SHERIFF APPEAL COURT

[2023] SAC (Civ) 4
KIL-A185-20

Sheriff Principal C D Turnbull
Sheriff Principal D C W Pyle
Appeal Sheriff G A Wade KC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL D C W PYLE

in the appeal in the cause

ALAN KING

Pursuer and Appellant

against

BLACK HORSE LIMITED (t/a Jaguar Financial Services)

Defender and Respondent

and

PARK'S (AYR) LIMITED

Third party

Pursuer and Appellant: Haddow, advocate; TC Young LLP
Defender and Respondent: Adams, advocate; TLT LLP

19 January 2023

Introduction

[1] The short point which arises in this appeal is whether the hirer under a hire purchase agreement is entitled to rely upon his rejection of a motor vehicle when he continues to use it after rejection. The matter came before the sheriff in the form of a motion for summary

decree. After hearing parties, the sheriff granted decree of absolvitor in favour of the respondent.

[2] The respondent is the owner of the vehicle and the third party is the supplier. The appellant avers that the vehicle was defective. That is disputed. Both parties accept that if the use of the vehicle post-rejection does as a matter of law prevent the appellant relying upon the purported rescission of the contract then the action must fail. The respondent has lodged a cross appeal, but it is agreed that if the appeal fails the cross appeal becomes irrelevant. A further matter comes before the court, being a motion to dismiss the action because of procedural default by the appellant. Again, that matter is irrelevant if the appeal fails.

The Undisputed Facts

[3] The appeal proceeds upon the hypothesis that the vehicle was not of satisfactory quality, that the appellant was thereby entitled to rescind the contract and that intimation of rejection was unequivocal. It is undisputed that the appellant entered into a hire purchase agreement with the respondent for the vehicle, a Jaguar motor car, in June 2019. By an email in October 2020 the appellant rejected the vehicle under reference to section 9 of the Consumer Rights Act 2015 ("the 2015 Act"). The email was not lodged as a production. It has now been lodged, but given that the respondent accepts that the email was an effective rejection for the purposes of the appeal we do not think it is necessary to refer to it. It is also a matter of agreement that after the rejection the appellant continued to make the contractual monthly payments by way of a direct debit, continued to have the vehicle taxed and insured and from the date of rejection to 3 November 2021 continued to drive the vehicle to the extent that an additional 6,231 miles were added to the vehicle's mileage.

Indeed, as at the date of the hearing of the motion before the sheriff the appellant had admitted that he had continued to pay the instalments, to tax and insure the vehicle and to use it.

Appellant's Submissions

[4] The period of a consumer's possession of defective goods can be divided into three periods: first from delivery to rejection; secondly, from rejection to the raising of an action to enforce it; thirdly, from the raising of the action to the court's determination. Delay by the consumer in the second period might fairly be said to prejudice the ability to enforce his rights. But once an action is raised the court should be slow to take the delay as being prejudicial to either party's ability to enforce their rights. Following intimation of rejection the trader can treat the purported rescission as a repudiation of the contract, recover the goods (the vehicle in this case) and demand payment under the contract. Not to do so is a tactical choice. If post-rejection use extinguishes the consumer's ability to enforce his or her rights, a considerable burden is created: the bearing of the cost of storing the vehicle and the hiring or replacing of it to meet transport needs. That will be for an indeterminate time. The burden as a whole will be a considerable disincentive for the consumer to have recourse to litigation, even where "no win, no fee" services are available. Cancellation of a direct debit for future instalments under the agreement may result in a notice of default which will affect the consumer's credit rating. For the trader there is no risk of damage to the vehicle post-rejection because of the consumer's motor insurance policy, the risk of depreciation caused by additional mileage post-rejection matters being merely a litigation risk, such risk becoming crystallised only if the trader loses the court action. Deduction from any repayment due to the consumer to reflect the use of the vehicle will be made if the trader

loses the action (section 24(8), 2015 Act). The 2015 Act creates a new and distinct regime governing remedies including the right of rejection (sections 19-24) for all contracts within its scope. It does not import or adopt the previous right of rejection provided for in the Sale of Goods Act 1979 ("the 1979 Act") (section 35) or for hire purchase contracts introduced by the Supply of Goods (Implied Terms) Act 1973 (as section 12A). The common law rules were superseded by the statutory rules on rejection provided in the Sale of Goods Act 1893 ("the 1893 Act") and latterly the 1979 Act. In any event, the 19th century cases cited in Bell's Principles relate to the sale of goods, not hire. Moreover, the rights of rejection in the 2015 Act do not have their origin in the concept of deemed acceptance, as did the right of rejection in the 1979 Act. Instead, the 2015 Act creates a new short term right to reject, which cannot be waived in a manner adverse to the consumer (section 22) and a final right of rejection which is open-ended as regards time but is constrained by the trader's right to repair (section 24). It would be surprising that an Act of Parliament intended to introduce a more consumer favourable regime for certain contracts had the effect of imposing restrictions stricter than those in non-consumer contracts. The concept of personal bar is distinct from the bar on the right to reject in contracts of sale. While it is conceded that the concept of personal bar may apply in certain circumstances under the 2015 Act, such circumstances are not present in this case. The 2015 Act provides a statutory mechanism to avoid unfairness to the trader if the consumer finally rejects the goods having had their use for a significant time (and for vehicles, any time) (section 24(8) and (10)). That section does not distinguish between pre- and post-rejection, but if it is considered that it does it imposes the losses on the trader for post-rejection use only where the trader elects to ignore the consumer's rejection (section 24(9)). It follows that personal bar cannot apply where there is post-rejection use. In any event, the criteria for personal bar are not satisfied in this case: the

appellant raised proceedings within weeks of the rejection. Thus, the respondent cannot credibly claim to have reasonably believed that the appellant would not enforce his right to rejection; nor has the respondent taken any action or refrained from action on the back of such reasonable belief; nor has the respondent suffered prejudice (Reid and Blackie, Personal Bar, Chapter 2 et seq). To impose personal bar on the consumer in the present set of circumstances would impose a significant burden. That would be disproportionate and would not be consistent with a statutory scheme designed to give clear and simple rules for consumer protection.

Respondent's Submissions

[5] The respondent relies upon the post-rejection use of the vehicle and the common law rules which apply. (*Ransan* v *Mitchell* (1845) 7D 813; *Padgett* v *McNair* (1852) 15D 76; *Chapman* v *Couston, Thomson & Co* (1871) 9 Macph 675; *Electric Construction Co* v *Hurry & Young* (1897) 24R 312; *Croom & Arthur* v *Stewart & Co (1905)* 7F 563; *John Girvan & Sons* v *Abel* 1950 SLT (Sh Ct) 60; *Ian James Wilson* v *AGCO Finance Ltd* [2018] SC Edin 24; Gloag and Henderson, *The Law of Scotland* (14th ed) para 12.42). It is a plea of personal bar. Continued use of the vehicle with the effect of adding mileage to it and risking its damage or destruction on the road was an obvious and continuing prejudice to the respondent. Rejection has the same effect under the 2015 Act as it did at common law: rescission of the contract. There is a presumption of statutory interpretation against the common law being changed by statute unless the enactment uses clear and unambiguous language (*Leach* v *R* [1912] AC 305, at 311; M7 *Real Estate* v *Amazon UK Services* 2019 SLT 1263, at para [22]). The position under the 2015 Act is the same as applied under the 1893 Act: the statute did not dis-apply the common law that use post-rejection bars the remedy. The approach of the

Inner House in *Electric Construction Co* v *Hurry & Young* applies in this appeal.

Sections 24(8) and 24(9) of the 2015 Act are of no assistance to the appellant. They cannot be construed as changing the common law rule. The use of the vehicle was inconsistent with the appellant's position that the vehicle was of unsatisfactory quality (section 9), not fit for purpose (section 10) or incapable of repair (sections 23(3)(a) and 24(5)(b)).

Discussion

[6] It is important to consider the genesis of the rule not to use goods after rejection. Professor Bell explains it thus (Principles (10th ed), para 99A):

> "Until 1892 there was by the law of Scotland no right to retain the goods and claim an abatement of the price as in the *actio quanti minoris* of the Roman law, unless in the case of fraud, or of a special bargain or usage. {He then goes on to quote section 11(2) of the Sale of Goods Act 1892.] A purchaser who elects to reject must not break bulk or use or consume the goods, but must act in accordance with the rules stated above (99(f)) in regard to rejection."

In support of that he cites Electric Construction Co v Hurry & Young. Para 99(f) is about a rule that "a buyer is not barred from rejecting goods as disconform to order by the mere fact that he has sold or used part of them before discovery of the defect". In support of that he cites *McCormick* v *Rittmeyer* 1869 7 Macph 854 in which the Lord President (Inglis) sets out the rule (at p 858):

> "When a purchaser receives delivery of goods as in fulfilment of a contract of sale, and thereafter finds that the goods are not conform to order, his only remedy is to reject the goods and rescind the contract. If he has paid the price, his claim is for repayment of the price, tendering re-delivery of the goods. If he has granted bill for the price, his claim is for re-delivery of the bill in return for the offered re-delivery of the goods. If any portion of the goods has before their rejection been consumed or wrought up so as to be incapable of re-delivery *in forma specifica*, then the true value (not the contract price) of that portion of the goods must form a deduction from the purchaser's claim for repayment of the price. The purchaser is not entitled to retain the goods and demand an abatement from the contract price corresponding to the disconformity of the goods to order, for this would be to substitute a new and different contract for that contract of sale which was originally made by the parties,

> or it would resolve into a claim of the nature of the *actio quanti minoris*, which our law entirely rejects."

The same point is made in the earlier case of *Ransan* v *Mitchell*. The Lord President (Boyle) described it as "by using the goods, [the purchaser] left the ground he at first stated he was to occupy, and adopted the contract". Lord Fullerton used the same expression: "by taking and using the goods, to which he [the purchaser who had rejected the goods] had no right but through the contract, he has actually adopted the contract". Lord Jeffrey described it as "a just and effectual repudiation" which "was afterwards as effectually retracted, and the contract adopted". Lord Mackenzie looked at it from a practical level where goods are defective:

> "What is to be done? Why, just what happens every day – the merchant says I repudiate the bargain, and deposit the goods at your risk. But then, though goods of an inferior quality were improperly sent, prices may rise, and they may consequently become more valuable, and the merchant may take and dispose of them after all. Now, if he did so, could he say that he would repudiate the contract still?"

These authorities predate the 1893 Act. They do contain a tension between the principle that rescission of a contract brings the contract to an end (albeit still with legal consequences flowing from it) as against intimation of rejection followed by adoption due to actings inconsistent with the rejection. Be that as it may, the point is that the rule is clear: use of goods after rejection is prohibited. The authorities do not treat it as an aspect of the law of personal bar - or personal exception, as Professor Bell describes it (op cit, para 27A) - although the effect is similar. One of the reasons for the rule is about the law of remedies and, it appears, to halt attempts to introduce the *actio quanti minoris* into Scots Law. But perhaps the more fundamental objection, as Lord President Inglis (*supra*) expressed it, was that without the rule there would be created a different contract between the parties – a breach of the fundamental principle of freedom of contract.

[7] As noted above, the rule remained unchanged despite the 1893 Act and its introduction of the remedy of retention of the goods and damages. In *Electric Construction Co* v *Hurry & Young*, Lord McLaren (p 321 et seq) said that allowing rejection and future use "would be a very strange theory of law" because on rejection the purchaser should do nothing "subsequent to the rescission which would injure or affect [the goods'] saleable quality". In his opinion, the 1893 Act, when it speaks of the purchaser's right of rejection, "must be taken to mean a rejection according to known legal conditions" and if the rejection is disputed by the seller and is awaiting a decision of a court "the goods must be treated as if in neutral custody". That decision was followed in *Croom & Arthur* v *Stewart & Co*.

[8] In a modern context, under the statutory regime of the 1979 Act, the Inner House in *MacDonald* v *Pollock* (2013) SC 22 noted (at para [48]) that inconsistent conduct post an unequivocal rejection of goods might give rise to a plea of personal bar, but that case is primarily concerned with whether there had been an unequivocal rejection in the context of a verbal rejection and disputed parallel conduct.

[9] In our opinion, it is clear from the authorities that the rule that defective goods should not be used after rejection is not governed by the general principles of the concept of personal bar. It is, we accept, in its effect a bar on the exercise of the remedies which flow from a valid rejection, but that is, as is clear from Bell's Principles, no more than the use of the word 'bar' to describe the practical consequences of such conduct. Indeed, it is instructive that Professor Bell does not discuss the rule at all in the context of personal bar (op cit, para 27A).

[10] Nor do we accept that the statutory scheme for consumer protection precludes the common law rules or, as Lord McLaren put it, "known legal conditions". Given that a well-established rule of common law can be altered by statute only by clear, definite and positive

words (*Leach* v *R, supra; M7 Real Estate* v *Amazon UK Services, supra*), we see nothing in the 2015 Act which satisfies that test. Sections 24(8) and 24(9) do not assist the appellant. Section 24(8) must be considered in the context that the 2015 Act provides that rejection of the goods means that the contract is treated as at an end (sections 20(4) and (20)(5)). Section 24(8) is about deduction of the refund for use of the goods after delivery. At best, it is neutral on use post-rejection. Section 24(9) deals with the specific circumstance where the trader has agreed to collect the goods, but fails to do so. That is quite separate from use post-rejection where the rejection itself is in dispute. We regard the points made by counsel for the appellant about extraneous matters such as credit scoring, the risks within litigation and so on as irrelevant. Indeed, they are in any event not matters which the court is entitled to take into account unless the words of the 2015 Act itself point in their favour or exceptionally reference is made to parliamentary material and the like (*Pepper (Inspector of Taxes)* v *Hart* [1993] AC 593). There is no speciality in hire purchase contracts. We accept that by definition a hire purchase agreement is a contract for the hiring of goods under which there is conferred upon the purchaser an option to purchase the goods. In practice, hire purchase is a device which gives the hirer possession and the use of the goods over a period during which the seller retains title to the goods as security for the unpaid price. It is not a contract of sale until the hirer exercises the option to purchase the goods. Nevertheless, there is nothing inherent within a hire purchase contract, particularly given its adoption into the statutory regime for the sale of goods and, further, for consumer contracts, for the obligations post-rejection to exclude the rule of non-use post-rejection.

[11] Personal bar may be relevant in cases where there is an equivocal, rather than an unequivocal, rejection of the goods, such that parallel or, perhaps, immediate post-rejection actings of the purchaser may be relied upon, although we also doubt that it is always the

case under Scots Law that reliance or prejudice requires to be present for the doctrine to apply (eg, *Armia* v *Daejan Developments Ltd* (1979 SC (HL) 56). But, as we have concluded, it has no application where the rule of no post-rejection use has been established by the authorities and for reasons of principle in which personal bar plays no part. Indeed, parallel actings may be no more than relevant circumstances in determining whether as a matter of fact and law there has been an effective rejection, including its intimation to the trader.

[12] Given the decision we have reached on post-rejection use, it is unnecessary for us to consider the other circumstances relied upon by the respondent, being the continued payment of the instalments due under the contract and the taxing and insuring of the vehicle.

Decision

[13] For the reasons we have given, we shall refuse the appeal. There being no relevant facts in dispute, it follows that the sheriff was correct to grant summary decree and, given that there was no possibility of the appellant curing the defects in the pleadings, to assoilzie the respondent.

[14] While it is clear that the criticisms made of the pleadings are well founded, if we had been prepared to allow the appeal on the substantive issue we would have agreed with the sheriff that decree by default ought not to be granted for the failure of the appellant to lodge an intelligible Record. Instead, we would have allowed the appellant 21 days to lodge a Minute of Amendment and allowed an appropriate period for Answers. Counsel for the respondent advised that the cross appeal was not insisted upon in the event that the appeal was refused. We therefore say nothing more about it. We shall find the appellant liable in the expenses and certify the appeal as suitable for the employment of junior counsel.