representing the value to Mr. Farley of his right to a competently-performed survey, the approach demonstrates a willingness to give greater substance to the idea that primary contractual rights are enforceable rights in themselves.

DAVID PEARCE

ENFORCING A POSSESSORY TITLE TO A STOLEN CAR

JASON Costello, who made "something of a living" by doing up and selling cars, was found by the Police in possession of a turbo-charged Ford Escort. Although he was the car's registered keeper, the Police (rightly) suspected that it was stolen. They seized it under section 19 of the Police and Criminal Evidence Act 1984 ("PACE"). In this they acted lawfully. They questioned Costello but never actually prosecuted him—despite the original vehicle identification and engine numbers' having been ground off; Costello's having acquired the car through a "friend" with multiple convictions for handling stolen cars; and his keeping a "car ringing kit" for forging registration numbers under the back seat.

Under section 22 of PACE the Police had power to retain the car for as long as was necessary to establish its lawful owner. Their inquiries yielded nothing so their statutory power to retain the car expired. Nonetheless, the Police refused to return it to Costello. He thereupon sued them in conversion, seeking specific return of the car and damages for wrongfully detaining it after the expiry of their authority.

In *Costello* v. *Chief Constable of Derbyshire Constabulary* [2001] EWCA Civ 381, [2001] 1 W.L.R. 1437 the Court of Appeal allowed his claim. Lightman J., who delivered the leading judgment, applied the classical rules on enforcement of possessory titles. Costello's possession of the car gave him a title to possess which was good against all the world except one who could assert a better title (at para. [31]). The Police's authority to possess under PACE had expired, so Costello's title, which had temporarily been "suspended", now reverted to being stronger than that of the Police (*ibid.* at para. [14], applying *Webb* v. *Chief Constable of Merseyside Police* [2000] Q.B. 427). The person with the best title, the original owner, was unknown. He could not be joined as a party to the action so as to defeat Costello's claim to possession on the ground that Costello's title was weaker than the original owner's. Although section 8(1) of the Torts (Interference with Goods) Act 1977 purports to abolish the rule that a *jus tertii* is no defence in an

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action for wrongful interference with goods, the statutory exception has no place where the third party is unknown. Any other conclusion would allow a defendant to succeed against a claimant with a stronger title than his own by relying on the yet stronger title of an unknown third person to whom he might never have to return the goods.

It made no difference that Costello knew the car was stolen so that by buying it he probably committed the offence of handling stolen goods under section 22 of the Theft Act 1968. In Lightman J.'s view: "possession ... is entitled to the same legal protection whether or not it has been obtained lawfully or by theft or by other unlawful means" (at para. [31]). To return the car to Costello did not infringe the principle *ex turpi causa non oritur actio*. Lightman J. accepted that Costello's previous possession of the car was sufficient evidence of his title as against the Police (see F. Pollock and R.S. Wright, *Possession in the Common Law* (Oxford 1888), p. 22—regrettably this authoritative work was not cited in judgment), so there was no need for Costello to rely on any prior illegal transaction to prove his title to the car (cf. *Tinsley* v. *Milligan* [1994] 1 A.C. 340, 370 *per* Lord Browne-Wilkinson).

Even accepting this result, it is surprisingly difficult to explain how Costello still had a title to sue for conversion when the Police's authority to retain the car expired.

A possessory title to a chattel is more vulnerable to destruction than the possessory title acquired by a squatter in adverse possession of land. Any number of relative fee simple estates can be generated at law by successive acts of adverse possession of real property. Legal estates cannot be created in personal property. Only two legal ownership interests can exist concurrently in a chattel, one relative in the possessor and the other indefeasible in the original owner. This follows from the evidential presumption that possession is prima facie evidence of ownership. Possession is an exclusive, and therefore unitary, concept. It cannot vest separately in different people. Consequently, the presumption can generate only one relative ownership interest at a time, and that must vest in the possessor for the time being (see *Pollock and Wright*, p. 25). It might be thought, therefore, that the presumption could no longer work in favour of the person who was dispossessed of the chattel, with the result that he would not have any continuing relative ownership interest and a right to possess (*Buckley* v. *Gross* (1863) 3 B. & S. 566, 573 *per* Blackburn J. and *Irving* v. *National Provincial Bank Ltd.* [1962] 2 Q.B. 73, 80 *per* Holroyd Pearce L.J.). He might have a claim in trespass for the very act of being dispossessed of the chattel (though section 19 of PACE meant that Costello lacked

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even this), but nothing to support an action arising from the defendant's later dealings with the chattel.

Costello must therefore illustrate a small extension of the presumption that possession is prima facie evidence of ownership. Past possession may be evidence of present ownership and a continuing right to possess where a defendant can no longer rely on the positive authority by which he first lawfully dispossessed the claimant, and where he cannot pretend to be holding the chattel on behalf of the true owner whose title is superior to the claimant's (*Field* v. *Sullivan* [1923] V.L.R. 70, 84 *per* Macfarlan J.). There is a robust practical logic to support this result. A defendant who has a limited statutory authority to dispossess the relative owner without incurring tort liability should be open to liability in respect of his later dealings with the chattel once his statutory authority expires.

No abstract theory of reified property interests will explain the result. It is unhelpful to ask whether Costello's relative ownership interest was somehow suspended while the Police lawfully retained the car, or whether it reverted to him when the Police's authority expired. To say that Costello had a relative ownership interest in the car when he lacked possession simply expresses the conclusion that the court, for pragmatic reasons, was willing allow him an action in conversion against the Police. As has long been true of common law actions, the availability of the remedy determined the existence of Costello's substantive right, not the right of the remedy.

DAVID FOX

IF AT FIRST... UNDUE INFLUENCE AND THE HOUSE OF LORDS

THE House of Lords in *Royal Bank of Scotland plc* v. *Etridge (No. 2)* [2001] UKHL 44, [2001] 3 W.L.R. 1021 refined and reformulated the principles laid down in *Barclays Bank plc* v. *O'Brien* [1994] 1 A.C. 180. Among other things, *Etridge* sets out new minimum requirements for mortgagees who take third party security from wives or partners and for solicitors whose task it is in such cases to advise the surety.

The goal is balance. The law should protect the victim of undue influence, but should also protect the interests of the lender. If lending institutions cannot with confidence create binding charges, they will stop lending on the security of concurrently owned homes. In *O'Brien* the House set this balance by recourse to a new and unconventional use of the doctrine of constructive notice. *Etridge*

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