Rowland v Divall: logical fallacy?

Daniel M Collins, Senior Lecturer in Law, Middlesex University, Mauritius

Sections 12, 13 and 14 of the Sale of Goods Act 1979 (as amended), provide a consumer with fundamental and inalienable "rights" when purchasing goods or entering into a 'Contract of Sale' wherein "the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price" (section 2(1)). This note will specifically address the first of these implied rights, section 12, in the context of current legislative change, although the overarching hypothesis is that the courts' interpretation of this provision is both confusing and intrinsically unfair.

Section 12(1) provides that:

> "In a contract of sale…there is an implied term on the part of the seller that in the case of a sale he has a right to sell the goods, and in the case of an agreement to sell he will have such a right at the time when the property is to pass".

This simply codified this traditional common law position, and concerns the right to sell and not the transfer of title, which means that the seller need not be the legal owner of the goods, provided he possesses the authority to sell. Consequently, although the right to sell and ownership *are* generally co-existent, this is not always so. For example, an agent does not own goods, but derives an authority or right to sell from his or her principal and, more unusually, ownership may be encumbered by third party rights, thereby negating a right to sell, as happened in *Niblett* v *Confectioners Materials* [1921] 3 K.B. 387, where injunctive relief was granted to prevent the defendant owners of tins of condensed milk from selling these whilst their labels bore the registered trademark of a competing manufacturer; ownership did not create a coterminous right to sell and conferred a power on the trademark holder to, in effect, prevent the sale. It is worthwhile noting that this further constituted a breach of section 12(2)(b), requiring that "the buyer will enjoy quiet possession of the goods except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed or known."

Section 12 breach

By virtue of section 6(1)(a) of the Unfair Contract Terms Act 1977, liability for breach of the obligations arising under section 12 cannot be excluded or restricted by reference to any contract term (subject to the contracts excepted in that Act), and section 12(5A) confirms that the obligation under section 12(1) is a contractual condition, the legal basis of which is that there has been a total failure of consideration or, more specifically, the buyer did get any of what he paid for as the seller did not have the right to sell. The fallacious nature of this supposition is best highlighted by *Rowland* v *Divall* [1923] 2 KB 500, a case doubtless familiar to commercial practitioners and academics alike.

Simply put, the claimant, a motor dealer, purchased a car from the defendant for £334. Two months later, he sold it to a local buyer for £400. After this buyer had used the car for a further two months, the car was repossessed by the police as having been stolen. The claimant repaid the £400 to the buyer and sued the defendant for return of the £334 purchase price. In reversing the first instance decision of Bray J., the Court of Appeal concluded that there had been a total failure of consideration. The claimant had bargained for ownership not use. The four months use was regarded as irrelevant and no set off (or a sum deducted to take into account any advantage received or detriment suffered) was allowed for such extensive use, with Atkin LJ opining (at 507) that the buyer had:

> "not received any part of that which he contracted to receive - namely, the property and right to possession - and, that being so, there has been a total failure of consideration. The plaintiff is entitled to recover the £334 which he paid."

Such restitution was supported by Bankes LJ, who commented (at 504) that it could not "possibly be said that the plaintiff received any portion of what he had agreed to buy…namely a car to which he would have title", and could recover all of the purchase money. Essentially, this would appear to countenance the right to extensive free use of the goods without the buyer having to make allowance for the often extensive use he has received, despite such constituting consideration within most accepted definitions. Furthermore, we are told by *Mason* v *Burningham* [1949] 2 KB 545, that where a buyer has incurred other losses or expenses, for example repairs, these can also be claimed from the seller. Although the Law Commission has suggested that such "unjustified enrichment would not be solved by requiring the buyer of goods with defective title to make a money allowance in favour of another person who also does not have a valid title to the goods" (Law Com No 160, Cmnd 137 (1987) at 57), the view of the Court of Appeal in *Rowland* v *Divall* has not received universal approval: for example, the Law Reform Committee (1966; Cmnd. 2958) argued that an allowance should be made for use by the innocent buyer in such situations, and Professor Atiyah has referred to the decision in *Rowland* v *Divall* as "a fallacy". One may further argue that such a position is directly contradictory of other contractual tenets: for example, section 1 (3) of the Law Reform (Frustrated Contracts) Act 1943, enables a party to recover (or deduct) an amount for a "valuable benefit" conferred before discharge as an exception to the full recovery principle, and there would seem to be further inconsistency with other provisions of the Sale of Goods Act – particularly section 35, where a buyer is deemed to have "accepted" goods, thereby having a claim in damages only, where, if after a reasonable time, he fails to intimate rejection to the seller. By direct transposition into the context of *Rowland* v *Divall*, four months would appear too long a time to enable discharge, and so difficulties in valuing use and depreciation notwithstanding, there would seem to be a strong case for reform of the status quo.

Seismic legislative change

We are currently seeing a seismic change in the nature of consumer protection. For example, the Consumer Rights Directive is being introduced through several

statutory instruments to include The Consumer Rights (Payment Surcharges) Regulations 2012, and the reform of distance and off-premises sales in The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (which supersede the Consumer Protection (Distance Selling) Regulations 2000 and the Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations 2008). These latter Regulations provide that where a consumer exercises their right to cancel a sales contract (pursuant to Regulation 29) and

> "the value of the goods is diminished by any amount as a result of handling of the goods by the consumer beyond what is necessary to establish the nature, characteristics and functioning of the goods, the trader may recover that amount from the consumer, up to the contract price " (Regulation 34(9)).

For clarification, Regulation 34(12) states that -

> "Handling is beyond what is necessary to establish the nature, characteristics and functioning of the goods if, in particular, it goes beyond the sort of handling that might reasonably be allowed in a shop."

So, in the context of the cancellation of distance contracts, there will be a pecuniary charge imposed on the consumer subject to the above criteria. Such is clearly sensible, not least because any handling may well diminish the value of the goods and arguably constitutes use. On this basis, one may question why the unfettered use of a motor vehicle does not also provide the right to claim a suitable deduction from any refund granted upon breach of section 12?

It is somewhat disappointing that the government has failed to address the *Rowland* v *Divall* 'injustice' through its imminent 'flagship' Consumer Rights Bill 2013, prima facie a commendable attempt to simplify and consolidate a number of areas of consumer protection under a single piece of legislation (due to come into force by October 2015), and to provide a new statutory regime for consumer contracts in such key areas as description, quality, passing of property, contracts for the supply of services and exemption clauses. Significantly, although there will be a number of new provisions pertaining to remedies and digital content contracts, there will not be any change to the existing section 12, and a parallel provision appears in clause 16. This is surprising, more so when considering that the legislature has addressed its collective mind to the issue of 'use' elsewhere in the Bill. For example, as part of the overhaul of the remedy regime, any refund due to the consumer as a result of them exercising their "final right to reject" (where, for example, the goods are not of satisfactory quality) may be reduced to take account of any use of goods in the period since they were delivered.

By way of counterbalance, it may be suggested that the aforementioned provisions in both the Consumer Rights Bill 2013 and The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, enabling a seller to deduct an element for use from any refund, is predicated (albeit impliedly) upon him or her having initial ownership and the "right to sell". However, such a justification would seem sophistic, and it is arguably the case that the real emphasis should be focused more on the unfairness of permitting a buyer the unfettered use and enjoyment from

goods, with the practical implication being that they obtain full restitution in the event of a breach of section 12.