

Legal Analysis of the Challenges of Unfair Terms and Consumer Protection in Hire Purchase Transactions in Nigeria¹

Abstract

Hire-purchase agreement is a contract of hire plus the option to purchase. However, certain terms which are imputed in the hire purchase agreements, especially by the owner, and some of which are imposed by law can be onerous on the hirer. There is equally the question of what protections are available to the hirer as a consumer of goods in hire purchase transactions. This paper analysed the concept of hire purchase, its various challenges in Nigeria and assess the various laws through which the rights of consumers of hire purchase goods are protected. Doctrinal method of legal research was adopted in executing this work. Primary and secondary sources of legal research writings were deployed. Statutory provisions and case laws served as primary sources while secondary sources of legal research like law textbooks, dictionaries, articles in learned journals and online materials were equally utilised. It was the finding in this paper that unfair terms in a hire purchase agreement violates the doctrine and principle of good faith, a principle which is based on the idea of honesty and true sincerity in dealings with others, such that there is neither maliciousness nor fraudulent act which makes things harder for the other party upon agreeing to contract with another. The paper recommended that Nigeria should adopt the practice in some other countries where unfair terms in a hire purchase agreement is subjected to “gross consumer violation test.” These tests are to ensure that the consumers are not taken for granted and that their rights are not violated because of the vulnerable position they occupy. This should be made applicable by law in Nigeria.

Keywords: Hire Purchase, Owner, Hirer, Consumer Protection, Transactions

1. Introduction

A Hire-Purchase agreement is a contract whereby the owner of a chattel lets it out on hire for a periodic rent with the provision that on due compliance with the various terms of the agreement, and the compliance with the various terms of the agreement, and the completion of the agreed number of payment of rent, the hirer either becomes the owner of the goods automatically or shall have the option of purchasing the chattel by the payment of a small agreed sum.

2. Hire-Purchase as a Concept

There have been several scholarly definitions of ‘hire purchase’ offered by different authors and the statute books. There are judicial pronouncements which have suggested definitions of the term. In Halsbury’s Laws of England,² a contract of hire-purchase is defined as;

A contract of hire with option to purchase under which the owner of the chattel undertakes to sell it to, or that it shall become the property of the hirer conditionally on his making a certain number of payments. Until the making of the last payment, however, no property in the chattel passes.

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²Halsbury’s Laws of England, Vol. 9(1), p791.

In *Scammell v. Austin*,³ a judicial definition of hire-purchase was given where the term was defined as a complex transaction, not a contract of sale but a bailment. A statutory flavour is given to this definition in Section 1 of the English Hire-Purchase Act, 1965 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.”

From the foregoing, it is clear that it is an agreement concluded between a bailor of chattels, that is, the owner, and a bailee who is the hirer, in respect of some particular goods with the option of the hirer purchasing the goods. According to Agbonika;⁴ ‘Hire-purchase under the common law may be defined as an agreement for the delivery of goods by the owner to a person (usually referred to as ‘hirer’) under which the latter is granted an option to purchase those goods’.⁵

A judicial backing was given to this definition by Okagbue, J.C.A, in the case of *Samuel Aro v Allen & Co Limited*⁶ where he analysed this concept as follows:

...essentially, a hire purchase system is a system whereby the owner of the goods lets them on hire for periodic payments by the hirer upon an agreement that when a certain number of payments have been completed, the absolute property in the goods will pass to the hirer but so however, that the hirer may return the goods at any time without any obligation to pay further balance of rent accounting after return; until the condition has been fulfilled the property remain in the owner’s possession.⁷

By the aforementioned definitions, the following elements are very important in a hire purchase agreement;

- i. it is a contract of bailment between the owner and the hirer;
- ii. it must be for a specific period of time, during which installment payments are made without default; and,
- iii. option to purchase is exercised at the end of the periodic payment without default.

The above mentioned elements of hire-purchase are so important that the absence of one can go a long way in determining whether or not the transaction is a hire-purchase agreement. In the case of *Joe Allen & Company Limited v Adewale*,⁸ the Court regarded the transaction as a sale but not a hire-purchase, simply because there was no option to purchase which is a hallmark of a contract of hire-purchase where the hirer has the option to return or purchase the goods.

Hire purchase therefore means a transaction where goods are purchased and sold on the terms that;

- i. payment will be made in installments;
- ii. possession of the goods is given to the buyer immediately;

³ (1941) 1 All E.R 14.

⁴ JAM Agbonika & JAA Agbonika, *Hire-Purchase (Commercial Law)* (Ibadan, Ababa Press Limited, 2014) p.6.

⁵ Ibid.

⁶ (1979) 2 FNR 292.

⁷ OL Oshitokunbo (2015) An Almanac of Contemporary and Convergent Jurisprudential Restatement, Almanac Foundation at p.14.

⁸ (1929) 9 NLR 111:3.

- iii. property (ownership) in the goods remains with the vendor till the last installment is paid;
- iv. seller can repossess the goods in case of default in payment of any installment; and,
- v. Each installment is treated as hire-rent till the last installment is paid.

3. Justification for Adoption of the Hire Purchase System

There are three major reasons for the adoption of hire-purchase system of commercial transactions;

- i. One of the most important reasons and the first is that it enables credit to someone, who is unable to pay cash for the goods he wants and who would be happy to pay some deposit and therefore pay the balance in installments at a stipulated rate of interest.
- ii. The other reasons for this system is that the dealer or the manufacturer of the goods cannot always provide credit and yet the goods must be bought to enable the dealer remain in business or maintain healthy turnover.
- iii. The third reason for the adoption of the hire purchase system is the possible evasion of the Money Lenders Act 1939 Cap 124 LFN, 1958, which regulates the conduct of the business of money lending.

4. Analysis of the Laws and Rules Applicable to Hire-Purchase Transactions in Nigeria

4.1. Hire Purchase Act

Originally, the Nigerian Hire Purchase Act, 1965 is modeled after the United Kingdom Hire Purchase Act of 1938 and the Advertisement (Hire Purchase) Act 1957 with some modifications to meet local needs. The Nigerian Hire Purchase Act was originally passed in 1965 and made applicable to Lagos State only but by virtue of Hire purchase (Application) Decree 1966,⁹ it was made applicable to the rest of the country. It came into force in October 1, 1968 by virtue of Hire Purchase Act, 1965 (Application Day) Order 1968. The Hire Purchase (Amendment Decree No. 23 of 1970) made minor changes to section 8 and 9 of the Act. The Hire Purchase Regulation of 1968 was made and published by Commissioner for Trade and Industries in exercise of his power under Section 5 and 8 of Hire Purchase Act of 1965. These amendments and further adjustment were made when the Act was re-enacted in 1990. The Act is designed to regulate not only Hire Purchase but also credit sale transactions. The Hire Purchase Act is not a codifying statute like Sale of Goods Act, 1893 although some rules of common law are extensively modified by the Act. There are still considerable areas in which those rules remain applicable.

4.2. Rules of Common Law.

The rules of common law are applicable to hire-purchase transactions in the following cases;

- i. It is applicable to cases falling outside the operation of the Act.
- ii. It applies to all agreements which became effective before October 1, 1968.
- iii. It applies to goods other than motor vehicles, whose hire purchase or total purchase price exceeds N2, 000.

4.3. Hire-Purchase Agreement

A Hire Purchase agreement may either be oral or written under the common law rule. It is however pertinent to note that a detailed hire-purchase agreement is usually in writing and indeed should be in writing. There are usually two parties to the contract of hire-purchase

⁹No. 42 of 1966.

namely the hirer and the owner of the goods. In appropriate cases, there may be a third party such as the finance company, the dealer or the guarantor. According to the Hire Purchase Act,¹⁰ a hirer is; ‘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 right or liabilities under the agreement has passed by assignment or by operation of law’.

While an owner is defined as;

The person who lets or has let goods to a hirer under a hire-purchase agreement and includes a person to whom the owner’s property in the goods or any of the owner’s rights or liabilities under the agreement has passed by assignment or by operation of law.¹¹

The parties in a hire purchase agreement, the owner and the hirer, must not be a minor, i.e. persons below the age of 18 years and must be of a sound mind. In every contract, parties have duties and obligations. The contract of hire-purchase is however, not an exception to this rule. By Section 2(1) of the Hire Purchase Act, it is the duty of the owner to furnish information on the hire purchase agreement, put the terms of the agreement in a written form and notify the hirer within fourteen days failing which he will not be able to enforce the contract in the event of a default. Also by the provisions of section 6 (1) (a) (c) of the Hire Purchase Act, at any time before completing payment, a hirer can write to the owner requesting a copy of the agreement (or presumably any other relevant documents) and for a statement showing the amounts already paid, full details of any amount due and the amount and time for payment of the balance. If the owner fails to do this within 14 days of receiving the request, he will be unable to enforce the agreement until he had complied with the request. If he fails to do so for a month or more he commits an offence Section 6(2).

4.4. Obligations of the Owner

The first obligation of the owner under the common law is to deliver the goods which are the subject matter of the hire-purchase agreement to the hirer. It is a fundamental duty and its breach will entitle the hirer to repudiate the contract. Delivery in this sense might not be physical transfer but voluntary transfer of possession from one person to another. Secondly, the owner should possess a good title to the goods. If his title is impeached or with encumbrance, this will amount to a total failure of consideration as between the purported owner and the hirer, as the owner has no right to transfer possession to the hirer.

4.5. Obligation of the Hirer

The hirer has the fundamental obligation to accept delivery of the goods, the subject matter of the hire purchase. Such hirer will be liable in damages if he fails to take delivery within a reasonable time after he had been requested to do so. It is also the primary duty of the hirer to pay promptly the various sums provided for in the agreement in accordance with the provisions of the agreement. The payment in installments as specified in the hire-purchase agreement is mandatory and must be strictly complied with. There are certain circumstances where the installment payment may be suspended or waived.

¹⁰Hire Purchase Act, 1968, sec 20(1).

¹¹ Ibid.

In *Offodile and Sons Enterprises v. S.C.O.A (Nig.) Ltd*,¹² there was a hire-purchase agreement between the parties in respect of a motor vehicle during the civil war, and understandably, the rentals were not paid, but the hirer enjoyed the undisturbed use of the motor vehicle. After the civil war the owners sued for arrears of rentals. The court held that the owners were entitled to the rentals, and that the hirer's strict liability to pay rentals during the war period was only waived or suspended during the civil unrest, and that should not be regarded as destroying the right to recover the rentals.

5. Consumers' Protection in Hire Purchase Transactions.

Consumers in a hire purchase agreement are protected against unfair terms of the agreement. A term of agreement is unfair "if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."¹³ The most common type of unfair terms happen to be exclusion clauses whereby one party seeks to exclude their liability arising under the contract. Another example under unfair terms includes penalty clauses where a party specifies an amount payable on breach of contract which is out of proportion to the loss that the party would suffer. As unfair terms can operate oppressively, the law restricts the use of such terms.¹⁴

The parties cannot choose to deliberately violate the rights that are protected by the Act. Parties are however free to provide the exemption or exclusion of any of the aforementioned terms in their agreement so long as doing so will not affect the very basis of their contract.

Protections available under the common law manifest in two forms. Firstly, the courts will consider if the term has been incorporated into the contract. The position of the law is that where there is a written contract which is signed, a party is bound by all the terms of the contract irrespective of whether or not they were aware of the terms it contained.¹⁵ In the case of *L'Estrange v Graucob*,¹⁶ claimant purchased a cigarette vending machine for use in her café (coffee shop), she then signed an order form which stated in small print 'any express or implied, condition, statement of warranty, statutory or otherwise is expressly excluded.' The vending machine did not work and the claimant sought to reject it under the Sale of Goods Act of 1893 for not being of merchantable quality. The Court held that in signing the order form, the claimant was bound by all the terms contained in the form irrespective of whether she had read the form or not. Consequently her claim was unsuccessful.

Furthermore, if there has been any form of misrepresentation of terms whatsoever, the clause is not effective as proven in the case of *Curtis v Chemical Cleaning*¹⁷ where the claimant took

¹² (1969) CCHCJ 1333.

¹³ Unfair Contract Terms Guidance: Guidance for the Unfair Terms in Consumer Contracts Regulations 1999 Regulation 5(1).

¹⁴ MS Afolayan and AO Kumapayi, 'A Comparative Legal Analysis of Elements of Contract of Sale under the Laws Regulating Contract of Sale in Nigeria, South Africa and United States.' *International Journal of Research and Innovation in Social Science (IJRISS)* 2021, Vol. 5 No. 11

<https://www.rsisinternational.org/journals/ijriss/Digital-Library/volume-5-issue-11/51-56.pdf> (Index).

¹⁵ MS Afolayan and AE Arogundade, 'Analysis of the Legal Obligation of Suppliers and Manufacturers to Consumers in Nigeria and the United Kingdom.' *International Journal of Research and Innovation in Social Science (IJRISS)* 2021, Vol. 5, No. 11. 1-5. (Index) www.rsisinternational.org/journals/ijriss/Digital-Library/volume-5-issue-11/01-05.pdf.

¹⁶ [1934] 2 KB 394.

¹⁷ (1951), 1 KB 805.

her wedding dress to the cleaners. She was asked to sign a form. She then asked the assistant what she was signing and the assistant told her that it excluded liability for any damage to the beads. The form in fact contained a clause excluding all liability for any damage howsoever caused. The dress was then returned, badly stained. The court held that the assistant had misrepresented the effect of the clause and therefore could not rely on the clause in the form even though the claimant had signed it.¹⁸

Finally, it is important that there should be reasonable notice of exclusion clauses or terms as seen in the case of *Thomson v LMS Railway*¹⁹ where the claimant was injured while stepping off a train. The railway company displayed prominent notices on the platforms excluding liability personal injury and damage to property due to negligence. The tickets also stated that they were subject to terms and conditions displayed on the platform. The claimant was illiterate and could not read the signs. She argued that the exclusion clause was not incorporated into the contract as the railway company had not brought the clause to her attention at the time the contract was made. The court held that the clause was incorporated and there is only a requirement to take reasonable steps to bring the clause to the attention of a reasonable person. There was no duty to ensure that every traveler was aware of the clause. The claimant was therefore unsuccessful in her claim for damages.

The Hire Purchase Act (1965) also provides protection for consumers in a hire-purchase agreement. By virtue of Section 4(3) of the Act, the implied warranties of quiet possession and freedom from encumbrance or charge as well as implied condition as to title and merchantable quality in Section 4(1) cannot be excluded by agreement but the implied condition as to fitness for a particular purpose may be excluded provided that before the contract was made the owner brings to the notice of the hirer, the exclusion or modification and the effects of such have been clear to him. In the case of *Ogwu v. Leventis Motors Ltd*,²⁰ the lorry hired had registration number different from the one on delivery. The contract contained an exemption clause as to its quality and fitness. It was held that the owners were in breach of a fundamental term of the contract and that the exemption clause could not protect them from liability. Also, in the case of *Udekwo v. Abosi*²¹ the custom officials improperly seized a car which was subject to a hire-purchase agreement for failure to pay the import duty, the defendant was therefore not held liable due to the unwarranted interference.

Due to the harshness of certain provisions on the hirer, Section 3 of the Act renders void six types of provisions which at times appear in hire-purchase agreements. According to Section 3(a) of the Act, a provision in an agreement authorising the owner to enter the hirer's premises for the purpose of repossessing the goods is void. Section 3(b) provides that a provision in an agreement which limits the hirer's rights (under section 8) to terminate the agreement or which increases the maximum payments allowed on such termination is void. While Section 3(c) states that a provision in an agreement making the hirer's liability on termination by the owner greater than the maximum allowed on termination by the hirer under section 8 is void.

¹⁸MS Afolayan, 'Legal Analysis of Electronic Payment System and Frauds Associated with E-Commerce Transactions in Nigeria.' *Nnamdi Azikwe University Journal of Commercial and Property Law*, 2021, Vol. 8, Issue No. 3, pgs. 116-125 <https://journals.unizik.edu.ng/index.php/jcpl/article/view/813>.

¹⁹ (1930) 1 KB, 41.

²⁰ (1963) 2 ALL NLR 65.

²¹ (1974) E.C.C.S.L.R 298.

By Section 3(d) a provision in an agreement whereby a dealer acting on behalf of the owner is automatically made the agent of the hirer is void. This provision and Section 3(e) prevents the owner from avoiding his legal responsibility for certain acts or statement of the dealer. Thus, Section 3(e) provides that a provision in an agreement whereby the owner is relieved of responsibility for the acts, statements or omission of any person, such as a dealer, acting on his behalf in forming the agreement is void.

Section 3(f) renders void a provision in an agreement requiring the hirer to use the services of an insurer, repairer or other person not freely chosen by the hirer. A careful look at the aforementioned provisions reveals that it protects the owner at the detriment of the hirer hence, the need to preclude them by legislation.

Under Section 4 of the Act, there are five implied terms which the law will imply into the hire purchase agreement even if it is excluded. Two of these implied terms are warranties and three are conditions. According to Section 20 of the Act, a warranty is an agreement with reference to goods which are the subject of a contract but collateral to the main purpose of the contract the breach of which give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated. In other words, a warranty is a non-essential subordinate term subsidiary to the main purpose of the contract, breach of which entitles the hirer to sue for damages but he cannot repudiate the contract and must perform his part of it.

By the provisions of Section 4(1) (a) there is an implied warranty that the hirer shall have quiet and undisturbed possession of the goods. Section 4(1) (c) provides for an implied warranty that the goods shall be free of charges or encumbrances whenever the property is due to pass.

Section 4(1) (b) there is an implied condition that at the time the property in the goods are to pass to the hirer, the owner will have the right to sell them to him. As stated by Lord Russell in the case of *Monttorts v. Mauden*²² “*the right to sell means that the man had a right to sell the thing as it was... and that nobody had a title superior to that of the vendee.*”²³

Section 4(1) (d) provides for a condition that the goods shall be of merchantable quality except;

- (i) where the goods are expressly hired as second hands goods or
- (ii) the defects were not reasonably apparent to the owner at the time of the agreement or
- (iii) the hirer has examined the goods and the defect complained of should have been apparent on examination of the goods.

6. Conclusion

Hire purchase agreement, simply put, is a contract of hire plus the option to purchase. Hence certain terms which are imputed in the hire purchase agreements some of which are by the owner and some of which are imposed by law can be onerous on the hirer. In England, the application of such terms is well regulated by the Unfair Terms in Consumer Contracts

²² (1895) 12 RPC 266.

²³ MC Okany, *Nigerian Commercial Law*, (Africana-Fep Publishers Limited, 1992) p.83.

Regulation 1994,²⁴ whereas in Nigeria certain sections are dedicated in each Act²⁵ to regulate such terms. Hire purchase originated as a convenient form of agreement widely used by traders selling on credit in the olden days, the practice became recognised and regulated by legislation and by the courts over the years. Unfair terms in a hire purchase agreement violate the doctrine and principle of good faith, a principle which is based on the idea of honesty and true sincerity in dealings with others, such that there is neither maliciousness nor fraudulent act which makes things harder for the other party upon agreeing to contract with another. In actual fact the terms agreed upon are an agreement to burden one party more than the other.

7. Recommendations

1. Unfair terms have posed such a problem that to bear their existence, countries now ensure that a “fairness test” is applied to them, in some countries it is called “gross consumer violation test.” These tests are to ensure that the consumers are not taken for granted and that their rights are not violated because of the vulnerable position they are in. This should be made applicable by law in Nigeria.
2. Computer-generated agreement should be admissible in Nigerian courts. By virtue of Section 84 of the Evidence Act,²⁶ computer-generated documents are now admissible in Nigerian courts; same should be extended to online contracts in form of agreement.

²⁴ This Regulation implements a European Council Directive 93/13 (0) L95, 21.4.93, p.29. Also, Halsbury’s Laws of England, Vol.9 (1) at page 791.

²⁵ For example, Hire Purchase Act, Cap. H4. Laws of the Federation of Nigeria, 2004, sec.3, provides for avoidance of certain terms in a Hire Purchase Agreement.

²⁶ Evidence Act Cap.112 Laws of the Federation of Nigeria, 2004, sec.84.