemplates exercise of the option *for* purchase but what of the case where the hirer exercises the option *against* purchase? This clause could, in addition to that of Lord Denning, be given the interpretation that the hirer was not to get his initial payment back where he decided not to buy, and to have no reference at all to the situation where there was no exercise of the option at all. On the other hand, clause 3(b) provided that " if the hirer shall punctually pay the monthly hire rentals and all other sums due under this agreement and shall strictly observe and perform all the terms conditions and obligations on his part contained in this agreement, he shall have the option to purchase the vehicle for the sum of 20s."

4. *Nicholls* v. *Lovell* [1923] S.A.S.R. 542, *per* Poole J. at p. 545.

The hirer, in fact, did strictly observe and perform all the terms conditions and obligations which were expressly contained in the agreement. What he did not do was to handle his affairs in such a way that no judgment creditor would levy execution. The agreement nowhere imposed upon him such an express obligation. All that clause 5 says is that if this does happen, the agreement and the hiring "shall forthwith and for all purposes be determined absolutely and come to an end." The only obligation which he failed to discharge was actual payment of instalments, and this failure was attributable solely to the owners' action under clause 5, despite the hirer's offer to meet outstanding instalments within one month. Thus, it is at least arguable that no option existed until after the payment of the final instalment since until that time exercise of it might be prevented by action taken by the owners consequent upon events not characterized amongst the express obligations of the hirer under the agreement.

Either interpretation of the word 'option' in these circumstances can be claimed to be arbitrary, in principle, but, for future cases, there is now strong authority in favour of the view that if the grantor of an 'option' fetters himself in any way, an option exists from the forging of the first fetter. The contrary view, that an option only comes into existence when the grantee finds himself in a position where exercise can only be prevented by his own failure to discharge express obligations seems to have been disapproved.

In theory, the remedy is in the hirer's own hands. He can insist upon the insertion of some such clause as "The option referred to shall only be deemed to come into existence at such time as its exercise or non-exercise depends solely upon the discharge by the hirer of the express obligations contained in this agreement." And then, of course, he can try and buy the goods elsewhere.

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