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# **Sale by a non-owner: striking a fair balance between the rights of the true owner and a buyer in good faith**

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### Cases cited

[Shogun Finance Ltd v Hudson \[2003\] UKHL 62; \[2004\] 1 A.C. 919; \[2003\] 11 WLUK 469 \(HL\)](#)

### Legislation cited

[Sale of Goods Act 1979 \(c.54\) s.21\(1\), s.23, s.24, s.25](#)

[Hire-Purchase Act 1964 \(c.53\) Pt III](#)

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### \**Cov. L.J. 1* Introduction

When a non-owner sells goods to an unsuspecting purchaser two strong claims are in conflict - the right of the true owner to assert his title if another person lays claim to those goods, and the right of the innocent third party who has paid for the goods in good faith to keep those goods as his own.<sup>1</sup> Somehow the law has to reconcile these rights and determine "Who is the owner?"<sup>2</sup> The answer is vital because, although the person who is held not to be the owner will, in theory, have a remedy against the unauthorised seller,<sup>3</sup> that seller will probably be a "rogue" who has disappeared, and, if he can be found, may be penniless and any unsuccessful (and innocent) party will lose out financially. The starting point in law is that the true owner's rights are paramount, although many exceptions have been created to this rule by both common law and statute<sup>4</sup>. This has created an unsatisfactory situation, with the law being developed in a piecemeal fashion and being interpreted restrictively, and often inconsistently, by the courts.<sup>5</sup> This article will examine whether the various statutory exceptions to *nemo dat*- designed to provide a balance between the claims of both innocent parties rather than redressing the law in favour of security of transactions - operate fairly.

### The case of *Shogun Finance*

The dilemma of determining legal title is strikingly illustrated in the recent House of Lords' decision in *Shogun Finance Ltd v Hudson*.<sup>6</sup> The rogue, posing as a Mr Patel and using Patel's driving licence, entered into a written contract for the hire purchase of a car. This was achieved by a finance company (the claimants) buying the car from the retailers to supply to the rogue, which they did on the strength of false documents \**Cov. L.J. 2* provided by the rogue to the retailers. The written contract then referred to an agreement between Mr Patel and Shogun Finance. The rogue then sold the car to Mr Hudson and disappeared, leaving the claimants to bring a claim against the new purchaser. The defendant relied on s.27 of the Hire Purchase Act 1964, which allows a purchaser in good faith to take good title from someone who has entered into a hire purchase agreement for

a motor vehicle. The question was, therefore, whether Shogun Finance had entered into such an agreement, or whether that original agreement was void on the grounds of mistake.<sup>7</sup> A majority of the House of Lords held that the original agreement was clearly between Shogun Finance and Mr Patel and thus the rogue had not entered into a hire purchase contract so as to allow him subsequently to pass title. Consequently the defendant received no title and Shogun Finance could recover the car, leaving the defendant without the car or his money.

Although the decision in this case hinged on its written status, it exposes the arbitrariness of legal principles deciding true title. Had the original parties not entered into such a specific contract then in all likelihood the court would have accepted that the rogue would have obtained at least a voidable title,<sup>7</sup> which would have defeated the true owner's claim because the defendant would have acquired such title before the true owner took steps to avoid the contract.<sup>8</sup> As the contract was written, and referred specifically to a party other than the rogue, the majority of the court refused to look beyond its express terms and declared the original "contract" void. The dissenting Lordships held, however, that the question of whom Shogun Finance truly wished to contract with was relevant despite the existence of a written contract. Thus, the bona fide purchaser's success or failure in this case, and indeed many of the other examples studied in this article, depends on the method by which the original contract was concluded and the majority view of the court as to the legal effect of such contracts; whilst the judges engage in legal and academic arguments on, in this case, the law of mistaken identity, an innocent purchaser loses his claim to goods that he has bought in good faith.

This article will now examine the equity of that situation and whether fairness can be and is achieved by the strict application of the *nemo dat* principle and its exceptions, or whether the law should take a less technical approach and be led by principles of fairness. The article will begin with a critical account of the rule and its exceptions, space precluding a full account of the legal rules and the case law.<sup>9</sup>

### The general rule

The Latin maxim *nemo dat quod non habet* provides that no one can transfer a better title to goods than he himself possesses, reflecting the law's need to protect the property rights of the true owner, and is partially set out in s.21(1) of the 1979 Act.<sup>10</sup>

\***Cov. L.J. 3** The maxim and the exceptions<sup>11</sup> have grown due to the nature of transferring personal property; unlike transactions for the sale of real property, where the formalities involved make it difficult for a non-owner to transfer title to an unknowing purchaser, contracts for the sale of personal property are on the whole informal and the buyer is not required to inquire formally about the seller's right to sell. Thus, it is relatively common for non-owners to purport to transfer goods to an unsuspecting buyer and the law is faced with the dilemma of deciding who holds a valid title to the goods. We will now consider the exceptions to the *nemo dat* principle to analyse whether or not the law does indeed strike a fair balance between each party's rights.

### Estoppe

Section 21(1) of the 1979 Act incorporates the general legal doctrine of estoppel,<sup>12</sup> and applies when the true owner has represented to the third party that another person has the right to pass title in the goods.<sup>13</sup> This may consist of estoppel by words or conduct, where the true owner has represented that someone else has authority to sell the goods,<sup>14</sup> and estoppel by negligence, where the true owner has behaved carelessly in respect of the goods in such a way as to cause loss to the third party.<sup>15</sup> The exception embodies the principle that "wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it."<sup>16</sup> The rationale is that the true owner has in some way misled the other party and the exception is, therefore, rooted in fairness.

However, the scope of the estoppel doctrine is extremely limited and in *Mercantile Bank of India Ltd v Central Bank of India Ltd*<sup>17</sup> Lord Wright commented that very few cases of actions for conversion in which a plea of estoppel by representation was alleged have succeeded. For example, in *Moorgate Mercantile v Twitchings*,<sup>18</sup> the \***Cov. L.J. 4** court rejected the claim that the true owners of a car (a finance company) had held a hirer under a hire purchase contract out as the true owner by failing to register the car and thus leading the defendant to believe that the hirer had the right to sell. There had been no estoppel by misrepresentation since the claimant had made no representation.<sup>19</sup> Also, in rejecting the argument for estoppel by negligence,

it was held that the claimant owed no duty of care to other finance companies or to dealers to register the transaction.<sup>20</sup> It might be argued that the decision gives undue respect to the rights of the true owner, and that the dissenting opinion of Lord Wilberforce, that it would not be unreasonable to impose a duty on the claimant in such a case, might give proper protection to the innocent third party, particularly where the true owner is a business.<sup>21</sup> The possibility of letting the businessperson suffer the loss in such cases is examined later in the article, but as the courts are reluctant to apply the estoppel exception it is clear that innocent purchasers must normally look to the other exceptions for protection.<sup>22</sup>

### Sale under a voidable title

A *voidable* contract is one that may be avoided on the ground of fraud, misrepresentation, non-disclosure, equitable mistake,<sup>23</sup> or duress or undue influence, as opposed to *void* contracts for mistaken identity, a lack of coincidence between the terms of the offer and the acceptance, and where goods have been stolen.<sup>24</sup> Under s.23 of the Act a purchaser may be able to obtain a perfect title to goods out of an imperfect title where the rogue has sold the goods on to an innocent buyer, who buys them in good faith and without notice of the seller's defect in title.<sup>25</sup> This protects the innocent purchaser's rights by placing them above the true owner in cases of fraud, but the success of the innocent purchaser in such cases depends on the timing of the true owner's rescission; the law allowing the true owner to assert his ownership rights provided he does so before the purchaser buys the goods. This rule is not without controversy and in *Car and Universal Finance Ltd v Caldwell*<sup>26</sup> the Court of Appeal held that it was possible to avoid the contract without either telling the fraudulent \*Cov. L.J. 5 person or retaking possession of the goods; in this case by informing the police and relevant motoring authorities. It has been proposed that notice to the rogue should be a prerequisite in this respect<sup>27</sup> and the case was not followed in Scotland on virtually identical facts.<sup>28</sup>

There are a number of controversial issues. First, for the provision to apply the original transaction must be one that transfers to the seller a voidable *title* to the goods. Therefore, it is necessary to distinguish between the situation where the true owner intends to pass the property in the goods to the seller, e.g. on sale of the goods, and the situation where the true owner intends to transfer to the seller nothing more than possession of the goods.<sup>29</sup> In this respect it has been noted that the section depends on the intention of the parties and that the owner's subjective intent should not be a realistic criterion for judging the legitimacy of the transaction.<sup>30</sup> Second, a buyer will acquire a good title only if he buys them in good faith and without notice and in *Whitehorn Brothers v Davison*<sup>31</sup> it was held that the true owner bears the burden of proving that the buyer bought with notice or otherwise than in good faith. This ruling reverses the burden of proof applied in the case of similar provisions and it has been submitted that it is capable of unfairness.<sup>32</sup> Thirdly, the provision does not apply in cases where the original transaction is void as opposed to voidable. As is evident from cases such as *Shogun Finance* (above), the distinction between such agreements can be very fine, depending on the application of complex common law principles and often inviting conflicting judicial attitudes. Whichever views are correct, a bona fide purchaser's (or owner's) claim may fail depending on how the original transaction is classified, irrespective of either fault or the equity of any claim. Consequently, the view that all transactions affected by misrepresentation as to identity should be merely voidable (at least as far as third parties are concerned) has the advantage of certainty and fairness.<sup>33</sup>

### Seller in possession after sale

This exception, contained in s.24 of the Act,<sup>34</sup> applies where a seller sells goods to one party, retains the goods and then, before delivery to the contractual buyer, delivers or transfers the goods or documents to another under a sale.<sup>35</sup> The aim of this \*Cov. L.J. 6 provision is to protect an innocent purchaser who is deceived by the vendor's physical possession of goods or documents and who is unaware of legal rights which fetter the apparent power to dispose.<sup>36</sup> However, it is difficult to distinguish this case from one where a thief has possession of the goods or the documents of title and then misleads the innocent purchaser. This is compounded by the fact that s.24 does not require that the seller should continue to be in possession of the goods or documents of title with the consent of the buyer;<sup>37</sup> the provision thus applying whether or not the buyer could be taken to have run the risk of the second sale by leaving the goods with the original seller. However, the person receiving the goods or documents of title must receive them in good faith and without notice, and the burden of proof is on that person.<sup>38</sup>

As with all these provisions, difficulties have arisen with regard to its scope and application. For example, it only applies where goods have been sold and does not apply to a mere agreement to sell,<sup>39</sup> a distinction that will be of no comfort to the party losing the claim. In addition it applies even if the seller is now in possession not as a seller but as a repairer of the goods. Thus, in *Pacific Motor Auctions v Motor Credits*<sup>40</sup> and *Worcester Works Finance v Cooden Engineering*,<sup>41</sup> it was held that the crucial question was whether the seller's possession was physically continuous. Further, there is considerable uncertainty where there has been a break in possession so that the buyer has, even for a short time, had the goods in his or her hands, although he or she has later re-delivered them to the seller.<sup>42</sup> The complexity of these rules increase the uncertainty of who receives good title and, it is submitted, should not be the proper basis of deciding the better title between two innocent parties.

### Buyer in possession after sale

This exception is contained in s.25 of the Act<sup>43</sup> and deals with the situation where possession of the goods has passed to the buyer before ownership has passed to him, \*Cov. L.J. 7 permitting a buyer to transfer ownership to a sub-buyer. The section talks of "a person having bought or agreed to buy goods"<sup>44</sup> and thus only applies where the buyer has obtained possession of the goods (or the documents of title to the goods) with the consent of the seller but without becoming owner.<sup>45</sup> The section does not apply where someone has obtained goods without having agreed to buy them,<sup>46</sup> and a customer under a hire purchase agreement, or a conditional sale agreement, is not a buyer for the purpose of s.25, although that scenario is covered by other provisions, below. Although, unlike the position under the seller in possession (above), a seller of goods cannot be deprived of his title to the goods under the provisions of s.25(1) unless the goods or documents of title were in the possession of the buyer with his consent, such consent is presumed in the absence of contrary evidence and the burden is on him to prove lack of consent.<sup>47</sup>

Section 25 goes further than the voidable title exception and gives good title to the innocent second purchaser even where the true owner has avoided the contract.<sup>48</sup> This might be justified because in such a case the seller voluntarily lets his buyer take possession, incurring the risk that the buyer, before he has paid and therefore before he has acquired title, sells and delivers the goods to a sub-purchaser.<sup>49</sup> Nevertheless, it has been proposed that s.23 should override s.25.<sup>50</sup> In addition, s.25 only applies where the buyer in possession has acted in the normal course of a business as a mercantile agent,<sup>51</sup> perhaps strengthening the fairness of the innocent purchaser's claim.<sup>52</sup> The person receiving the goods or documents of title must receive them in good faith and without notice of any lien or other right of the original seller in respect of the goods.<sup>53</sup> The burden of proof rests on the person receiving the goods.

This provision appears to be more rooted in fairness than the rule in s.24, above. It would be rare for a seller to allow a buyer possession of the goods without ownership \*Cov. L.J. 8 in the property having passed, and such a seller should perhaps bear the risk of a subsequent sale, and the requirement that the buyer acts as a mercantile agent provides further justification for the provision. However, as with many of the other provisions, the technical rules relating to its application can give rise to inconsistency and unfairness.

A hire purchase (HP) is a type of installment payment arrangement in which a buyer gains possession and use of an item immediately but does not become the legal owner until they have paid the full purchase price through periodic installments.

### Part III Hire Purchase Act 1964

It is common for a person to acquire a car on hire purchase terms and then to dispose of it for cash before he has completed the hire purchase payments. These transactions are not protected by s.25 because someone acquiring goods on hire purchase is not a buyer,<sup>54</sup> but the Hire Purchase Act 1964 created a new exception by providing that if a car subject to a hire purchase or conditional sale agreement<sup>55</sup> is sold to a private purchaser, that purchaser would acquire a good title if he bought it in good faith and without notice of the hire purchase or conditional sale agreement.<sup>56</sup> This provides welcome and reasonable protection to the private purchaser,<sup>57</sup> who was formerly excluded from protection on technical grounds. On the other hand it has been noted that the provision is a purely pragmatic response and that its limited coverage makes it a matter of happy accident for those *bona fide* purchasers who, in a subsequent dispute with a finance company owner, discover that they have dealt with a bailee rather than a financial lessee;<sup>58</sup> although the same author notes that the mischief of the legislation is clear enough and that trade or finance purchasers have the opportunity to consult registers of hire purchase and conditional sale agreements, whereas private purchasers may not.<sup>59</sup>

The provision has a wide-ranging effect and applies to three sets of circumstances where a third party will acquire a good title. First, if a motor vehicle owned by A is let under a hire purchase agreement to B, who wrongfully sells it to C, an innocent private purchaser, C will acquire a good title to the vehicle. Second, where a motor vehicle owned by A is let under a hire purchase agreement to B, who wrongfully sells it to C, a trade or finance purchaser, who then sells it to D, an innocent private purchaser, D will acquire a good title to the vehicle. Third, a motor vehicle owned by A is let under a hire purchase agreement to B. B wrongfully sells the vehicle to a finance company, which lets it under a hire purchase agreement to C. Provided that C was, at the time of the letting, the first private purchaser of the vehicle in good faith and without notice of the original hire purchase agreement, the letting under this hire purchase agreement is a valid letting; and if, in pursuance of this agreement, the finance company transfers the property in the vehicle to C, he acquires a good title even though at the time the property is transferred he has been informed of the \**Cov. L.J.* 9 original hire purchase agreement and so has notice thereof.<sup>60</sup> However the provision does not apply where the original hire purchase contract is void, for example, because of mistake. There is also some doubt whether it would apply where the owner has avoided the contract before the purchaser acquires the goods without notice.<sup>61</sup>

Certain anomalies are present. For example, under s.27(2) (the first example above), a good title is conferred upon *any* private purchaser (provided he acts in good faith and without notice) to whom the debtor has himself disposed of the vehicle. However, under s.27(3) and (4) (the second and third examples above), only the *first* private purchaser after the disposition by the debtor to a trade or finance purchaser is protected, and then only if he acts in good faith and without notice. Further, the protection afforded in the circumstances mentioned in s.27(4) will only apply where a trade or finance purchaser lets the vehicle to the debtor, and not where the vehicle is let to him by the original debtor.<sup>62</sup> It is questionable whether a claim to good title should depend on the construction of such technical legal rules, particularly where the distinctive rules do not appear to have any strong rationale.

### **Sale by agents and mercantile agents**

Where a third party buys goods from an agent belonging to a true owner in reliance on the agent's apparent authority to sell them, the true owner is bound and the third party acquires a good title.<sup>63</sup> However, a third party would not get good title if the agent merely *agreed to sell the goods to the third party and the transfer of property was dependent on the third party's payment of the price.*<sup>64</sup> Further, if the dealer pledges it as security for a loan, he or she would not under general contract law be treated as having apparent authority to do so. This is so, even though, from the point of view of the third party dealing with the dealer, his or her relationship to the goods looks the same. Section 2(1) of the Factors Act 1889 addresses these issues and extends the \**Cov. L.J.* 10 power to pass good title when a mercantile agent effects the transaction.<sup>65</sup> The pledging of goods and documents of title is an important part of financing international trade and people importing large amounts of commodities may pledge goods or documents of title in order to borrow money against them.<sup>66</sup> Thus, it was felt unsatisfactory to draw a distinction between the agent who sells and the agent who pledges and this was the subject of statutory amendment by a series of Factors Acts 1823-1889.<sup>67</sup>

The provisions only apply to sales by a "mercantile agent"<sup>68</sup> who must not only be in possession<sup>69</sup> with the owner's consent, but must be in such possession as a mercantile agent.<sup>70</sup> For example, a car dealer who has both a sales room and a service facility is clearly a mercantile agent and has the consent of his customers to have possession of their cars for service, but if he were given the goods as a repairer and were to put one of these cars into the sales room and sell it, this would not be a protected transaction because he would not have had possession of the car as a mercantile agent, but rather as a repairer.<sup>71</sup> Further, in *Pearson v Rose and Young*,<sup>72</sup> the Court of Appeal held that the Factors Act did not apply where the dealer had possession of the car with the owner's consent, but did not have possession of the log book (the registration documents) with the owner's consent. The Court of Appeal also held that a sale of a car without the log book would not be a sale in the ordinary course of a business. Although these limitations help protect the misled principal, it has been noted that the rule is hard on innocent purchasers, for how are they to know that an agent, contrary to appearances, is holding the goods in a private capacity or for a purpose other than that for which he usually takes possession of goods?<sup>73</sup>

A number of presumptions do exist to assist the innocent purchaser. First someone who has the custody of the goods (or who controls someone else who has it) will be deemed to be in possession. Once this is established it will then be presumed that this \**Cov. L.J.* 11 was with the owner's consent; the burden of proof of showing that this was not the case is on the owner. Second, any consent given by the owner to the agent's possession of goods or of documents of title to goods is also deemed

to be given with respect to documents of title.<sup>74</sup> Third, although possession by the mercantile agent must be with consent of the owner, this consent is presumed in the absence of contrary evidence. Fraud will not automatically negate consent but such consent could be negated by mistake as to identity of the owner and possibly by illegality.<sup>75</sup> To balance the rights of the owner, the purchaser must take in good faith and without notice. "Notice" in this context means actual knowledge of the fact, but as has been noted<sup>76</sup> a person can also have knowledge by being aware of circumstances which would lead a reasonable person to reach such a conclusion. Knowledge acquired in either of these ways is enough to exclude a party from the benefit of the provisions, although it is doubted whether a slight suspicion would suffice.<sup>77</sup>

The exception is obviously rooted in commercial reality and in principle appears fair. The owner, almost inevitably a businessperson, has entrusted the goods with the agent and should bear responsibility when faced with a claim by an innocent third party. Further, even if an owner of goods is bound by the sale, he may nevertheless recover from the buyer the price agreed to be paid for the goods, or any part of that price, subject to any right of set-off on the part of the buyer against the agent.<sup>78</sup> It is questionable, therefore, whether the owner has suffered any real loss, and if he has, whether such loss could have been avoided by a more careful selection of his agent.

### Proposed Reform

This section of the article will examine the various proposals for reform of the general rule and its exceptions. Given the complexity of the legal rules, their potential for unfairness and the continual problem of non-owners selling and pledging goods to innocent purchasers, it is surprising that this area has resulted in little proposal for reform and even less actual law reform. In 1966 the Law Reform Committee looked into the area, but no legal changes were made as a result.<sup>79</sup> In 1994 the Department of Trade and Industry published a Consultation Paper, proposing reforms to the *nemo dat* principles, but this resulted only in the removal of the "market overt" rule.<sup>80</sup> Further, Professor Diamond published a review of the area in 1989,<sup>81</sup> but again no reform was forthcoming. Whatever proposals, if any, are introduced, the present general rule combined with its exceptions cannot be described as satisfactory. The rules are technical and the rights of the innocent parties have been determined by complex and \***Cov. L.J. 12** often inconsistent application of commercial legal rules. For example, Thornely refers to a system of complicated and duplicated provisions that require a thorough overhaul.<sup>82</sup> It is essential therefore, that other possibilities are addressed.

### All (consumer) purchasers to be protected

In order to aid the protection of (consumer) purchasers, it might be possible to extend the purchaser's right to title under s.12 of the Sale of Goods Act 1979 to the right to claim that title as against the true owner of the goods.<sup>83</sup> Obviously the purchaser would have to act in good faith, and the proposal's credibility would be strengthened if the purchaser was acting as a consumer and the seller was acting in the course of a business. The true owner would then have to find a remedy either from the rogue, or any intermediary seller if the latter was unable to rely on this proposal. The proposal is linked to the idea that the owner should take responsibility for his property when he gives over possession, but if the consumer were to be fully protected then the rule would apply even where the original owner was blameless. The proposal may also be linked with re-introducing the market overt rule, considered below. If this, or similar proposals were then the existing statutory rules might be retained, applying to business transactions. However, for reasons given throughout this article it is submitted that those provisions be replaced by more flexible rules based on fairness, fault and apportionment.

### Re-introduction of the "market overt" rule

The exception of "market overt" was abolished by the Sale of Goods (Amendment) Act 1994. Under this rule a bona fide purchaser got good title where there had been a sale by a trader in a shop in the city of London or in an open market. The exception was flawed as it was ancient in origin and restricted in its geographical scope, yet instead of its abolition there may be a strong case for its re-introduction on a general scale. Thus in 1966 the Law Reform Committee recommended that the concept should be extended to all shops, giving a person who buys goods at trade premises or by public auction a good title, provided he does so in good faith and without notice.<sup>84</sup> The advantage of such a rule is that it would promote consumer protection, leaving the true owner and the trade seller to sort out their legal differences without disturbing the purchaser's rights.

### Placing the risk on owners

It has been proposed that existing statutory provisions be replaced with a broad principle that where the owner of goods has entrusted them to, or acquiesced in their possession, by another person, an innocent purchaser of those goods should acquire good title.<sup>85</sup> This broad approach, protecting the owner only in cases of theft, possibly misrepresentation or, of course, the bad faith of the purchaser, assumes that the owner \**Cov. L.J. 13* be held responsible for any subsequent dealings in his property and might appear unfair, particularly if the owner is not in business. It might, however, be justified by the desire to achieve consumer protection and could be linked with the above proposal to protect consumers. In addition, particularly in the case of businesses, the owner might be in the best position to insure against such risks.

### Apportionment

The major disadvantage of the *nemo dat* principle is that the courts have to choose between two valid claims and the loser will be left with nothing. Thus, in *Ingram v Little*<sup>86</sup> Devlin LJ criticised this "all or nothing approach" and advocated a power of apportionment based on the relative fault of the respective parties.<sup>87</sup> The idea of fault is already incorporated within a number of the statutory exceptions, but those rules do not allow the sharing of blame and loss. Apportionment might, therefore, provide fairness in cases where the courts are unable to fit the innocent purchaser into one of the exceptions, but nevertheless feel that the true owner should not deprive the innocent purchaser of his whole claim. For example, it might apply where either party could have checked the full facts before acting, and would be especially appropriate in cases where the principle of estoppel does not apply to deprive the owner of his claim.<sup>88</sup> In any case, the Law Reform Committee rejected the idea of apportionment, firstly on the ground that it would lead to increased and uncertain litigation, (particularly where there had been a number of transactions following the rogue's disposal of the goods) and secondly because the Committee could see no reason why the innocence of the owner should be penalised in cases where both parties were simply unfortunate.<sup>89</sup>

### Duty on all parties to inspect credentials and other facts

As an alternative to providing complete protection for the purchaser, one proposal could be that a purchaser who lays claim (or who defends a claim) to title would lose that claim if they had failed to take all reasonable steps to confirm the credibility of the seller of the goods or their true ownership. This duty could be heavier in the case of business purchasers who would have greater access to relevant data, but could also apply to consumer purchasers where appropriate. This would alleviate the unfairness towards the true owner who is deprived of title, if not providing him with financial comfort. Similarly, a true owner, particular one in business, would have a duty to ensure that his goods did not knowingly fall into the hands of the rogue. Again, some of these principles are evident in the existing rules, but the proposal could be used alongside the possibility of apportionment to produce as fair a result as possible.

### One principle of fairness with statutory guidelines

A drastic change to the current situation would involve the replacement of the *nemo dat* rule and its statutory exceptions with a power of the courts to settle disputes relating to ownership by reference to an overall principle of fairness, perhaps controlled by statutory guidelines. Thus in a case where the courts have to decide the \**Cov. L.J. 14* question of title between the true owner and an innocent purchaser, the court could grant title to the party who in the court's opinion it would be most equitable to do so having regard to the fault (if any) of each party and to general principles of commercial fairness; thus also assessing who is best placed to bear the risk. In coming to that conclusion the court could have regard to a number of factors, such as the opportunity for either party to verify the credentials of any fraudulent party, the business or other status of either party, and the opportunity of either party to insure against the risks of any deception. The bona fides of both parties would be a condition precedent of their claim and the courts could perhaps have the power to make an award on the basis of apportionment.

The advantage of such a scheme would be that the success of each party's claim would no longer be based on the scope and application of antiquated and extremely complex legal rules, which often have little to do with the fairness of the case - an issue which should dominate the question of title when two innocent parties are seeking a remedy for an injustice caused by a fraudulent third party - and are generally not understood by the relevant parties. The disadvantage is that it would entrust decisions on title to the courts and allow them to make decisions on the basis of fairness, or rather their perceptions of fairness.<sup>90</sup>

This disadvantage could be tempered by the inclusion of statutory guidelines, which could reflect Parliament's desire to protect consumer or other interests. The rule would be analogous to the principles of reasonableness contained in the Unfair Contract Terms Act 1977, which give a discretionary power to the courts to regulate exemption clauses but also provides guidelines on the application of the reasonableness test.

Whatever proposals are adopted, we must remember the criticism levelled by Professor Atiyah at the recommendations of the Law Reform Committee of 1966 - that any proposals had to be based on a thorough investigation of evidence supporting the case for unfairness.<sup>91</sup> In other words there should be evidence as to the frequency of these scenarios as well as the plausibility of each party verifying information as to the title of the goods. Consequently the above proposals are made on the assumption that there is a need to protect consumers and other innocent purchasers and that reform is worthwhile. Further, consideration could be given to the possibility of creating a separate statutory scheme outside the Sale of Goods Act. Thus one commentator<sup>92</sup> questions whether the proper place for these rules is the Sale of Goods Act and asks whether it would be better to have a separate and comprehensive statute, whilst another feels that the *nemo dat* provisions could just as easily be the subject of a special title transfer statute.<sup>93</sup>

### Conclusions

Although the maxim and its exceptions still have a role to play because of the informal nature of sales transactions for personal property, the current situation is governed by complicated legal rules and exceptions determining the scope of the rules and the protection offered to owners or purchasers, and it is submitted that the rules \**Cov. L.J. 15* should be led by fairness rather than technical legal niceties. There are at present clear problems with inconsistencies in the cases, especially in the area of estoppel and the distinction between void and voidable contracts, and consequently the rule and the exceptions often fail to represent either a rational or cohesive set of principles for balancing conflicting interests.

The need for the rule and its exceptions is clear. It would be onerous for sellers to have to prove title to goods every time they sell, in a similar way to vendors of land; it would disrupt the convenience of everyday commercial transactions. It is also clear that the true owner of goods merits some protection and in this respect the law ensures that the thief is incapable of passing a good title. The traditional position is that only the legal owner of goods or one who has been authorised or otherwise held out as entitled to dispose of them can make a disposition.<sup>94</sup> If this initial position is to remain, then the law must ensure that the exceptions to it are applied logically and clearly, allowing the true owner to prevail in justified circumstances and, more importantly, allowing both parties to foresee as far as possible the consequences of dealing with a rogue.

**Ultimately the rules and their exceptions should ensure fairness, even though the achievement of total fairness may in some cases be impossible.** To ensure this, the law may have to elevate the claims of weaker parties, such as consumer buyers, above the true owner's claim. This will not be too objectionable provided the true owner is in a relatively good position to get some redress. Thus, even though the owner has been deprived of his title by the operation of one of the exceptions to the *nemo dat* rule he can in certain cases have access to other remedies, for example by instituting proceedings in tort for wrongful interference against any person who converted the goods before his title was extinguished.<sup>95</sup> In addition, the true owner *may* be in a stronger position to insure against the possibility of fraud.

Whether the law is kept in substantially its present state or not, it is clear that the inevitable unfairness created by the rogue is often compounded by the uncertainty and iniquity of the present law. At the very least, and given the fact that such claims engage the property rights of parties under the Human Rights Act 1998,<sup>96</sup> the unsuccessful party should be able to understand why his claim has been defeated and the reasoning of such decisions should not be the prerogative of academics and specialist judges.

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## Footnotes

- 1 See Davis, I, "Transferability and sale of goods' (1987) LS 1, and Weir, Taking For Granted - The Ramifications of *Nemo Dat* (1996) 49(2) CLP 325
- 2 In many cases a number of innocent parties may be involved, as where a rogue sells the true owner's goods to X, who then sells them to Y. In such a case if the true owner redeems the goods from Y, Y may sue X for breach of contract and X is affected by the actions of the rogue.
- 3 By virtue of s.12 of the Sale of Goods Act 1979, which implies a condition to the effect that the seller has title to the goods, or in the case of the owner an action in misrepresentation against the "rogue".
- 4 Under ss.21-27 of the Sale of Goods Act 1979
- 5 See Bridge, M., *The Sale of Goods* (OUP 1977), at page 410
- 6 [2003] 3 WLR 1371. See Phang, Lee and Koh, "Mistaken Identity in the House of Lords' [2004] CLJ 24; Hare, Identity Mistakes: A Missed Opportunity? (2004) 67 MLR 993; Connolly, Whose car is it anyway? (2003) Sol J 9; and Kramer, Unilateral Mistake as to Identity (2004) Student LR 17
- 7 See the rule contained in s.23 of the 1979 Act.
- 8 The House of Lords appeared to have accepted that the decision in *Ingram v Little* [1961] 1 QB 31 is no longer good law and that *Phillips v Brooks* [1919] 2 KB 243 represents the true legal position: that the presumption is that the owner wanted to contract with the person standing before him, whatever his identity.
- 9 For a detailed account of this area, see Atiyah, *The Sale of Goods* (Longman 2001) 10 th edition; *Benjamin's Sale of Goods* (Sweet and Maxwell 2001); Bridge, *Sale of Goods* (OUP 1997); Davis, *Sale and Supply of Goods* (Sweet and Maxwell 1996) 2 nd edition.
- 10 "Subject to this Act, where goods are sold by a person who is not their owner, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had..."
- 11 The exception of "sale in market overt" used to be the only effective exception based upon the assumption that a dishonest person is less likely to sell goods that he or she does not own in an open market than in a private sale. This rule was abolished by the Sale of Goods (Amendment) Act 1994.
- 12 It is contained at the end of s.21(1) by the use of the words "unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell". For a full account of the exception and its application, see Bridge, M., *op cit* note 5, at page 423; and Davies, I., *op cit* note 9, at page 191
- 13 This is different to the case where the seller consents to the sale within s.21(1) of the Act, in which case such consent does not have to be relayed to the subsequent purchaser, as it does with estoppel.
- 14 See *Henderson and Co v Williams* [1895] 1 QB 521 and *Shaw v Commissioner of Metropolitan Police* [1987] 1 WLR 1332 on estoppel by words, and *Farquharson Bros v King* [1902] AC 325 on estoppel by conduct.
- 15 See *Lickbarrow v Mason* (1787) 2 TR 63
- 16 *Ibid* at 70. For a criticism of that wide principle, see *Farquharson Bros & Co v King & Co* [1902] AC 325 at 335, 342; *Rimmer v Webster* [1902] 2 Ch 163 at 169; *London Joint Stock Bank v Macmillan* [1918] AC 777 at 836.
- 17 [1938] AC 387
- 18 [1977] AC 890. The case concerned a car let on hire purchase terms by the claimants, a finance company. Due to mistake the car was not registered with HPI (Hire-Purchase Information). The "purchaser" of the car offered the car for sale to the defendant, who checked with HPI and then purchased the car, and sold it to a bona fide purchaser. The claimant subsequently found the car had been sold and brought an action against the defendant.
- 19 Any representation had been made by HPI but it had simply said, which was true, that the car was not registered with it. In any case HPI was not the agent of the claimant for the purpose of making any representation about the car.
- 20 See also *Central Newbury Car Auctions v Unity Finance Ltd* [1957] 1 QB 371, where the court refused to find an estoppel simply because the owner had allowed a rogue to take away the registration documents. Bridge notices the inconsistency with this reluctance to accept liability with the equivalent rules in *non est factum*, *op cit* note 5, at page 431.
- 21 Contrast *Mercantile Credit v Hamblin* [1965] 2 QB 242, where the Court of Appeal imposed a duty of care on the owner of goods, but held that the duty was not broken on the facts.

- 22 See Bridge, *op cit*, note 5, at page 432, where the author states that the doctrine does little to assist the bona fide purchaser.
- 23 The scope of this principle is now severely limited by the recent decision in *Great Peace Shipping v Tsvarliris Salvaging Ltd* [2003] QB 679.
- 24 Benjamin, *op cit* note 9, at 7-021
- 25 "When the seller of goods has a voidable title to them, but his title has not been avoided at the time of sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title". This may not be a true exception to the *nemo dat* rule as the voidable title is still a good title until avoided. See Goode, *op cit*, note 13, at page 462
- 26 [1965] 1 QB 525. In this case a car owner had sold his car to a rogue and received a worthless cheque in return. On discovering that the cheque was worthless the next morning he immediately informed the police and motoring organisations.
- 27 Twelfth Report of the Law Reform Committee (1966), Cmnd. 2958
- 28 *McLeod v Kerr* [1965] SC 253.
- 29 The section has no application therefore in hire purchase or conditional sale agreements, or if the seller is in possession of the goods on "sale or return" approval, or at the time of sale the property has not yet passed to the seller.
- 30 Davies, I., *op cit* 9, at page 194
- 31 [1911] 1 KB 463
- 32 See Benjamin, *op cit* note 9, at 7-027. See also Twelfth Report of the Law Reform Committee (1966) Cmnd. 2958. The buyer is thought to be in a better position than the true owner to prove the circumstances of his acquisition of the goods.
- 33 See Lord Denning MR in *Lewis v Averay* [1972] 1 QB 198, and the Law Reform Committee's proposals in its Twelfth Report, considered below.
- 34 "Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, has the same effect as if the person making the delivery or transfer were expressly authorised by the owner of goods to make the same".
- 35 In *Michael Gerson (Leasing) Ltd v Wilkinson and State Securities* [2000] 3 WLR 1645, the Court of Appeal held that the delivery did not have to be physical but could be constructive. See Ulph, Sale and Lease-Back Agreements in a World of Title Relativity (2001) 64 MLR 481.
- 36 Lord Pearson in *Pacific Motor Auctions Ltd v Motor Credit (Hire Purchase) Ltd* [1965] AC 867, 886
- 37 Benjamin, *op cit* note 9, at 7-059
- 38 *Ibid*, at 7-066
- 39 *Ibid*, at 7-054
- 40 [1965] AC 867
- 41 [1972] 1 QB 210
- 42 See Bridge, *op cit* note 5, at pages 456-459, where he surveys the conflicting case law on this point. Bridge opines that the repair situation might sensibly be read out of s.24, if only because of the ignorance of the risk of the consumer buyer, although careful law reform is put forward as a better alternative.
- 43 "Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, has the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner. Section 25(2) further states "for the purposes of subsection (1). (a) the buyer under a conditional sale agreement is to be taken not to be a person who has bought or agreed to buy goods; and (b) "conditional sale agreement" means an agreement for the sale of goods which is a consumer credit agreement within the meaning of the Consumer Credit Act 1974 under which the purchase price or any part of it is payable by instalments, and the property in the goods is to remain in the seller (notwithstanding that the buyer is to be in possession of the goods) until such conditions as to the payment of instalments or otherwise as may be specified in the agreement are fulfilled".
- 44 Thus excluding someone who has taken goods on "sale or return".
- 45 It has been noted that at first sight it seems curious that a disposition by a person who has bought the goods should also be included since as a normal rule, a buyer to whom the property in the goods has passed under a

contract of sale will be able to confer a good title by virtue of his property in them. See *Benjamin*, *op cit* note 9, at 7-069

46 *Shaw v Commissioner of Police* [1987] 3 All ER 305. See also *National Employers' Mutual General Insurance Association Ltd v Jones* [1987] 3 WLR 901. Both cases are noted by Thornely, "Thieves, Rogues, Innocent Purchasers and Legislative Tangles" [1988] CLJ 15.

47 The meaning of consent has given rise to considerable difficulty, although unless the contract between the buyer and seller can be shown to be void the *de facto* consent of the seller will suffice, even though the buyer may be guilty of theft. See *Benjamin*, *op cit* note 9, at 7-072.

48 *Newtons of Wembley Ltd v Williams* [1965] 1 QB 560. In this case it was held that although the claimant had avoided the title, the buyer was still a buyer in possession of the car and that the second buyer had obtained a good title, as he had bought the car in good faith and had taken possession of the car.

49 See further Dobson, *op cit* note 2, at page 94

50 Law Reform Committee: Twelfth Report on the Transfer of Title to Chattels (1966)

51 *Newtons of Wembley Ltd v Williams*, *supra* note 48.

52 It has been suggested that if this requirement were discarded, the question of the way in which the goods were disposed of would then be relevant to the bona fides of the person receiving them, but not otherwise. See *Benjamin*, *op cit* note 9, at 7-079

53 It seems that if the first purchaser has notice then a subsequent purchaser of the goods from him will not be entitled to claim the protection of s.25.

54 Nor does the Factors Act protect them, as the seller is not a mercantile agent.

55 It does not apply to sale or return agreements, security bills of sale or financial leases.

56 Detailed reading of the statutory provision shows that a statutory title passes only if the first private purchaser has acted in good faith and without notice. If the first private purchaser falls short of this standard, then it does not matter how much good faith is mustered among any number of subsequent private purchasers, for they are all damned. See Bridge, M., *op cit* note 5, at page 481

57 Defined as purchasers who are not "trade or finance purchasers".

58 See Bridge, M., *op cit* note 5, at page 480

59 *Ibid*, at page 480. There is now in fact a website available to such purchasers - [www.hpicheck.com](http://www.hpicheck.com)

60 *Benjamin*, *op cit* note 9, at 7-094

61 *Ibid*, at 7-088

62 *Ibid*, at 7-095. Benjamin also uses the scenario where a motor vehicle owned by A is let under a hire purchase agreement to B who wrongfully sells it to C, a trade or finance purchaser. C lets the vehicle to D (a private purchaser) under a hire purchase agreement, and before the property is transferred to him in pursuance of this second agreement, D wrongfully sells the vehicle to a private purchaser, E. Benjamin submits that even assuming that D was at the time of the letting was without notice of the original hire purchase agreement, and that E is likewise innocent, E would not acquire a good title.

63 *Lloyds and Scottish Finance Ltd v Williamson* [1965] 1 All ER 641. For example, if a car owner puts his car with a dealer to sell, the car owner would normally be bound by the contract that the dealer makes even though the dealer may have acted outside his actual authority by accepting a lower price than agreed. Such sales will be with the consent of the owner, within s.21 of the Act. See Atiyah, *op cit* note 9, at 381-382.

64 See *Shaw v Commissioner of Police of the Metropolis* [1987] 3 All ER 405. Here an owner gave possession of his car to an agent, a rogue, in circumstances where the owner clearly held out the agent as authorised to sell the car. The agent agreed to sell the car to a third party, ownership to pass on payment. The third party gave a banker's draft to the agent who disappeared, and the bank did not honour the draft. The car was seized and the court held that s.21(1) applied only to a sale, not to an agreement for sale, and since the third party had never paid for the car, the property had not passed to him. It has been noted that this decision has to be read with some caution as the third party was trying to acquire rights to property for which he had not paid any money. For further discussion on this case see Goode, *op cit* note 13, at page 454

65 This provides that where a mercantile agent is, with the consent of the owner, in possession of goods or the documents of title to goods, any sale, pledge or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent shall ... be as valid as if he were expressly authorized by the owner of the goods to make the same, provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.

66 Atiyah notes that the section is mostly used in cases of motor vehicles, rather than the scenario where agents pledged goods consigned by foreign merchants to English ports: *op cit* note 9, at page 383.

- 67 The Factors Act 1889 continues in force in s.21(2) of the Sale of Goods Act, which provides "nothing in this  
Act affects (a) the provisions of the Factors Acts or any enactment enabling the apparent owner of goods to  
dispose of them as if he were their true owner.'
- 68 A mercantile agent is defined in s.1(1) Factors Act as meaning "a mercantile agent having in the customary  
course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or  
to buy goods, or to raise money on the security of goods'.
- 69 Possession here means physical control of the goods with an intention to exclude others. See Bridge, M, *op cit*  
note 5, at page 437
- 70 *Forristal v McDonald* (1883) 9 SCR 12. For further reading on the problems of defining "mercantile agents' see  
Bridge, M., *op cit* note 5, at page 432-434.
- 71 See Furmston, M, *op cit* note 12, at page 82.
- 72 [1951] 1 KB 275. Here the claimant delivered his car to a mercantile agent in order to obtain offers, but he gave  
no authority to sell it. The agent succeeded in obtaining the logbook by a trick, and having obtained both the  
logbook and the car the dealer dishonestly sold the car.
- 73 See Goode, *op cit* note 13, at page 456
- 74 For instance, a mercantile agent who deposits his principal's goods in a warehouse and being issued with a  
warehouse receipt will be deemed to be in possession of the warehouse receipt with the consent of the owner.  
See further Bridge, M., *op cit* note 5, at page 438
- 75 *Benjamin, op cit* note 9, at 7-035
- 76 By Lord Tenterden in *Evans v Trueman* (1830) 1 Moody & R. 10 at 12
- 77 *Benjamin, op cit* note 9, at 7-045.
- 78 *Ibid*, at 7-046
- 79 Law Reform Committee: Twelfth Report on the Transfer of Title to Chattels (Cmnd. 2958, April 1966). For a  
discussion on the Committee's findings, see Diamond (1966) MLR 413 and Atiyah (1966) MLR 541.
- 80 Transfer of Title: Sections 21 to 26 of the Sale of Goods Act 1979 (January 20 1994). For a damning report  
of the consultation process, see Davenport, Consultation - How Not to do it (1994) 110 LQR 165 and Miller,  
Transfer of Title (1994) 13 Tr. Law 299.
- 81 *Review of Statutory Interests in Property* (1989)
- 82 Thornely, *supra*, note 46, at page 18
- 83 The Law Reform Committee rejected a relaxation of the privity rule in relation to actions for lack of right to sell  
by treating each sale in the chain as an assignment of rights of action in relation to the title of goods sold.
- 84 Law Reform Committee, Twelfth Report on the Transfer of Title to Chattels (Cmnd. 2958, April 1966. See  
Diamond (1966) MLR 414-15.
- 85 Diamond, *A Review of Security Interests in Property* (1989), para 13.6
- 86 [1961] 1 QB 31
- 87 *Ibid*, at pages 73-74.
- 88 See the cases dealt with under the heading of estoppel, above.
- 89 See Atiyah (1966) MLR 413, at 414
- 90 The Law Reform Committee of 1966 had similar reservations with respect to the possibility of apportionment.
- 91 Atiyah, *op cit* note 9, at 541-544.
- 92 See Bridge, M., *op cit* note 5, at 411
- 93 Atiyah, *op cit* note 9, at 413
- 94 Goode, *op cit* note 13, at page 60
- 95 *Benjamin, op cit* note 9, at 7-002
- 96 Under Article 1 of the First Protocol to the European Convention on Human Rights (1950). See Booth, R,  
General Common Law Claims and the Human Rights Act, in Havers and English (eds), *An Introduction to  
Human Rights and the Common Law* (Hart 2002), at page 94.