

Repossession of Goods by the Owner under the Malaysian Hire-Purchase Act 1967: An Overview

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Abstract: Repossession of goods the subject-matter of hire-purchase agreement is an important remedy available to the owner in hire-purchase transactions under the Malaysian Hire-Purchase Act 1967. Repossession occurs when the hirer has defaulted in the payment of instalments. This is the right of the owner, which enables him to take back the goods from the hirer provided that he must follow certain conditions as provided by the Act. This paper aims to look into the safeguards that are in place before and after the exercise of repossession of goods by the owner. The methodology adopted in this paper is a legal library-based research, focusing mainly on primary and secondary legal sources. The paper concludes that the owner has the right to repossess the goods from the hirer if he commits a breach of his obligations under the hire-purchase agreement. However, the right to repossess can only be enforced accordingly with the existence of a valid hire-purchase agreement. The Act seems to be over protective of the hirer compared to the owner. The paper recommends that a balanced approach is needed in order to protect both parties in a hire-purchase agreement.

Keywords: *Hirer, Hire-purchase agreement, Instalments, Owner, Remedy, Repossession*

INTRODUCTION

The Malaysian Hire-Purchase Act 1967 provides several remedies to the owner of goods let out on hire-purchase in case of a breach of the hire-purchase agreement by the hirer. Repossession of the hire-purchase goods is one of such remedies. Repossession occurs when the hirer has defaulted in the payment of instalments. In reality, repossession of the hire-purchase goods strikes at a core feature of a hire-purchase transaction [1]. It denies the hirer the possession of the hire-purchase goods. Therefore, the remedy of repossession is not lightly administered. Repossession entails the goods instead of being in the custody of the hirer finding their way back to the owner [1]. Upon repossession of the goods by the owner, the owner at once has possession of, and property in, the goods. From the perspective of the hirer, upon the owner repossessing the goods, the hirer loses his possession and the use of the hire-purchase goods. Since the paper focuses on the remedy of repossession, which is available to the owner of goods under the Malaysian Hire-Purchase Act, it is important to point

out from the very beginning that recent amendments were made to the Act in 2010. The amendments came into force on 15th June 2011.

The aim of this paper is to examine the safeguards that have been put in place in terms of the exercise of the right to repossess the hire-purchase goods by the owner. The paper also highlights some of the controversies dogging the remedy and suggests some solutions which may occasion a revision of the Hire-Purchase Act. The paper is divided into four parts, excluding the introduction. The first part deals with the meaning and nature of hire-purchase transaction. This part of the discussion is important as it will go on to show how hire-purchase transaction is different from the contract of sale of goods. Furthermore, the first part also addresses the meaning of the terms “owner”, “hirer” and “goods” in the context of a hire-purchase agreement. The second part addresses the concept of repossession of goods under common law. Again, this part of the discussion will go on to show as to whether the Malaysian Hire-Purchase Act has embraced or departed from the common law approach in terms of

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repossession of hire-purchase goods. The third part deals with the concept of repossession of goods under the Hire-Purchase Act. Under this part, the paper will address the safeguards that have been put in place both before and after repossession in order to protect the interests of the hirer. This part of the paper will also address some of the weaknesses of the Act, especially in terms of protecting the interests of the owner. The Act seems to be over protective of the hirer compared to the owner. The fourth part focuses on the conclusion. This part will embrace some recommendations bearing in mind that a hire-purchase form of agreement greatly appeals to a hirer because he is given possession of the goods as well as a period of time to pay by regular instalments. Therefore, a balanced approach is needed in order to protect the interests of both parties when the owner exercises his right to repossess the goods.

MEANING AND NATURE OF HIRE-PURCHASE TRANSACTION

A hire-purchase transaction is basically an agreement wherein the owner agrees to hire goods to the hirer with an option for the hirer to purchase the goods [2]. Generally, hire-purchase means obtaining the benefit of the possession and use of goods before one has fully paid for them. Section 2 of the Hire-Purchase Act 1967 defines a “hire-purchase transaction” as being a transaction of hire with an option to purchase the said goods under the transaction regardless of whether the agreement describes the instalments as rent or hire or otherwise. A hire-purchase transaction may also be viewed as being a bailment transaction with an option to purchase [3]. The reason why the said transaction is also viewed as being similar to that of bailment is because the hirer is under a duty to care for the goods whilst the goods are under the hirer’s possession and that the hirer may be liable for any damages to the goods whilst being in the care and possession of the hirer [3]. This principle was addressed in the case of *Thambipillai v Borneo Motors (M) Ltd* [4] wherein the court held that: A hire-purchase agreement after all is a bailment coupled with an option to buy, so that, apart from bailment, the main purpose of the hire-purchase agreement is to enable the hirer to become the owner by observing all the terms and conditions of the agreement.

It is clear that the Hire-Purchase Act 1967 is concerned with a transaction where a person acquires goods and pays them off by instalments. Until full payment, title to the goods remains with the person from whom possession was obtained by the hirer. In *Tractors Malaysia Bhd v Kumpulan Pembinaan Malaysia Sdn Bhd* [5], the Federal Court decided that on a proper

construction of the agreement, it was clearly the intention of the parties that property in the tractor was not passed to the hirer until full payment was made. Therefore, it was not a sale on instalment terms but more in the nature of a hire-purchase which would give the appellant the right to repossess on breach of the terms by the respondent. In *Credit Corporation (M) Sdn Bhd v The Malaysian Industrial Finance Corp & Anor* [6], the High Court held that until the hirer had exercised his option to purchase by paying the total amount and fulfilling all his obligations under a hire-purchase agreement, no property in the car passed to the hirer.

The nature of a hire-purchase transaction is that it varies from a sale of goods transaction. The difference between these two transactions relate to the passing of property/ownership. Under a sale of goods transaction, the property passes when the contract between the parties is concluded, as such, there is no requirement under a sale of goods transaction for payment to be made in full prior to passing of property, unless, such is stipulated in the said contract [3]. Property could pass although payment of the purchase price is postponed. In a hire-purchase transaction, property in the goods does not pass at the time of the agreement. It would suffice to note that in a hire-purchase transaction, property will not pass upon the execution of the hire-purchase agreement between the hirer and the owner. The issue on passing of property or ownership is only relevant when the hirer pays his final instalment and decides to exercise his option to purchase the goods [3]. Certainly, such option is also available should the hirer decides to determine the hire earlier than the contracted period.

Throughout the hire-purchase period, the hirer obtains only possession of the goods and is also given the option to purchase the goods at the end of the duration of time [7]. The hirer is not obliged to purchase and is not a person who has “agreed to buy the goods”. Therefore, if he sells the goods before he has exercised the option to purchase, he cannot pass a good title to the buyer. Because the owner retains the ownership of the goods, he can repossess the goods under the *nemo dat* rule from a defaulting hirer or an innocent purchaser to whom the hirer may have sold the goods.

Owner

Section 2 of the Hire-Purchase Act 1967 defines the term “owner” as a person who lets or has let goods to a hirer under a hire-purchase agreement and includes a person to whom the rights or liabilities of the owner under the agreement have passed by assignment or operation of law. Looking at the definition of the term “owner”, it would suffice to note that throughout the period of hire-purchase, title to the goods remains with the owner and not the hirer. Thus, the owner may assert his title against any third party who may have ‘bought’

the goods from the hirer. Therefore unlike a sale of goods, no title to the goods passes from the owner to the hirer during the period of hire. The owner has the right to payment of rent instalments for the period the hirer is in possession.

Hirer

Section 2 of the Hire-Purchase Act 1967 defines the term “hirer” as a person who takes or has taken goods from an owner under a hire-purchase agreement and includes a person to whom the rights or liabilities of the hirer under the agreement have passed by assignment or by operation of law. Under a hire-purchase agreement, for as long as the hiring contract subsists, “ownership” in the goods still vests with the owner; it does not pass to the hirer [7]. That being so, the hirer has no title in the goods to pass to a third party. If he does so, he will be liable for conversion [7]. Therefore, unlike a sale of goods, no title to the goods passes from the owner to the hirer during the period of hire. A guarantor is also caught under this definition because under the agreement, the hirer’s rights or liabilities may pass to him by way of assignment or by operation of law.

Goods

The Hire-Purchase Act 1967 covers only a limited range of goods listed in the First Schedule. The list of goods under the First Schedule are: (1) All consumer goods and (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. The phrase “consumer goods” is defined in section 2 of the said Act as goods purchased for personal, family or household purposes. Goods also include any replacements and renewals by the hirer of any part or parts and any accessories added or additions made by the hirer during the period of the hiring [8]. Thus, the provisions of the Hire-Purchase Act would apply to the hire-purchase of the aforementioned goods. Other types of goods are governed by the common law [9]. However, the paper argues that the enumeration of “goods” in the First Schedule does not imply that parties are not free to adopt the Act’s provisions in a hire-purchase agreement on goods not covered in the Schedule. Such a hire-purchase agreement is not void. The Act may still apply to hire-purchase of non-First Schedule goods if the parties so agree; it is all a matter of contract.

REPOSSESSION OF GOODS UNDER COMMON LAW

At common law, the owner has the right to recover possession of the goods if the hirer commits a breach of his obligations under the hire-purchase agreement [7, 9-10]. The owner can do so by physically retaking his goods (provided he does so “peacefully”) or

by filing an action in court [7]. Such a drastic step taken by the owner 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 owner can, so far as the common law is concerned, repossess the goods even though, say, nine-tenths of the purchase price has been paid [11]. As mentioned earlier, throughout the period of hire-purchase, the title to the goods remains with the person from whom possession of the goods was obtained. The latter may assert his title against any third party who may have “bought” the goods from the hirer. The owner’s right to repossess is absolute for the hirer’s right under an agreement is entirely and exclusively dependent upon the terms of his agreement [12].

REPOSSESSION OF GOODS UNDER THE HIRE-PURCHASE ACT 1967

The Hire-Purchase Act 1967 lays down various restrictions on the power of the owner as a means of protecting the hirer. It could be argued that the Act was intended to overcome the problem posed by the strict application of common law. The relevant provisions of the said Act are sections 16 to 19. In support of these provisions, reference must also be made to the Hire-Purchase (Recovery of Possession and Maintenance of Records by Owner) Regulations 1976. The restrictions imposed on the owner can be neatly explained in two situations, before and after repossession takes place.

Before Repossession

Section 16(1) requires the owner to supply the hirer with a notice of repossession. In other words, notice of repossession must be given to the hirer when goods are to be repossessed. Before the owner exercise his right to repossess the goods, the owner must first assure that the balance of the loan to be paid by the hirer must be more than one-third of the purchase price of the goods hired. By fulfilling this requirement, only then the owner would have complied with the requirement that the hirer has defaulted two successive instalments. Under section 16(1), the owner must serve the hirer a twenty-one day notice of intention to repossess, in writing as set out in the Fourth Schedule. The written notice must be serviced in compliance with section 43 of the Act. The owner can retake possession of the goods only after the expiry of the notice period and if the overdue instalments are not settled by then. In *Pang Brothers Motors Sdn Bhd v Lee Aik Seng* [13], where a car was taken by the respondent on hire-purchase agreement with the appellant. The respondent failed to pay the instalments due and the appellant issued a notice under section 16(1). The issue was whether the notice was in fact served. The court held that section 16 clearly specifies that the period before which the seizure can

take place shall be not less than twenty-one days after the service of the notice. However, the date specified in the notice was two days short of the statutory minimum requirement and the notice was therefore bad in law even if served and its effect was therefore null and void.

In addition, there appears to be no time limit within which to repossess upon the expiry of the notice, so long as the arrears of instalments and interest thereon remain outstanding [2, 3]. In *United Manufacturers Sdn Bhd v Sulaiman bin Ahmad & Anor* [14], where the court allowed the plaintiff's appeal and observed that section 16(1) of the Act only requires that before repossession, the notice to be served on the hirer must be in writing, 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 twenty-one days after the service of the notice. Section 16(1) does not specify any time limit within which an owner must repossess after service of section 16(1) notice. So long as the provisions of section 16(1) of the Act have been complied with, the owner can repossess the goods and the relevant notice does not cease to be effective merely because the owner did not actually repossess until two years after service of the said notice so long as the arrears of instalments including arrears of interest due on overdue instalments remain payable and unpaid.

Section 16(1A) provides that if the payment of instalments made amounts to more than one-third of the total cash price of the goods comprised in a hire-purchase agreement and there had been two successive defaults of payment by the hirer, the owner shall not exercise any power of taking possession of the goods comprised in the hire-purchase agreement arising out of any breach of the agreement relating to the payment of instalments unless he has obtained an order of the court to that effect. Hence, section 16(1A) requires an order of the court to be obtained by the owner before repossessing the hired goods if the balance of the loan is less than one-third of the purchase price of the goods. This section governs a situation where the hirer is deceased. Although section 16(1A) is silent regarding the applicability of the procedure for repossession as laid down in section 16(1), such provision is applicable in the circumstance as provided in section 16(1A), except, when the notice for the breach is being effected under the Fourth Schedule, it must be stated that the nominee of the deceased shall be the receiver of the notice [3].

Section 16(2) provides 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. The onus of proving the existence of those grounds lies upon the owner. Section

16(2) 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 [7].

Under section 16(7), it is provided that before the owner or his agent repossesses the goods, he must, in addition to complying with the provisions of the Act, comply with any regulations as may be prescribed. Under the Hire-Purchase Regulations 1976, Rule 3(1) requires the owner to send a notice to the hirer informing him 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.

Section 16A provides that a hirer who returns the 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. However, it is important to note that upon service of the notice under the Fourth Schedule and after twenty-one days had lapsed from the service of the notice, the owner may take possession of the goods.

After Repossession

Within twenty-one days after repossessing the goods, the owner is required, under section 16(3), to serve on the hirer and every guarantor of the hirer a notice in the form set out in the Fifth Schedule. Section 16(3) is mandatory and if the owner fails to comply with this section, the rights of the owner under the hire-purchase agreement will cease and/or terminated. This is clearly spelled under section 16(6) of the Act. Therefore, it is important for the owner to serve a notice in the form as set out in the Fifth Schedule on the hirer and every guarantor of the hirer within twenty-one days after the owner has taken possession of the goods. In *Hong Leong Finance Bhd v Rajandram* [15], Augustine Paul J stressed the importance for the owner to comply strictly with provisions regarding notices as set out in the Fourth and Fifth Schedules.

The owner is also required, under section 16(4), to deliver to the hirer a document acknowledging receipt of the goods. The document must set out a short description of the goods, the date, time and place where the goods were repossessed. This is by virtue of section 16(5).

As mentioned earlier, if the owner fails to serve the notice in the form set out in the Fifth Schedule, his rights under the hire-purchase agreement "thereupon cease and determine". This is by virtue of section 16(6). But the owner may apply to court immediately for an extension of time as contained in section 41 of the Act. Such an application shall not be done *ex parte* because

the hirer's rights will be prejudiced [3]. However, if the hirer then recovers the goods repossessed, the agreement has the same effect as though notice had been given. In other words, the hire-purchase agreement is deemed to continue in force between the parties [7].

Under section 17(1), it is provided that where the owner has taken possession of the goods under section 16, he must not, without the hirer's consent, sell or dispose of them or part with possession thereof until the expiration of twenty-one days after the date of the service of the notice set out in the Fifth Schedule. Under section 17(2), 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. In other words, section 17(1) requires the owner to retain goods repossessed. He is prohibited to dispose of the goods within twenty-one days after the date of repossession of goods.

In addition, where the owner has taken possession of any goods, the hirer shall be liable for the cost of repossession. The hirer has no rights to deny his liability to pay the cost because it is stipulated in the hire-purchase agreement between the owner and the hirer [3]. The hirer's right is only to the extent of contending total costs incurred when the owner took possession of the goods. In *Khoo Thau Sui v United Engineers* [16], the court observed that the appellant (hirer) had contractually undertaken to pay such costs and expenses and he could not thereafter dispute his obligation to pay the actual cost incurred.

Sections 17A and 17B deal with the issue of permit for repossession. Only a person that is given a permit can execute the repossession process. The permit is issued by the Controller which means that it is directly controlled by the government. Therefore, when the owner engages an agent to execute repossession, that particular agent must have a permit.

Section 18(1) deals with hirer's rights when goods are repossessed by the owner. Therefore, when the owner repossesses goods under section 16, the hirer may, within twenty-one days of receipt of the Fifth Schedule notice, require the owner by written notice to redeliver the goods to him or require that the goods be sold to a person introduced by him. Also, the hirer has the right to recover from the owner the difference, if any, having regard to the total value of the goods, inclusive of the amounts already paid, and the net amount payable. The owner is not, however, entitled to recover any sum which, when added together to the value of the goods (at repossession) and the amount already paid, exceeds the net amount payable for the goods. This is by virtue of section 18(2) of the Hire-Purchase Act 1967.

It is equally important to note that the 'net amount payable' for purposes of section 18 is the total amount payable less statutory rebates for terms charges and insurance. The 'value of goods' is the best obtainable price or the cash paid by the person introduced by the hirer, less reasonable costs of repossession, including storage, repair and maintenance charges and reasonable costs of selling or attempting to sell or otherwise dispose of the goods. This is by virtue of section 18(3)(a) and (b) of the Hire-Purchase Act 1967.

Under section 18(4)(a), it is provided that where the owner intends to sell the goods by public auction, he must serve on the hirer a copy of the notice of such public auction not less than fourteen days from the date the said auction is to be held. Therefore, when the owner takes possession of goods and required to sell them by public auction, he is responsible to ensure that the goods are sold at the best market price. If the owner fails to comply with such requirement, the hirer will be estopped from reducing his losses. This was enunciated by Yusoff Mohamed J in the case of *Hong Leong Finance Bhd v Lee Cheng Heng* [17].

In addition, section 18(4)(b) echoes the sentiment that if the owner intends to sell the goods otherwise than by public auction, he 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. If the owner fails to comply with this requirement, he shall be guilty of an offence.

Under section 18(5)(a), the hirer will not be able to recover anything from the owner unless he acts fast. He must, within twenty-one days of receiving the notice under the Fifth Schedule, give to the owner a notice in writing, setting out the amount which he is claiming under this section. The notice can either be signed by the hirer himself or by his solicitor or agent. On the other hand, section 18(5)(b) states that 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.

If, before proceedings under section 18(5) are commenced by the hirer, the owner serves on the hirer an offer in writing to pay the amount claimed, the matter would be settled if the offer is accepted by the hirer. If proceedings are commenced, the owner may pay the amount offered into court and in this event he is entitled to the same rights as if he had tendered the amount to the hirer. This is by virtue of section 18(6) of the Hire-Purchase Act 1967. In other words, 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 [7, 18].

Section 19(1)(a)(b) and (c) deals with hirer's power to regain goods repossessed. Under certain circumstances, the hirer may regain goods repossessed by the owner. If, after twenty-one days of giving the notice in the Fifth Schedule, the hirer pays or tenders to the owner the amount due, remedies any breach and pays or tenders to the owner the reasonable costs and expenses of and incidental to the repossession and return of the goods to the hirer, the owner is obliged to return the goods 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 goods [7].

It would suffice to note that by virtue of section 19(2)(a) and (b), it is important to note that if, upon return of the goods to the hirer, the hirer does not remedy any breach, the owner has no right to repossession unless, by written notice given at the time of return of the goods, he specified the breach and required the hirer to remedy it and the hirer has failed to do so within the time specified in the notice or within twenty-one days, which is longer.

CONCLUSION

It is evident from the above discussions that the owner has the right to repossession of the hire-purchase goods if the hirer commits a breach of his obligations under the hire-purchase agreement, usually non-payment of instalments. The governing statute on hire-purchase in Malaysia has been around for some time. Though it captures the important remedy of repossession that the owner can exercise in a hire-purchase transaction, there are gaps to fill in its provisions regarding the enforcement of this all-important remedy available to damaged owner. There is no doubt, however, that the provisions of the Act seem to be over protective of the hirers. For example, the consequences of non-compliance with section 16(3) by the owner tends to create an imbalance in the scale of justice in hire-purchase agreements. This is by virtue of section 16(6) which imposes a penalty on the owner who fails to serve a section 16(3) notice. The rights of the owner under the hire-purchase agreement would cease and determine. It would seem that the owner would not be able to enforce any remedy given to him by the agreement to recover any amount from the hirer. However, if the hirer exercises his rights under this Act to recover the goods repossessed by the owner, the agreement will have the

same force and effect in relation to the rights and liabilities of the owner and the hirer as it would have had if the notice had been duly given. Thus, it is hereby recommended that section 16(6) of the Act should be amended in order to remove the kind of imbalance in the scale of justice as far as hire-purchase transactions are concerned.

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