

Thinking point 12.1

Consider whether or when an appropriation occurs in these supermarket scenarios:

1. If consent is irrelevant, when does the customer appropriate: when they remove an item from a shelf, when they place it in their basket or when they leave without paying?
2. Does the shop assistant or shelf-filler appropriate?
3. D carelessly knocks an article off the shelf and then replaces it.
4. D removes an item intending not to pay for it but changes her mind and replaces it.
5. D lifts an item off the shelf to read the label and puts it back.

Answer guidance

The answer to all of the above scenarios is that whilst for the majority an appropriation occurs as soon as the customer assumes a right of ownership over property (i.e.: possession or control), for Lord Lowry an appropriation would not occur until the assumption is accompanied by MR. Unfortunately, his view did not prevail, and so appropriation now occurs in all of the above scenarios at a very early stage. This has no legal consequence unless it is accompanied by MR when it then becomes theft, even before anything adverse to the interests of the shop has been done.

Thinking point 12.2

1. V lends D his bicycle for two weeks. D fails to return it. When does D appropriate?
2. Right now, you are presumably sitting on some sort of a chair whether at home/in the university or on the bus/tube. According to whose view in Gomez are you appropriating it and why?
3. V advertises his Rolex watch for sale. D, a rogue, agrees to buy it and one week later gives V a forged building society cheque for the price. V hands the watch to D. The cheque bounces. Has D stolen the watch?
4. A nurse responsible for mentally handicapped patients is authorised to deposit cheques into trust accounts in their name from which she can draw for their needs. She receives a cheque for £4,250 on behalf of one and opens a trust account in a building society in his name. She opens a further two accounts in his name when further cheques are received, one at a different and one at the existing building society. She intends to use the money for herself. When does appropriation occur?

Answer guidance

1. As soon as he assumes possession. Under s3(1) it would not have been until s/he had MR, i.e.: when the decision was made not to return the bicycle.
2. The majority – consent is irrelevant to appropriation which is now a neutral term.
3. These are essentially the facts of *Dobson v General Accident Fire and Life Assurance Comp. PLC.* [1989] which followed *Lawrence*: D appropriated despite the consent of the owner as soon as he assumed rights of ownership.
4. The issue here relates to appropriation, but also to dishonesty. The question is to what extent there is consent to open the accounts. *Gomez* makes it clear that appropriation by consent is not limited to situations in which consent has specifically been induced by deception. The vulnerability of the victim and the position of control of the defendant may also be relevant factors in establishing appropriation.

Thinking point 12.3

There is an old adage that what the civil law protects is no crime. But look at these questions:

1. D befriends an elderly, wealthy man (V). V makes all sorts of valuable gifts to D in the genuine wish to give her tokens of his friendship. The gifts are not the result of any deception, pressure, undue influence or coercion on V's part. She does, however, take knowing advantage of V's loneliness in the hope that he will give her some of his wealth. Has she appropriated V's gifts?

2. Have you sold a car/house knowing there were defects which the purchaser did not discover? The contract would be valid under the civil law. Would this now be theft?

3. Some of you might recognise the facts of the next question from the contract law case of *Smith v Hughes* (1871) LR 6 QB 597:

Seller (S) offers to sell to purchaser (P) some oats and shows him a sample. P accepts but later refuses to take delivery on the grounds that the oats are new and he mistakenly thought he was buying old oats. In fact, the question of age was not mentioned at all. The agreement is held binding in court despite P's unilateral mistake. Moreover, the contract is valid even if S knew of P's self-deception. The rule *caveat emptor* (buyer beware) applies.

S is entitled to his money. Following *Gomez and Hinks*, is S attempting to appropriate and steal P's money if he knew of P's mistake but said nothing to correct it? Neither *Hinks* nor *Gomez* was referred to in the subsequent Court of Appeal case of *R v Briggs* [2003] 1 Cr App R 34, [2004] Crim LR 495 concerning theft of a credit balance of a bank account. The court held that an appropriation required 'a physical act' by D and that D must cause V's loss. Therefore, where D had used deception to get two Vs to transfer money from their own bank account to the account of D's own solicitor, there was no appropriation. It seems that different courts still apply their own interpretations of the law. We look at this case again under 'property.' Finally, the Privy Council in 2006 confirmed the wider *Gomez/Hinks* interpretation of appropriation. The case arose from the British Virgin Islands which has the same law on theft as England and Wales.

Answer guidance

1. Most people would consider this to be a far cry from conventional ideas of criminality. Immoral yes. But *Gomez and Hinks* say that despite D's acceptance of gifts giving her the right to an indefeasible title to the property under the civil law, her dishonesty converts her acceptance into an appropriation and theft.
2. and 3. Theoretically, yes to both.

Thinking point 12.4

Does D steal the following items?

1. X takes his bicycle to a shop for repair. The repairer, R, does the work but X fails to collect it as arranged. After three weeks, R puts the bicycle outside the shop because he needs the space. It remains there for a further week when D, a passer-by, sees the bike and takes it.
2. D, a workman dredging a pool on local authority open space, finds two antique gold rings. He decides to keep them.

Answer guidance

1. Looking at the above, this would not constitute abandonment (R (Ricketts) v Basildon Magistrates Court [2010] EWHC 000 (Admin)) and presumably R would have to go to reasonable lengths to ascertain from X that he no longer wanted his bicycle. Presumably, also, R might want to retain possessory title over it until he was paid.
2. The owner of the pool has better right to property than D: South Staffordshire Water Co v Sharman [1896] 2 QB 44.

Thinking point 12.5

D goes into a restaurant and orders a meal. He eats the meal and leaves without paying.
Has D committed theft?

Answer guidance

It depends on when the decision not to pay was made:

- If it was at the outset when ordering the meal, D will have been dishonest at the time of appropriating and it would be possible to say that before eating the food it still belonged to the restaurant. D commits theft.
- If it was after eating, the food belonged to him (Edwards v Ddin). D does not commit theft.
- Regardless of when the decision was made, D will commit an offence of 'making off without payment' contrary to s3 Theft Act 1978.

D may also have committed a fraud offence if his conduct amounted to a false representation.

Thinking point 12.6

If the facts of Kaur occurred today, would Ms. Kaur have appropriated and stolen the shoes?
(Consider how Gomez might have affected the outcome.)

Answer guidance

If the issue was appropriation, then under Gomez she would have appropriated the shoes as soon as she did anything with them, the consent of the shop being irrelevant. If her mind was dishonest at that point she would have committed theft, even before doing anything wrong!

Even if her dishonest intention arose after picking the shoes up and taking them to the cashier, it would probably be the same, appropriation here equating to selecting and presenting the shoes for payment (Atakpu).

Thinking point 12.7

V gives D £1800 to buy a particular type of car on V's behalf. D spends the money on himself. Has D committed theft?

Answer guidance

This is the case of Dunbar [1988] Crim LR 693. The money was received by D under an obligation to account for it in a particular way under s5(3).

Thinking point 12.8

V owes D £50 and has been avoiding D for several weeks. D badly needs the money. D bumps into V one day who has a bundle of notes in his pocket. As V takes his mobile phone from his pocket a £50 note falls out and D takes it in the belief that it is his.
Does D commit theft?

Answer guidance

It all depends on the genuineness of D's state of mind. If s/ he honestly believes that s/he has the right to take the money, then s2(1)(a) provides a defence. Note that for the Ghosh test of dishonesty, D's honest belief will no longer be relevant.

Think box 12.9

Are the following Ds dishonest under s2(1)(c)?

1. V is a legal clerk working for a firm of solicitors. She is engaged on a large conveyancing case. On her way to a meeting where the purchase will be completed, she leaves the office file containing a bankers' draft for £1 million on the seat of the underground train (a draft is as good as cash on presentation to a bank). She gets off the train without it. D finds the draft and keeps it, taking no steps to trace the firm on whose account it has been drawn.

2. D finds a copy of the latest best-selling detective novel on the seat of a bus. There are only one or two people sitting at the back of the bus and they do not appear interested in it. She decides to keep it.

Answer guidance

1. Clearly he would be unable to assert a genuine belief under s2(1)(c) that the owner could not be found.
2. It would be easier to assert an honest belief here for the item has far less value and the owner has probably left the bus. But one should hand it into the driver as lost property.

Dishonesty will be a question of fact in every case and must be left to the jury to decide. This is so whether D asserts a belief under s2(1), or the *Ghosh* test, though this will now be an objective test only, as the judge will direct the jury, following Ivey, that it is irrelevant whether D appreciated that her actions were objectively dishonest.

Thinking point 12.10

Question (a) derives from Feely and (b) derives from Ghosh. Identify the objective and subjective parts of the test.

Answer guidance

- a. Objective
- b. Subjective

Note however, that the subjective element of the Ghosh test was rejected by the court in Ivey v Genting Casinos.

Thinking point 12.11

1. Do you consider D to be dishonest in the following situations:
 - (a) D spends half an hour at work each day using the firm's computer for her personal emails?
 - (b) D takes home from work pens, staplers and paper for her personal use?
 - (c) D buys a cheap CD player from a friend knowing that it has 'come off the back of a lorry' (i.e. that it is stolen)?
 - (d) D inflates her expenses claims at work so as to receive more than she has spent?
 - (e) D conceals certain episodes of self-employment in her tax returns so as to avoid paying as much income tax as she should?
2. D has been accused of theft and puts forward the *Ghosh* defence. The jury is not representative of society being entirely white and predominantly male. Suppose D is black and a single mother or mentally disabled and inarticulate or a scruffy and ill-educated young man. What are the risks of leaving the definition of dishonesty up to the jury?
3. D is a fanatical member of an animal liberation movement. She sees a kitten in a cage by the front door of a research establishment. The kitten is clearly destined for experimentation. D takes it away with the conviction that she is honestly appropriating property belonging to another. Is she dishonest under the *Ghosh* test?

Answer guidance

1. Probably, you will all have different views. Applying both parts of the *Ghosh* test, many of you will think that in each case D's conduct was probably dishonest (question 1) but that as it is something that most people might do from time to time, and that D might not regard herself as being dishonest according to ordinary standards, it is not necessarily criminal (question 2). Read the extracts from Edward Griew's article.
2. This poses the circularity of the test: if D is so unaware of ordinary standards that she believes society would agree with her conduct, she is not to be regarded as dishonest. This is not what Lord Lane in *Ghosh* intended. Clearly, on a common sense basis, most people would say her conduct was dishonest and that, even if she believed herself to be right, her conduct was still criminal.

3. Note that the decision in *Ivey v Genting Casinos [2017]* dispenses with the subjective element in the test. Therefore, the prosecution will no longer be required to prove that the defendant appreciated that the act was dishonest according to ordinary standards. As long as the act was

dishonest according to the standards of reasonable and honest people, the test is satisfied.

Thinking point 12.12

Does D have an intention to permanently deprive in the following situations?

1. D uses V's mobile phone without permission intending to replace it. He makes so many calls that the batteries run flat. He then returns the phone.
2. D takes V's Arsenal season ticket without permission intending to return it later. He uses it for nine months before returning it to X.
3. D takes a booklet of supermarket loyalty coupons from an empty check-out. When she does the next week's shopping she hands vouchers to the cashier and receives a substantial discount on the bill.

Answer guidance

1. Borrowing: All the goodness/value of the batteries has been used up. S6(1) applies.
2. Borrowing: Some of the goodness/value remains although comparatively little compared to the cost. Strictly Lloyd should apply but query whether this would be fair to X.
3. Buy-back principle: S6(1) applies.

Thinking point 12.13

Has D committed robbery?

1. D enters a museum just before closing time with the intention of stealing ancient antiquities from the third floor. As he descends the stairs with the property he is confronted by a museum attendant. D hits him over the head and knocks him unconscious.
2. D approaches a blind person (V) from behind and shouts 'Give me your bag or you'll get this.' He waves a knife at V's back. Unknown to D, V is also deaf and does not hear. D grabs V's bag from her hand.

Answer guidance

1. As D descended the stairs with the property, followed by attacking the attendant, this was theft accompanied by the use of force and hence a robbery.
2. The Court of Appeal held that section 8 required any amount of force to be used against a person in order to steal and not only sufficient to

overpower or prevent resistance from the victim as under the former law. In most cases, especially 'mugging' of mobile telephones, ipods or lap-top computers, force against the property will also be force against the person.

A mere threat of force is sufficient. The threat does not need to result in actual fear or the actual infliction of force. Section 8 requires that D puts or seeks to put any person *in fear of being then and there* subject to force. Therefore, a futile threat against a deaf, blind or sleeping person will suffice. A threat of future force is probably not sufficient unless it can be said that D will still be on the job of stealing at that point.

Thinking point 12.14

D1 meets D2 in a pub—a well-known spot for the exchange of stolen Rolex watches.

A police officer observes D1 handing several watches to D2. He calls for further police assistance and five minutes later he and other officers arrest D1 and D2. Has D2 handled stolen property?

Answer guidance

According to AG's Ref (No 1 of 1974) it all depends on the intention of the police officer:

If he is merely watching – then he is exerting no possession or custody over the watches and they are still stolen. If he knows the watches to be stolen and by making the call for reinforcements demonstrates an intention to possess, then the watches have been restored. The second possibility is probably unlikely here.

Thinking point 12.15

D would like to buy a new washing machine but cannot afford one. She meets X one day who offers her a brand new top of the range Italian-made machine for £150 provided she buys it that day. D knows the retail price is over £500. D jumps at the chance and hands over £150 in cash to X upon delivery. The next day D's friend Z admires the machine and says she would like one just like it. D tells her she can have it for £250 cash. Z who knows the retail price agrees and pays on delivery. D buys another identical machine from X with the money and pays the surplus £100 into her bank account. She later uses the money to buy shoes and clothes for her children. X was working for W who had stolen a consignment of Italian machines. Have D Z or X handled stolen goods?

Answer guidance

The definition of Handling under s22 Theft Act 1968 requires all six elements of the AR/MR to be satisfied. Therefore, each needs to be considered in turn in relation to each defendant:

D and X

AR: X works for W who had stolen the machines. He clearly receives them from W and therefore handles them. D buys two stolen machines from X for £150. Both D and X have therefore received the stolen machines. They do not do so in the course of stealing them. Not only have D and X received the machines but they also realize their cash value and undertake or assist in their removal, disposal and realization, i.e.: X to D and D to Z. They have therefore handled the machines and the proceeds of sale in respect of each.

MR: D probably knows that both are stolen since she is aware of the full price. X must also do so. They are therefore both dishonest as defined under the *Ghosh/Ivey* Test, i.e.: that the conduct is dishonest according to ordinary standards. It is immaterial whether they are aware that others would deem them dishonest. They are both probably guilty of handling two machines.

D and Z

AR: In selling the first machine to Z, D is receiving the machine from X and undertaking its disposal and realizing its cash value. She therefore handles it. In depositing the surplus into her bank account she commits an offence under s24A Theft Act 1968 *Retaining a Wrongful Credit*. In later spending the surplus, after purchasing a new machine, she commits another handling offence in relation to the proceeds of sale.

MR: She probably knows that the machine is stolen and is therefore dishonest according to the *Ghosh/Ivey* test.

Z certainly receives the machine from D but as to whether she commits a handling offence will depend on her MR. She pays slightly more and this may not, therefore, provide such clear evidence of dishonesty. Note that under s3(2) Theft Act 1968 if she later learns that the machine was stolen and does nothing about it, she will commit a handling offence.