Whose car is it anyway?

The House of Lords’ majority decision in *Shogun v Hudson* means buying second-goods is now riskier than ever, says Michael Connolly.

What happens when a person buys a car saddled with hire-purchase debt? The problem, legally, is that as the finance company owns the car, the seller had no title to pass. So the finance company may reclaim their car (or its value) under a basic principle of English law, *nemo dat quod non habet* (non-owner cannot pass title).

If the buyer is a dealer, he must take his chances. He may improve them by offering to settle outstanding HP debt – thus encouraging some sellers to come clean. As a matter of course, he will make a check with a finance register of car credit agreements (a service provided by several organisations, such as HPI Ltd, the AA or the RAC). If the finance company has registered the agreement, the dealer will be put on notice. The innocent private purchaser, however, is protected by a *nemo dat* exception, Part III of the Hire Purchase Act 1964 (the 1964 Act), which provides him with good title against the hire-purchase company.

The 1964 Act covers a range of scenarios, from the innocent ‘hiter’ who sells with the intention of repaying the debt, to a hiter who is dishonest from the outset. When such a rogue impersonates someone who is creditworthy, the law becomes unclear. The focus shifts to the transaction between the finance company and the fraudster: was it voidable for fraud, or void for mistaken identity? If void, is there any agreement to which the 1964 Act can apply, and the finance company retains good title against the innocent purchaser.

This state of the law has come about more by accident than design. In 1878 the House of Lords, in *Cundy v Lindsay* (1878) 3 App Cas 459, held that where a fraudster, by correspondence, impersonated a well known company, the contract was void for mistaken identity. Thus, the original owner, never having parted with title under a contract, could reclaim its goods from the innocent purchaser. However, in the 20th century, a line of authority grew that was more sympathetic to the innocent purchaser. Where the original transaction was made ‘face-to-face’, a presumption was made that the original owner intended to deal with the person in front of him, even though that person, a rogue, was impersonating another. In these cases it was held that there was a contract, albeit voidable because it was tainted by the fraud. If the rogue resold the goods before the original owner rescinded, the innocent purchaser would get good title against the original owner. Perhaps most famous of those cases is *Lewis v Armer* [1972] 1 QB 198 CA, where the rogue impersonated the actor Richard Greene (of TV Robin Hood fame), to obtain possession of a car on the strength of a (worthless) cheque.

The lower courts, bound by *Cundy v Lindsay*, have only been able to aid the innocent purchaser by making such fine distinctions. Apart from Parliament, only the House of Lords can overrule *Cundy v Lindsay*, preferably by a unanimous clear judgment. The first opportunity since 1878 arose in *Shogun Finance v Hudson* [2003] UKHL 62; [2003] 147 JLB 1368. Unfortunately, the House of Lords delivered five speeches, with a bare majority preserving *Cundy v Lindsay*.

**Facts of Shogun**

On 10 June 1996 a rogue (“R”) visited car showrooms in Leicester and showed an interest in a Mitsubishi Shogun motor car. R agreed a price (£22,250) with the salesman, subject to obtaining hire-purchase finance. R signed a draft finance agreement (the offer) in the name of Durlabh Patel, producing a genuine, but stolen, driving licence to verify his name and address. The dealer sent the signed draft and a copy of the licence to Shogun Finance. Shogun confirmed the credit rating of Durlabh Patel and directed the dealer to hand over the Mitsubishi to R. The legal analysis of this transaction differs from the image of a dealer handing over the keys to the customer: the dealer sells the car to the finance company, which in turn hires it to the customer under the credit agreement. Thus at law, the finance company becomes the new owners, while the customer enjoys merely possession of the car (with an option to buy it after paying all the hire charges.)

R immediately sold the car to an innocent purchaser, Mr Hudson (“H”), for £17,000, and then disappeared. When Shogun discovered the fraud and traced the car, as owner, it sued H in conversion, demanding the car, or its value. By a majority the Court of Appeal found for Shogun ([2002] QB 834). H appealed to the House of Lords.

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Issue for the House of Lords

One distinguishing feature of this case is that any face-to-face dealings were through an intermediary, the dealer. However, for the whole House, this was not an issue. The case was reduced to two competing principles. The majority suggested that all contracts of mistaken identity induced by fraud should be voidable, whether made face-to-face, or otherwise. For the minority, where a contract is reduced to writing, that contract is between those named in the document, and no one else. Thus there could be no contract whatsoever between the original owner (Shugon Finance) and R, and H could not call upon the 1964 Act to obtain title. This latter principle prevailed.

Majority decision

Lords Hohhouse, Phillips and Walker found for Shugon. Lord Hohhouse stated (at para 49):

"The relevant principle is well summarised in Phipson on Evidence, paras 42-11 and 42-12: 'When the parties have deliberately put their agreement into writing, it is conclusively presumed between themselves and their privies that they intend the writing to form a full and final statement of their intentions, and one which should be placed beyond the reach of future controversy, bad faith or treacherous memory.'"

The majority approved Hector v Lyons (1988) 58 P&CR 156 (CA). Mr Hector, who had dealt personally with the vendor, signed a contract to purchase a house using his son's name. The Court of Appeal refused his subsequent claim for specific performance on the simple ground that he was not the purchaser identified in the written contract. Brown-Wilkinson v C stated (at p 159):

"[T]he [face-to-face] principle ... has no application to a case such as the present where there is a contract and wholly in writing."

Lord Hohhouse approved of that passage and added (at paras 49-50):

"[H]'s argument also fails on another ground. There was no consensus ad idem between the finance company and R. Leving on one side the fact that R never had any intention himself to contract with the finance company, the hire-purchase 'agreement' to which H pins his argument was one purportedly made by the acceptance by the finance company, by signing the creditor's box in the form of a written offer by Mr Durlabh Patel to enter into the hire-purchase agreement. This faces H with a dilemma: either the contract created by that acceptance was a contract with Mr Durlabh Patel or there was no consensus ad idem, R having no honest belief or contractual intent whatsoever and the finance company believing that it was accepting an offer by Mr Durlabh Patel. On neither alternative was there a hire-purchase agreement with R."

Dissenting view

Lords Nicholls and Millett dissented. Lord Nicholls first explained the effect of fraud on the formation of a contract (at para 6):

"Fraud does not negative intention. A person's intention is a state of mind. Fraud does not negative a state of mind. The existence of a fraudulent misrepresentation means that a person's intention is formed on a false basis - a basis, moreover, known by the other party to be false."

Then he suggested that the effect of fraud should not be confined to the 'face-to-face' cases (at paras 26-28):

"C writes to O saying he is X and the deal proceeds on that basis. ... At first sight it seems counter-intuitive to speak of a contract between O and C in cases of this type. It seems counter-intuitive because on its face a contract in writing or in correspondence expressed to be made between O and X is inconsistent with its being a contract between O and C. But this intuitive response is not a sound guide if it leaves out of account, as all too easily it may, the vitally important underlying fraudulent misrepresentation. In his dealings with O the crook C represented he was X, and O proceeded to deal with him (C) in that belief.

When this feature is kept in mind it readily becomes apparent that in principle cases of this type are not different from cases of face to face dealings. But in each case, whatever the mode of communication, what matters is whether O agreed to sell his goods to the person with whom he was dealing, not why he did so or under what name."

Lord Nicholls then turned to the reasoning of the majority, that the written document is paramount (at paras 29-33):

"...it is said that, whatever the position in face to face dealings, in cases of written contracts or contracts made by correspondence there can be no contract between O and C, contradicting as this would the terms of the document. ... The flaw in this reasoning is that it begs the crucial question: to whom was the offer made? In my view [Cundy v Lindsay]... is not reconcilable with... Lewis v Acrey... The legal principle applicable in these cases cannot sensibly differ according to whether the transaction is negotiated face to face, or by letter, or by fax, or by email, or over the telephone or by video link or video telephone."

Accordingly, Lord Nicholls overruled Cundy v Lindsay.

Effect of the judgment

The majority decision will no doubt disappoint consumer groups and please the credit industry. The innocent private purchaser of a car, obtained from a finance company by the fraud of impersonating another to obtain credit, is in the same position as the trade purchaser. He will have to hand over the car or its value to the finance company. H had to pay twice for his Shogun car, Accordingly, private purchasers should take all possible precautions when buying. One option is to pay the premium of buying from a reputable dealer (whom he could sue for breach of contract for failing to provide title, under s 12 of the Sale of Goods Act 1979 (SGA)). Otherwise, the purchaser should check the car's history with the finance register, as a dealer would. The cost to a consumer is about £40. This is not fool-proof, though. The finance company may fail to register the agreement. This may occur by simple carelessness (Moorgate Mercantile v Twitchings [1977] AC 890, HL), or where the goods are resold promptly (perhaps by pre-arrangement) before the administration of registration is complete, or
where the finance company (perhaps induced by prior dealings) releases the vehicle before it counter-signs the proposal form, thus creating an oral agreement, yet to be registered (see *Hichens v General Guarantee Corp Ltd* [2001] EWCA 359 for these two instances). In any case, a failure to register will not deprive the finance company from claiming its title against an innocent purchaser (*Twigg-Richards*).

This decision also affects a separate class of cases, where the rogue purports to buy (rather than hire, or lease) the goods. *Levis v Avery* is an example. The innocent purchaser in these ‘buyer’ cases normally will claim under two nemo dat exceptions: voidable title and buyer in possession (provided, respectively, in ss 23 and 25 SGA). The rogue with a voidable title may pass good title before the defrauded seller rescinds the contract. In the absence of the rogue that seller may rescind by informing the police of the fraud (*Car & Universal Finance v Caldwell* [1965] 1 QB 525). Where the owner rescinds in time, the innocent purchaser may still be able claim title under s 25 SGA, because the rogue was a ‘buyer in possession’, although when reselling the goods, the rogue must have acted as a mercantile agent dealing in the ordinary course of business (*Newtons of Wembly v Williams* [1965] 1 QB 560). So where the rogue poses as a private seller, s 25 will not operate.

A prerequisite for either of these exceptions is a contract between the original owner and the rogue, (see, for s 25 SGA, *Dowler Williamson Roofing v Humbercide CC* [1977] 14 Build LR 70). In most of these ‘buyer’ cases the transaction between the owner and the rogue is reduced to writing. Typically, a car dealer will use some form of standard written contract (if only to comply with the special VAT rules for car dealers). Even private sellers normally write out a detailed receipt, including the date, the car’s details, the price and the names of the parties. They might add ‘car bought as seen and inspected’ or similar words. In these cases the document usually represents the bargain (save for statutorily implied terms), and following this decision, it displaces the face-to-face principle. Without acknowledging as much, the majority, for all practical purposes, have killed off the face-to-face principle.

Although innocent purchasers will be deprived of claiming title under ss 23 or 25 SGA they may, in some cases, be able to claim a title under another nemo dat exception, estoppel, which is preserved by s 21 SGA. If the original owner hands over possession of the goods and a receipt, and the rogue persists with the same alias when reselling, the original owner has represented the rogue as apparent owner, and will be estopped from claiming his title against an innocent purchaser who relied on that representation (see *Sham v Commissioner of Police* [1987] 3 All ER 405, CA). This will not apply to the ‘hire-purchase’ cases, because handing over the goods alone is not enough for estoppel (*Central Neubury Car Auctions v Unity Finance* [1957] QB 371 CA).

Reform?

In his dissent, Lord Millet noted that the German Civil Code, Art 932, provides that a purchaser acting in good faith acquires title where he obtains possession from a seller without title. He concluded (at paras 85-86):

"Thus, under German law, whether or not A obtained title from B, he is able to pass a good title to D. 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 … 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 contemp- plated harmonisation of the general principles of European contract law very difficult to achieve."

However, this reasoning was rejected by Lord Hobhouse (at para 55):

"[T]o attempt to use this appeal to advocate, on the basis of continental legal systems which are open to cogent criticism, the abandonment of the soundly based nemo dat quod non habet rule (statutorily adapted) would be not only improper but even more damaging."

Lord Millet envisages a time when the reasoning of the majority will be reversed, probably by a European Directive. Until such a time, buying second-hand goods is riskier than ever.