

Looking again at theft: valid titles to property and theft liability.

By Simon Parsons,

Chartered Legal Executive and Associate Professor of Law, Southampton Solent University.

The offence of theft is defined by section 1(1) of the Theft Act 1968 as follows “A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it”. It was enacted in response to the view of the Criminal Law Revision Committee that theft was the appropriate sanction for the simple thief whilst the deceitful rogue who obtained property by a false deception or misrepresentation should be liable for the more serious offence of obtaining property by deception (or since 15th January 2007 fraud). This distinction was finally broken by the decision of the House of Lords in *Gomez* [1993] A. C. 442 HL where the majority construed section 3 (1) of Theft Act 1968 so that ‘appropriation’ in the offence of theft was extended to include any assumption of the owner’s rights and was not limited to adverse assumptions (such as attaching a bar code to goods in a supermarket which shows a price lower than that which is properly payable for the goods). The result of this decision is that even if the owner of the property consents to its taking there is still an appropriation for purpose of the offence of theft and it is irrelevant that the defendant’s title to the property is void or voidable. In *Gomez* a rogue was convicted of theft after he persuaded a manager of an electrical shop to hand over electrical goods in return for stolen cheques which he represented were as good as cash. (He should have been charged with obtaining property by deception and not theft). Thus the legal effect of *Gomez* was to introduce a subjective basis for appropriation because the manifest criminality required by an adverse assumption of rights was not required for there to be appropriation. There was a shift of emphasis to the defendant’s state of mind when he appropriated the property although the appropriation would have an underlying wrongfulness in that, at the very least, the civil law

transaction had to be voidable. Thus the *actus reus* of theft required the composite whole of a 'dishonest appropriation' in that any finding of dishonesty would be based on the wrongfulness of the appropriation.

Therefore as the House in *Gomez* had before it a voidable contract (voidable for fraudulent misrepresentation) and not the case of an acquisition of indefeasible or valid title to property it was thought that there could not be an appropriation if such a title was obtained i.e. the title was not void or voidable.

The issue of whether there could be an appropriation when the defendant received a valid title to property was finally decided in the decision of the House of Lords in *Hinks* [2001] 2 A.C. 241 HL. In *Hinks* the defendant Karen Hinks made friends with John Dolphin, a man of limited intelligence, who had a building society account which contained his savings and money he had inherited from his father. Almost every day, between April and November 1996, the defendant accompanied Mr Dolphin to his building society where he made withdrawals from his account of the maximum permissible sum of £300 cash per day. Those sums plus cheque withdrawals, amounting to a total of about £60,000, were kept by the defendant or deposited in her account. The defendant was convicted upon indictment of several counts of theft relating to the moneys withdrawn from Mr Dolphin's account and the transfer to the defendant of Mr Dolphin's colour television set. The Court of Appeal dismissed the defendant's appeal and was not willing to challenge the trial judge's acceptance of the defence case that Hinks had received valid gifts. However, the court certified that a question of law of general public importance was involved in its decision.

The question which the House of Lords was asked to answer, was: “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 s1 (1) of the Theft Act 1968?” The House of Lords held by a majority of four to one, that the answer to the question was yes and by a majority of three to two that the convictions were safe. Lord Steyn, who gave the leading speech for the majority, held that "appropriation" within the meaning of section 3 (1) of the Theft Act 1968 was a neutral word which included any assumption by a person of all of the owner's rights. Therefore the acquisition of an indefeasible title to property from a person who no longer retained any proprietary interest or any right to resume or recover any proprietary interest in the property was capable of amounting to ‘appropriation’ of that property. This means that juries do not have to concern themselves with whether a transfer of title to property was void, voidable or valid when considering whether there has been an appropriation. Thus there are no restrictions on the scope of appropriation and the emphasis will in most cases shift to the question of whether the defendant was dishonest. The decision in *Hinks* goes beyond *Gomez*, in that appropriation no longer requires any wrongfulness in itself (manifest or underlying) so that the *actus reus* of theft no longer requires the composite whole a ‘dishonest appropriation’. The two elements have been separated so that any wrongfulness in the offence of theft can be found in the defendant’s dishonesty alone.

The consequence of *Gomez* and *Hinks* is that the offence of theft is now itself extraordinarily wide and the role of the dishonest element is essential as the only reason why the ordinary shopper is not guilty of theft when she picks up goods from the supermarket shelves is her honesty. Following *Hinks* the question of the defendant’s title to property is irrelevant to the issue of appropriation. This could lead to some awkward consequences concerning civil law concepts. First, a thief can remain the absolute owner of the property of which he has been

convicted of stealing. Thus if John Dolphin took back the money Karen Hinks stole from him he could face a theft charge. Second, if a person receives the money from Hinks knowing of its origins he cannot be guilty of handling because Dolphin had no right of restitution. Third, if the police decided to seize the money Hinks would have an action in conversion against the police. This is indicative of how the decision in *Hinks* has the potential to prevent the proper operation of theft in the protection of property rights. The decision in *Hinks* is bad law because there should be a link between the civil law of vitiation and appropriation since the underlying rationale of the offence of theft is to protect and support property rights. When there is valid gift or contract there is no proprietary interest to protect nor any right to resume or recover any proprietary interest.

For eleven years the law of theft was in this unhappy state but in 2012 there was the decision in *Jouman* [2012] EWCA Crim 1850. The facts are very similar to those of *Hinks* in that the victim a Miss Cairra was a vulnerable individual of eighty-five who was easily confused. The victim had £88,000 invested in an investment bond. Miss Cairra was befriended by the defendant Jouman who persuaded her to hand over the proceeds of the investment bond in the form of two cheques. The defendant was tried at Blackfriars Crown Court by a judge and jury on two counts of theft, the trial judge having directed the jury that “Your route to verdict is this. You ask yourself, ‘Was this a gift or might this have been a gift?’ If the answer to that is, ‘Yes, it was a gift or might have been a gift’, it is not guilty and you acquit her of both charges. You will only convict her if you are satisfied that it was not a gift. The word ‘dishonesty’ really does not need definition. But, ladies and gentlemen, if this was not a gift, then what happened, clearly, in anybody's language was dishonest.” The jury convicted the defendant and she appealed to the Court of Appeal maintaining that Miss Cairra had given her the monies as valid gifts. The court dismissed her appeal holding that the trial judge had

correctly directed the jury: “the reasonable inferences to be drawn from the circumstances leading up to the transfer of the two sums as showing that this was not a gift freely given”. The Court of Appeal thought that there had been a gross breach of trust in which the defendant had orchestrated and organised the encashment and transfer of the whole of the victim’s wealth to herself.

The implication from “this was not a gift freely given” is that, if the gifts to Jouman were voidable for actual undue influence or (if coercion was not present) voidable for unconscionability, there could be an appropriation for the purposes of the offence of theft. But if the gifts were valid there would not be an appropriation. The decision in *Jouman* is to be welcomed as it represents a return to the composite whole of “dishonest appropriation” in that a finding of dishonesty derives from the underlying wrongness of the appropriation i.e. that the civil transaction was voidable. The decision reasserts the view that there is a link between the civil law of vitiation and appropriation and supports the rationale for the offence of theft - to protect and support property rights. Miss Cairns continued to have a proprietary interest in the monies she gave Jouman and Jouman’s theft conviction supported that proprietary interest. But the problem is that *Jouman* conflicts with the House of Lords’ decision in *Hinks* where it was held that there could be an appropriation for the purposes of theft where there was a valid gift. The decision in *Hinks* was binding on the Court of Appeal but the judgment of that court makes no reference to *Hinks*. Applying *stare decisis* the Court of Appeal should have made it clear that issue of whether there was a valid gift or not was irrelevant as to whether there was an appropriation and the central question was whether Jouman was dishonest. Unfortunately the decision in *Jouman* is *per incuriam* as it ignores a binding precedent and cannot be followed.

This is unfortunate as the offence of theft was enacted to protect civil property rights and thus an appropriation should only be possible in law where the defendant has in the civil law a void or voidable title to property but not when the transaction is valid. There is a need for the Supreme Court revisit the issue of valid titles and theft liability.