

LAYBY SALES

REPORT OF THE CONTRACTS AND  
COMMERCIAL LAW REFORM COMMITTEE

Presented to the Right Honourable the Minister of Justice  
in August 1969

REPORT OF THE CONTRACTS AND COMMERCIAL  
LAW REFORM COMMITTEE ON THE LAW  
GOVERNING LAYBY SALES

To: The Right Hon. the Minister of Justice

In accordance with our terms of reference we have examined the law relating to layby sales and report as follows.

1. During the last thirty years a special type of contract of sale known as the layby agreement has become common in New Zealand. The essential feature of a sale "on layby" as it is popularly called is that the vendor retains possession of the goods until the purchaser has paid the whole of the price for them. In some cases it is an express term that the property in the goods does not pass to the purchaser until he has paid the full price.

We were informed by persons having practical knowledge in this field that a high proportion of layby purchases are by young people, for whom it is a form of saving and who may sometimes have difficulty in obtaining the goods on credit or on hire-purchase terms. We think it important to bear this in mind in considering what protection should be given to those who purchase goods in this way.

2. The layby contract does not appear to have been the subject of any reported decision in New Zealand, England or Australia, or to have attracted the attention of the legislature in any jurisdiction except New South Wales. None of the standard books on the sale of goods discuss it as a special class of contract of sale. Only a few

mention it at all, and that in passing.<sup>(1)</sup> The term "layby" is a stranger to the judicial dictionaries we have consulted, and appears to be an Australian and New Zealand usage. However, there is a definition of a layby sale in the Layby Sales Act 1943 of the State of New South Wales and we think that this definition, which we now set out, will suffice for the purposes of this report.

"'Layby sale' means a sale of goods or an agreement to sell goods under conditions, expressed or implied, which provide that -

- (a) the goods sold or agreed to be sold will not be delivered to the purchaser until the purchase price or a specified part or proportion thereof is paid, whether or not any charge is expressed to be payable for storage of the goods; and
- (b) the purchase price or, where a deposit is paid, the balance of the purchase price -
  - (i) is to be payable by instalments (whether the number of instalments or the amount of all or any of the instalments is fixed by those conditions or is left at the option of the purchaser) payable over a fixed or ascertainable period; or
  - (ii) is to be paid at the expiration of a fixed or ascertainable period with an option, express or implied, for the purchaser to make payments in respect of the purchase price during that period; and where, by virtue of two or more agreements none of which, by itself, constitutes a layby sale, goods are sold or agreed to be sold subject to the conditions referred to in the foregoing provisions of this definition, the agreements shall, for the purposes of this Act, be treated as a single agreement made at the time when the last agreement was made."

(1) Australian Mercantile Law, Yorston & Fortescue, 13th ed. 1965; The Law of Sale of Goods in Australia and New Zealand, Sutton, 1967; Hire Purchase Law, Else-Mitchell & Parsons, 4th ed. 1968.

3. A layby sale differs from the ordinary hire purchase transaction, in which the purchaser acquires possession immediately after paying his deposit. In both cases he pays for the goods by instalments. There is a very wide definition of a hire purchase agreement in the Hire Purchase Agreements Act 1939, and this includes conditional sales as well as hire purchase agreements in the narrower sense. However the Act does not apply in any case where the property in the goods passes at the time of **sale**, and in any event the remedies it gives are clearly adapted to cases where the purchaser has possession of the goods and is paying the instalments.<sup>(1)</sup>

4. It is evident that the vendor under a layby agreement is in a very secure position. He has possession of, and in many cases, the property in the goods, and he has the purchaser's money pending payment of the full price. He is the recipient of the purchaser's trust to a degree unusual in the general run of mercantile transactions. Especially is this so where the layby contract does not require the appropriation of specific goods to the contract at the time it is made. In this respect contracts fall into two classes. The first is an agreement for the sale of goods which are there and then identified and which the vendor undertakes to lay aside for the purchaser pending completion of the contract. This form of contract is frequently used for speciality goods such as ladies' garments, but is, according to our information, also used sometimes for other goods such as heaters. The other form of contract requires no such appropriation and consists merely of a promise by the vendor to deliver the goods when payment has been made to him in full. Assuming

(1) A layby sale would be included within the definition of a "credit sale agreement" in the Hire Purchase and Credit Sales Stabilisation Regulations 1957 if the instalments are spread over a period of nine months or more. D.F. Dugdale, Hire Purchase in New Zealand, 2nd ed. 1965.

that the vendor will remain solvent, there seems to be little objection to this form of contract where it relates to mass-produced goods, any one of which will answer the contract.

5. There is another class of contract which we mention for the sake of completeness. This relates to what are called "Christmas accounts" or "Christmas clubs". A customer agrees that he will pay money into an account kept by a storekeeper, the accumulated savings being used at Christmas time to purchase from the storekeeper goods selected by the customer. We do not regard this transaction as amounting to a layby sale. It is really an unsecured deposit, and we do not mention it further.

#### Defects in Law

6. On the whole the layby system seems to have worked in New Zealand with little friction and with general satisfaction. Nonetheless cases of hardship and injustice have occurred. The Department of Justice has information of a number of complaints made to Government from time to time by customers of companies carrying on a layby business. Some companies failed with consequent loss to the customers. The most notable example is that of the Northern Linen Company Limited, a company incorporated under the Companies Act in December 1960 with a nominal capital of £2,000. It had borrowed on the security of debentures charging all its undertaking and assets sums aggregating £7,500. The company fell into financial difficulties and in February 1965 the secured creditors appointed a receiver. The company went into liquidation in March 1965. In the liquidation proofs of debt were lodged by some 3,000 layby purchasers as well as many trade creditors. The total debts aggregated approximately £40,000 of which £26,000 related to layby sales.

In many cases the goods subject to the layby contract were not found on liquidation, with the consequence that

the layby customers were in law merely unsecured creditors ranking after the secured creditors. But even if the goods had been found, title under the terms of the particular agreement would not have passed unless all instalments had been paid. The layby customers in this case sustained heavy losses. An unfortunate feature was that most of the customers were young girls who had entrusted their savings to the company for the purchase of trousseaux.

7. The Department has on record details of two other failures of companies dealing by the layby method, one in 1960 where losses of approximately £18,000 were incurred and another in 1962 where losses aggregating some £17,000 were incurred. A third company selling linen goods on layby has recently gone into voluntary liquidation, and purchasers are likely to suffer a substantial loss.

8. We have considered representations made to the Minister of Industries and Commerce by the Consumer Council in 1965, a copy of which was supplied to us by the Consumer Institute, the Council's successor. The Council did not object to layby methods of selling. In fact, says the Council, it recognises that layby selling is a form of saving which enables many to buy items which otherwise they might have to go without and when run under proper control it is, says the Council, quite an acceptable method of trading. We agree with this view. However the Council claimed that the system is open to exploitation by the dishonest operator and urged the Government to bring down legislation to control the whole field of layby trading. The Council commended to the attention of Government the provisions of the Layby Sales Act 1943 of the State of New South Wales, which, said the Council, appeared to be very suitable for adoption as a basis of similar legislation in New Zealand.

9. The managing director of a New Zealand company which does a substantial business in the layby field has also suggested that parts of the New South Wales Act could well be introduced in New Zealand. He thought that legislation should provide -

- (a) that within one month after the sale the merchant should appropriate actual goods to the sale, at which time they become the customer's goods subject only to a lien for unpaid purchase money;
- (b) until the actual goods are appropriated the merchant should be entitled to collect a deposit only, which should be paid into a special trust account. Until appropriation the customer should be able to withdraw and have the deposit refunded.

Where the goods were bulky and required substantial storage space, the merchant should be exempted from this obligation by Order in Council, provided he obtained an adequate fidelity bond.

10. The New South Wales Act contains 22 sections extending over 24 printed pages. It is a complex piece of legislation. The salient features of the Act are -

- (a) Vendors are prohibited from entering into layby sales unless the goods are in their possession at the time the agreement is made, except where;
  - (i) the contract provides that the purchaser shall not pay more than 20% of the price before the goods have been received by the vendor and inspected and approved by the purchaser, and the deposit is held by the vendor for the benefit of the purchaser in a trust account opened

with a trading bank (s.3(1) and (2)); or

- (ii) the goods are of a class defined by the Governor and the vendor has taken out a fidelity bond for an amount fixed by the Minister (s.3(5)).

The vendor who does not observe these provisions is guilty of an offence and liable to substantial penalties.

- (b) Every vendor must keep a register of layby sales and enter certain particulars therein.
- (c) Every vendor must at the time the contract is made deliver to the purchaser a sales docket containing a description of the goods and an itemised statement of the price, a document in writing setting out the terms and conditions of the contract and a notice in writing in the prescribed form containing a summary of the provisions of the Act. Parol agreements varying, modifying, adding to, or substituting other terms are void as against the purchaser (s.5).
- (d) The vendor is obliged to set the goods aside, where the goods are in the possession of the vendor, at the time of the contract or as soon as practicable after the contract was made, and where the goods are not in existence or not in the possession of the vendor at the time of the contract, as soon as practicable after the goods have been accepted and approved by the purchaser. From such time the vendor must hold the goods separate and distinct from his other goods, and identified with reference to the serial number of the layby sale. The purchaser and the police have a right to inspect the goods. It is not specifically



enacted that such goods are held in trust for the purchaser so as to be excluded from the vendor's general assets, but it would appear that this was the intention of the legislature.

- (e) There are specific provisions regulating the right of the parties to determine the sale (sections 8 and 9) and regulating the rights of the parties on determination (section 10). Contracting out is prohibited (section 14) and certain terms and conditions are imported (section 15).
- (f) Moneys received by the vendor from the purchaser are to be lodged with a separate trust account in the name of the vendor with a trading bank and are not available for the vendor's general creditors (section 17).

11. We are of the opinion that the legislature should intervene to protect against abuses of the sort that have occurred, and in the interests of fair dealing. However we regard the New South Wales legislation as far too onerous and detailed for New Zealand requirements. We think it significant that no other Australian State has followed the New South Wales example. Our specific inquiries in Australia have shown that, with one exception which we later refer to, there is thought to be little need for regulation of layby agreements.

12. We see little advantage in practice in requiring the giving of fidelity bonds, the segregation of layby goods from the vendor's assets, or the banking of payments by layby purchasers in separate trust accounts as under the New South Wales Act or (in a different field) the Building Contracts (Deposits) Act 1962 of the State of Victoria. These requirements offer no real security against the dishonest trader, who will simply ignore them.

Indeed the semblance of security may be exploited by the cheat in order to delude his victims more effectively. Another possibility that has been raised is the registration of persons or companies who sell goods on layby. Having regard to the multiplicity of businesses, both small and large, that are likely to wish to sell goods in this manner, we are satisfied that an effective system of registration could hardly be achieved and that the inconvenience to traders would far outweigh any benefits.

13. In our opinion the proper course is to recognise layby customers as a special class of creditors in the insolvency of the layby vendor. The very name "layby" is likely to give the customer a sense of security and those who solicit purchases are trading on it. We think that those who finance the vendor's business for gain and those who extend credit to the vendor to encourage the vendor to buy their goods should yield priority to the vendor's layby customers. They assist the vendor in order that he may sell and it seems to us proper that they should be bound within reason by the vendor's contracts in the ordinary course of the business they have made possible. If the property in goods had passed under an ordinary instalment sale, the customers would as owners of the goods take precedence over the interests of secured and unsecured creditors, now that s.61(c) of the Bankruptcy Act 1908 (the "order and disposition clause") is about to disappear. What we are suggesting is that for this purpose the purchaser should be treated as if the property had passed and, if there are no goods available for him, should be advanced in priority over the general and secured creditors.

14. If such a preference is established, financiers and merchants will, in their own interest, exercise a degree of supervision over layby vendors. The unstable layby vendor will find it more difficult to raise finance or obtain credit. Some business will be curtailed but

this necessarily follows the achievement of the objective of giving greater security to the layby purchaser.

Recommendation

15. We therefore recommend that legislation should be enacted to carry into effect the following propositions -

- (a) If on the winding up or bankruptcy of a layby vendor, there are goods of the kind which the layby vendor has contracted to sell to a layby purchaser, whether appropriated to such contract or not, the layby purchaser shall be entitled, on payment of the balance of purchase price then unpaid in the manner and at the times prescribed by the contract, to complete the purchase and obtain the property in the goods. If there are insufficient unappropriated goods to satisfy all layby purchasers, the goods should be available to earlier purchasers in preference to late purchasers. The above rights should not be available if no payment by the layby purchaser has been made within the three months immediately preceding the winding up or receivership, if that is a breach of the contract.
- (b) If there are no goods, or if the goods available are insufficient to meet the layby contracts, then each layby purchaser who has not secured the goods comprised in his contract shall be a creditor in the liquidation or bankruptcy to the extent of the payments he has made to the vendor on account of the purchase price with priority over all unsecured creditors and over creditors secured by a floating charge but subject to the priorities established by section 308(1) (a) (b) and (c)

of the Companies Act 1955. There should be a qualification as in paragraph (a) above for the case of the purchaser in default.

- (c) The priority we recommend in paragraph (b) should bind a receiver for debenture holders in like manner as is provided by s.101 of the Companies Act 1955.
- (d) Layby purchasers who are officers or employees of the layby vendor, and their spouses, should be excluded from this preference.
- (e) The provision should apply only to retail sales, so that a merchant will have no special preference.

#### Other aspects

16. What we have discussed so far are the problems that may arise if a vendor becomes insolvent before the layby agreement is performed. There are however certain other features of layby agreements that we consider call for attention and that could in our opinion be corrected without imposing any undue burden on traders. We have in mind in particular the situation where the purchaser has paid a greater or lesser amount towards the price of the article and for one reason or another does not complete or is not in a position to complete the purchase.

17. In the absence of a special term in the contract, the legal effect of a failure by the purchaser to complete payments is uncertain. The initial payment may well be treated by the law as a deposit, to be forfeited if the purchaser fails to pay the whole price in accordance with the contract. No doubt a vendor who is willing to complete his side of the bargain could sue the purchaser for the rest of the price (White and Carter (Councils) Limited v. McGregor [1961] 3 All E.R. 1178), although in practice this would be unlikely. On the other hand,

if the vendor accepts the purchaser's default as putting an end to the contract, the purchaser may be able to require him to refund payments made to the extent that they exceed his actual losses.

What is more significant is the practice sometimes adopted of stipulating that all payments made are to be forfeited if the goods are not purchased. For example, the agreement entered into by those who bought goods from the Northern Linen Company contained the following term -

"No portion of this order will be delivered until full purchase price is paid. Cancellation entails loss of deposit and all payments made."

18. The reasons for failure to complete payment on goods are no doubt as varied as human nature. It is easy to think of some that the ordinary person would regard as adequate - illness, loss of employment or of overtime, or the additional demands of dependants on the purchaser's resources. Perhaps he simply finds he has over-committed himself and has debts that must be paid off in priority. A comparable situation in the hire purchase field led in the nineteen thirties in New Zealand and in many other jurisdictions to legislation such as is contained in sections 3 and 4 of the Hire Purchase Agreements Act 1939, and it seems to us that the reasons for this are equally valid in the case of layby sales. We recall that layby purchases can be a form of saving and are often made by young people.

19. There are two types of case. The first is where at the time of the agreement a unique article is set aside; the second where the contract is for the purchase of one of a class of goods having identical characteristics. In the second case the vendor is likely to lose little or nothing by the termination of the contract. Any inconvenience is compensated for by the fact that he has had the use of the purchaser's money without interest.

There seems no reason why a purchaser on giving notice should not be able to receive back what he has paid.

20. Where the agreement is to purchase a specific article which is (or ought to be) set aside the problem is less straightforward. The most obvious example is that of fashion goods whose value may sharply decline with the passage of time. Having regard to the seasonal nature of so much women's clothing, a termination of the contract even after a comparatively short period might render the goods largely unsaleable. On the other hand, this will not always happen; and indeed it is improbable in any case where specific goods are bought on layby because the goods, or a particular design, are in short supply, e.g. a dinner service of a particular pattern. The resale value of these goods may very well be as high after an interval as at the time of the agreement.

21. We disapprove of the retention by the layby vendor of payments made by the purchaser in excess of the vendor's losses. Whether or not such retention is made pursuant to a term of the contract, we think the law should prohibit it. We are satisfied that in the vast majority of cases, the retailers who engage in this class of business do give relief to their customers in proper cases. Indeed the New Zealand Retailers Federation said in evidence before the Tariff and Development Board in its inquiry into instalment credit trading that a refund in full was "generally" given on termination of layby contracts for non-fashion merchandise. Legislation conferring a right to a proper refund will therefore not cause hardship to responsible vendors, while it will grant an obviously necessary relief against what we consider to be unconscionable bargains.

22. The New South Wales Act has met the problem in sections 8-10 which we set out in an appendix to this report.

In essence this applies to layby sales the concept that has found general favour in relation to hire purchase agreements - that the vendor is entitled to protection from loss should the sale not be completed but is not entitled to a windfall at the customer's expense. We do not believe that the enactment of a provision along the New South Wales lines would unduly burden traders. It is of interest that a report on the law relating to consumer credit and to money-lending made to the Standing Committee of Attorneys-General in Australia, although considering that there was in general little need to regulate layby agreements, has recommended legislation in all States to protect the consumer upon default in payment of instalments. This report points out that where a purchaser has paid most of the instalments a forfeiture clause is capable of working injustice and gives the seller an undeserved benefit. The recommendation is that other States copy section 10 of the New South Wales Act.

23. One feature of the New South Wales provision is that unless the trader proves otherwise the value of the goods when the sale was determined is deemed to be the same as their value when it was made. We have reservations about the fairness of this in the case of fashion goods, although to a degree the vendor already protects himself here when he stipulates a shorter time for completion in the case of these goods, as we understand he normally does. We can see no formula that would effectively distinguish fashion goods from other goods, and therefore consider that where the goods are appropriated to the contract at the time of sale any such presumption should apply only if the sale is determined within one month. Subject to that we favour legislation along the lines of sections 9 and 10. We do not think it necessary as in section 8 to give the vendor any special right to determine the sale.

### Recommendation

24. We recommend that legislation be enacted whereby a layby purchaser who does not wish to complete payment may give notice (which we do not consider should have to be in writing) and is thereupon entitled to a refund of the difference between the total amount paid plus the value of the goods at the time the sale is determined and the purchase price of the goods plus 20 per cent of the cash price of the goods as a conventional figure to recoup the vendor for his selling costs. The value of the goods at the time when the sale is determined shall prima facie be the price payable under the layby agreement, but where the contract is for the sale of specific goods this presumption shall apply only if the sale is determined within one month.

25. There is one other consequence that calls for examination where the contract is for the sale of goods which are identified when it is made. In the ordinary case it is suggested<sup>(1)</sup> that this would result in the property in the goods passing at once to the purchaser. But if this happens, the risk also passes prima facie and if the goods are destroyed by fire or other cause the purchaser would shoulder the loss. This is something that the average layby customer could hardly be expected to appreciate and if he did he would be unlikely to know what to do about it. As it is far easier and more convenient for the seller to insure than for the buyer, common sense suggests that the seller should carry the risk as long as the goods are in his possession notwithstanding that the property may have passed to the buyer. We so recommend.

(1) Yorston & Fortescue, Australian Mercantile Law, 13th. ed., 235-6; Sutton The Law of Sale of Goods in Australia and New Zealand.



For the Committee

A handwritten signature in dark ink, appearing to read 'M.F. Chilwell', is written above a horizontal line.

Chairman

DATED at Wellington the 18th August 1969.

Members:

Mr M.F. Chilwell, Q.C. (Chairman)

Mr B.J. Cameron

Professor B. Coote

Mr D.F. Dugdale

Professor E.P. Ellinger

Mr W. Iles

Mr C.I. Patterson

APPENDIXLAY-BY SALES ACT 1943 (N.S.W.)SECTIONS 8-10

## 8. Determination by vendor of lay-by sale.

(1) A vendor shall not, in the exercise of any power expressly or impliedly given to him by the lay-by sale, determine the lay-by sale except as provided in this section.

(2) Notice of intention to determine the lay-by sale shall be given to the purchaser at his place of abode last known to the vendor, and shall specify the date, not being earlier than seven days after the date of service of the notice and of the statement herein-after referred to, upon which the lay-by sale will be determined.

Such notice shall be accompanied by a statement signed by the vendor or his agent showing the following particulars -

- (a) the purchase price of the goods;
- (b) the total amount of moneys paid and the value of any other consideration provided by the purchaser in respect of the lay-by sale;
- (c) the amount which the vendor estimates to be the value of the goods at the time of the notice, indicating whether or not such value is the same as the value at the date of the sale or agreement to sell;
- (d) the amount which the vendor estimates is sufficient to recoup him for selling costs in respect of the lay-by sale;
- (e) the balance estimated to be due to the vendor or the purchaser as the case may be.

(3) If, on or before the date specified in the notice, the purchaser pays or tenders to the vendor the balance due in respect of the purchase price of the goods the vendor shall deliver the goods to the purchaser.

(4) This section shall apply to and in respect of lay-by sales made before and not completed at the commencement of this Act as well as to and in respect of lay-by sales made after such commencement.

9. Right of purchaser to determine lay-by sale.

(1) A purchaser shall, at any time before the purchase price under a lay-by sale has been paid, be entitled to determine the lay-by sale by giving notice in writing to the vendor of his desire to determine the lay-by sale. The lay-by sale shall be determined as from the date of service of the notice or from such later date as may be specified in the notice.

(2) The vendor shall, within four days after he has received a request in writing from the purchaser and the purchaser has paid or tendered to him the sum of one shilling for expenses, supply to the purchaser a statement signed by him or his agent showing the following particulars -

- (a) the purchase price of the goods;
- (b) the total amount of the moneys paid and the value of any other consideration provided by the purchaser in respect of the lay-by sale;
- (c) the amount which the vendor estimates to be the value of the goods at the time of the notice, indicating whether or not such value is the same as the value at the date of the sale or agreement to sell;
- (d) the amount which the vendor estimates is sufficient to recoup him for selling costs in respect of the lay-by sale;
- (e) the balance estimated to be due to the vendor or the purchaser as the case may be.

Any vendor who, without reasonable cause, neglects or refuses to supply any such statement shall be guilty of an offence against this Act and shall be liable to a penalty not exceeding ten pounds.

(3) Nothing in this section shall prejudice any right of the purchaser to determine a lay-by sale otherwise than by virtue of this section.

(4) This section shall apply to and in respect of lay-by sales made before and not completed at the commencement of this Act as well as to and in respect of lay-by sales made after such commencement.

10. Rights of vendor and purchaser on determination of lay-by sale.

(1) Where a lay-by sale is determined under section eight or section nine of this Act the following provisions shall have effect -

- (a) If the total amount of the moneys paid, and the value of any other consideration provided by the purchaser in respect of the lay-by sale, and the value of the goods at the time when the lay-by sale is determined, exceeds the purchase price of the goods and an amount sufficient to recoup the vendor for selling costs in respect of the lay-by sale, the purchaser shall be entitled to recover such excess from the vendor as a debt due and payable by him to the purchaser.
- (b) If the purchase price of the goods and an amount sufficient to recoup the vendor for selling costs in respect of the lay-by sale exceeds the total amount of moneys paid, and the value of any other consideration provided by the purchaser in respect of the lay-by sale is determined, the vendor may recover such excess from the purchaser as a debt due and payable by him to the vendor, but shall not be entitled to recover any additional sum, whether as penalty or compensation or otherwise in consequence of the determination of the lay-by sale.

(2) Where a lay-by sale has been determined under section eight or section nine of this Act the value of the goods at the time when the lay-by sale was determined shall, unless the contrary is proved, be deemed to be the value of such goods at the time when the lay-by sale was made; and any loss of value of such goods whether due to deterioration of the goods or otherwise shall, unless the vendor proves that the loss could not have been avoided by the exercise of reasonable diligence on his part, be disregarded.

(3) Where a lay-by sale has been determined under section eight or section nine of this Act and, at the time when the lay-by sale was determined, the goods were not in existence or not in the possession of the vendor, then the value of the goods at the time when the lay-by sale was determined shall, for all purposes of this Act, be deemed to be the value of the goods at the time when the lay-by sale was made.