Whose car is it anyway?

The House of Lords' majority decision in Shogun Finance v Hudson [2003] UKHL 62; (2003) 147 SJLB 1368 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’ hirer who sells with the intention of repaying the debt, to hirer who is dishonest from the outset. But 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, there is no credit 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 Averay [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 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 v Hudson. 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 become 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.

**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 minority suggested that all contracts of mistaken identity induced by fraud should be voidable, whether made face-to-face, or otherwise. For the majority, 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 (Shogun Finance) and R, and H could not call upon the 1964 Act to obtain title. This latter principle prevailed.

**Majority decision**

Lords Hobhouse, Phillips and Walker found for Shogun. Lord Hobhouse 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. Browne-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 Hobhouse 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. Leaving 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 no 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, wherever 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 Averay ... 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 e-mail, 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. Mr Hudson 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 Ltd [2001] EWCA 359 for these two instances). In any case, a failure to register will not debar the finance company from claiming its title against an innocent purchaser (Twitchings).

This decision also affects a separate class of cases, where the rogue purports to buy (rather than hire, or lease) the goods. Lewis v Averay 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 Wembley 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, Dawber Williamson Roofing v Humberside CC (1979) 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 Shaw v
Reform?
In his dissent, Lord Millett 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 \textit{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 contemplated 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 \textit{nemo dat quod non habet} rule (statutorily adopted) would be not only improper but even more damaging."

Lord Millett 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.

BOX (Page 2): Buying stolen goods
Where goods are stolen, no \textit{nemo dat} exception can help the innocent purchaser. The last possibility of obtaining good title to stolen goods was extinguished with the overdue abolition of the historic exception, \textit{market overt}, in 1995. (A fact strangely overlooked by Lord Hobhouse, (at para 42), who also called the rogue a ‘thief’ (at para 52).) If goods have been reported stolen, it may appear on car finance register. Again, a check is recommended.

BOX (Page 3): Commentary
Lord Hobhouse considered (at para 49) the rule applied was ‘one of the great strengths of English commercial law’, failing to acknowledge that this case had serious implications for consumer law. Of the majority only Lord Walker considered the policy issue of which of two innocent parties should bear the loss. In \textit{Lewis v Averay}, Lord Denning MR (at 207) said he “felt it wrong that an innocent purchaser… should have his title depend on such refinements. After all, he has acted with complete circumspection and in entire good faith: whereas it was the seller who let the rogue have the goods and thus enabled him to commit the fraud.”

However, in \textit{Shogun} Lord Walker responded to this by stating (at 182):

“Your lordships have to lay down a general rule to cover the generality of cases, and it would not be right to make any general assumption as to one innocent party being more deserving than the other.”

It is difficult to imagine a case where the innocent purchaser deserves less sympathy than the original owner who parts with possession without sufficient security, or as Lord Denning put it, ‘enabled’ the fraud. In his dissent in the Court of Appeal (at para 12), Sedley, LJ was scathing about Shogun’s procedures. It gave £20,000 worth of credit on the strength of a driving licence and a credit check, which in no way confirmed that even the real Mr Patel could afford the instalments. It could only afford this ‘cavalier’ approach because it could rely on repossessing the vehicle from an innocent purchaser. Further, in these ‘hire-purchase’ cases, the finance company is better placed to bear the loss. Had the decision gone against Shogun, finance companies would respond (possibly under pressure from their insurers) by making serious checks, for instance, by writing to the named creditor for confirmation of his offer. Had Shogun done this, H would not have paid twice for a car.

There are two further problems with this decision. First, adherence to the written agreement to the exclusion of other evidence was a strange preference when the document was the least accurate account of
Second, Lord Hobhouse (at para 49) asserted that his decision provided ‘certainty’. For the consumer, nothing could further from the truth. The innocent purchaser of goods is now in a more precarious position than before. If he is buying a car, he may check the car finance register (assuming he is aware of it), and hope that any agreement was registered. Alternatively, he must hope that any finance agreement attached to the car was either made in the rogue’s name, or made face-to-face with the finance company (unlikely) and orally (see *Hichens v General Guarantee*). A further risk introduced by this decision arises where the goods were obtained under a fraudulent sale, where the rogue posed as another, (unless, again, it was a face-to-face oral contract). Here the innocent purchaser may do nothing but hope that the ingredients of estoppel are present. The original owner has more certainty. So long as he reduces the transaction to writing, he may hand over his goods with *no* security (let alone a worthless cheque, or a forged driving licence), and reclaim them from any innocent purchaser. His uncertainty arises if the rogue uses the document as proof of ownership. Here, the original owner may be estopped for representing the rogue as apparent owner. Had the minority view prevailed, the law would be more, not less, certain.