

# Open Research Online

---

The Open University's repository of research publications and other research outputs

## Mistaken identity and the precarious third party

### Journal Item

How to cite:

Fletcher, Roland (2004). Mistaken identity and the precarious third party. *Law Teacher*, 38(3) pp. 372–386.

For guidance on citations see [FAQs](#).

© 2004 Taylor Francis

Version: Accepted Manuscript

Link(s) to article on publisher's website:

<http://dx.doi.org/doi:10.1080/03069400.2004.9993163>

---

Copyright and Moral Rights for the articles on this site are retained by the individual authors and/or other copyright owners. For more information on Open Research Online's data [policy](#) on reuse of materials please consult the policies page.

---

[oro.open.ac.uk](http://oro.open.ac.uk)

## RECENT LEGAL DEVELOPMENTS

**Editor: Michael Jefferson**

### CONTRACT LAW

#### MISTAKEN IDENTITY AND THE PRECARIOUS THIRD PARTY

##### **Introduction**

THE DECISION in *Shogun Finance Ltd v. Hudson* [2003] 3 WLR 1371 dealt with the notion of mistaken identity and considered the rules of agency when dealing with the formation of a hire purchase contract. It is irresistible to question this decision and the application of the legal rules, dealing with mistaken identity, that were produced over a hundred years ago and to apply them in today's commercial environment. This article examines the basis of the decision and whether the application of the law has become distorted in its quest to apply an artificial formula to ascertain whether a contract is void or voidable.

##### **The notion of mistaken identity**

*Shogun Finance Limited v. Hudson* demonstrates the current position when dealing with mistaken identity, along with the distinction between dealing at arms length and by correspondence. The appeal involved a rogue who went to the premises of a motor dealer and informed the manager he wanted to purchase a Mitsubishi Shogun that was on display. Credit was to be arranged, by the manager, through Shogun Finance Ltd. The rogue produced identification in the form of a driving licence, which he had stolen, and the manager telephoned Shogun Finance Ltd to provide the necessary details. Credit was approved and the rogue paid a ten per cent deposit partly in cash, partly by cheque (which was later dishonoured) and the rogue obtained possession of the vehicle. The rogue sold the vehicle to a Mr Hudson, a private purchaser and innocent third party, for £17,000. When the facts were made known to Shogun Finance Ltd they claimed the vehicle from Mr Hudson. Shogun Finance alleged the contract with the rogue was void, based on mistaken identity, and the rogue was not able to pass on title (ownership) to Mr Hudson. Shogun Finance Ltd insisted they intended to contract with the person named on the licence that was presented to the showroom manager, and never intended to contract with the rogue. However, Mr Hudson attempted to rebut Shogun Finance Ltd's

372  
Downloaded by [Open University] at 01:47 31 January 2014

##### RECENT LEGAL DEVELOPMENTS 373

contention by claiming he had acquired ownership of the vehicle under s. 27 of the Hire Purchase Act 1964. The effect of this section entitles an innocent third party, who purchases in good faith, to obtain ownership. In this instance Mr Hudson was claiming to have met the criteria: he was not a car dealer and purchased the vehicle in good faith from the seller whilst the vehicle was subject to a hire purchase agreement. However, Shogun Finance successfully submitted that they only ever intended to contract with a Mr Patel, who was the named individual on the licence presented to the showroom manager. The Court of Appeal and the House of Lords accepted this line of argument based upon the principles laid down in *Cundy v. Lindsay* (1878) 3 App Cas 459 (HL) and the initial contract between the rogue and Shogun Finance (hire-purchase agreement) was void. This decision left Mr Hudson in an untenable position; he was unable to trace the rogue to claim back his money and had to give the vehicle back to Shogun Finance. Given the role each party played and the perceived risks taken by Shogun Finance and the car dealer, arguably, this decision is unjust and has produced yet another anomaly.

##### Judicial policy

Within the last one hundred years judicial policy making has produced a number of contradictory decisions, thus the issue of mistaken identity remains a complicated area of law due to the continuous piecemeal decisions produced by the courts. This is not meant to be a direct criticism of the

judiciary but *Shogun Finance v. Hudson* is the latest imbroglio which reaffirms the constraints within which the judiciary are making their judgment and statutory intervention is needed to release them from these constraints. The Law Reform Committee made recommendations<sup>1</sup> in 1966, which recommended that when goods are sold to a fraudster who then sells them on to an innocent third party, the contract should be voidable and not void.<sup>2</sup> The application of void and voidable in the context of mistaken identity has been expanded through the legal concepts employed by the judiciary who have created a self-authorizing language that has escalated the argument, through a proliferation of cases that have culminated in *Shogun Finance v. Hudson*, to whether or not property and title have passed to an innocent third party. When dealing with the transfer of goods it is imperative to be able to distinguish between physical possession and ownership (title) of the goods. The transference of title involves a number of situations that may include a seller who does not own the goods. The legal rules have developed in such a way that in given circumstances a seller may confer not only physical possession of the goods but also a good

<sup>1</sup> Twelfth Report of the Law Reform Committee on the *Transfer of Title to Chattels* (Cmd 2958, 1966).

<sup>2</sup> Para. 15.

Downloaded by [Open University] at 01:47 31 January 2014

374 ROLAND FLETCHER

title on his buyer and in doing so defeat any claims of the true owner.<sup>3</sup> It may sound ludicrous to assert that a non-owner may be able to transfer a good title (ownership) to a purchaser, who buys in good faith. However, this is the crux of the problem. When two innocent parties, the original seller and the third party, compete for the ownership of the goods in question, who should lose out? To answer this question it is necessary to examine the legal rules and compare the application of these rules through case law and legislation that has created a legal quagmire.

It is often thought that only the owner of the goods is capable of transferring a good title and this is confirmed by the legal maxim *nemo dat quod non habet*.<sup>4</sup> However, this is only the starting point and this approach would support the position where a thief steals a car and then sells it on to an innocent party. In this situation the thief never acquired title to the car and was therefore never in a position to pass title to the third party. In such an example the law does not provide any protection for the bona fide purchaser and the purchaser's innocence is not sufficient to deprive the owner of his title. The thief has committed a criminal act and this approach is further supported by the fact that the owner of the vehicle did not facilitate the process, whereby the thief obtained possession without the consent of the owner of the goods.<sup>5</sup> However, if the owner had voluntarily parted with possession of the goods to a fraudster, who later sold the goods on to an innocent third party, it may be possible under one of the exceptions to the *nemo dat* rule to divest ownership of the goods in a third party. In such a situation it is the initial transaction between the original owner and fraudster that is analysed by the courts using the legal rules that have been mainly developed through case law. Such case law has illustrated a piecemeal approach when dealing with mistaken identity that has been encapsulated in the decision of *Shogun Finance Ltd v. Hudson*.

*Consensus Ad Idem*

At the heart of any contract is *consensus ad idem*: if there is no genuine agreement between the parties then there is no contract. This is a fundamental principle when dealing with the formation of a contract. Thus, a contract may be described as a legally enforceable agreement between two or more identifiable persons who freely enter into such an arrangement. Therefore, in the absence of genuine consent, for example, if the offeree believes he is accepting an offer from a person who holds himself out to be a particular individual, this may constitute a unilateral mistake. Such an operative mistake may result in the contract either being

<sup>3</sup> See s. 23 Sale of Goods Act 1979 and part three of the Hire Purchase Act 1964 s. 27.

4 No one can give that which he has not (i.e. no one can give a better title than he has).

5 See also the Sale of Goods Act s. 12 which contains three implied contractual obligations relating to title and the case of *Bawland v. Divall* [1923] 2 KB 500.

Downloaded by [Open University] at 01:47 31 January 2014

RECENT LEGAL DEVELOPMENTS 375

void *ab initio* or voidable. It is this premise that will decide whether or not a contract has been formed. Therefore, the intention of the parties is fundamental and it is the judiciary, drawing upon previous decisions for guidance, who decide what the parties intended based upon the facts presented to them. However, the objectivity and application of the legal rules within certain decisions has confused the area of law. For example, the intention of the parties and who they intended to contract with was discussed in the case of *Shogun Finance Ltd v. Hudson* in regard to whether fraudulent misrepresentation would eliminate any such intention. This was pertinent to the decision in this case and was commented upon by Lord Nicholls of Birkenhead:

A contract of sale and purchase, like any other contract, requires agreement, a meeting of minds. The seller must intend, or appear to intend, to sell the goods, and the buyer must intend, or appear to intend, to buy the goods on the agreed terms. The presence of fraud does not negative the existence of such an intention on the part of either party. Fraud does not negative intention. A person's intention is a state of mind. Fraud does not negative a state of mind.<sup>6</sup>

Thus it is hardly surprising that the decision of *Shogun Finance Ltd v. Hudson* has presented some major problems when dealing with intention and mistaken identity. This debate provoked a difference of opinion between their Lordships and left us with a decision that appears, from a consumer's perspective, to be unjust.

It would appear that future developments have been constrained by the limits imposed by contradictory decisions that have provided guidance on the legal rules yet created a state of confusion and the need for statutory intervention. This is evident through a number of cases that have been selected to demonstrate that no two authorities appear to agree on a common classification that strictly defines mistaken identity. The tension between comparative decisions was succinctly summed up by Denning LJ (as he then was):

In the development of our law, two principles have striven for mastery. The first is for protection of property: no one can give a better title than he himself possess. The second is for the protection of commercial transactions; the person who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time, but it has been modified by common law itself and by statute so as to meet the needs of our times.<sup>7</sup>

<sup>6</sup> At 1374.

<sup>7</sup> *Bishopsgate Motor Finance Corp Ltd v. Transport Brakes Ltd* [1949] 1 KB 322.

Downloaded by [Open University] at 01:47 31 January 2014

376 ROLAND FLETCHER

It is questionable that the current legal rules are meeting "the needs of our times." With the development of technology and new methods of communication it is arguable that nineteenth and early twentieth century case law is preventing the development of this area of the law and is in need of reform. For example, the principal case that dominated the decision of *Shogun Finance Ltd v. Hudson* was *Cundy v. Lindsay*, which was decided over a century ago. Even though this case is still a dominating decision today, the medium of making contracts has developed beyond the realms of *Cundy*. Lord Nicholls of Birkenhead was mindful of this factor when considering *Cundy* and the developments that have since occurred: "Unfortunately these developments have left the law in a state of disarray. The question before the House on this appeal is whether this distinction, so far as it remains, should still be regarded as good law."<sup>8</sup>

**Void or voidable: that is the question?**

The majority of cases that have tested the legal rules have tended to focus on whether or not the parties have contracted face to face<sup>9</sup> or alternatively by

correspondence.<sup>10</sup> The latter, generally, results in the contract being declared void *ab initio* whilst the former recognises a valid contract which may be avoided by an innocent party, usually the original seller. This legal dilemma may result in disastrous consequences for an innocent third party who believes, to all intents and purposes, he or she have acquired ownership of the property. Thus, in such cases the interpretation of the offer and the medium through which it was made has been the focus and dominating factor in the majority of decisions. This has raised difficult problems for the judiciary and was commented upon by Lord Nicholls of Birkenhead: If a crook (C) fraudulently represents to the owner of goods (O) that he is another identifiable person (X) and on that basis O parts with goods to C by way of sale, is there in law a contract between O and C? Does the answer to this question differ according to whether O and C communicated face-to-face, or by correspondence, or over the telephone, or by e-mail? The law on cases involving this type of fraudulent conduct, euphemistically described as cases of "mistaken identity", is notoriously unsatisfactory. The reported decisions are few in number and they are not reconcilable.<sup>11</sup>

Thus, the problem escalates when a crook sells the goods to an innocent third party. Any proprietary right the third party may acquire in the goods

<sup>8</sup> *Shogun Finance Ltd v. Hudson* [2003] 3 WLR 1371 at 1374.

<sup>9</sup> *Inter praesentes*.

<sup>10</sup> *Inter absentes*.

<sup>11</sup> *Shogun Finance Ltd v. Hudson* [2003] 3 WLR 371 at 1373.

Downloaded by [Open University] at 01:47 31 January 2014

RECENT LEGAL DEVELOPMENTS 377

depends upon whether the original contract between the crook and first seller was either void or voidable. The equitable doctrine of mistaken identity recognises a valid contract and allows the mistaken party to set aside the contract, as long as an innocent third party has not acquired any rights in the property. This has been the kernel of the argument when dealing with the transfer of ownership and an innocent third party. The common law provides that a seller can only transfer title which he possesses and cannot give what he does not possess and the *nemo dat* rule has been incorporated into the Sale of Goods Act 1979, s. 21(1) of which states:

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, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

Section 21 appears to seek a balance between the competing interests of the original owner and the buyer, although it would seem there is an overall bias in favour of the original owner. This said, the underlying policy that has evolved was summed up by Ashurst J:

We may lay it down as a broad general principle, that, wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such a third person to occasion the loss must sustain it.<sup>12</sup>

However, s. 21 does give guidance as to when a person may pass on title, for example, if he has the authority to do so and this may occur when dealing with the rules of agency. The latter part of s. 21: "... unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell" relates to an estoppel and arguably creates an apparent owner. This requires a representation to be made by the person who is to be estopped. One of the leading cases that demonstrate this provision is the case of *Eastern Distributors Ltd v. Goldring* [1957] 2 All ER 525 that involved a scam by a motor dealer and the owner of a Bedford van. This case clearly established that if an owner places an agent in a position where it would seem that the agent is the apparent owner he (the agent) is able to pass title to an innocent purchaser.

#### **A common denominator and mistaken identity**

When dealing with mistaken identity there have been a number of cases that have produced a common denominator: specifically, the seller must

<sup>12</sup> *Lickbarrow v. Mason* (1787) 2 Term Rep 63, HL at 70.

Downloaded by [Open University] at 01:47 31 January 2014

### 378 ROLAND FLETCHER

only have ever intended to contract with an identifiable person, whose identity was fundamental at the inception of the agreement. This common factor was exercised in *Shogun Finance Ltd v. Hudson* applying the ratio of *Cundy v. Lindsay*. This case involved a contract that was negotiated by letter and the identity of the parties were established through their correspondence, which as far as Lindsay was aware was one Blenkiron & Co. The seller, Lindsay, was induced by the rogue to believe they were dealing with a reputable firm. In this instance goods were sent to the rogue who sold them on to an innocent third party, Cundy. When the mistake was discovered the sellers reclaimed the goods from the third party. The court held, in this instance, the contract was void and not voidable. Thus, there had never been a contract between the rogue and the seller and this allowed the seller to reclaim their goods. The sellers ever intended to contract only with a specific named person and not with the rogue. Lord Cairns said: ". . . there was no consensus of the mind which could lead to any agreement or any contract whatever."<sup>13</sup> Thus, as far as Lindsay was concerned they only ever intended to contract with the firm known as Blenkiron & Co and identity was fundamental. A comparable case that gave a different outcome was that of *King's Norton Metal Co Ltd v. Edridge, Merret & Co Ltd* (1897) 14 T.L.R. 98. In this case a rogue called Wallis was purporting to be a firm called Hallam & Co. Hallam & Co did not exist and had never existed. Wallis had prepared the letters on headed notepaper, which displayed a picture of a factory and related depots overseas, and obtained an order of metal wire. Wallis then sold the wire to the innocent third party, Edridge, Merret & Co Ltd, who became the defendants in this case. When King's Norton did not receive payment they attempted to claim back the wire from Edridge. King's Norton's claim was made on the basis that the contract between them and Wallis was void. The Court of Appeal held that King's Norton had only ever intended to contract with the writer of the letter, Wallis, even though the writer was using an alias. Thus, a contract had come into existence between King's Norton and Wallis and the contract was voidable but not void. Therefore, when Wallis sold the property to the defendants they acquired ownership of the goods. A.L. Smith LJ explained the decision as:

With whom, upon this evidence, which was all one way, did the plaintiffs [King's Norton] contract to sell the goods? Clearly with the writer of the letters. If it could have been shown that there was a separate entity called Hallam & Co. and another entity called Wallis then the case might have come within the decision in *Cundy v. Lindsay*. . . . There was only one entity, trading it might be under an alias, and there was a contract by which the property passed to him<sup>14</sup>

<sup>13</sup> At 465.

<sup>14</sup> (1897) 14 T.L.R. 98 at 99.

Downloaded by [Open University] at 01:47 31 January 2014

RECENT LEGAL DEVELOPMENTS 379

These decisions have established the legal rules and were firmly applied in *Shogun Finance Ltd v. Hudson*. The necessity to establish whether there was a contract in the first place was commented upon by Lord Nicholls of Birkenhead: "The right of . . . [the] innocent third party may depend upon the nice distinction between a voidable contract and a void contract."<sup>15</sup> This is a typical scenario which may happen every day of the year, yet the law, when dealing with such issues, is in disarray. The distinction between finding there was no agreement between the original parties or a voidable contract has led to a complex body of cases and on-going conflicting judgments that involve a fine line of reasoning which has produced a legal dilemma.

Thus, the common law has developed in a way that has allowed an individual to adopt a name to deceive another person, provided there is no error as to the identity of the person to whom the offer is being made. The judiciary, to a large extent, has been placed in a position where it has had to create the legal rules in order to address the issues that have arisen. In

1966 Lord Gardiner, the then Lord Chancellor, referred the matter to the Law Reform Committee who discussed the matter in their Twelfth Report (Cmnd 2958) that dealt with the transfer of title to chattels. Unfortunately, the Report's recommendations were not implemented. Consequently, *Cundy* and *King's Norton* have been consistently applied to subsequent decisions on mistaken identity. However, methods of communication have developed since the days of *Cundy* and *King's Norton*. Many contracts today may be negotiated through the means of e-mail, web-cam, telephone, and fax or even the traditional pen and paper. If the use of modern technology was used to commit a similar fraud today would *Cundy* and *King's Norton* still be applied? Lord Nicholls of Birkenhead has given direction on this question:

The legal principle applicable in these [fraudulent misrepresentation] cases cannot sensibly differ according to whether the transaction is negotiated face-to-face, or by letter, or by fax, or by e-mail, or over the telephone or by video link or video telephone. . . . The essence of the transaction in each case is that the owner of the goods agrees to part with his goods on the basis of a fraudulent misrepresentation made by the other regarding his identity. Since the essence of the transaction is the same in each case, the law in its response should apply the same principle in each case, irrespective of the precise mode of communication of offer and acceptance.<sup>16</sup>

Thus, the guidelines are still developing and being established by the judiciary in order to accommodate individual circumstances as and when 15 *Shogun Finance v. Hudson* [2003] 3 WLR 1371 at 1373.

<sup>16</sup> *Ibid.* at 1381.

Downloaded by [Open University] at 01:47 31 January 2014  
380 ROLAND FLETCHER

they appear necessary. However, it would seem that Lord Nicholls is suggesting that regardless of the mode of communication the law is rigid in its approach and should be applied in its current form. Surely this begs the question: is it time for statutory intervention? The legal rules dealing with offer, acceptance and mistaken identity have become blurred due to the advancement of technology and the variety of methods of communication. This is an opportune time to review the current position of the law and evaluate its application in light of today's technology.

### **The innocent third party**

The courts have attempted to give justice to third parties in circumstances that have allowed them to do so. The general approach, as shown above, is that contracts entered into by correspondence are usually void and the third party will have no redress but to give the goods back to the original seller. However, there have been a number of cases where the court has held the contract to be voidable and allowed the third party to acquire legal rights in the property.

There have been two contrasting decisions that cannot be reconciled. The first is *Phillips v. Brooks Ltd* [1919] 2 KB 243 which involved a jeweller who sold a ring to a rogue who falsified his identity and paid for the ring using a stolen cheque. The rogue informed the jeweller he was Sir George Bullough and gave an address to support this identity. The jeweller consulted a directory and found that a Sir George Bullough lived at this address. Having confirmed the name and address the jeweller allowed the rogue to pay by cheque and take the ring. The rogue sold on the ring to an innocent third party before the cheque was dishonoured. The jeweller claimed the contract was void for mistaken identity and reclaimed the ring from the third party. The court found there was a contract between the jeweller and the rogue but this contract was voidable and title could and did pass to an innocent third party. In this instance title had passed before the contract had been avoided, allowing the third party to acquire title to the ring. Horridge J believed that the jeweller was prepared to sell to the person who was in his shop and that identity was not an issue. The jeweller would only have succeeded in his claim if he had convinced the court that he only ever intended to contract with a Sir George Bullough and

no one else. Although the jeweller had taken steps to verify the name and address given by the rogue he did no more than this and therefore took the risk of parting with possession of the ring. In this case it would appear that Horridge } was demonstrating that if one is prepared to take a risk they must also bear the consequences of that risk. The third party was not privy to this risk and, arguably, Horridge J struck a balance between the two

Downloaded by [Open University] at 01:47 31 January 2014  
RECENT LEGAL DEVELOPMENTS 381

innocent parties. However, Goodhart<sup>17</sup> disagrees with the decision on the assertion that:

Did the shopkeeper believe that he was entering into a contract with Sir George Bullough and did North [the rogue] know this? If both answers are in the affirmative then it is submitted that there was no contract. If a blind man makes an offer to A, who is present, in the mistaken belief that he is B, can A, who is aware of the mistake, accept the offer? The law must have lost all touch with reality if it holds that under such circumstances there is a contract. Mere presence by itself cannot have so remarkable an effect . . . It is therefore submitted that *Phillips v. Brooks* was incorrectly decided.<sup>18</sup> There is substance to Goodhart's argument which he supports by using the case of *Lake v. Simmons* [1927] A.C. 487<sup>19</sup> but it must not be overlooked that in *Phillips v. Brooks Ltd* the jeweller was prepared to sell to anyone in front of him and identity was not an issue until method of payment was made, whereas in *Lake v. Simmons* the jeweller, in that case, only ever intended to deal with a specific person and this was made clear by Viscount Haldane: "[Lake] thought that he was dealing with a different person . . . and it was on that footing alone that he parted with the goods. He never intended to contract with the woman [rogue] in question."<sup>20</sup>

The case of *Ingram v. Little* [1961] 1 QB 31 further compounded matters. In this case the rogue, who claimed to be a PGM Hutchinson and gave an address to support his identification, wished to purchase a car and pay by cheque. The seller verified the name and address using a telephone directory and concluded the contract. The rogue then sold the car on to an innocent third party and the cheque was dishonoured. The original seller claimed the contract was void and reclaimed the car from the third party. It was found, based upon the facts, although the seller was face to face the contract was void for mistaken identity and the seller was able to reclaim the car. Pearce LJ supported this judgment by stating:

If a man orally commissions a portrait from some unknown artist who had deliberately passed himself off, whether by disguise or merely by verbal cosmetics, as a famous painter, the impostor could not accept the offer. For though the offer was made to him physically, it is obviously, as he knows, addressed to the famous painter. The mistake in identity on such facts is clear and the nature of the

<sup>17</sup> Goodhart, A.L., *Mistake as to Identity in the Law of Contract*, (1941) 57 L.Q.R. 228.  
<sup>18</sup> At 240-41.

<sup>19</sup> Viscount Haldane found there was no operative mistake.

<sup>20</sup> At 500.

Downloaded by [Open University] at 01:47 31 January 2014

382 ROLAND FLETCHER

contract makes it obvious that the identity was of vital importance to the offerer.<sup>21</sup>

This case was indeed an exception to the rule and was not followed in the later case of *Lewis v. Averay* [1972] 1 QB 198. This case involved the sale of a car in return for a worthless cheque. A rogue agreed to purchase the car and persuaded the seller he was a well-known actor, Richard Greene, who played Robin Hood in a television series, and verified his identity with a Pinewood Studio card containing the rogue's photograph. The rogue obtained possession and sold on the car to an innocent third party, the defendant. The Court of Appeal found that the seller intended to contract with the person in front of him. Thus, the contract was voidable and as a



consequence the third party acquired title before the contract was avoided. Thus, the courts have given different answers even though the material facts within each case were similar in essence and each case led to the handing over of goods, which were later sold to an innocent third party. However, the fine distinctions made between *Cundy v. Lindsay*, *Phillips v. Brooks Ltd* and *Lewis v. Averay* have contributed to the decision in *Shogun Finance Ltd v. Hudson*. When the Court of Appeal initially heard the case, Sedley LJ was of the opinion that those who created the risks should also shoulder the responsibility and this would provide protection for an innocent third party by making such contracts voidable and not void. He based this upon the following proposition:

As I listened to the argument in this case, I felt it wrong that an innocent purchaser (who knew nothing of what passed between the seller and the rogue) should have his title depend on such refinements. After all, he has acted with complete circumspection and in entire good faith: whereas it was the seller who let the rogue have the goods and thus enabled him to commit the fraud. I do not, therefore, accept the theory that a mistake as to identity renders a contract void. I think the true principle is that which underlies the decision of this court in *King's Norton Metal Co Ltd v. Edridge Merret & Co Ltd* (1897) 14 TLR 98 and of Horridge J in *Phillips v. Brooks Ltd* [1919] 2 KB 243, which has stood for these last 50 years. It is this: When two parties have come to a contract—or rather what appears, on the face of it, to be a contract—the fact that one party is mistaken as to the identity of the other does not mean that there is no contract, or that the contract is a nullity and void from the beginning. It only means that the contract is voidable, that is, liable to be set aside at the instance of the mistaken person, so long as he does so before the third parties have in good faith acquired rights under it.<sup>22</sup>

21 At 57.

<sup>22</sup> *Shogun Finance Ltd v. Hudson* [2002] 2 WLR 867 at 873.

Downloaded by [Open University] at 01:47 31 January 2014

RECENT LEGAL DEVELOPMENTS 383

In the House of Lords Lord Nicholls of Birkenhead followed this approach:

As between two innocent persons the loss is more appropriately borne by the person who takes the risks inherent in parting with his goods without receiving payment. This approach fits comfortably with the intention of Parliament in enacting the limited statutory exceptions to the proprietary principle *nemo dat quod non habet*. Thus, by section 23 of the 1979 Act Parliament protected an innocent buyer from a seller with a voidable title. . . . In a case such as the present [*Shogun Finance Ltd v. Hudson*] the owner of the goods has no interest in the identity of the buyer. He is interested only in creditworthiness. It is little short of absurd that a subsequent purchaser's rights depend on the precise manner in which the crook seeks to persuade the owner of his creditworthiness and permit him to take the goods away with him. . . . A person is presumed to intend to contract with the person with whom he is actually dealing, whatever be the mode of communication.<sup>23</sup>

However, s. 23 is silent in regards to void titles and only makes reference to voidable titles:

When the seller of goods has a voidable title to them, but his title has not been avoided at the time of the 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<sup>24</sup>

Thus, the section is reflected in both *Phillips v. Brooks* and *Lewis v. Averay* where the bona fide purchaser was deemed to have acquired a good title.

However, as the section only makes reference to a voidable title it has not been applied to instances such as *Cundy v. Lindsay*. This has led to a separation of different outcomes based upon the constraints of these decisions. Is it now time to merge these outcomes and adopt the opinions

of Sedley LJ and Lord Nicholls? The legal application of these rules is still left to the judiciary to work out and decide which of the two innocent parties should obtain title to the goods. It appears that the law is in a poor state and in need of repair. This was never more evident than in the case of *Shogun Finance Ltd v. Hudson* where Lord Nicholls made it clear that there should be no distinction between void and voidable and the benefit should be given to the innocent third party. He believed this was the spirit in which section 23 was introduced and should be applied accordingly. Lord Nicholls was of the opinion that:

23 *Shogun Finance Ltd v. Hudson* [2003] 3 WLR 1371 at 1381-82.

24 Section 23 of the Sale of Goods Act 1979.

Downloaded by [Open University] at 01:47 31 January 2014

384 ROLAND FLETCHER

. . . if the law of contract is to be coherent and rescued from its present unsatisfactory unprincipled state, the House has to make a choice: either to uphold the approach adopted in *Cundy v. Lindsay* and overrule the decision in *Phillips v. Brooks Ltd* and *Lewis v. Avery*, or to prefer these later decisions to *Cundy v. Lindsay*.<sup>25</sup>

However, unless these proposals are given statutory force the argument will continue and innocent third parties such as Mr Hudson will not be protected.

Agency

In the Court of Appeal Dyson LJ considered whether the rogue was the debtor under the hire-purchase agreement and was then able to pass title to Mr Hudson under the Hire Purchase Act 1964.<sup>26</sup> However, an argument was made at the Court of Appeal stage that *Lewis v. Avery* and *Phillips v. Brooks Ltd* should be applied as the showroom manager was acting as the agent for Shogun Finance Ltd. If this argument were accepted then the hirepurchase contract would have been deemed to have been made face-to-face between the rogue and Shogun Finance Ltd. Dyson LJ examined the argument submitted by Mr Cousins, who acted as Counsel for Mr Hudson, that:

. . . even if the dealer was not the agent of the claimant for the purposes of making the hire-purchase agreement, it was the company's agent for the purpose of receiving information from the rogue and passing it on to the company. He [Mr Cousins] said that the dealer was the "eyes and ears" of the company so that, in effect, this was a face to face agreement.<sup>27</sup>

Dyson LJ went on to consider whether or not the car dealer was acting as agent for Shogun Finance. However, Dyson LJ was of the opinion that the dealer was not the agent of Shogun Finance but had merely delegated various functions and tasks, which included ascertaining the identity of prospective hirers. His decision was based upon the decision in *Mercantile Credit Co. Ltd v. Hamblin* [1965] 2 QB 242, where Pearson LJ stated:

In a typical hire purchase transaction the dealer is a party in his own right, selling his car to the finance company, and he is acting primarily on his own behalf and not as general agent for either of the two parties. There is no need to attribute to him an agency in order

25 *Shogun Finance Ltd v. Hudson* [2003] 3 WLR 1371 at 1381.

26 See *Shogun Finance Ltd v. Hudson* [2002] 2 WLR 867 at 881.

27 At 884.

Downloaded by [Open University] at 01:47 31 January 2014

RECENT LEGAL DEVELOPMENTS 385

to account for his participation in the transaction. Nevertheless the dealer is to some extent an intermediary between the customer and the finance company, and he may well have in a particular case some *ad hoc* agencies to do particular things on behalf of one or other or it may be both of those two parties<sup>28</sup>

Dyson LJ went on to reinforce this point using the dictum of Lord Upjohn from the case of *Branwhite v. Worcester Works Finance Ltd* [1969] 1 AC 552:

My Lords, it is no doubt true for some purposes the motor dealer

acts as agent in the loose sense of being a go-between for the intending purchaser and the finance company. He fills in the forms on behalf of the intending purchaser: he no doubt has information which enables him to fill in some of the details, and he has a supply of forms, which enables him to perform those useful business functions. But, so far as relevant to the question before your Lordships, I do not think the doctrine of agency enters into it at all.<sup>29</sup> Lord Justice Brooke agreed with Dyson LJ's judgment and echoed the concerns for Parliamentary intervention with reference to the Law Reform Committee's proposals of 1966.<sup>30</sup> The House of Lords rejected the agency argument and Lord Hobhouse of Woborough discussed the implications of agency in relation to the facts of this case:

There is no room for the application of the "face-to-face" principle between the rogue and the finance company. Nor was the dealer the agent of the finance company to enter into any contract on behalf of the finance company. The dealer is a mere facilitator serving primarily his own interests. . . . As regards the delivery of the motor car by the dealer to the rogue, it is not in dispute that, in making the delivery, the dealer was acting as the agent of the finance company. But he was acting without authority. The dealer's authority was to deliver the car to a Mr Durlabh Patel, not to anyone else.<sup>31</sup>

Lord Hobhouse may have ruled against the contention that the dealer acted as the agent for Shogun Finance Ltd but this is very self-protecting for finance houses and dealers.

<sup>28</sup> At 269.

<sup>29</sup> At 579D.

<sup>30</sup> Committee's Twelfth Report, Cmnd 2958, 1966.

<sup>31</sup> *Shogun Finance Ltd v. Hudson* [2003] 3 WLR 1371 at 1387 and 1388.

Downloaded by [Open University] at 01:47 31 January 2014

386 ROLAND FLETCHER

Conclusion

It would seem then that the decision in *Shogun Finance Ltd* accommodates the commercial activities of finance houses and car dealers whilst ignoring the interests of innocent third parties, such as Mr Hudson. Surely, if finance houses and car dealers receive the benefits from such an arrangement they should also accept the associated risks? Mr Hudson had no prior knowledge of the hire-purchase arrangement and purchased the car from the rogue in good faith. It would seem the innocent third party (Mr Hudson) has been penalised in the name of justice. Given the facts of this case Mr Hudson was indeed non-culpable in comparison to the dealer and Shogun Finance Ltd. If the arrangement between the dealer and Shogun Finance Ltd had been recognised as one of agency the interests of justice would have been served. It seems it is indeed time for Parliamentary intervention.

ROLAND FLETCHER

*University of Glamorgan*

D