Title: ‘New notes on the old oats’

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is reduced to applying abstract principles, and these based on general conclusions drawn from personal experience, to fundamental matters of the law of homicide. It is probably true that more people would behave heroically than otherwise in an emergency, but who can say with accuracy other than those who were there and lived to tell the tale? After a major disaster, there is always a need from the point of view of national morale to talk of heroism rather than cowardice. We are told that 'women and children first' was the order of the day for the lifeboats when the *Titanic* went down, but it is suggested that women and children in the third class were excluded from this privilege.

If the law seemed to bear harshly in its operation in the case of a mandatory sentence, there had never been a time when there were more effective means of mitigating its effect than at the present day, according to the Lord Chancellor, who referred to *Dudley and Stephens*. It had also been put to him that the law had to move with the times, and that the times were now less violent than in 'the bad old days of Hale or Blackstone'. He referred to the holocaust of the Jews, international terrorism on the scale of massacre, and explosion of aircraft in mid air:

'Social change is not always for the better, and it ill becomes those who have lived through the cruel events of the 20th century to condemn as out of date those who wrote in defence of innocent lives in the 18th century' (at p 582).

Lord Hailsham indicated that the answer to the first certified question should be 'no', on the second question on the facts as they had to be assumed the answer had to be 'yes', and the third question would also be answered 'yes'.

Avoiding death as defence

Lord Mackay of Clashfern devoted close attention to the decision in *Lynch*. He had not been able to find any writer of authority who was able to give rational support for the view that the distinction between principles in the first degree or those in the second degree was relevant to determine whether or not duress should be available to a particular case of murder. The justification for allowing a defence of duress to a charge of murder was that a defendant should be excused who killed as the only way of avoiding death himself or preventing the death of some close relation such as his own well loved child. That was essentially the dilemma which the court had faced in *Dudley and Stephens*, and in denying it, the court declined that consideration to be used as a defence to murder. If that result were right in *Dudley and Stephens*, it could not be wrong in the present appeals. It was worth noting that when the Law Commission had recommended that the defence be available in murder they had suggested a definition of duress which was considerably narrower than that thought to be available in the present law in respect of other offences.

The House of Lords can scarcely be criticised for this decision. In an era of increasing lawlessness, a defence of duress in murder could be interpreted as a licence to kill. □

New notes on the old oats

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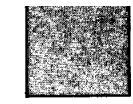
The author examines a case over a century old and demonstrates its influence on modern cases.

No one would dispute that *Smith* v *Hughes* (1871) 6 LR QB 597, is part of the contract lawyer's heritage. Yet the case is something of an enigma. Its sheer difficulty threatens to obstruct a clear view of any axiomatic principle to be extracted therefrom. Indeed, students may grow sceptical about the importance of the precedent. They may think that its web of fine distinctions has no general significance; it is no more than a trap within which to ensnare the unsuspecting student. The object of this article is to dispel any such lingering scepticism, and to explain precisely why *Smith* v *Hughes* is seminal and how it remains of continuing significance for recent developments in the law of contract.

The facts of *Smith* v *Hughes* were that the defendant race horse trainer 'contracted' to buy some oats from the plaintiff farmer. However, when the first parcel of oats was delivered, the defendant refused to pay and he refused to accept further deliveries. The oats tendered were 'green', and the defendant argued that he had been under the impression that the agreement was for 'old' oats. The plaintiff sued for the price of the oats delivered and he claimed damages for the defendant's refusal to accept further deliveries. The jury ruled in favour of the defendant, whereupon the plaintiff appealed to the Queen's Bench on the grounds that the judge had misdirected the jury.

Unsafe decision

So much for the easy part of the case. The difficulty concerns the Queen's Bench decision to allow the appeal on the grounds that the jury's decision was unsafe. The problem was that the judge invited the jury to find for the defendant on two possible grounds, one of which the Queen's Bench thought was unsatisfactory, and it was not clear whether the jury decision rested on the safe or the unsatisfactory ground. The aspect of the judge's direction which troubled the Appeal Court was his guidance on the



law where one assumed that the plaintiff had not described the oats as good old oats. Here, the judge had advised that the jury should return a verdict in favour of the defendant if they were satisfied that the plaintiff believed that the defendant was under the (mistaken) impression that he was contracting for old oats. As it will be appreciated, this question was put from a very awkward trajectory. The jury were being asked to consider whether the plaintiff vendor realised that the defendant buyer was labouring under a mistaken apprehension. But this was not what bothered the court. What troubled the Queen's Bench was the ambiguity in the trial judge's direction as it bore on the nature of the mistake; and this takes us to the nub of the case.

'Offer and acceptance'

Consider the distinction between these two situations:

(*A*) the buyer (mistakenly) understands the seller's offer to be an offer to sell old oats, but the seller in fact intends to offer only a parcel of oats (with no specification as to the oats being old or otherwise);

(*B*) the buyer (correctly) understands the seller's offer to be an offer to sell a parcel of oats (with no specification as to the oats being old or otherwise), which oats the buyer (mistakenly) judges to be old oats when, in fact, they are green oats.

Situation (*A*) discloses, as it were, an 'offer and acceptance' mistake; the buyer misunderstands the terms of the offer. Situation (*B*) involves no 'offer and acceptance' mistake, simply a mistake by the buyer as to the physical characteristics of the subject matter of the agreement. The position of the Queen's Bench in *Smith* v *Hughes*, was that if the seller realised that the buyer was making an 'offer and acceptance' type of mistake, as in situation (*A*), then the jury would rightly find for the defendant buyer. However, if the seller thought that the buyer's mistake simply related to the physical characteristics of the oats, as in situation (*B*), then it would be wrong to find for the defendant. Since the judge's direction obscured the distinction between situation (*A*) and situation (*B*) mistakes, the case was sent back for a new trial.

Even with this spadework behind us, it might seem like a lot of hard thinking for little reward: what great principle underlies all this? Even if we grasp just why the Queen's Bench allowed the appeal, and understand the ambiguity in the direction to the jury, what precisely is the significance of the decision?

Contractual intention

For some commentators the significance of *Smith* v *Hughes* lies in its approach to the ascertainment of contractual intention. To this end one often finds (see eg Treitel, 'The Law of Contract' (6th ed, 1983, p 1); Furmston, Cheshire and Fifoot's Law of Contract (10th ed, 1981, p 218)) the following well known words of Blackburn J cited:

> 'If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into a contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms' (*Smith* v *Hughes* (1871) 6 LR QB 597, 607).

What the reader is apparently invited to make of Blackburn J's observations is that the English law of contract is committed to an objective theory of contractual interpretation. Now, it is certainly trite law that English law employs an objective test to identify contractual intention; but to found this point on *Smith* v *Hughes* and Blackburn J's dictum really is very odd.

First, if one wanted a nice clear statement of what the objective test means, one would hardly look to Blackburn J's statement as the best available. Lord Denning has said on countless occasions, and in words of one syllable, that English law is generally not concerned with the inner thoughts and intentions of contracting parties but, rather, with their words and conduct. Secondly, Blackburn J's statement takes the 'reasonable man' as its reference point. But, while the objective test certainly operates from the standpoint of the proverbial fly on the wall, there is a difference between an impartial fly and a reasonable fly.

The impartial fly simply reconstructs the contract as a disinterested observer, noting the parties' words and behaviour. The observer may regard the resulting contract as totally unreasonable, but this is irrelevant. By contrast, the reasonable fly will have ideas about the reasonableness of various interpretations; not just as a matter of reasonable fit with the parties' words and conduct, but as a matter of reasonableness simpliciter. Thirdly, the complexity of Blackburn J's statement (it is complex, is it not?) arises because it incorporates the awkward trajectory of *Smith* v *Hughes* itself. That is to say, Blackburn J's statement not only focuses on some contracting party *X*, and reads *X*'s intentions through the eyes of the reasonable man; it also incorporates the beliefs of the other contracting party, *Y*.

There are two dimensions to this: the reasonable man's interpretation of *X*'s intention, and *Y*'s interpretation of *X*'s intention. What seems to be distinctive about *Smith* v *Hughes*, in this context, is not so much that it relies on the reasonable man's interpretation of the buyer's intentions, but that it attaches significance to the seller's understanding of the buyer's intentions. In other words, *Smith* v *Hughes* gives some indication of the extent to which the parties' inter subjective understanding can qualify the objective approach.

Objective approach

Although it is a little strange to select *Smith* v *Hughes* generally, or Blackburn J's dictum in particular, as a straightforward example of the objective approach, this is not to say that the case is unimportant if approached from this angle. As we have said, the case is instructive in showing how, within the general objective framework of contractual intention, the inter subjective perceptions of the parties may still be significant. *Smith* v *Hughes* implies that even if, objectively interpreted, the agreement was for oats (without specification as to age), the seller could not hold the buyer to such an agreement if he realised that the buyer had misunderstood the terms of the agreement, ie if the buyer had made an 'offer and acceptance' mistake. In other words, a party will not be allowed to take advantage of a situation (*A*) mistake in which he has acquiesced. This puts *Smith* v *Hughes* on all fours with a case like *Hartog* v *Colin and Shields* [1939] 3 All ER 566, where the buyer was not allowed to 'snap up' the seller's erroneous offer; and, more generally, *Smith* can then be located within that group of cases which deal with the relationship between objective interpretation and 'mistaken' subjective intention: see eg *Raffles* v *Wichelhaus*

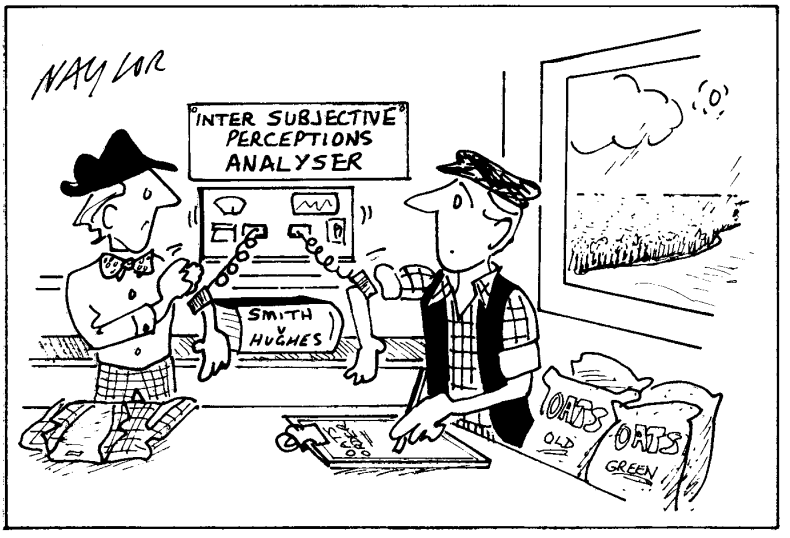
(1864) 2 H & C 906; *Tamplin* v *James* (1880) 15 Ch D 215; *Scriven Bros and Co* v *Hindley and Co* [1913] 3 KB 564. Even allowing all this, however, this hardly marks out *Smith* v *Hughes* as a landmark decision. Seen in this light, *Smith* is important, but scarcely a case that merits a place in contract's hall of fame.

To understand why *Smith* v *Hughes* truly is seminal, we must turn away from the operative situation (*A*) mistake. The key to the case is the inoperative situation (*B*) mistake. The crucial question is why the Queen's Bench regarded this latter type of mistake as no defence for the buyer. Once we see why situation (*B*) mistakes must be discounted, we can see why *Smith* is part of the bedrock of the classical English law of contract.

It is sometimes said that the distinction between situation (*A*) and situation (*B*) mistakes is altogether too nice. Nevertheless, it represents a very important watershed in the philosophy of English contract law. By taking a hard line against situation (*B*) mistakes, *Smith* v *Hughes* supports the principle that a contracting party is not lightly to be relieved of a bad bargain. Put rather crudely, if the defendant race horse trainer had no use for new oats, then it was up to him to ensure that he bought only old oats. To allow situation (*B*) mistakes to be operative would be to permit buyers to escape from imprudent bargains which they later regretted. Yet this policy would jeopardise in the clearest possible way contract's classical function of facilitation of commerce. Accordingly, by disallowing situation (*B*) mistakes, the Queen's Bench were making no pedantic point; they were hauling contract back from the precipice.

Seller's knowledge

The relevant plea of mistake in *Smith* v *Hughes* was not simply that the buyer had made a mistake, but also that the seller knew this. If the buyer had made a situation (*B*) mistake, wrongly thinking that the oats were old, and if the seller realised that the buyer had slipped up, would this not afford grounds for the defence? This, however, was precisely what the Queen's Bench said would not constitute a good defence. Situation (*B*) mistakes were inoperative even where the other contracting party realised that such a mistake had been made. The seller had no duty to correct the buyer's mistake. As Cockburn CJ remarked in a particularly telling passage:



'The question is not what a man of scrupulous morality or nice honour would do. . . . The case put of the purchase of an estate, in which there is a mine under the surface, but the fact is unknown to the seller, is one in which a man of tender conscience or high honour would be unwilling to take advantage of the ignorance of the seller; but there can be no doubt that the contract for the sale of the estate would be binding' (ibid, at pp 603–4).

So, if the buyer wanted old oats, the onus was on him to see to it that the oats he obtained were actually old oats (or that the contract provided for the sale of old oats specifically), and he could not look to the seller for any assistance in this respect.

Put in these terms *Smith* v *Hughes* is more than an important piece in a confusing jigsaw of mistake cases; it is part of a long line of precedents which emphasise the individualistic philosophy to which the English law of contract is classically committed. This philosophy militates against any contractual doctrine being used as an easy escape from an imprudent bargain. Thus, the tough line in *Smith* v *Hughes* with regard to the buyer's situation (*B*) mistake is matched by the hard nosed view of common mistake set out by the majority of the law lords in *Bell* v *Lever Brothers Ltd* [1932] AC 161. Equally, the individualistic philosophy underpins the ruling view of both the doctrine of frustration (see *Davis Contractors Ltd* v *Fareham Urban District Council* [1956] AC 696) and of implied terms (see *Liverpool City Council* v *Irwin* [1977] AC 239); it explains the courts' refusal to review the adequacy, as opposed to the sufficiency, of consideration; and it accounts for the courts' unwillingness to upset working contracts on the grounds of uncertainty: see eg *Foley* v *Classique Coaches Ltd* [1934] 2 KB 1, and so on. *Smith* v *Hughes*, therefore, is no one-off case; it is one of the main supports for the view that it is no function of the courts to bail a party out of a bad bargain which is later regretted. In other words, the individualistic axioms guiding the Queen's Bench in *Smith* v *Hughes* run beyond the narrow boundaries of the doctrine of mistake; they are the axioms upon which the classical law of contract itself is predicated. This is why *Smith* v *Hughes* really is seminal.

As we said at the outset, *Smith* v *Hughes* remains significant. In the light of the above discussion, this means that the individualistic principles continue to inform judicial thinking. Two areas of recent development are noteworthy; first, the floating of such doctrines as inequality of bargaining power/unconscionability (see *Lloyds Bank Ltd* v *Bundy* [1975] QB 326) and economic duress (see eg *North Ocean Shipping Co* v *Hyundai Construction Co* [1979] QB 705); and, secondly, the introduction of the Unfair Contract Terms Act 1977 (UCTA) reasonableness discretion.

Inequality of bargaining power

With respect to the emergence of fresh common law doctrines, such as inequality of bargaining power and economic duress, the relevance of the individualistic philosophy is to act as a constraint on doctrinal development. Above all, such doctrines must not be allowed to undercut the hard line entrenched elsewhere in the law of contract. From this perspective, the doctrine of inequality of bargaining power looks like a very dangerous idea indeed. Thus, in *Pao On* v *Lau Yiu Long* [1980] AC 614, Lord Scarman spoke for the Privy Council in rejecting the idea that inequality of bargaining power should be treated as a ground for releasing a commercial contractor from an inconvenient bargain. He said that:

'where businessmen are negotiating at arm's length it is unnecessary for the achievement of justice, and unhelpful in the development of the law, to invoke such a rule of public policy. It would also create unacceptable anomaly. It is unnecessary because justice requires that men, who have negotiated at arm's length, be held to their bargains unless it can be shown that their consent was vitiated by fraud, mistake or duress' (at p 634).

Precisely the same sentiments underlie Lord Scarman's more recent observations on the same theme in *National Westminster Bank plc* v *Morgan* [1985] AC 686:

'It is the unimpeachability at law of a disadvantageous transaction which is the starting point from which the court advances to consider whether the transaction is the product merely of one's own folly or of the undue influence exercised by another' (at p 709).

The Queen's Bench in *Smith* v *Hughes* surely would have approved of such caution. Economic duress, however, is less threatening; indeed, it may well support individualistic thinking. If the parties strike a bargain which proves to be unfavourable to one side, and if (as in *North Ocean Shipping*, supra) the disadvantaged party seeks a renegotiation, then the principle of economic duress (by challenging the renegotiation) effectively keeps parties to their original bargains. In this context, an easy line on economic duress is in tune with the individualistic principle. After all, if the shipyard in *North Ocean Shipping* could not have run a frustration argument past *Davis* v *Fareham*, supra, why should they be able to pressurise the client into an extra payment? To the extent that the shadow of *Smith* v *Hughes* stretches into the late 20th century, we can expect to see economic duress flourish (at least, in renegotiation contexts), while inequality of bargaining power will simply gather dust.

Principle of reasonableness

It is by no means clear, however, that the individualistic principle will hold its ground. Lord Denning's imprint of reasonableness has made its mark on practically every aspect of contract and UCTA has capped this development. Where the principle of reasonableness has irresistible force, as under UCTA, the courts face the task of making sense of the new discretion. There is little evidence to date that the courts have much sense of direction in this respect (cf discussion of this problem in 'Contract: the Seeds of Doubt' (1984) 128 SJ 371-3). Nevertheless, the individualistic principle, in the guise of a non interventionist reasonableness, will not go down without a fight; and this, surely, is the significance of the ex cathedra pronouncements in *Photo Production Ltd* v *Securicor Transport Ltd* [1980] AC 827. The point is that the courts, if they follow the *Photo Production* lead, will not lightly invoke the UCTA discretion in order to relieve a commercial contractor of a bad bargain. And, in a world where the *S S Contract* is tossed about in the swirling Sea of Reasonableness, the individualistic principle of *Smith* v *Hughes* may well remain a welcome landmark enabling the courts to get their bearings.

It is a commonplace that contract has too many doctrines chasing after too few ideas. Certainly, as we have explained already, the individualistic idea at the core of *Smith* v *Hughes* threads its way through a number of doctrines, eg mistake, frustration etc, and confirms this image of the classical law of contract. With respect to the modern law of contract, however, things are rather different. We now have too many competing ideas chasing after the doctrines, and it is a moot point to what extent the philosophy of *Smith* v *Hughes* can continue to spread its influence. Whatever its eventual fate, though, *Smith* v *Hughes* should not be remembered as an esoteric discussion of mistake, having little to contribute to contract generally. On the contrary, the individualistic principle of the case is central to the thinking of classical contract law, and is a valuable benchmark for plotting the changes taking place within the modern law. □

100 YEARS AGO

On 26 March 1887 the SOLICITORS' JOURNAL reproduced the report of the committee appointed to inquire into the accommodation in court houses for prisoners awaiting trial at assizes and quarter sessions. In some of the 200 lock-ups dealt with 'order and decency are attempted to be enforced by the presence of an officer among the prisoners; in others no officer could be expected to endure the atmosphere in which the prisoners have to spend their time; and the worst evils of that promiscuous association . . . must be encountered for hours, and even days together, by children, women, and men who may be, for some of whom are, innocent . . . Men and women are in many such places of detention, bolted for many consecutive hours, sometimes for many consecutive days, into boxes or cupboards measuring, in some instances, as little as 2ft. 4in, by 2ft. 1in. (Gloucester, where prisoners have been confined in these boxes six days running), and even 2ft. 6in. by 1ft. 9in. in one instance (Bodmin). This practice is more common than might be supposed . . . :—Central Criminal Court, boxes, 2ft. 6in. by 3ft.; Devizes, 2ft. 4in. by 2ft. 6in.; Salisbury, 3ft. by 2ft. 6in.; Marlborough, 2ft. by 2ft. 4in.; Gloucester, 2ft. 1in. by 2ft. 4in.; Lewes, 2ft. 6in. by 3ft.; and Bodmin, 2ft. 6in. by 1ft. 9in. When it is considered that a great many of such cells are all but dark, . . . that some are close and overheated by hot-water pipes or gas burners, while in others the temperature in winter is often as low as 40 to 45 degrees, with damp and unprotected stone floors, it is not using the language of exaggeration to say that such a method of confinement may inflict great suffering, both of body and mind, and that its wholesale adoption savours little of the humanity, which is extended to convicted criminals'.