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Plausible rogues: contract and property

A. INTRODUCTION

The plausible rogue in *Shogun Finance Limited v Hudson*,¹ pretending to be a Mr Durlabh Patel, whose driving licence he had obtained unlawfully, went shopping for a “four-by-four”. A Mitsubishi motor dealer, after running a credit check on Patel, delivered a £22,000 Shogun, the rogue having made the required deposit with a bad cheque and signed a Shogun hire-purchase contract in the name of Patel. After selling to Hudson, who bought in good faith for £17,000, the rogue disappeared. A *bona fide* private purchaser, without notice of a hire-purchase agreement, can get good title to a motor vehicle sold by a hire-purchase debtor.² This exception to *nemo dat quod non habet*³ was open to Hudson provided there was a hire-purchase contract.

Although *Shogun Finance* is a contract matter, the court considered the facts by reference to cases concerned with whether property passed to a fraudulent transferee who misrepresented his or her identity. Faced with a complex and difficult-to-reconcile⁴ body of authority it is unsurprising that the opinions of five English Law Lords envisage different routes to rationalisation.⁵

This note will comment on: issues in plausible rogue cases; existing authority; how *Shogun Finance* was decided; and possible harmonisation.

B. ISSUES IN PLAUSIBLE ROGUE CASES

The situation of goods delivered for a bad cheque or credit on a fraudulent misrepresentation of identity will necessarily require legal steps by the party prevailed upon (P) seeking restoration of the previous status quo. Two situations are potentially problematic for P: the insolvency of the rogue (R) or, more likely, his or her effective transmission of title to a third party (T) in a cash sale.

The critical question will be whether property passed from P to R, even if only on a defective basis open to reduction by P. When the common law is applied, P having delivered to R the issue will be whether, in so doing, P intended to transfer ownership. Was there an act of delivery driven by the parties' intention that ownership should pass? When the Sale of Goods Act 1979 (SOGA) is applied, the question will simply be whether P intended to pass ownership, the act of delivery being no more than an indicium of this. Under the Act, while the issue is still whether there was a “transfer of property as between seller [P] and buyer [R]”⁶ the focus is on what was agreed, in the

1 [2004] 1 AC 919.

2 Hire-Purchase Act 1964, s 27(1) and (2).

3 See K G C Reid, *The Law of Property in Scotland* (1996) para 683.

4 C Rotherham, *Proprietary Remedies* (2002) 128 observes that “[t]he cases have tended to turn on artificial and elusive distinctions” and “[t]he state of the authorities that has resulted does the law no credit”.

5 See C MacMillan, “Mistake as to Identity Clarified?” (2004) 120 LQR 369.

6 The first sub-heading to Part III of the Act, concerned with the active requirements for the passing of property, where that is competent in terms of the prerequisite of the transferor being owner, or acting

sale contract, as to ownership passing. Where goods have been handed over in exchange for a cheque, or on credit, the issue will be whether there was a contract in which the parties intended that ownership should pass.

Under the common law and the SOGA the fundamental question raised by false identity cases is whether a possible act of transmission is void or merely voidable.⁷ Whether a defective act of transfer from P to R is void or voidable is, of course, critical to the position of T where R has sold on to T. In principle, where, because of a fundamental failure of consent, the transaction between P and R is incapable of producing a legal relationship, there can be no question of a basis for transmission from R to T. On the other hand, where P and R have engaged in an act of transfer sufficient to be effective but, for one reason or another, defective and open to possible reduction, the position is different. In this case, pending the defective transfer being set aside, R can pass title to T. Moreover, if T is in good faith—unaware of the circumstances—his or her title is likely to be unimpeachable.⁸

In *Shogun Finance* the issue was whether the hire-purchase contract, under which the vehicle was delivered, was void or only voidable; however, because of the hire-purchase exception to the *nemo dat* rule, this contract question was one with property consequences.

C. SURVEY OF AUTHORITY

The courts in England and Scotland recognise a distinction between, on the one hand, P parting with goods to R in the belief, induced by R, that R is in fact a third party, X, and, on the other hand, P parting with goods to R under a misrepresentation which leads P to believe that “R” is a somehow different and preferable party from the actual R. The cases are readily distinguishable by a “benefit of hindsight” test applied to P’s perception; in the first case P is purporting to transact with someone who does not engage with him; in the second the two parties are engaging but only because P has been taken in by R’s misrepresentations. In principle, there is no concluded transaction in the first case because P’s intention is to transact with X, not with R. Thus a leading text says that for the contract to be held void “there should be some identifiable third person for whom the offer or acceptance was intended”.⁹

In the English case of *Cundy v Lindsay*¹⁰ the transferors believed the transaction was with Blenkiron & Co, a firm known to them; the House of Lords held that there had been no contract with the fraudulent transferee (named Blenkarn) and that the goods could be recovered from an innocent purchaser. In *Morrison v Robertson*¹¹ a

under the owner’s authority, as provided for under the second sub-heading of “transfer of title”. The less than apposite wording of these sub-headings in the SOGA attracts criticism; for a recent instance see G L Gretton, “Ownership and insolvency: *Burnett’s Trustee v Grainger*” (2004) 8 EdinLR 389, 390.

7 See Reid, note 3 above, para 601: “A voidable title is a subsistent title—like an absolutely good title—but it is a subsistent title subject to the possibility of future challenge.”

8 As under SOGA, s 23.

9 P S Atiyah, J N Adams and H L MacQueen, *The Sale of Goods*, 10th edn (2001) 41.

10 (1878) 3 App Cas 459.

11 1908 SC 332.

rouge (Telford) represented himself to be the son of one Wilson, with whom Morrisson had previously transacted.¹² It was held that ownership in the livestock had not passed because, as far as Morrisson was concerned, he was delivering to Wilson.¹³ In the alternative type of case, the transferor is deluded as to the other party's standing, rather than his or her identity. Both the English and the Scottish courts have held that, in this situation, pending reduction of the defective transaction the fraudulent transferee has a subsistent title and, accordingly, can give an unimpeachable title to a *bona fide* onerous third party.¹⁴

In English law the distinction between the two classes of case has been blurred by the notion that the transferor's mind necessarily engages with the other party, even though the former's perception is that someone else is involved.¹⁵ In *Phillips v Brooks Ltd*¹⁶ a jeweller delivered a ring to a rogue who pretended to be Sir George Bullough. Knowing of Sir George, the jeweller verified his address; despite insisting to the contrary, he was held to have intended to sell to the rogue. *Ingram v Little*¹⁷ went the other way, but Devlin LJ, dissenting, observed that Miss Ingram believed that the fraudster and the reputable person he represented himself to be were "one and the same".¹⁸

D. THE DECISION IN *SHOGUN FINANCE*

By a 3:2 majority in *Shogun* the Lords upheld the court *a quo*;¹⁹ following *Cundy v Lindsay*, the majority reasoned that Shogun Finance had sought to engage with Patel, with no legal consequences because he was not involved. The minority regarded *Cundy v Lindsay* as wrongly decided. Lord Phillips, in a wavering majority speech, was attracted by the minority proposition that "[w]here two individuals deal with each other, by whatever medium, and agree terms of a contract, then a contract will be concluded between them, notwithstanding that one has deceived the other into thinking that he has the identity of a third party."²⁰ No such concession came from Lord Hobhouse who, in the strongest majority speech, emphasised the construction of documents and contractual aspects. Rejecting the argument that the finance company was ready to do business with anyone, whatever his or her name, Lord Hobhouse observed that it "was only willing to do business with a person who ... meets its credit requirements."²¹

12 "A possible case of essential error rendering a contract void": W W McBryde, *The Law of Contract in Scotland*, 2nd edn (2001) para 15-87.

13 See D L Carey Miller, *Corporeal Moveables in Scots Law* (1991) para 8.09 for an attempt to explain the decision in terms of the causal/abstract analysis.

14 *King's Norton Metal Co v Edridge* (1897) 14 TLR 98; *MacLeod v Kerr* 1965 SC 253.

15 For discussion of the relevant case law see Atiyah, Adams and MacQueen, note 9 above, 41-44, and J Beatson, *Anson's Law of Contract*, 28th edn (2002) 326-332.

16 [1919] 2 KB 243.

17 [1961] 1 QB 31.

18 At 65.

19 [2002] QB 834; agreeing with the trial court, the Court of Appeal held that T could not benefit from the hire-purchase exception to *nemo dat* because R's possession was not in terms of a hire-purchase agreement; Sedley LJ, dissenting, held that P had contracted with R through its agent's face-to-face dealing with him and that T accordingly obtained a good title under the hire-purchase exception.

20 Para 169.

21 Para 48.

Moreover, he emphasised finality as “one of the great strengths of English commercial law” and “one of the main reasons” for it being preferred to “laxer systems which do not provide the same certainty.”²²

Lord Walker agreed that the issue was whether there was a hire-purchase contract; Taking a wider view than Lord Hobhouse, he observed that “it would not be right to make any general assumption as to one innocent party being more deserving than the other.”²³ Characterising the appeal “as essentially a problem about offer and acceptance”²⁴ Lord Walker observed that the issue should be determined objectively, not by enquiry “into what either party actually intended, but into the effect, objectively assessed, of what they said or wrote”.²⁵

The minority court was more radical. Lord Nicholls urged giving effect to the policy that “[a]s between two innocent persons the loss is more appropriately borne by the person who takes the risks inherent in parting with his goods without receiving payment.”²⁶ SOGA exceptions to *nemo dat*²⁷ tended in that direction; a policy-based approach “is supported by writers of the distinction of Sir Jack Beatson”²⁸ and “consistent with the approach adopted elsewhere in the common law world, notably in the United States of America in the Uniform Commercial Code”.²⁹ A solution founded on the policy of protecting an innocent third party would avoid the “absurd” outcome in which “a subsequent purchaser’s rights depend on the precise manner in which the crook seeks to persuade the owner of his creditworthiness and permit him to take the goods away with him.”³⁰

In the other minority speech Lord Millett proposed a solution in which a uniform policy-based principle would apply. Also referring to Beatson’s *Anson* and the US UCC, he found support in a Law Reform Committee report,³¹ for reform which, in his view, is necessary “[i]f the law is to be rationalised and placed on a proper footing”.³²

In commending the cogency of the policy adopted in the US UCC for its “good sense and justice” Lord Millett also refers to Professor Atiyah’s view that one “who hands over goods to a stranger in exchange for a cheque” takes a “major risk” and,

22 Para 49.

23 Para 182.

24 Para 183.

25 Para 183; as authority for this Lord Walker quotes W M Gloag, *A Treatise on the Law of Contract*, 2nd edn (1929, reprinted 1986) 7: “[t]he judicial task is not to discover the actual intentions of each party; it is to decide what each was reasonably entitled to conclude from the attitude of the other.”

26 Para 35.

27 Para 35, the statutory exceptions are considered in Reid, note 3 above, paras 680-683; Atiyah, Adams and MacQueen, note 9 above, 371-411; and in Carey Miller, note 13 above, paras 10.18-22.

28 Para 35, citing Beatson, note 15 above, 332.

29 Para 35, citing the 14th edn (1995), s 2-403.

30 Para 35.

31 “Transfer of Title to Chattels” Twelfth Report of the Law Reform Committee (Cmd 2958: 1966), 15. Beatson, note 15 above, at 332, summarises the Report’s recommendation as follows: “where goods are sold under a mistake as to the buyer’s identity, the contract should, so far as third parties are concerned, be considered voidable and not void” this approach being justified because “[i]t is after all the seller who has accepted the identity and given credit to the fraudulent buyer on the basis of what may be fairly perfunctory inquiries.”

32 Para 84.

consequently, "it does not seem fair that he should be able to shift the burden of this risk on to the innocent third party."³³ Lord Millett's speech goes on to refer to the solution of German law:

Under German law, too, the innocent third party obtains a good title, though this is a consequence of the law of property rather than the law of contract. Article 932 of the German Civil Code provides that a purchaser acting in good faith acquires title where he obtains possession from a seller who has no title.³⁴ The purchaser is not in good faith if he knew, or by reason of gross negligence did not know, that the goods did not belong to the seller.³⁵

E. A CASE FOR HARMONISATION?

Lord Millett's appeal to the good sense of German law is followed up with a comparative comment.

German law reaches this conclusion by admitting a far wider exception to the *nemo dat quod non habet* rule than we accept, and this enables it to dispense with the need to decide the contractual effect of mistaken identity (and the meaning of "identity" in this context) or to conduct a fruitless enquiry into the identity of the intended counterparty. Our inability to admit such an exception compels us to adopt a different analysis, but it would be unfortunate if our conclusion proved to be different. Quite apart from anything else, it would make the contemplated harmonisation of the general principles of European contract law very difficult to achieve.³⁶

A difficulty with this apparent radicalism is that it in fact urges a harmonisation of property rather than contract; the primary issue in *Shogun Finance* was whether there is a contract, but the Lords decided the case in the context of earlier cases in which the issue was whether property had passed to the rogue. Regarding relaxation of the *nemo plus* principle in the interests of third parties, there is a certain gulf between, on the one hand, a number of the major systems of continental Europe and, on the other, English and Scots Law.³⁷ A 1976 Scottish Law Commission memorandum, produced under the leadership of Professor Sir Thomas Smith, demonstrated this.³⁸ But, of course, the modern Civilian systems themselves represent a wide range of different approaches.³⁹

In *Shogun Finance* the solution of German law is presented as a policy-driven model standing in contrast to English law in which the technical void/voidable issue must always be addressed. While *nemo dat* rules, it does so over a limited domain not extending to the circumstances of defective intention to pass property. In this arena, the real battleground, distinctions—sometimes appearing more as subtleties—control

33 Para 84, quoting from P S Atiyah, *An Introduction to the Law of Contract*, 5th edn (1995) 86.

34 R Zimmermann, *The Law of Obligations* (1990) 272, note 6, identifies modern German law as "a legal system [which] recognises acquisition of ownership (from a non-owner) in good faith."

35 Para 85.

36 Para 86.

37 L P W van Vliet, *Transfer of Moveables* (2000) 29 sees the difference as a matter of degree but singles out English law as "very reluctant to recognise exceptions to the *nemo plus* principle".

38 Corporeal Moveables. Protection of the Onerous Bona Fide Acquirer of Another's Property (Scot Law Com Memorandum No 27, 1976)

39 U Drobniig, "Transfer of Property", in A S Hartkamp *et al* (eds), *Towards a European Civil Code*, 3rd edn (2004) 741.

outcomes, to the exclusion of any consistent approach.⁴⁰ As Sir Jack Beatson notes, regarding the particular area of mistaken identity, “[i]t is by no means easy to draw any convincing distinction between these various cases, and it is doubtful whether the statements of principle contained in them can be reconciled.”⁴¹ In Scotland the limited case-law can be made to fit a structure of principle which, following a well-established tradition, jurists seek to impose.⁴²

Property is the area of private law least caught up in “[o]ne of the most significant legal developments of our time...the gradual emergence of a European private law”.⁴³

In the words of Jan Smits the comparative European property law position reflects a “minimal level of uniformity”.⁴⁴ Specifically regarding the “contractual transfer of property”,⁴⁵ the 1975 UNIDROIT draft on the good faith acquisition of corporeal moveables,⁴⁶ having to face “far-reaching and deep-rooted differences”⁴⁷, was limited to the international level. Excluding work on insolvency, property law has really only been touched on at the international level in the specialised area of cultural objects.⁴⁸ This work has helped to highlight differences between systems of private law⁴⁹ but, of course, the policy priorities of commerce will not necessarily match those of cultural property.

F. CONCLUSION

On the facts *Shogun Finance* is a contract case; surely not, however, one which should have been litigated all the way to the Lords—the rogue may have been plausible but the notion of a contract binding the finance company was hardly so in the circumstances. On any wider remit, the case does nothing to clarify English law’s approach to the problem of property handed over on the basis of a fraudulent misrepresentation of identity. The issue being the existence of a contract rather than an act of transfer, there was hardly room for a radical approach to the property problem.

It is significant that certain Law Lords see harmonisation of contract law as a goal to be pursued. So far as property law is concerned, Scots and English law are more

40 See Rotherham, note 4 above, “The proprietary consequences of vitiated intention to transfer”, 127-152, which well illustrates the difficulties of an area of law of which the *Shogun Finance* problem is only a small part.

41 *Anson’s Contract*, note 15 above, 332 (cited in the minority opinions of Lords Nicholls and Millett, and in the somewhat reluctant majority opinion of Lord Walker in *Shogun Finance*; see, respectively, paras 35, 84 and 186).

42 See Reid (“contract and conveyance”), note 3 above, paras 606-18.

43 R Zimmermann, *Comparative Foundations of a European Law of Set-Off and Prescription* (2002) 1.

44 J Smits, *The Making of European Private Law* (2002), 245.

45 An apposite label in the present context.

46 UNIDROIT, Etude XLV, Doc 58 (1975). The Committee of Government Experts which produced the UNIDROIT draft was chaired by the late Professor Sir Thomas Smith of the University of Edinburgh; see T B Smith, *Property Problems in Sale* (1978) 17.

47 W W Kowalski, *Restitution of Works of Art Pursuant to Private and Public International Law* (2002), 137.

48 For example the 1993 EU Directive on the Return of Cultural Objects (93/7/EEC OJ 1993 L 74/74).

49 Kowalski, note 47 above, 102-145 dealing with “solutions at national level” and “efforts towards harmonisation”; the writer (102-3) identifies “two very different groups offering the owner either relatively strong protection and far-reaching restitution or practically no protection”, and a third, more diverse, group “composed of a vast range of indirect solutions”.

Civilian, on the point raised in this case, than the modern codified Civilian systems; both go far to protect the owner's right through general insistence on the Romanist *nemo dat quod non habet*. In the modern Civil Law world policy-driven diversity is the norm. A compelling argument for harmonisation is the problem of title laundering by transporting valuable moveables to favourable legal regimes.

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Professor Kenneth Reid most kindly made helpful comments on an earlier version but the author alone is responsible for this paper.

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Duties of care, causation, and the implications of *Chester v Afshar*

A. INTRODUCTION

In its decision in *Chester v Afshar*,¹ a 3:2 majority of the House of Lords held that the scope of a doctor's duty to warn his patient of a non-negligible risk inherent in surgery extends to liability for personal injuries sustained by the patient as a result of the actuation of such risk. Where the warning required by the duty is not given, the patient may claim in damages for the injuries sustained, even although, on normal causal principles, she cannot show that she would not have undertaken the surgery at some later date had the warning been given. The course adopted by their Lordships is one which had already been charted by the High Court of Australia in *Chappel v Hart*,² a decision to which the majority of the Judicial Committee made extensive reference.

This result may cause consternation in some circles, particularly medical ones, although it is one for which there has been advocacy from leading legal academics.³ Opposition is likely to centre upon concerns about the alleged lack of a causal connection between the doctor's breach of duty and the injuries suffered by the patient, concerns which were given primacy by the minority. If Miss Chester was unable to prove on the balance of probabilities that she would not have had the surgery on being warned of the risks of the injury (in this case, a condition known as cauda equine syndrome, "CES" for short), then she could not prove that but for the doctor's failure to warn she would not have been in the same position.

I wish to argue that the decision reached in *Chester v Afshar* is not explicable

1 [2004] All ER (D) 164, [2004] UKHL 41.

2 (1985) 195 CLR 232.

3 A Honoré, "Medical non-disclosure, causation and risk: *Chappel v Hart*" (1999) 7 *Torts LJ* 1; A Grubb, "Clinical negligence: informed consent and causation", (2002) 10 *Med L Rev* 322; J Stapleton, "Cause-in-fact and the scope of liability for consequences" (2003) 119 *LQR* 388.