CHATTEL LEASING – A LOOPHOLE IN CONSUMER PROTECTION*

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Contracts for the leasing of chattels are invariably governed by a standard-form contract. The terms which are commonly inserted in such a contract are reproduced in the Appendix to this article.[1] It is the purpose of the article to analyse chattel leasing agreements with reference to the provisions of the standard-form contract, and to pinpoint areas where the law in relation to such transactions is in need of reform. Comparisons will be made with developments in South Australia where the enactment of *The Consumer Transactions Act,* 1972, has resulted in increased protection for the position of the lessee under a leasing agreement.[2]

It is pertinent at once to distinguish a hire-purchase agreement, which contains an option to purchase the goods at the end of the hiring period, from a simple leasing arrangement, which does not. Provided no option to purchase the goods at the end of the hiring period is given to the lessee either in the chattel leasing agreement itself or in a separate collateral agreement,[3] the protection afforded by *The Hire-Purchase Act,* 1959 (Qld.) to the hire-purchaser is inapplicable to the lessee's situation under a simple hiring agreement. The courts will, however, admit parol evidence to see if the transaction does contain an element of purchase, even though the parol evidence appears to contradict the written lease.[4] Despite this attempt to legally distinguish a hire-purchase agreement from a leasing agreement, the two transactions in commercial reality are often similar since, in all but short term hirings, there may well be a "business understanding" between lessor and lessee that the lessee will have the "chance" to buy the goods at the end of the leasing period for the residual cash value expressed in the agreement.[5] In many cases it may be impracticable to return the goods at the end of the lease in any case (e.g. lifts, an air-conditioning plant).[6]

In all leasing agreements the legal relationship between lessor and lessee is that of bailor and bailee, but it is useful to differentiate their commercial uses. Simplistically three broad divisions can be made:–

* I am indebted to Mr. John Forbes, Senior lecturer in law, University of Queensland, for the suggestion of this topic, and for valuable assistance in preparing the article.

1. In particular, clauses 6, 7, 8, and 9 of the standard-form contract in the Appendix are always inserted in the same, or similar terms. References will be made to particular clauses of this standard-form contract during the course of the article.
2. For an analysis of the full implications of this Act see a note in (1973) 47 A.L.J. 208.
3. *Senes & Sons Pty. Ltd.* v. *Carige* (1967) 87 W.N. (Pt. 2) (N.S.W.) 46.
4. *(S.C.) Thorn – L. & M. Appliances Proprietary Ltd.* v. *Claudianos* [1970] Qd.R. 141. On the facts it was only necessary to decide that parol evidence can be admitted to *interpret* the words of the written document. However Campbell J. inclined to the wider view that parol evidence could be admissible even if it contradicted the written lease (at p. 153 (C–D)). See also *Campbell Discount Ltd.* v. *Gall* [1961] 1 Q.B. 431.
5. See *The Law Council of Australia's Committee Report on Fair Consumer Credit Laws* (1971–72) para. 2. 3. 5. This Report is commonly referred to as the *Molomby Report,* and this practice will be followed in this article.
6. The blatant legal device of a perpetual hiring agreement – "to pay a rent of $100 a month for one year, and than $1 a year if, and when, demanded" – does not appear to have been commercially used to avoid the provisions of *The Hire-Purchase Act,* 1959 (Qld.). Interestingly, such an agreement came within the definition of a hire-purchase transaction under *The Hire-Purchase Act* of 1933 (Qld.), as amended by *The Law of Distress and Other Acts Amendment Act* of 1934 (Qld.) but not within the definition of a hire-purchase transaction under *The Hire-Purchase Act,* 1959 (Qld.) 5. 2(1). Probably the reason for the non-use of the device is the "business understanding" that the lessee can buy at the end of the hiring period, and, therefore, acquire title.

(a) The leasing of equipment to a commerical undertaking to be used for the purposes of the business. The lease is often taken from a finance house who purchases the goods from the supplier, but the supplier may itself be the lessor, especially in cases where he is to provide ancillary services such as maintenance.[7] The advantages to a business venture of leasing have been well publicised,[8] but can be briefly summarised:–

(i) It avoids the problem of purchasing equipment which may soon become obsolescent, or which is only needed for the particular short-term venture the organisation is engaged in. In the case of leasing new machinery it ensures that the equipment need only be kept for its likely period of maximum efficiency. At the end of the lease period the goods can be returned, the lease renewed (if there is an option to do so), or bought.

(ii) It avoids the necessity of large capital expenditure, when capital may be unavailable and which, if available, can be used for other profit-making purposes. For example, a firm with a high profit-making turnover would wish to keep as much capital as possible available for stock purchase.

(iii) It avoids having to show a hire-purchase commitment or a borrowing as a balance sheet liability, and it thus may be easier for the company to obtain credit elsewhere.

(iv) The lessee is not necessarily obliged to pay a deposit. Compare this with the statutory 10 per cent under Section 25 of *The Hire-Purchase Act*, 1959, (Qld.).

(v) Lease payments are deductible in computing profits for income tax purposes provided the goods are used in the production of assessable income, the lessee is given no option to purchase, and the lease payments are based on a depreciation rate which will reduce the value of the goods to a reasonable and acceptable figure at the end of the lease. The tax advantages of leasing over hire-purchase, or purchase by means of bank overdraft (if available) must not be over-emphasised. Often the main advantage is the benefit of deducting the lease payments at an earlier date than it is possible to deduct amounts for depreciation in the case of sale or hire-purchase. Generally leasing will not significantly reduce the amount of tax payable.[8a]

In summary, it may be said the lack of capital is always a strong determining factor. A significant proportion of leasing is carried on by small family companies

7. This type of lease is commonly referred to as an "operating lease."
8. See *The Australian*, March 18th, 1974. For a full analysis of the advantages and disadvantages of leasing see "*The Economics of Leasing Plant and Equipment*" by F. J. Finn (University of Queensland Papers, Department of Accountancy).

8a F. J. Finn, ibid, at p. 164. This conclusion is, however, a generalisation. Finn writes:–

"However, in certain specific cases leasing *may increase* the absolute amount of tax deductions because of the different treatment of lease premiums and depreciation allowances by the Commissioner. A common example is the case of a professional man or tradesman carrying on business for himself who leases a motor vehicle for business purposes. Under the ownership alternative he may be allowed a percentage only of the total depreciation allowance because the vehicle is deemed to be used partly for private purposes also, whereas if the vehicle is leased the total lease premiums may in some cases be allowable deductions. A similar anomaly exists where a business firm obtains buildings under a financial lease or through a sale and lease-back agreement in preference to the ownership alternative. Depreciation on buildings is not an allowable taxation deduction, whereas the whole lease premium is allowable, even though a portion of the premium is in effect an allocation of the capital cost of the building."

of low to average liquidity which are guaranteed personally by directors or other individuals, and who are in no better bargaining position with the finance company than the private hire-purchaser.[9] There is much to be said, therefore, for applying any reforms in relation to this area to leases taken by corporate entities.[10] "Big business transactions" should, however, be excluded, and this may effectively be done by providing that any measures introduced to protect the lessee should only extend to leases where the total amount of rental involved is below a stipulated figure.[11]

(b) The leasing of equipment to professional people for use in the course of their profession. The advantages are much as in (a).

(c) Leasing by private consumers either for short periods (motor-cars) or for indefinite periods (television sets). Leasing is undertaken here because of convenience, economic viability (e.g. television sets, where the rental company undertakes to provide maintenance), or out of misunderstanding of the nature of the contract.[12]

From the point of view of the lessor the financial viability is calculated on the amount raised by the instalments. The agreement will provide that if the lessee is in breach of the terms of the agreement and the lessor exercises his express contractual right to repossess the goods,[13] or if the lessee voluntarily returns the goods[14] before the expiration of the period of the lease, then the unpaid balance of the rent for the *whole* period of the lease will become payable by the lessee (less a stipulated, and usually small, rebate.[15]). Further, if the actual market value of the goods at the end of the period of the lease, or its prior termination, is less than the *anticipated* value of the goods at the end of the lease – the so-called "residual value", which is specified in the agreement when it is made – then the lessee will be required to make good this deficiency.[16] The overall result is that the lessor is financially protected both against early termination of the agreement, and against unexpected depreciation of the value of the goods leased.

It is now proposed to analyse the present law in relation to chattel leases, with special reference to the standard-form contract. It is convenient to present such analysis under the following headings:–

1. The Obligations of the Parties in relation to the Quality of the goods leased.

(The reader here should refer to clause 2(b) and clause 9 of the standard-form contract in the Appendix.)

9. See the *Molomby Report,* supra n. 5, para. 2.5.5.
10. Compare, however, the exclusion of corporate entities from the ambit of the *Consumer Transactions Act,* 1972, (S.A.) s. 5(1). See also the *United Kingdom Report on Consumer Credit* (1971) Cmnd. 4596 (commonly referred to as the *Crowther Report*), Vol. (i) para. 6.2.59, which recommended that if the lessee is a body corporate it should receive no benefit of any protective legislation.
11. *The Consumer Transactions Act,* 1972, (S.A.) s.5 sets this limit at $10,000.
12. For the English experience of hirers misunderstanding the nature of the contract see the *Crowther Report,* supra n. 10, Vol. (i) para. 6.2.54.
13. See clause 6 of the standard-form contract in the Appendix.
14. See clause 8 of the standard-form contract in the Appendix.
15. In the standard-form contract, this rebate is 10 per cent per annum discount on each remaining instalment (see clause 6).
16. See clauses 7, 8 of the standard-form contract. If the market value is more than the residual value in the event of prior termination of the agreement by virtue of voluntary return or repossession then the agreement will generally provide that the lessee is to be credited with the difference between the two amounts (see clause 8). The lessee, however, will not receive this benefit if the market value is more than the residual value when the lease comes to an end merely because the period of the lease has expired.

In the absence of express contractual provision, the law implies a term that the goods shall be reasonably fit for their purpose into leasing agreements. The precise delineation of this term, however, remains uncertain. In its widest formulation it states that "when one person, for value, supplies a chattel to another to be used for an agreed or stated purpose, or for a purpose indicated by the nature of the chattel, he impliedly promises, in the absence of some provision to the contrary, that it is reasonably fit for such use." (per McTiernan J. in *Derbyshire Building Society* v. *Becker*).[17] Thus stated, the term is not limited merely to defects of which the lessor knew or ought to have known by the exercise of reasonable care on his part.[18] There is authority also to suggest that it is irrelevant that the goods had not been supplied in the lessor's ordinary course of business,[19] or that the lessee had not made it clear that he relied on the lessor's skill and judgment.[20] It would only be in situations where the lessee had taken the "risk as to the suitability"[21] of the chattel that he would not receive the benefit of the implied term. An example would be where the chattel has many purposes, and the lessee failed to specify for which one he needed the goods. Other judicial definitions of the implied term of fitness for purposes have narrowed its scope, equating it with the term implied by section 17(1) of the *Sale of Goods Act,* 1896 (Qld.). This now appears to be thedominant view.[22] The unfortunate effect of the Sale of Goods Act definition of the implied term is that if the goods are leased from a finance house the lessee may well have difficulty proving the additional elements of reliance on the lessor's skill and judgment, and that the goods are of a description which it is in the course of the lessor's business to supply.[23] Further the chattel may be leased under a trade name. Apart from the question of the scope of the term, there has been judicial uncertainty as to whether the term is to be designated as a condition, thus giving the lessee the right of repudiation, or a warranty, giving the lessee a claim only in damages. In *Star Express Merchandising Company Ltd.* v. *V. G. McGrath Pty. Ltd.*[23a], Dean J. said:– "It is clear enough that upon the hire of a chattel some warranty *or* condition as to quality or fitness should be implied." There has been no consensus of opinion on the issue.[24] A suggested approach to the problem is

17. (1961–2) 35 A.L.J.R., 498 at p.502. McTiernan J. quoted with approval Jordan C. J. in *Gemmell Power Farming Co. Ltd.* v. *Nies* (1935) 35 S.R. (N.S.W.) 469, at p.475. An earlier view that this term could not be implied in contracts for the hire of specific goods was expressly denied by McTiernan J. in *Derbyshire Building Society* v. *Becker* at p.502. For a full analysis of the scope of the implied term in hiring agreements, see (1970) 44 A.L.J. 560.
18. *Star Express Merchandising Co. Pty. Ltd.* v. *V. G. McGrath Pty. Ltd.* [1959] V.R. 443; *Derbyshire Building Society* v. *Becker* (1961–2) 35 A.L.J.R. 498, at p.504, per Kitto J.. Cf. however, *Hyman* v. *Nye* (1881) 6 Q.B.D. 684; *Reed* v. *Dean* [1949] 1 K.B. 188
19. *Star Express Merchandising Co. Pty. Ltd.* v. *V. G. McGrath Pty. Ltd.* ibid. at p.454, per Smith J. McTiernan J.'s formulation in *Derbyshire Building Society* v. *Becker* (1961–2) 35 A.L.J.R. 498 at p.502 did not include this limitation.
20. *Star Express Merchandising Co. Pty. Ltd.* v. *V. G. McGrath Pty. Ltd.* ibid. at p.446, per Dean J.
21. *Star Express Merchandising Co. Pty. Ltd.* v. *V. G. McGrath Pty. Ltd.* ibid. at p.446, per Dean J.
22. *Derbyshire Building Society* v. *Becker* (1961–2) 35 A.L.J.R. 498, at p.504, per Kitto J.; *Pampris* v. *Thanos* (1967) 64 S.R. (N.S.W.) 226.
23. The lessee would, in particular, have difficulty proving reliance on the lessor's skill and judgment where the chattel leased had numerous purposes, and the lessee had made it clear that he wanted the chattel for one of those purposes to the original supplier but not the lessor (that is, the finance house). As to the second element, if the finance house leased goods in which it rarely dealt then these could hardly be goods "of a description which it is in the course of the lessor's business to supply."

23a Supra n. 18 at p.446.

24. In *Star Express Merchandising Co.* v. *V. G. McGrath* [1959] V.R. 443, O'Bryan J. at p.443 referred to the term as a warranty; Smith J. at p. 450 referred to the term as a condition. In *Derbyshire Building Society* v. *Becker* supra n. 17 Kitto J. at p.505, and

given below.[25]

As indicated by clause 9, however, the parties rarely leave matters to rest on the implication of terms. Clause 9 states:–

> "9. I [the lessee] warrant that before signing this offer I have examined the goods and have satisfied myself as to their condition and suitability for my purposes and I agree that no warranty, condition, description or representation on your part is given and any express or implied warranty or condition as to the quality fitness safety or otherwise of the goods prior to or at any time during the continuance of the lease is hereby excluded and my obligations to pay rent and otherwise hereunder shall continue notwithstanding the occurrence of any defect or breakdown therein or any damage thereto falling short of destruction. And I agree that you will not be responsible for any representation or promise made by any person why may have introduced this transaction to me and I agree that you shall not be liable in respect of any law relating to taxation or other matters."

The clause will, in accordance with normal rules, be interpreted "contra-proferentum". Two suggested interpretations of the clause in favour of the lessee are given in footnotes,[26] but subject to these, the clause[27] as between lessor and lessee, would appear to effectively exclude the lessor's liability in relation to the qualityy oof the goods.[28] It is worth noting that in the event of an oral misrepresentation by the lessor the English courts might well defer to the view that the oral statement prevails over the written exemption clause.[29] This appears to be contrary to Australian authority.[30]

In a situation where the finance company is the lessor, the lessee may well have a remedy against the supplier who sold the goods to the finance company. Analogies can be drawn from the hire-purchase case of *Andrews* v. *Hopkinson.*[31] Three avenues were explored in that case by McNair J. He suggested:–

Taylor J. at p.508 said the term was a condition; Windeyer J. at p.509 regarded it as a warranty. McTiernan J. did not expressly specify, but probably regarded the term as a condition. Probably those judges who equate the term with the Sale of Goods Act implied term would follow that legislation and designate the implied term in leasing agreements as a condition.

25. See infra n.43, and related text.
26. The two suggested "contra proferentum" interpretations are: (1) The word "representation" could in the event of an oral mistatement, be interpreted as excluding "misrepresentation". (2) The word "destruction" could be said to relate back to "defect", "breakdown", "damage", and then be defined to include within its meaning goods which have severe "defects" etc. Thus there would be no obligation to pay rent if the goods have severe defects.
27. Notice, however, that the first part of the clause – "I warrant that before signing this offer I have examined the goods and satisfied myself as to their condition and suitability for any purposes" – is a statement as to past facts. It is not a "contractual obligation, which is essentially a promise by the promisor to the promisee that acts will be done in the future or that facts exist at the time of the promise or will exist in the future". *Lowe* v. *Lombank* [1960] 1 W.L.R. 196, at p.204, per Diplock J.. A representation that something has been done in the past may give rise to an estoppel, but not to any positive contractual obligation. For the conditions necessary to found an estoppel see *Lowe* v. *Lombank* at p.205 per Diplock J..
28. It is not proposed here to go into a detailed analysis of the doctrine of fundamental breach. See, in particular, on this issue *Thomas National Transport (Melbourne) Pty. Ltd.* v. *May & Baker (Australia) Pty. Ltd.* (1966) 115 C.L.R. 353 for an Australian statement of the law.
29. *Mendelssohn* v. *Normand Ltd.* [1970] Q.B. 177, at p.183, per Lord Denning M.R..
30. *Marks* v. *Hunt Bros. (Sydney) Pty. Ltd.* (1958) 58 S.R. (N.S.W.) 381.
31. [1957] 1 Q.B. 229.

(a) That in the event of a misrepresentation by the supplier the lessee may sue on a collateral contract between himself and the supplier. The device of the collateral contract has been applied in Australia, but is is generally difficult to prove such an agreement. What is needed, is a statement which amounts to a "contractual promise, guarantee, or assurance."[32]

(b) That the supplier could be liable in negligence for supplying defective or dangerous equipment, if he knew or ought to have known of the defect, and if the supplier suffers damage as a result. On the facts of *Andrews* v. *Hopkinson*[32a] the plaintiff recovered damages for physical injury suffered on this basis, but there is some authority to suggest that a negligent supplier would also be liable for the cost of repair of any defect, independently of any other damage suffered.[33] Since 1964, if a negligent statement is made about the quality of the goods, the lessee could base his claim on the doctrine of negligent mistatement enunciated in *Hedley Byrne* v. *Heller.*[34] The lessee would have to prove that the supplier giving the negligent advice either carried on the business of giving advice or information, or let it be known in somee other way that he claims to possess skill and competence in the field in question.[35]

(c) That a contractual relationship could be inferred between supplier and hirer, even if no mistatement is made by the supplier, into which the terms of fitness for purpose could be implied. The contract presumably would be inferred from the conduct of the parties on these terms: "in consideration of you making an offer to the finance company to take the goods on lease, I (the supplier), agree to sell the car to the finance company if you do not withdraw your offer."[36] This seems doubtful, and has never been applied in English or Australian courts.

Despite these common law possibilities of rendering the supplier liable it is suggested that statutory reform should provide for a re-allocation of contractual liability between lessor and lessee in relation to the quality of the goods. The following recommendations are put forward:–

(i) That the lessor be unable to exclude liability for the quality of the goods. This follows the recommendations of the *United Kingdom Report on Consumer Credit* (commonly referred to as the *Crowther Report*).[37] The *Consumer Transactions Act,* 1972 (S.A.) adopts this approach in implying mandatory terms of correspondence to description, merchantability and fitness for purpose.[38]

(ii) That the supplier be made statutorily liable for any representations or statements he makes to the lessee, following section 6(1) (b) of *The Hire-Purchase*

32. *Savage J. J. & Sons Pty. Ltd.* v. *Blakney* (1970) 44 A.L.J.R. 123. *F. Jones & Co.* v. *C. G. Crais & Sons* (1962) 62 S.R. (N.S.W.) 410.
32a. Supra n.31.
33. *Dutton* v. *Bognor Regis U.D.C.* [1972] 1 Q.B. 373 at p.396, per Lord Denning M.R.. *Quaere* whether the lessee would recover for any consequential financial loss e.g. loss of profits. See *Spartan Steel & Alloys Ltd.* v. *Martin & Co. Ltd.* [1972] 3 W.L.R. 502; *S.C.M. (U.K.) Ltd.* v. *Whittal & Son Ltd.* [1971] 1 Q.B. 337.
34. [1964] A.C. 465.
35. *The Mutual Life & Citizens' Assurance Co. Ltd.* v. *Evatt* (1970) 122 C.L.R. 628. *Quaere* whether the business of a supplier of equipment, who is not a manufacturer, involves the giving of advice and information relating to the mechanical condition of the equipment.
36. See A.L. Diamond *"Introduction to hire-purchaselaw"*, (Butterworths), p. 68.
37. Supra n. 10,Vol. (i) para. 6.6.13. Cf. the *Molomby Report* supra n.5, which recommended that the implied term as to fitness could be excluded, where the lessee is "made aware" before contracting that the contract excludes it (at para. 5.1.8 and 5.5.1).
38. ss. 8(3), 8(4), 8(5) and 8(6) of the *Consumer Transactions Act,* 1972 (S.A.).

Act, 1959 (Qld.). The supplier, in respect of any statement made by him should also be deemed to act as an agent for the lessor, if the two are different personalities. Such a provision has also been applied to hire-purchase transactions by Section 6(1)(a) of *The Hire Purchase Act,* 1959, (Qld.). This would bring home to the lessor the misrepresentation of the supplier even in matters not affecting the quality of the goods. Damages should be given for innocent misrepresentations as well as rescission but not, as in the United Kingdom *Misrepresentation Act,* 1967 "in lieu of rescission" (thus preventing the obtaining of damages because rescission is itself barred in some way). In leasing arrangements the justification for saddling the finance company with liability for the dealer's actions is the strong economic link between finance company and dealer. Often a dealer will continue in business only because of the credit facilities provided by the financier. The supplier will often lack sufficient funds to satisfy judgment against him on his own account, and, in such a case, if the lessee has no right of action against the finance company, he will have to bear the consequences of the dealer's misrepresentations. However, the finance company should still be able to be indemnified by the dealer, following section 6(3) of *The Hire-Purchase Act* 1959 (Qld.).

(iii) A precise definition of the term of fitness to be implied in all leasing agreements is needed. The suggested formulation is that given by McTiernan J. in *Derbyshire Building Society* v. *Becker.*[39] This is a broader formulation than that suggested by the *Molomby Report,*[40] and adopted by the *Consumer Transactions Act,* 1972 (S.A.)[41] which largely followed the definition of the term implied by section 17(1) of the *Sale of Goods Act,* 1896 (Qld.). The term implied by the Commonwealth *Trade Practices Act, 1974* in connection with consumer transactions is akin to McTiernan J.'s formulation. Section 71(2) states:–

> "Where a corporation supplies (otherwise than by way of sale by auction or sale by competitive tender) goods to a consumer in the course of a business and the consumer, expressly or by implication, makes known to the corporation or to the person by whom any antecedent negotiations are conducted any particular purpose for which the goods are being acquired, there is an implied condition that the goods are supplied under the contract for the supply of the goods are reasonably fit for that purpose whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the consumer does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the corporation or of that person."

"Supplies" is defined by section 4(1) as including hiring. This section only applies to corporate bodies selling to consumers, but it obviates the need for reliance on the lessor's skill and judgment, and the need to prove that it is in the course of the lessor's business to lease goods of the same description as the leased goods. It is sufficient if the goods are leased "in the course of a business". Further the "particular purpose" may be made known to the person "by whom the antecedent negotiations were conducted" (that is, the supplier) and not necessarily to the lessor himself. Indeed, the phrase

39. (1961–2) 35 A.L.J.R. 498 at p.502.
40. Supra n.5 para. 5.1.8; 5.5.1.
41. s.8(6). Unlike the *Sale of Goods Act* implied term, s.8(6)*does* apply to goods sold under a trade name.

"particular purpose" according to traditional interpretations will clearly embrace the "normal purpose indicated by the nature of the chattel",[42] even when nothing is said. The distinction between new and second-hand goods in section 5(3) *Hire-Purchase Act,* 1959 (Qld.) thankfully disappears; a hirer is entitled to expect second-hand goods to be fit for their purpose. It is hoped that the burden of proof in relation to the circumstances showing the customer does not rely on the skill and judgment of the corporation will be placed on the corporation. Additionally, the corporation should not be allowed to exclude liability by incorporating a written term in the agreement that the buyer "has not relied on the skill and judgment of the corporation". It is submitted that this would be void under section 68(1) as "having the effect of excluding restricting or modifying" the implied term as to fitness.
The Trade Practices Act, 1974, also incorporates (in sections 70(1), (2), and 71(1)) terms of merchantable quality and correspondence to description. It is doubtful if these terms were implied at common law. This is perhaps a recognition of the similarity between leasing and hire-purchase transactions. Correspondence to description and merchantability are not important to a hirer *if* the goods fulfil their purpose, but if he buys at the residual cash value this may be important for re-sale purposes. The terms may, moreover, be of value if the particular chattel leased has numerous purposes and the lessee fails to indicate the special purpose for which he requires the goods. If in these circumstances the chattel is totally unsuitable for any of its purposes then, although the lessee will be unable to rely on the implied terms as to fitness for purpose, he may be able to rely on the fact that the goods are of unmerchantable quality or fail to correspond to their description.

(iv) The suggested term in (iii) should not be classified as a condition or warranty per se. This is to be compared with the traditional approach of the *Trade Practices Act,* 1974. The lessee should not have the right to repudiate for a minor defect which, although rendering the chattel temporarily unfit for use, can easily be remedied by the lessor. The lessee should give the lessor, by written notice, a reasonable opportunity to remedy the defect if capable of remedy, and only if he fails to remedy the breach should the lessee be allowed to terminate the agreement. The approach is in line with authorities at common law which suggest that the question of whether a term is a condition or warranty should be determined by the severity of the consequences of the breach of contract rather than any prior classification of the term at the time of the formation of thecontract.[43]

These proposals do not cater for all possible problems that can be envisaged. One practice that is prevalent in the U.S.A. and England is where the supplier leases to the consumer, and requires the lessee to pay by promissory note providing for payment by instalments. The lessor then discounts the promissory note to a finance house which can sue on the promissory note unaffected by any breach of contract or misrepresentation by the original lessor. In relation to this the Crowther Committee recommended[44] no negotiable interest, other than a cheque, be taken in relation to leasing agreements. Another analogous American practice, again with the purpose of avoiding contractual liability, is for the original lessor to assign the benefit of leasing contracts to an assignee (usually a finance house), having provided in the lease that the lessee shall not be entitled to raise against the assignee defences open to him against the assignor – the so-called "cut-off" clause. It is suggested,

42. See *Preist* v. *Last* [1903] 2 K.B. 148; *Buckley* v. *Lever Bros. Ltd.* [1953] 4 D.L.R. 16.
43. *Hong Kong Fir Shipping Co. Ltd.* v. *Kawasaki Kisen Kaisha Ltd.* [1962] 2 Q.B. 26. cf. however, *The Mihalis Angelos* [1971] 1 Q.B. 164.
44. See supra n.10 Vol. (i) para. 6.6.18

therefore, that any agreement purporting to limit the rights of a lessee against an assignee of a chattel lease should be void.

2. Rights of the Parties on Breach of their respective obligations under the agreement or on voluntary termination of the agreement

(The reader here should refer to clauses 6, 7 and 8 of the standard-form contract in the Appendix.)

Clause 6 of the standard-form agreement provides that in the event of the lessee being in breach of specified obligations under the agreement, which are enumerated, the lessor may demand the unpaid balance of the rent for the whole period of the lease (less a rebate amounting to 10 per cent per annum discount on each remaining instalment). This is commonly referred to as an accelerated rental provision. Clause 6 also gives the lessor the right to re-possess the goods in the event of a breach by the lessee of the specified obligations.

The major contractual question which has teased the courts is whether the accelerated rental provision in clause 6 is void as being in the nature of a penalty. The fundamental test is "whether the sum stipulated for can or cannot be regarded as a genuine estimate of the contractor's probable or *POSSIBLE* interest in the due performance of the obligation." (Per Griffith C.J. in *Lamson Store Service Co. Ltd.* v. *Russell, Wilkins & Sons Ltd.*,[45] quoting with approval Lord Dunedin in *Public Works Commissioner* v. *Hills.*[46]) If it cannot be so regarded it is a penalty clause. In order to provide an answer to this question it is necessary to ascertain the maximum quantum of damages the lessor can obtain on a breach of the agreement by the hirer in the absence of an accelerated payment clause. In other words, what is the lessor's *possible* financial interest in the leasing agreement? It has been held[47] that providing the lessee has evinced an intention to repudiate the agreement by his breach (e.g. his conduct shows he can and will not pay the rental),[48] and providing the supply of goods exceeds the demand, so no re-hiring is possible, the lessor will be able to recover by way of damages the total amount of future outstanding rental payments,[49] while making no deduction in respect of the re-possessed goods. If this computation is followed in Australia it follows that the accelerated payment provision in clause 6 is not unconscionable or extravagant in relation to the *possible* loss that could flow from the breach. It is suggested, however, that this approach is illogical. Unless the lessee had special knowledge of the state of the market or abundance of the lessor's stock so as to invoke the second limb of the rule in *Hadley* v. *Baxendale*,[49a] then damages should be computed according to the normal market situation – that is, where the goods can be re-let without undue difficulty. In other words, in the absence of special knowledge damages should be computed according to "the loss which arises in the ordinary course of things", and a normal market situation is the ordinary situation.[50]

Australian courts have generally upheld accelerated payment clauses as liqui-

45. (1906–7) 4 C.L.R. 672, at p.681.
46. [1905] A.C. 368, at p.375.
47. *Inter-Office Telephones Ltd.* v. *Freeman* [1957] 3 All E.R. 479; *Robophone Facilities* v. *Blank* [1966] 1 W.L.R. 1428.
48. *Financings Ltd.* v. *Baldock* [1963] 1 Q.B. 104.
49. This sum would have to be discounted to take into account the fact that the owner is receiving a lump sum immediately. Also any saving of expenditure would have to be deducted, e.g. if the lessor was to provide maintenance, the cost of that maintenance.

49a (1854) 9 Exch. 341.

50. See *Robophone Facilities* v. *Blank* supra n.47, at p.1439 (F–G), per Lord Denning M.R., criticising *Inter-Office Telephones Ltd.* v. *Freeman* supra n.47.

dated damages provisions.[51] Even where the total outstanding rental is made payable on numerous stipulated breaches, some of which will *normally* occasion only trifling damage, the courts have emphasised the *possibility* of serious loss resulting from such breaches and regarded the clause as a genuine pre-estimate of damages.[52] The latest authority on the construction of accelerated rental provisions is *I. A. C. (Leasing) Ltd.* v. *Humphrey.*[53] The comments of the High Court on a clause very similar to clause 6 of the standard-form agreement in the Appendix are instructive. The agreement in *I. A. C. (Leasing) Ltd.* v. *Humphrey*[53a] also contained a provision that in the event of the actual value of the goods on premature termination of the agreement (either by a re-possession or voluntary return) being greater than the residual value specified in the agreement, the difference in amount was to be paid to the lessee. This corresponds to a similar provision in clause 8 of the standard-form contract.

Walsh J. said (in discussing whether the equivalent provision to clause 6 was a penalty):

> "The fact that the provision could operate upon breaches varying greatly in their seriousness and in their likely consequences might suggest a conclusion that the imposition of such a liability as a consequence of a breach, followed by a termination of the contract, could not be a genuine pre-estimate of damage. Such a conclusion *might be warranted* if the lessor might regain the possession and the right of disposal of the equipment when only a small part of the term of the lease had gone by and might do this in consequence of a minor breach, which would really have little damaging effect upon the value of the equipment, and if the lessor might thus receive in those events a large profit not related to any damage which had actually been suffered. *But the agreement provides its own limitation upon the ability of the lessor to gain a large profit by reason of the equipment being re-possessed after a relatively short period. If the period has been short and if the equipment has not suffered any substantial deterioration by reason of the breach it is reasonable to suppose, looking at the matter as at the date of the making of the agreement, that the actual value at the date of termination of the agreement will be substantially in excess of the appraisal value. That excess will be set off against the rebated instalments which the lessee will be required to pay.*"[54]

Thus it appears that a vital factor preventing clause 6 of the standard-form contract being struck down as a penalty lies in the provision of clause 8 relating to repayment to the lessee of the difference in value between the market value of the chattel at the time of re-possession and the residual value specified in the agreement.

Clause 8 also provides that the unpaid balance of the rent (less rebate) shall become payable if the lessee *voluntarily* returns the goods. In the event of the lessee voluntarily returning the goods, no question of whether the accelerated rental

51. See, for example, *Western Electric Coy Ltd.* v. *Ward* (1934) 51–52 W.N. (N.S.W.) 19, where a clause providing for immediate payment of all outstanding rental payments on breach was upheld; and *International Leasing Corporation (Vic) Ltd.* v. *Aiken* [1967] 2 N.S.W.R. 427.
52. See, in particular, the approach of Griffith C. J. in *Lamson Store Service Co. Ltd.* v. *Russell, Wilkins & Sons Ltd.* supra n.45 at p.682. Notice that a clause providing for additional rental provisions may be construed as the price the lessee has to pay for the exercise of additional rights beyond those contractually guaranteed. *M.-G.-M. Pty. Ltd.* v. *Greenham* (1966) 85 W.N. (Pt. 1) (N.S.W.) 468.
53. (1972) 46 A.L.J.R. 106.
53a. ibid.
54. *I.A.C. (Leasing) Ltd.* v. *Humphrey* supra n.53 at p.109–10.

clause is a penalty or not can arise, since the hiring has not been terminated by the hirer's breach but because of a voluntary termination.[55] While legally sound, the rationale behind this may be doubted. One reason why the lessee will voluntarily return the goods is because he is about to commit a breach in the future (e.g. for non-payment of rent). It merely saves the lessor the task of re-possessing the goods. Another reason might be that the goods had become obsolete or were not fit for their purpose. In that case, the goods, at the time of voluntary return, would probably be worth less than their residual value, and the lessee would incur a heavy financial burden under the stipulation in clause 8 of the standard-form contract which provides that the lessee must pay the lessor the difference between the market value of the goods on re-possession or voluntary return, and the residual value, if the market value at that time is less than the residual value.

This leads on to a final point arising from clause 8. It was argued in *I.A.C. (Leasing) Ltd.* v. *Humphrey*[55a] that such a provision, indemnifying the lessor against a market value of the goods on re-possession or voluntary return which is less than the residual value, constituted a penalty. On the facts of the case the market value of the chattels was far below the residual value when the owner re-possessed. The court held that the provision could not fall to be even *considered* as a penalty since the provision in that clause could be brought into play where no breach had occurred; that is, in the event of the goods being returned voluntarily. It was only in the event of a provision being brought into play *solely* by a situation of breach that the clause could fall to be considered as a penalty. Walsh J. said:–

> "The view has prevailed in England that those rules may be applied in appropriate circumstances to make such a provision unenforceable, in so far as it operates, in the events which happen, as a consequence of a breach of contract, notwithstanding that the same results may be attached by the agreement to acts or events which involve no breach: see *Bridge* v. *Campbell Discount Co. Ltd.* [1962] A.C. 600, in which the opinion of the majority of the Court of Appeal in *Cooden Engineering Co. Ltd.* v. *Stanford* [1953] 1 Q.B. 86, was approved. But there has been a preponderance of opinion in favour of the view that it is only when a provision operates so that the event upon which an obligation is placed upon a party to pay a sum of money to another party to a contract is the breach by the former party of a term of the contract, that the question arises whether an obligation arising upon that event is a penal provision."[56]

Walsh J. hinted it might be different, if the residual value was a sham, not being based on a bona fide estimate of the expected depreciation of the chattel over the leasing period. In that case "the provision might be intended simply as a sanction against breach."[57]

A few general comments should be made in relation to the accelerated rental provisions. It is true, as Walsh J. pointed out in *I. A. C. (Leasing) Ltd.* v. *Humphrey,*[56a] that a provision (as in clause 8) that allows for the difference between the market value of the chattel at the time of re-possession, or voluntary return, and the residual value specified in the agreement to be paid to the lessee does alleviate the hardship imposed by the accelerated rental provisions. Nevertheless if the value of the chattel depreciates, which it may do through no fault of the

55. *Campbell Discount* v. *Bridge* [1962] A.C. 600; *I.A.C. (Leasing) Ltd.* Humphrey, *supra n.53.*
55a. Supra n.53.
56. at p.110.
56a. Supra n.53.
57. At p.100.

hirer, the lessee's liabilities will be very heavy. Further, the amount received by the lessor on early termination is far more than he could expect to receive in damages at common law, given a *normal* market situation. In view of these considerations, the *Molomby Report* proposed that a more equitable formula should be devised to calculate the amount payable both on re-possession and voluntary return.[58] A formula has been adopted under the *Consumer Transactions Act,* 1972, (S.A.).[59] This formula statutorily guarantees that the lessee will be credited with the amount by which the market value of the goods exceeds the residual value on re-possession or voluntary return prior to the expiration of the lease. Such a provision is, in any case, commonly inserted in the standard-form leasing agreement (as in clause 8). The formula also gives the lessee a small rebate to take into account the fact that the lessor receives payment at an earlier point of time than he otherwise would.[59a] However, the lessor may still recover a substantial sum from the lessee, whereas at common law, given a normal market situation, when re-hiring is possible, the recoverable damages may be minimal. There seems no reason why the lessor should be able to make a double profit and it is, therefore, suggested that there should be statutory reform so that the lessee is not made liable to indemnify the lessor against "loss" which the lessor does not, in the usual course of things, suffer.[60]

The lessor is given rights to re-possess the goods by the standard-form agreement, and to enter any premises for the purposes of exercising such rights.[61] There is no common law right to re-possess.[62] Re-possession can be exercised without notice in sharp contrast to the provisions for notice required for hire-purchase transactions under section 13 of *The Hire-Purchase Act,* 1959, (Qld.). The only possibility for a lessee is to petition for equitable relief. In a situation where the lessee has defaulted in payment of rent, such equitable relief from forfeiture may be granted where the lessee is considered able to pay the arrears of rent immediately or within a time specified by the court.[63] It is suggested that the lessee should always be given a period in which to remedy his breach.[64] The *Consumer Transactions Act,* 1972, (S.A.) does effectively give such a period by requiring the lessor to give seven days' notice in writing of his intention to re-take possession. Further, by section 22(1) of that Act, the Credit Tribunal established under it may "avoid or modify any term or condition" of a lease that is "harsh and unconscionable". This allows for a degree of flexibility. The lessor under this power could be restrained from re-possessing for trivial breaches; for example, a failure by the lessee to notify a change of address.[65] It may also allow the lease to be modified to allow an extension of time to pay for a lessee who is genuinely sick or unable to find employment, but who shows a reasonable prospect of being able to meet his commitments if the extension were granted.[66]

In the event of the lessor breaking his obligations under the agreement (for instance, his implied warranty of quiet possession), the lessee may recover damages measured by the increased hiring charges he has to pay on hiring the goods else-

58. Supra n.5 para. 5.7.10.
59. S.23, and regulations thereunder. (See Government Gazette (S.A.) Dec. 20th, 1973, p.3415 (Twentieth Schedule)).
59a. In fact the formula under the South Australian Act works out as being less generous to the lessee than thyformula in the ordinary standard-form contract (see clause 6).
60. If the lessor does, in fact, suffer great loss, then he should, of course, be able to recover that loss.
61. Clauses (6), 4(d).
62. *Ex parte Marks* (1902) 19 W.N. (N.S.W.) 151.
63. *Barton & Thompson & Co. Ltd.* v. *Stapling Machines* [1966] 2 A11 E.R. 222.
64. The standard-form agreement does give the lessee an opportunity to remedy a default in payment within fourteen days (see clause 6).
65. See clause 2(g) of standard-form contract.
66. See the comments of the *Molomby Report* supra n.5 para. 5.7.13.

where, and the loss for the period he is without the goods. He cannot, of course, unlike hire-purchase, recover for the loss of bargain in acquiring the goods, even if there is a "gentleman's agreement" that he will buy them at the end of the lease.

3. Other Clauses.

A number of other clauses in the leasing agreement are worthy of comment. In clause 4(c) the agreement imposes a 10 per cent interest rate on any money overdue on the agreement. By section 38(1) of *The Hire-Purchase Act,* 1959, (Qld.) no greater interest than 8 per cent can be imposed. This illustrates once again how leasing agreements escape the protection of The Hire-Purchase Acts. Other clauses seek to protect the lessor from possible future liabilities. In clause 12 the lessor guards himself against possible changes or re-interpretation of the sales tax or income tax law. For instance, if the definition of "sale by wholesale" in section 3(1) of *The Sales Tax Act (No. 1)* were changed to attract additional tax. Finally, the indemnity in section 3(e) seeks to protect the lessor against any claims arising out of the keeping of the goods (e.g. costs by third parties for damages). Such indemnity clauses have been strictly construed.[67]

4. The Question of Disclosure

In a leasing arrangement the lessee may not be adequately informed of his true liabilities. In particular the lessee may not be adequately informed of his liabilities on the expiration of the period of the lease or on its premature determination. It is, under the existing law, open to the lessor to offer the consumer low rental payments during the lease period, but include a high residual value making it probable that the consumer would face a large obligation on termination of the lease as the market value of the goods at that time will be much lower than the residual value.[68] The lessee may also fail to realise the extent of his total financial commitment. Under certain types of fixed term hiring, the total rental is equivalent to what would have been the purchase price of the goods if they had been supplied under a hire-purchase agreement. To provide disclosure of these matters, the *Consumer Transactions Act,* 1972, (S.A.) imposes an obligation on the lessor to provide in the written lease a statement of the lessee's liabilities upon termination of the lease, the total amount payable under the lease, and the number of periodic payments to be made.[69] A copy of the lease must be served upon the lessee within fourteen days. Certain other basic disclosures have to be made: extra charges not included in the rental, the dates when the payments become due, and the amount of stamp duty and advance rental payable.[70] These requirements should be made compulsory in Queensland.

There is one surprising omission in the disclosure requirements of the South Australian Act. Nowhere does there need to be a statement as to the nature of the agreement and the fact that at no time will the goods become the property of the hirer. There is no direct Australian evidence, but the English experience offers a salutary warning as to the dangers. The crowther Committee reports:–

> "In the first place there is evidence to indicate that not infrequently a consumer enters into a rental agreement believing that it is a hire-purchase agreement and that eventually the goods will belong to him. This belief may

67. See, for example, *Imperial Furniture Pty. Ltd.* v. *Auto Sprinklers* [1967] 1 N.S.W.R. 29.
68. See clause 7.
69. s.20(1) (f); s.20(1) (g).
70. And see generally s.20(1) (a)-(h).

be induced by deception on the part of the person letting the goods on rental, or it may arise from a genuine misunderstanding on the part of the hirer as to the nature of the contract without there being any improper conduct whatsoever by the other party. Either way, the hirer may pay out substantial sums of money only to find at the end of the day that he is no nearer to acquiring the hired goods than he was at the beginning."[71]

5. Third Party Rights

The Bills of Sale Acts generally have no application to leasing arrangements. However, some leasing arrangements are in reality only secured transactions and fulfil much the same function as a chattel mortgage. When chattels are leased over long periods so their residual value at the end of the lease is nil, the reservation of title to the lessor is, in truth, a form of security interest. The lessor is in much the same position as a mortgagee under a chattel mortgage. From the point of view of third party creditors there is something to be said for chattel leases of this kind being subject to some registration procedure.[72] Although it is not proposed to go into the question here, the establishment of an efficient registration scheme for all security interests is a matter in relation to which reform is long overdue.

Conclusions

The foregoing analysis has indicated that while there have long since been statutory developments in Queensland to protect the position of the hire-purchaser from the onerous terms originally imposed by standard-form hire-purchase ocntract, there have been no such parallel reforms introduced to protect the lessee under a chattel lease. This is irrational in view of the practical similarity that exists in practice between the two transactions. In particular, there are two main areas of concern:–

(1) The ability of the lessor to exclude liability for the quality of the goods leased, and any mis-statements he makes.
(2) The onerous financial liabilities the lessee will face, and about which he may well be ignorant, on early termination of the lease, resulting from re-possession or voluntary return.

The recommendations proposed are clear from the text.

J.C. PHILLIPS*

71. Vol. (i) para. 6.2.54. For an illustration of this misunderstanding see *Galbraith* v. *Mitchenall Estates Ltd.* [1964] 2 A11 E.R. 653.
72. See Article 9 of the *American Uniform Commerical Code;* Crowther Report Vol. (i) chapter 5.5.

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APPENDIX 1
STANDARD-FORM CONTRACT

TERMS AND CONDITIONS OF LEASE

I, THE ABOVE LESSEE, AGREE:–

1. (a) Subject as hereinafter provided to pay the rent instalments set out in the schedule together with the stamp duty thereon as stated in the schedule; (b) to obtain delivery of the goods at my expense.

2. (a) That any accessories tyres replacements and tools or other goods which now or hereafter are supplied with or are attached to the goods described in the schedule shall be or become a part thereof and shall be deemed to be included in the term "goods" herein; (b) to keep the goods in good order and repair and properly operated serviced and housed, observing at all times the manufacturers' recommendations in respect of operation and servicing; provided always that I shall not have to be deemed to have any authority to pledge your credit or create any lien upon the goods; (c) to indemnify you against loss (the measure of which shall be the then outstanding rent rebated as provided for in Clause 6 hereof together with the residual value hereunder, or the value of the goods, whichever is the greater, less the value (if any) of the salvage) arising from destruction or loss (including lawful confiscation) of the goods provided that in the event of such destruction or loss I shall cease to be liable to pay the rent instalments then unpaid or any relative stamp duty; (d) not to alter or make any addition to the goods without your previous consent in writing and not to alter any identifying number or mark thereon; (e) to keep the goods under my personal control and not to attempt or purport to sell dispose of or encumber the same or any interest therein nor without your prior written consent to sell or encumber nor agree to sell or encumber any land to which the goods may at any time be affixed; (f) not to assign this agreement or my rights thereunder; (g) to notify you immediately in writing of any change in my address and not to use the goods except in the State or Territory or Territories as you may from time to time approve of in writing; (h) to produce the goods for inspection as required by you from time to time; (i) at the expiration of the lease or upon its sooner determination to deliver up the goods to you at your address appearing hereon or such other place as you may direct in writing in good order and repair and in accordance with the provisions contained herein; (j) if I shall fail to deliver up the goods to you on the expiration of the lease, to pay you by way of liquidated damages for detention a daily sum equal to one thirtieth of the above total monthly payment.

3. (a) To ensure and keep the goods insured at all times during the currency of the lease against fire accident and theft and such other risks as you may require with an insurer approved by you in our respective names for our respective rights and interests for an amount equal to the full insurable value under an enforceable policy not subject to being defeated or avoided, or liability thereunder declined, by reason of any non-disclosure, mis-representation or breach of warranty, and to pay when due all premiums thereon; (b) to hand to you on request all policies of insurance as aforesaid; (c) not to do or permit or suffer to be done anything which might or could prejudice any insurance as aforesaid or any claim thereunder; (d) to comply with all relevant Acts Regulations and By-laws relating to the registration or licensing of the goods or in any other manner whatever relating to them or their use, and to pay promptly all requisite fees and charges; (e) to indemnify you against any claims and costs whatsoever arising out of the use operation or keeping of the goods or in any matter relating thereto; (i) to bear and to pay to you the stamp

duty payable in respect of the contract created by your acceptance hereof or of the use of the goods in pursuance thereof and unless otherwise agreed between us any payment by me shall be appropriated firstly in payment of stamp duty.

4. I further agree:– (a) to make all payments to your office to which this offer is addressed or such other place as you may direct in writing and any payments otherwise made and any payment sent by post shall be at my risk until received at such office or place; (b) to pay interest at the rate of 10 per cent per annum of any moneys payable hereunder which may from time to time be overdue and on any damages which may be recoverable thereunder; (c) to repay to you on demand any moneys which you may think fit to pay to make good any failure by me to comply with any obligations hereunder or any other obligations incurred by me in respect of the goods and any other expense you may incur in respect of the enforcement or protection of your rights hereunder or in the goods. (d) that you may enter any premises where you believe the goods are located for the purpose of inspecting or testing them or exercising any rights under Clause 6; (e) to pay all rent and mortgage interest on premises in which the goods may at any time be housed; (f) that you are hereby irrevocably authorised to use my name and to act on my behalf in exercising any rights of instituting carrying on and enforcing any legal proceedings which you think desirable to protect your rights in the goods; (g) not to affix the goods to land unless their use so requires or you consent in writing but in any event the goods shall as between us be considered as chattels notwithstanding that they may be affixed to land.

5. That nothing contained herein shall confer on me any right or property or interest in or to the goods and I shall be a bailee thereof only.

6. If during the lease you ascertain that I have made a false statement in this offer or in relation thereto or that I am now or hereafter a person convicted of an indictable offence or sentenced to imprisonment or if – (a) I default in payment of any rent instalment or sum payable on account of stamp duty pursuant to Clause 1(a) or of any sum demanded pursuant to Clause 4(c) and such default continues for 14 days; or, (b) any breach occurs of any provision hereof which might be calculated to prejudice the safety or condition of the goods or your ability to recover the same, that is to say, of sub-clauses (b) (d) (e) (f) (g) or (h) or Clause 2 or sub-clauses (a) to (c) (both inclusive) of Clause 3; or (c) any other default or breach on my part occurs and the same is not remedied within 14 days of written notice thereof by you; or (d) any event occurs constituting the act of bankruptcy on my part or the lessee (being a corporation) an order is made or a resolution is passed for its winding up or placing it under official management; or, (e) a receiver or receiver and manager of my assets or income or any part thereof is appointed; or, (f) execution of distress is issued against me – then and in any such event there shall become forthwith due and payable by me to you the unpaid balance of the rent for the whole period of the lease (less a rebate in respect of the rent instalments not then accrued due to be ascertained by applying a rate of ten per cent per annum to each such instalment over the period by which the date for payment thereof is brought forward by virtue of this clause), together with an amount equal to the stamp duty (if any) on the net rent so payable; and you may at any time (unless in the meantime the full amount payable under this clause has been paid) retake possession of the goods. Provided however that you may from time to time and on such conditions as you think fit waive your rights under this clause, but no such waiver shall affect your rights under this clause in respect of any further or continuing or recurring default breach or event.

7. (a) If, upon the goods being received into your possession consequent upon the expiration of the period of the lease or any extension thereof, the goods are disposed of by you for the best price you can reasonably obtain at the time, and

the net proceeds of such disposal (after allowing for all costs and expenses incidental to such disposal including storage) are less than the residual value stated in the schedule, I agree (subject to sub-clause (b)) to pay you on demand (additionally to any rent or other moneys payable by me) the amount of such deficiency.* (b) If you dispose of the goods other than by public auction or to or through traders dealing in goods of a similar description and as a consequence of such disposal the goods come into my possession or into the possession of my nominee or agent, then the provisions of sub-clause (a) of this clause shall not apply.

8. In the event of your agreeing to my returning the goods to you prior to the expiration of the period of thelease, the balance of the rent for the whole period of the lease shall forthwith become due and payable (less a rebate calculated in the same manner as provided in Clause 6) together with an amount equal to the stamp duty (if any) on the net rent so payable, and I agree to deliver up the goods to you or your nominee at the time and place nominated by you, and in the event of such return or in the event of you having retaken possession of the goods pursuant to Clause 6, you shall dispose of the goods as soon as reasonably practicable at the best price you can reasonably obtain at the time of disposal, and if the net proceeds of such disposal (after allowing for all costs and expenses incidental to repossession and to disposal including storage) are less than the residual value stated in the schedule, I agree to pay you on demand (additionally to any rent or other moneys payable by me) the amount of the deficiency;* if such net proceeds exceed the residual value the excess shall be set off against any unpaid rent in respect of the unexpired portion of the term and/or paid to me to the extent of any rent paid in advance in respect of the portion of the lease term unexpired at the date of return or repossession.

9. I, the lessee, warrant that before signing this offer I have examined the goods and have satisfied myself as to their condition and suitability for my purposes and I agree that no warranty condition description or representation on your part is given and any express or implied warranty or condition as to the quality fitness safety or otherwise of the goods prior to or at any time during the continuance of the lease is hereby excluded and my obligations to pay rent and otherwise hereunder shall continue notwithstanding the occurrence of any defeat or breakdown therein or any damage thereto falling short of destruction. And I agree that you will not be responsible for any representation or promise made by any person who may have introduced this transaction to me and I agree that you shall not be liable in respect of any statements regarding my rights or position in respect of any law relating to taxation or any other matters.

10. This instrument shall not be binding upon you until the memorandum of acceptance endorsed hereon shall have been signed by you and the provisions of this clause shall not be affected or prejudiced by reason of any pre-payment of moneys by me or the delivery of the goods to me which pending such acceptance shall be deemed merely provisional but in the event of the goods coming into my possession before such acceptance and my obligations hereunder as to insurance care and use of the goods and otherwise shall be deemed in force from such possession. The signing of any such memorandum shall of itself constitute an acceptance creating a contract governed by the law of the State or Territory in which the memorandum is signed.

11. That in consideration of your investigating my suitability as a lessee this offer shall be irrevocable for twenty-one days from the date hereof.

* NOTE: In the event of a payment by the Lessee under this provision, it is the view of the Commissioner of Taxation that the payment is an outgoing of capital and not deductible for income tax purposes.

12. I warrant that the goods will be used for the purpose stated by me to you at or prior to signing this offer and I indemnify you against any liability or additional liability you may incur under the Sales Tax Assessment Acts or the Income Tax Assessment Acts by reason of the use of the goods by me for any other purpose or by reason of any particular rate of depreciation which I may have represented to you as applicable to the goods or their use and upon which you have relied for calculation of the rental payable hereunder.
13. Your rights may be exercised by your nominees and assigns; if there is more than one lessee they shall be bound jointly and severally; the term "lessee" includes the permitted assigns of the lessee.