

Swift rebuff to Touts – by David W Marks KC

Equity's Darling is the bona fide purchaser for value without notice. But how far should equity's protection of such a purchaser be permitted also to protect a fraudulent vendor? *R v Hunter*¹ shows that the fraudulent vendor gains nothing from the innocent purchaser's status as "equity's darling". While that conclusion may seem obvious, the reasoning is instructive.

The problem of ticket scalping is universal. The ingenuity of touts has out-paced responses. Taylor Swift's 2023 US Tour is in the news because Ticketmaster pulled sales, faced with "industrial-scale ticket scalping" and 3 times more bots than ever seen before.²

In Australia, the ACCC secured civil penalties for misrepresentations, in *viagogo AG v ACCC*.³ That litigation targeted a marketplace, not the touts directly. It vindicated a Commonwealth Consumer Affairs Advisory Council 2010 report, "[Consumers and the Ticket Market ...](#)". The CCAAC found existing laws adequate, and even commented that ticket on-selling could have positive effects. But the consumer focus of regulation does not address concerns of event organisers.⁴ Thus, the game of cat-and-mouse continues.

Returning to the English decision of *R v Hunter*, the government has turned to the criminal law. The defendants were ticket touts. They, and many others in a crowded market for touting, used various devices to fool event organisers' computer systems into selling the touts far more tickets than permitted under terms of sale imposed by the event organisers. And the event organisers would also prohibit resale of tickets. Armed with loads of tickets obtained by deception, touts would use a small number of secondary ticketing websites. The touts sold the tickets to the public, but used these websites as their market places.

Neither the touts nor the secondary ticketing websites made clear to consumers the risk attached to purchase of a ticket from them. The tickets were sold at inflated prices, without disclosing the risk that the event organiser might treat a ticket as void, for breach of the resale conditions.

The defendant touts were charged with carrying on a business for a fraudulent purpose, contrary to a provision of the *Companies Act 2006* (UK).

Convicted at trial in the Leeds Crown Court, the touts appealed on a number of grounds, but only the sixth is of interest here. The touts relied on the doctrine of "equity's darling" to set up an answer to their criminal charges. The charges were dependent on consumers being adversely affected by a contractual condition justifying cancellation of the tickets. But the touts said that the consumers took free of such condition.

As the Court of Appeal observed, equity "rarely deigns to grace the earthy confines of the criminal courts and it does not do so here to cleanse the hands of the defendants".⁵ The Court suggested that the doctrine applied to real property transactions (contrary to the position in Australia⁶), and that there was nothing in the cases suggesting that it applied to a licence, as conferred by a ticket to attend an event.

¹ [2023] QB 1; [2021] EWCA Crim 1785

² See testimony of [Mr J Berchtold](#), to Senate Judiciary Committee, 24 January 2023, in a hearing called "That's the Ticket: Promoting Competition and Protecting Consumers in Live Entertainment".

³ [2022] FCAFC 87

⁴ Daniel Stuk "Ticket Scalping: Advocating for the Event Organiser" (2011) 6(1) ANZ Sports Law Jnl 87

⁵ *R v Hunter* [2023] QB 1, [176]

⁶ See *Firth v Centrelink (No 2)* (2002) 55 NSWLR 494 at [10]

More pointedly, the doctrine’s rationale is as a means of allocating rights and risk between two innocent parties. The doctrine was “not a device to scrub out the reprehensible and dishonest intermediate conduct of the fraudster. That person’s conduct remains dishonest – and criminal – even though equity has to resolve the allocation of property ownership rights as between the fraudster’s innocent victims”.⁷

There is an oddity in the attempted application of the doctrine here. As the Court points out, the usual scenario involves sale by a fraudster to an innocent party, who then on-sells to a second innocent party. Here, an innocent party sold to the fraudster, who on-sold to innocent consumers. “There is of course a considerable irony in the defendants’ seeking to invoke equity as a charter to enable them to perpetuate what is otherwise a fraud.”⁸

For those and other reasons, the touts’ appeal failed.

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⁷ *R v Hunter* [2023] QB 1, [178]

⁸ *R v Hunter* [2023] QB 1, [179]