be provided or for the transfer of intellectual property, the appropriate criterion is the substance of the contract, which in this case was the sale of a total system. It is necessary to look at all aspects of the sale including price, the nature of the material to be supplied, the terms for installation and the work which the system was designed to effect. In this case, factors such as that the bulk of the costs related to hardware, that hardware will not work without software, and that the system represented the fruits of much research and work, were of less importance than that it was "off the shelf" or mass produced, rather than "one off".

3. This case, where there is a sale of tangible chattels, albeit requiring software comprised within the system for their effective working, may be distinguished from the sale of computer software by itself. Whether such sale constitutes a sale of goods has never been decided positively.

► Graham Greenleaf

JONES v. UNITED DOMINIONS CORPORATION LTD.

Full court of the Supreme Court of Western Australia, unreported, 25 May 1983.

This case was an appeal from the decision of Wallace J. who had held that it was a fundamental breach of contract by a lessor that a leased computer system was useless for all practical purposes. The full court, in upholding the appeal, decided that the common law did not imply any condition or warranty in the lease agreement that the computer system would run at all. In the course of his judgment the Chief Justice indicated that the Court may have taken the same view of what constitutes a total failure of consideration concerning a computer system even if the liability of a manufacturer (or supplier) had been in issue and the contract had been one for sale rather then lease.

The Dispute: The plaintiff partnership (Jones), importers, agreed to purchase a turnkey computer system from Daro Australia Pty. Ltd, (Daro). The system consisted of a Daro Mini Computer and ancillary hardware and "software packages for order entry; debtors: creditors; general ledger; stock". The agreement required Daro to tailor its standard software package to satisfy Jones' particular business requirements.

Jones financed the purchase by leasing from the defendant | lessor, United Dominions Corporation (UDC). Mr Jones was interviewed by UDC's employee in completing their finance application and, in Wallace J's view, "thus the defendant became aware of the plaintiffs' reason for leasing the computer and complimentary (sic) software". While Daro was still working to complete the software modifications, the lease agreement was executed by Jones. It contained provisions to the effect that:

(i) At the request of Jones, UDC agreed to purchase goods itemised in a schedule which identified each piece of hardware and merely added "and including software", but Wallace J. held it was "common ground" that this included the modified software.

(ii) Jones agreed to obtain delivery of the goods and to ensure that they were ready for operation in accordance with the manufacturer's specifications at no cost to UDC.

(iii) Any express or implied warranties as to the quality or fitness of the goods were excluded, and the Lease represented the whole agreement between Jones and UDC.

(iv) Jones warranted that it had inspected the goods and found them suitable for its purposes.

UDC also required Jones to sign a Delivery Order acknowledging receipt of the goods before Daro would be paid and the goods delivered, by which Jones declared that installation of the goods has been completed and they are in satisfactory working order. UDC then paid Daro and received from it a Dealer's Certificate which included warranties concerning the goods. Daro then delivered the hardware and some software to Jones, but the whole of the modified software was never provided, as Daro went into liquidation a week later. Despite efforts by Daro over the next 3 months, the software remained "for all practical purposes ... useless". There were only minor defects in the hardware, which were remedied, but Daro never succeeded in making the equipment operate to produce satisfactory invoices, which meant that the general ledger and accounts payable systems were likewise inoperable.

Jones now purported to rescind the lease, contending that they had not been provided with "the software packages which were essential to the functioning of the computer equipment as a whole" and that there was consequently a total failure of consideration.

As plaintiffs, Jones sought a declaration that the lease had been validly rescinded because, despite repeated oral and written requests, UDC had failed to supply missing or workable software packages. They claimed damages in quasi-contract equal to all instalments paid. Claims for damages related to the costs of employing other software consultants, and under ss.71 and 75A of the Trade Practices Act 1974 (Cth) were abandoned.

At First Instance: Wallace J. held that the plaintiffs' rescission of the lease was valid and that they were entitled to the return of all monthly instalments paid. His Honour held that: "At common law there is an implied condition that the equipment to be leased by the defendant to the plaintiffs will be fit for the purpose indicated by them so long as the defendant was aware of the plaintiffs' requirement ...", citing as authority Derbyshire Building Co. Pty. Ltd. v. Becker (1961-62) 107 C.L.R. 633.

That the defendant was "fully aware of the nature of the plaintiffs' business" was found, partly on the basis of the plaintiffs' application for finance to the defendant, which detailed the plaintiffs' purposes in leasing the computer system. His Honour found further that "The nature of the equipment and the evidence reveals the plaintiffs' complete reliance upon Daro in the first instance and then upon the defendant to provide them with equipment capable of performing the plaintiffs' accounting procedures".

Clause 3 of the Lease Agreement, whereby the plaintiffs warranted to obtain delivery of the goods "in accordance with the manufacturer's specifications at no cost to the lessor", did not impose on the plaintiffs any obligation to ensure that the equipment was capable of performing the tasks required of it by the contract with Daro, but only the need to obtain delivery and installation of the hardware and software. Nor did the attempted exclusion of liability in Clause 13 avail the defendant, as "the parties' main object was to provide the plaintiffs with computer equipment suitable to carry out their accounting procedures in accordance with the System Specification".

Because "one must reject words, indeed whole provisions, if they are inconsistent with what

one assumes to be the main purpose of the contract ... on the facts as found ... there has been a total failure of consideration and the exemption clauses ... cannot deprive the plaintiffs of their right to rescind the contract".

In the Full Court: The Full Court, in unanimously allowing UDC's appeal, considered that "the only question ... is whether ... there has been a total failure of consideration" and concluded that there had not been.

"The appellant was the finance company and it came into the overall transaction in that capacity. It was not a manufacture of or a distributor of computers. So far as one can see, it had no particular knowledge of computers. And no one thought that it had.
The Court therefore concluded that it was "in the highest degree unlikely" that UDC "would assume any responsibility" for the adequacy Of the computer selected, and that there was "no evidence" to support such assumption of responsibility or reliance by Jones. It made no express mention of the implied condition of fitness on which Wallace J. relied

The Full Court rejected the argument that UDC promised to lease a "going computer" because "to find that would contradict the clear intention of the lease agreement, which was to lease the described equipment all contractual terms as to quality and fitness being excluded".

In what must be regarded as dicta, Burt C.J. advanced a "second reason for rejecting the argument" of total failure of consideration: "that in the sense of the agreement the computer is the computer - the hardware so-called - described in the schedule to the agreement and it is nowhere in the pleading alleged that the computer is defective in any way".

Comments:

1. Since the schedule to the Lease Agreement specifically said "and including software", Burt C.J.'s "second reason" suggests that the "mere" failure of the software to cause the hardware to perform any useful functions whatsoever for the plaintiffs could not, under any circumstances, constitute a total failure of consideration in the absence of the hardware being "defective". Such reasoning would seem equally applicable to the relationship between manufacturer (or supplier) and purchaser. Would this be so even if no suitable replacement software was available from other sources, and the hardware was consequently of little or no commercial value to the purchaser (and perhaps anyone else)?

2. It is submitted that the Derbyshire Building Co. case does not support a proposition as wide as that advanced by Wallace J. The High Court was unanimous in holding that the common law implied condition that goods shall be reasonably fit for a specified purpose applied with equal force to the hire of a chattel. However, in Kitto J's view, "The necessary foundation for implying a condition as to fitness is proof that the person to whom the chattels are supplied brought home to the mind of the supplier that he was relying on him in such a way that the supplier can be taken to have contracted on that footing". and thus, "If the recipient stipulates that he is to be supplied with a particular specified article, this may be a material factor in showing that an implication of fitness ought not to be made, as where it goes to show that he was relying on his own judgment".

   In Kitto J's view the better view is that such an implication (when made) "is not limited to fitness so far as the supplier knew or ought to have known".

   The relevance of Wallace J's finding of Jones' reliance upon Daro and the Full Court's express rejection of that finding would appear to depend upon both Courts' accepting the correctness of Kitto J's view of the lessee's reliance on the lessor. It was therefore unnecessary for the Full Court to consider the validity of the exclusion clause because, even in the absence of such a clause, there was no implied condition of fitness.

   It is surprising that none of the judgments acknowledge that this whole area, the Derbyshire Building Co. case, and Kitto J's above-quoted remarks in particular, have been the subject of considerable judicial and academic discussion and disagreement. See Turner (1972) 46 ALJ 560.

3. The significance of Derbyshire Building Co. Pty. Ltd. v. Becker to lessors of computer equipment nevertheless remains. In the absence of an effective exclusion clause it would, if Kitto J's view is correct, then be a question of fact whether a particular lessee relied upon the lessor to obtain goods fit for purposes communicated to the lessor, and if found in the affirmative the lessor would impliedly contract to lease goods fit for such purposes. In the case of lessors or their employees who have computer expertise, and lessees who do not, the danger could be considerable.

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