

HOUSE OF LORDS

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[2009] UKHL 35

on appeal from:[2008] EWCA Civ 382

OPINIONS
OF THE LORDS OF APPEAL
FOR JUDGMENT IN THE CAUSE

**TRM Copy Centres (UK) Limited and others (Respondents) v
Lanwall Services Limited (Appellants)**

Appellate Committee

Lord Hope of Craighead
Lord Hoffmann
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
Baroness Hale of Richmond

Counsel

Appellants:
Jonathan Ferris

(Instructed by Messrs Devereaux)

Respondent:
Bridget Williamson

(Instructed by Sherrards)

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Services Limited (Appellants)**

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LORD HOPE OF CRAIGHEAD

My Lords,

1. The appellant, Lanwall Services Ltd (“Lanwall”), supplies photocopiers to leasing companies which lease them in return for a rental payment to, among others, the operators of retail businesses in shops and sub-post offices. It then services and maintains the photocopiers under a maintenance agreement with the retailer. The respondents (for convenience I shall refer to them collectively as “TRM”) carry on business in competition with Lanwall. They too deal in photocopiers, but they do so in a way that differs from the business model used by Lanwall. They lease the photocopiers from a finance company. They then install them in shops and sub-post offices under an agreement, which is described as a Location Agreement, with the retailer.

2. TRM commenced these proceedings when they discovered that Lanwall had removed their photocopiers from premises where they had been installed under subsisting Location Agreements and replaced them with equipment supplied by Lanwall. Their case is that Lanwall’s actions constituted the tort of inducing the retailers to breach their Location Agreements with TRM. Lanwall’s defence is that TRM’s Location Agreements are consumer hire agreements. Various consequences follow if Lanwall is right on this point. The Consumer Credit Act 1974 provides that a licence is required to carry on a consumer hire business, and that agreements of that kind which are made by unlicensed traders are not enforceable against the hirer. Lanwall says that TRM are not licensed, so their agreements are unenforceable against the retailers. The Office of Fair Trading may make an order that the agreements of that kind are to be treated

retrospectively as if the trader had been registered. So Lanwall also says that the agreements had either been terminated or could be brought to an end by the retailers under that Act at any time.

3. On 2 May 2007 Master Rose ordered the trial of three preliminary issues. One of these was whether a Location Agreement, if made between TRM and a retailer who is an individual, is a regulated hire agreement for the purposes of section 15 of the Consumer Credit Act 1974. That section, as amended, provides:

“(1) A consumer hire agreement is an agreement made by a person with an individual (the ‘hirer’) for the bailment or (in Scotland) the hiring of goods to the hirer, being an agreement which –

- (a) is not a hire-purchase agreement, and
- (b) is capable of subsisting for more than three months, and
- (c) does not require the hirer to make payments exceeding £25,000.

(2) A consumer hire agreement is a regulated agreement if it is not an exempt agreement.”

Section 15(1)(c) will cease to have effect when section 2(2) of the Consumer Credit Act 2006 is brought into force, but no date for this has yet been identified. Lanwall’s case is that TRM’s Location Agreements are consumer hire agreements and that, as such, they are regulated agreements within the meaning of that section. Section 21(1) of the 1974 Act provides that a licence is required to carry on a consumer hire business. Section 40(1) provides that a regulated agreement is not enforceable against the hirer by a person acting in the course of a consumer hire business if that person is not licensed to carry on a consumer hire business of a description which covers the enforcement of the agreement. Section 40(2) enables a trader who is not licensed to apply to the Office of Fair Trading for an order that any agreements made during a period when he was unlicensed are to be treated as if he had been licensed as required. Section 101(1) of the 1974 Act provides that the hirer under a regulated consumer hire agreement is entitled to terminate the agreement by giving notice to any person entitled or authorised to receive the sums payable under the agreement. Contracting out of that protection is forbidden by section 173(1).

4. On 18 July 2007 Flaux J held that the Location Agreements were not consumer hire agreements within the meaning of section 15 of the 1974 Act: [2007] EWHC 1738 (QB). He decided the other two preliminary issues, as to whether on their true construction the two agreements that were before him were terminable at any time, against Lanwall also. Lanwall did not pursue those issues in the Court of Appeal. Its appeal against Flaux J's decision was directed only to the question whether the Location Agreements were regulated hire agreements for the purposes of section 15 of the 1974 Act. On 17 April 2008 the Court of Appeal dismissed the appeal: [2008] EWCA Civ 382; [2008] BusLR 1231. The issue which is now before the House is whether the courts below were right to decide this preliminary issue against Lanwall. It raises the following questions. What are the essential elements of a consumer hire agreement within the meaning of section 15? In particular, do the terms of TRM's Location Agreement embrace those essential elements?

The Location Agreement

5. As Flaux J explained in para 3 of his judgment, two forms of Location Agreement were before the court. It had been possible to obtain a copy of only one of them, however. This was a form of agreement which took effect from 1 June 2002. So it was to its terms that he directed his attention. Under this agreement the retailer agrees to the installation of a photocopier on his premises and undertakes to provide a location for it which is easily visible and accessible by the retailer's customers. The retailer's customers, and the retailer too, may use the photocopier. If they do, they are charged the rate per copy that is provided for in the agreement. The retailer undertakes to collect all sums paid for copies made on the photocopier and to account for them to TRM. He is entitled to deduct from those sums commission at a rate which increases as a greater number of copies are made, together with the VAT thereon. Accounting for these sums takes place monthly. No sums other than the rate per copy, less commission, are payable by either party in consideration of their undertakings to each other. The June 2002 Location Agreement is for an initial period of 36 months. Thereafter, unless terminated by either party on giving 90 days notice, it is renewed automatically for successive periods of 12 months.

6. The parties to the June 2002 Location Agreement are described as TRM on the one hand and "The Business" on the other. The standard form assumes that the Business will always be a company incorporated in England. But in practice these agreements are also entered into with

individuals. As the agreement is described as a “UK Copier Location Agreement” it appears to have been envisaged that they might be entered into with companies incorporated in other parts of the United Kingdom too. For present purposes, however, it is sufficient to note that in at least some of the situations where TRM and Lanwall are in competition with each other they were entered into with an individual. This has provided Lanwall with the opportunity to argue that they can be brought to an end by the retailer under the 1974 Act.

7. The relevant provisions of the June 2002 Location Agreement are as follows:

“TRM and the Business desire to allow TRM to locate a TRM owned photocopy machine and related products (the ‘Equipment’) and proprietary promotional material at the retail locations owned and operated by the Business. The Equipment will be available for use by the Business and its customers. TRM and the Business agree as follows:

1 TRM’s Obligations. During the term of this Agreement, TRM will:

1.1 deliver and install the Equipment and promotional material to the Business’ locations owned and operated by the Business as set out in Schedule 1 of this Agreement (Store Sites) and such other additional locations as TRM shall agree;

1.2 supply the Business with all paper, toner and supplies necessary for the operation of the Equipment;

1.3 provide repair and maintenance services for the Equipment and promotional material; and

1.4 provide appropriate training to the Business for the operation of the Equipment.

2 The Business’ Obligations. During the term of this Agreement, the Business will:

2.1 accept all the supplies necessary to operate the Equipment;

2.2 provide electrical power to operate the Equipment;

2.3 provide a clean, safe and orderly location for the Equipment, which is easily visible and accessible by the Business’ customers;

2.4 provide adequate space for promotional material provided by TRM;

2.5 collect all sums paid for copies made on the Equipment and account to TRM for all monies received from customers using the Equipment, less the Business' commission in accordance with Schedule 2 below;

2.6 oversee the use and operation of the Equipment by the Business' customers making best efforts to maximize copier uptime by the timely refilling of supplies, removal of paper jams when possible and contacting TRM promptly in the event of copier malfunction;

2.7 fulfil its duties, in accordance with its VAT status, to charge and remit all value added tax (herein referred to as 'VAT') and any other taxes incurred with respect to copies made on the Equipment;

2.8 promptly notify TRM in writing if the Business' VAT status or VAT number changes; and

2.9 promptly notify TRM if the Business changes ownership.

...

4 Retail Price and Commission Schedule. In consideration of TRM carrying out its obligations set out in this Agreement, the Business will pay TRM monthly for all copies made on the Equipment times the retail price specified in Schedule 2 (the Monthly Revenue), less the appropriate commission applied to all monthly copies as described in Schedule 2, together with VAT thereon.

The amount which is payable to TRM shall be computed and paid as follows: TRM will calculate and invoice the Business, monthly, for the amount due for copies made over the previous meter reading. TRM's invoice shall be paid within thirty (30) days from the invoice date. A late payment charge of 1.5 percent per month, or a minimum of £0.50, shall be added to any unpaid balance. Further, in the event that the Business fails to make such timely payment, TRM shall have the right to enter upon the Business location and to terminate this Agreement and remove the Equipment and promotional materials from the Business Location at any time without advance notice.

...

11 Use of Equipment. The Business shall at all times exercise reasonable care in using and supervising the use of the Equipment and shall not remove the Equipment from the Business location, part with possession of the

Equipment, or allow the Equipment to be used by anyone other than the Business or its agents, employees and customers...

Section 15 of the 1974 Act

8. The provisions of section 15 to which this case directs attention are to be found in the opening words of subsection (1). They state:

“A consumer hire agreement is an agreement made by a person with an individual (the ‘hirer’) for the bailment or (in Scotland) the hiring of goods to the hirer...”

This is, as Professor Sir Roy Goode, *Consumer Credit Law and Practice*, para 23.74, points out, an unnecessarily cumbersome provision. The definition might well have been expressed differently, had it not been for the precedents set by the Hire-Purchase Acts. Section 1(1) of the Hire-Purchase Act 1965, which applied to England and Wales, defined the expression “hire-purchase agreement” 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”. Section 1(1) of the Hire-Purchase (Scotland) Act 1965 defined the expression as meaning any contract whereby goods are taken on hire by one person from another in consideration of periodical payments, with an option to the person who takes them to become the buyer of the goods. Section 189(1) of the 1974 Act uses the same concepts to define what is meant, in England and Wales or in Scotland as the case may be, by the expression “hire-purchase agreement” for its purposes. It then uses the same concepts to define the expression “hirer”. This is said to be a person to whom goods are bailed, or (in Scotland) hired, under a consumer hire agreement.

9. The definitions in sections 15 and 189(1) are easy to apply in Scotland. All one needs to know is that the statute has defined this type of agreement as one for the hiring of goods. Bell, *Commentaries on the Law of Scotland* (McLaren’s edition, 1870), vol i, p 275 states that a contract of hiring, or location, is a contract by which the temporary use of a subject, or the work or service of a person, is given for an ascertained hire. At p 481 he re-states his definition in these terms:

“The contract of hiring, or *locatio conductio*, is that by which the one party agrees, in consideration of a certain hire or rent which the other engages to pay, to give to that other, during a certain time, the use or occupation of a thing; or personal service and labour; or both combined.”

For present purposes it is sufficient to note that it is the fact that the hiring is in consideration of an ascertained hire or rent which the hirer agrees to pay that marks this kind of contract out from others under which the temporary use or possession of a thing is given to another.

10. The English definitions, which refer to an agreement for the bailment of goods, require further analysis. They overlook the fact that bailment is not synonymous with hire. It embraces all situations in which possession of goods is given by one person to another upon the condition that they shall be restored to the person by whom possession has been given, or dealt with as he directs, upon expiry of the agreed period of possession: Goode, *Consumer Credit Law and Practice*, para 23.74. Views have differed as to the classes into which this legal concept may be arranged. In *Coggs v Bernard* (1703) 2 Ld Raym 909 Holt CJ said that there were six classes of bailment. The most up to date discussion is in *Halsbury's Laws of England* (4th ed), vol 3 (1) (2005 re-issue), para 2. It selects as the basic model the arrangement in *Jones on Bailment* (1st ed, 1781) pp 35-36, which divides bailment into five classes, as follows:

- “(1) the gratuitous deposit of a chattel with the bailee, who is simply to keep it for the bailor;
- (2) the delivery of a chattel to the bailee, who is to do something without reward for the bailee to or with the chattel;
- (3) the gratuitous loan of a chattel by the bailor to the bailee for the bailee to use;
- (4) the pawn or pledge of a chattel by the bailor to the bailee, who is to hold it as a security for a loan or debt or the fulfilment of an obligation; and
- (5) the hire of a chattel or services by the bailor to the bailee for reward.”

11. Professor Norman Palmer, in his capacity as consultant editor of *Halsbury's Laws of England* on Bailment, observes in para 2 that

modern authority recognises many variations on these basic models, and that many examples do not fit precisely into any particular category. But to understand the kind of bailment that section 15 of the 1974 Act refers to the classification in *Jones on Bailment* is all one needs. This plainly, as Mr Ferris for Lanwall accepts, is bailment by way of hire. That is to say, it is a bailment under which the person who receives possession agrees to pay for the use of the chattel in cash or kind during the period of his possession of it. A bailment which is gratuitous is outside the scope of the statute. On this analysis the effect of the definition in section 15 is, as one would expect, the same in England and Wales as it is in Scotland.

The effect of the Location Agreement

12. The Location Agreement lacks the most obvious badge of an agreement for hire. The obligations that the Business undertakes, as listed in clause 2, do not include an obligation to pay anything in cash or kind for the hire of the photocopier. The only obligation which involves the making of payments by the Business to TRM is that described in clause 4. In consideration of TRM carrying out its obligations under the agreement, the Business undertakes to pay TRM monthly for all copies made on the equipment multiplied by the rate per copy set out in Schedule 2. If no copies are made there is nothing to pay at all. If the copies made during the month are made only by customers using the equipment, the obligation is to account for the sums collected from the customers. If it has not used the photocopier itself during that month, the Business does not have to pay anything at all to TRM out its own money. The cash flow is all the other way, as the Business is entitled to deduct commission on the amounts that it has collected from the customers. Thus the financial returns that are obtained by either side relate entirely to the number of copies that are made by the photocopier. The greater the number of the copies, the better is the return to TRM on its investment. The greater the return to the Business too, as the amount of its commission increases according to the number of copies made by the photocopier that it has agreed to locate on its premises.

13. Mr Ferris submitted that the effect of this unusual arrangement is that the photocopier is hired to the retailer. The essence of it, he said, was that the Business obtained the right to use the photocopier in return for payment. The fact that the amount that had to be paid was related to the number of copies made was to be regarded simply as the business model for ensuring a return to TRM on its photocopier that the parties found most attractive. The fact that there was a stipulated amount that

had to be paid to TRM was all that was needed to bring the agreement under which possession of the photocopier was transferred to the Business into effect so that it could make use of it within the scope of section 15 of the 1974 Act. The payment of this amount was to be regarded as referable to the use of the photocopier, as the expectation was that once it had been installed it would be used. The nature of the consideration that was to be given for the opportunity to use it was immaterial. Any reward, whether monetary or otherwise, would do. He submitted that *Palmer on Bailment*, 2nd ed (1991), p 1209, note 12a confirmed this approach, as did the Supply of Goods and Services Act 1982, section 6(3), which provides that a contract can be a contract of hire for the purposes of that Act whatever is the nature of the consideration.

14. It seems to me however that this approach concentrates too much on one aspect only of the agreement. It overlooks the commercial reality of the transaction seen as a whole. As Thomas LJ put it in the Court of Appeal, para 31, following the approach of the First Division of the Court of Session in *Eurocopy (Scotland) plc v Lothian Health Board*, 1995 SLT 1356, it is necessary to look at the commercial purpose of the agreement. I think that, when the Location Agreement is looked at in this way, it takes on an entirely different aspect from that suggested by Mr Ferris.

15. The preamble to the Location Agreement indicates that it was conceived primarily as a means of maximising TRM's opportunity to obtain a return on its investment in the photocopier by locating it in a position where it would be used by as many people as possible. It refers to the parties' desire to allow TRM to locate the photocopy machine, including the promotional material, at the retail locations owned and operated by the Business. The photocopier is to be available for use by the Business, which undertakes to pay at the agreed rate for each copy that it makes less the agreed amount of commission. But the fact that its use by the Business on these terms is not the primary purpose of the agreement is demonstrated by clause 2.3 of the agreement, by which the Business undertakes to provide a clean, safe and orderly location for the equipment which is easily visible and accessible by the Business's customers. It is demonstrated too by clause 2.6, by which the Business undertakes to oversee the use and operation of the equipment by its customers making best efforts to maximise copier uptime. The Commission Schedule, which provides for the commission or profit that the Business is to earn from the location of the equipment on its premises, tells the same story. It anticipates the possibility of thousands of copies being made each month, on each of which business

commission will be paid, up to and beyond 14,000 copies. Such volumes far exceed the number of copies that an individual retailer is likely to make each month for his own purposes.

16. The question was asked in the course of the argument: who is paying whom for this arrangement? Miss Williamson, in her brief address, adopted that approach. To that question there can, in my opinion, be only one answer. From the commercial point of view the emphasis is all one way. TRM is paying the Business commission on each copy made on the equipment as consideration for the benefit that TRM has obtained by having its machine and its promotional material located in a place where it is easily visible and accessible by the Business's customers. The Business is under no obligation to use the equipment for its own purposes. If it does, the cost per copy is the same as that for everyone else, as is the rate of commission. It does not have to pay anything for any benefit to its own business that may result from the presence of the photocopier on its premises. The obligations that it undertakes are all designed to maximise the use of the equipment by its customers in order to promote the interests of TRM. This kind of bailment does not fall precisely into any of the five classes listed in *Jones on Bailment*: see para 9, above. It may be described as the delivery of the photocopier to the bailee in return for a reward to the bailee, by way of a commission on all sums paid for the copies made by it, for being permitted to locate it on his premises. It is sufficient for the purposes of this case to say, however, that the photocopier itself is not being hired by the bailee.

Conclusion

17. I agree with both the judge and the Court of Appeal that the preliminary issue must be decided in TRM's favour. The Location Agreement in TRM's standard form is not a consumer hire agreement within the meaning of section 15 of the Consumer Credit Act 1974. I would dismiss the appeal.

LORD HOFFMANN

My Lords,

18. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hope of Craighead. For the reasons he gives, with which I agree, I too would dismiss this appeal.

LORD RODGER OF EARLSFERRY

19. I have had the advantage of considering the speech of my noble and learned friend, Lord Hope of Craighead, in draft. I agree with it and, for the reasons he gives, I too would dismiss the appeal.

LORD WALKER OF GESTINGTHORPE

My Lords,

20. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Hope of Craighead. I agree with it, and for the reasons given by Lord Hope I too would dismiss this appeal.

BARONESS HALE OF RICHMOND

My Lords,

21. I agree that this appeal should be dismissed, for the reasons given by my noble and learned friend Lord Hope of Craighead. However, I do so with some unease. This happens to be a dispute between two rival providers of copying machines to post offices, shops and similar small businesses for use by the public or the businesses themselves. Neither needs any special protection from the other. But this might have been a dispute between the provider of such a machine and the small business

to which it was provided. It turns on the application of a piece of legislation, the Consumer Credit Act 1974, which was designed to protect consumers such as these small businesses. It would be unfortunate if that protection were to turn on fine distinctions between the terms of particular contracts, which are usually in standard form and may not be carefully studied by the consumer. As the Crowther Committee, whose report led to the 1974 Act, put it, “The greatest weakness of the present law of credit, and that from which most of the other defects stem, is the failure to look behind the form of a transaction and deal with the substance” (*Consumer Credit, Report of the Committee*, 1971, Cmnd 4596, para 4.2.2).

22. So it is worthwhile recalling why consumer hire contracts were included in the 1974 Act at all, despite the fact that they do not usually involve the provision of any credit (see Cmnd 4596, esp paras 1.1.9, 6.2.53 to 6.2.59, and N Palmer and D Yates, “The application of the Consumer Credit Act 1974 to consumer hire agreements” (1979) 38 CLJ 180, at 180). If a chattel such as a television set or a car is rented out for a long period, perhaps for most of its expected life, then the effect is much the same as a hire purchase or conditional sale agreement. The capital cost is spread out over the term and repaid by the consumer in the form of rental payments at the end of which there will be little if any value left in the item. The hirer who gets no ownership at the end of the term is even worse off than the hirer who at least becomes owner when all the instalments are paid. But he may be locked into the hiring for an unduly long time, perhaps longer than the useful life of the item hired. And there is a risk that he will not have understood the difference between hire and hire purchase (see *Galbraith v Mitchenall Estates Ltd* [1964] 2 All ER 653). Hence the main protections recommended by the Crowther Committee were the provisions of information and a right of restitution in certain circumstances; the Act added the requirement that the supplier be licensed and gave the consumer the right to terminate the hire (see White Paper, *Reform of the Law on Consumer Credit*, 1973, Cmnd 5427).

23. Although the English definition of a consumer hire agreement in section 15 of the 1974 Act appears to apply to all kinds of bailment (see the concerns expressed by Palmer and Yates, above), it is common ground in this case that it is confined to bailment by way of hire. The essence of hire is that the hirer acquires the use and possession of the goods from the provider in return for a rent, whether payable in cash or in kind. It is to be contrasted with an agreement where the provider pays a person to keep, look after or work upon his goods. So the issue in this case became: who was paying whom for what? Were the businesses

paying the provider of the copier for the privilege of having the machine on their premises so that they and their customers could use it? Or was the provider paying the businesses for the privilege of locating his machine in a place where it might generate an income for them both?

24. I do agree with Lord Hope that this agreement fell into the latter category. Nothing had to be paid unless the copier was used. When it was used, a set price per copy was payable to the provider. The business had to collect this money and account to the provider for it. But the business earned a commission on each copy made. It did not cost the business a rent to have the copier there. Instead the business stood to gain from its presence. And that gain came, not from profits which the business had earned with the machine, but from profits which the provider had earned. One can imagine consumer hire contracts in which a person hires a money-making chattel with a view to putting it to profitable use. The classic example of hire purchase was a sewing machine which the seamstress used to make or repair clothes or other linens for reward out of which she was able to afford the rental payments. But that is not what is happening here. The reward which the business makes from having the machine on its premises is not from any profitable use to which the business itself puts the machine. It is from the use to which others put it. The fact that the business may be one of those users makes no real difference. The business does not have to pay to have the machine irrespective of its profitability.

25. This may look like a fine distinction but the arrangement does not suffer from the main mischiefs which led the Crowther Committee and the promoters of the 1974 Act to include consumer hire within its provisions. Its worst feature is that the business is committed to housing (and insuring) the machine for three years, but this is counterbalanced by the lack of any commitment to pay for it. I am therefore persuaded that we need not be too troubled by the fear that, as the Crowther Committee commented of the common law, “If the merits of the first dispute had been the other way, the court might well have formulated the statement of principle quite differently, and the whole direction of the law in that area might have been altered” (para 5.1.4).