THEFT OR SHARP PRACTICE: WHO CARES NOW?

THE House of Lords has upheld, by a majority, the decision of the Court of Appeal in *Hinks* [2000] 3 W.L.R. 1590 (noted (1999) 58 C.L.J. 10), giving a positive answer to the certified question: "Whether the acquisition of an indefeasible title to property is capable of amounting to an appropriation of property belonging to another for the purposes of section 1(1) of the Theft Act 1968". The appellant had persuaded a somewhat simple-minded man to make her the "gift" of a quite considerable sum of money. No deception was alleged to have been employed, and so far as the civil law was concerned, the "gift" might well have been a perfectly valid transaction; the question was never determined by the jury, because it was deemed to be irrelevant by the trial judge. But the decision of the House of Lords is to the effect that she was properly convicted of theft however that question might have been answered. So, it would seem, a person may become the indefeasible owner of property and nevertheless be accounted a thief of that very same property, and by the very act of acquiring the ownership of it.

The House does not elaborate what the immediate practical consequences of such a ruling might be. Is the thief required (or might she be) to make restoration of the property or of its proceeds? If so, how can title be said to be "indefeasible" in any meaningful sense, or in the sense used in the question certified? What is the impact of the decision for the purposes of the law of contract? Is a contract dishonestly entered into (dishonesty, it must be remembered, being a question of fact for the jury) to be discounted so far as the underlying civil transaction is concerned? There is not the hint of an answer to these obvious questions in the speech of the majority (Lord Steyn, with whom Lords Slynn and Jauncey express themselves to be in agreement).

These not inconsiderable practical consequences aside, it might be asked whether there are any principles at stake, and why it matters that the House reached the conclusion that it has. Principles there certainly are, and they are cogently identified by Lord Hobhouse (dissenting) in the following passage:

> The reasoning of the Court of Appeal depends upon the disturbing acceptance that a criminal conviction and the imposition of custodial sanctions may be based upon conduct which involves no inherent illegality and may only be capable of being criticised on grounds of lack of morality. This approach itself raises fundamental questions. An essential function of the criminal law is to define the boundary between what conduct is criminal and what merely immoral.

https://doi.org/10.1017/S0008197301660616 Published online by Cambridge University Press

Not the least dispiriting feature of the majority speeches is their failure to engage with the issues thus identified. In the face of the difficulties (practical and theoretical) to which the majority conclusion will lead, a series of banalities is offered in place of answers: "one must retain a sense of perspective"; "in such cases a prosecution is hardly likely". These "men of the real world" responses would be the more convincing if they helped to resolve the practical questions posed earlier in this note. But they do not. We now have no idea when a contract might be said to be tainted because a person at the bad end of a bargain alleges dishonesty on the part of the other party.

Equally dispiriting is the claim that the issues were fully canvassed and adequately resolved in *Gomez* [1993] A.C. 442. A brief perusal of the dissenting speech of Lord Hobhouse is enough to demonstrate the hollowness of this claim. Perhaps the most telling remark of all, though, is the observation that: "Given the jury's conclusions, one is entitled to observe that the appellant's conduct *should* constitute theft, the only available charge". The emphasis, it may be said, is in the original, and is tantamount to saying that the jury can, in these matters, do more or less as it likes.

Briefly put, the criticism of the majority decision is that it leaves the law failing to perform a basic function of identifying with some precision what constitutes the *actus reus* of theft, by treating as criminal behaviour that lacks any element of manifest criminality. At its outer reaches, theft becomes something akin to a "thought crime". The familiar assertion is made that "the purposes of the civil law and the criminal law are somewhat different. In theory the two systems should be in perfect harmony. In a practical world there will sometimes be disharmony between the two systems." Is it not, though, at least one role of our highest court to eliminate these differences when that can easily be done? If the civil law is content to say that, in a given situation, no violation of a property interest has occurred, why should the criminal law conclude any differently?

This is the starting-point for Lord Hobhouse, who points out that the prosecution case from the start was that the defendant had "coerced or unduly influenced" her victim to part with his money. That being so, the transaction was vitiated, and it was quite unnecessary to cause such an enormous breach between the criminal law and the civil. Lord Hobhouse also recognises the principles at stake, when he says that "... to treat otherwise lawful conduct as criminal merely because it is open to disapprobation would be contrary to principle and open to the objection that it

https://doi.org/10.1017/S0008197301660616 Published online by Cambridge University Press

fails to achieve the objective and transparent certainty required of the criminal law by the principles basic to human rights".

There is a strong hint that the issues raised by this case and the series of related decisions cannot simply be wished away as the House seems to hope. They are too fundamental for that.

A.T.H. SMITH

PROVOCATION: MUDDYING THE WATERS

IN *Smith* [2000] 3 W.L.R. 654 the House of Lords by a bare majority affirmed the decision of the Court of Appeal (noted at (1999) 58 C.L.J. 7) and in doing so resolved a long-standing dispute as to which characteristics of the defendant are relevant when determining whether the reasonable person would have lost self-control and killed the victim (the objective test of provocation). Two distinct lines of authority had developed. First, a group of House of Lords and Privy Council cases had recognised that a characteristic would only be relevant where it affected the gravity of the provocation. Secondly, a line of Court of Appeal cases had recognised a wider test, whereby a characteristic would also be relevant if it affected the defendant's ability to exercise self-control. The House of Lords has now confirmed the latter test. Consequently, in *Smith* itself the defendant's severe depression was relevant because it made him less able to exercise self-control.

The main argument for rejecting the gravity of provocation test was that it contradicted the statutory definition of provocation in the Homicide Act 1957, section 3 of which states that "the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man." Since the provision emphasises that the jury can take into account "everything", it was not considered appropriate for the judge to direct that the jury should only be concerned with characteristics which relate to the gravity of the provocation. But, if this argument is taken to its logical conclusion, it means that the jury could take into account all characteristics of the defendant, which would undermine the objective test completely. For that reason the majority recognised that the judge should advise the jury that there are certain characteristics which should be disregarded. The majority identified some of these characteristics, but did not identify any clear rationale for doing so. Such characteristics include jealousy, tendency to violent rages and tantrums. Presumably these are excluded because they would undermine the

https://doi.org/10.1017/S0008197301660616 Published online by Cambridge University Press