

## On Villainy

(by **Peter Millett**, Queensland University Press, 2007)

In 2006, the TC Beirne School of Law at the University of Queensland launched the McPherson Lecture Series, inspired by the famous Hamlyn Lecture Series in England. The annual series of three lectures is named after The Honourable Mr Bruce McPherson, who recently retired from the Supreme Court of Queensland after serving 24 years on the bench. "On Villainy" is a published monograph of the three lectures given by Lord Peter Millett in the inaugural year of the series.

The general subject matter with which Lord Millett is concerned in his three essays is the problem of fraud in commerce, in the particular forms of circular transactions and identity theft.

In the first essay, Lord Millett sets the scene for his analysis of both circular transactions and identity theft by discussing Shakespeare's *The Merchant of Venice* and asking who the real villain in Venice was. Shylock, a Jewish merchant, lent money to Bassanio on the condition that Antonio act as surety agreeing to a pound of his flesh as security for the loan. Bassanio failed to repay the loan and Antonio's own wealth is unexpectedly still at sea by the time payment is due. Shylock seeks judgment against Antonio for his pound of flesh. The trial scene is well known to lawyers. Portia, Bassanio's wife, masquerades as a Doctor of Laws sent by Bellario, a true Doctor of Laws, to determine the case at the request of the Duke presiding over the trial. Portia undertakes a skilful cross-examination of Shylock and provokes him to insist on the enforcement of his strict legal right to the pound of flesh, thereby luring him in to her trap of having admitted to attempting to kill Antonio.

Millett's discussion of the great play is itself lively and entertaining and a creative way to introduce the problem of fraud. The link between *The Merchant of Venice* and the two substantive chapters on circular transactions and identity theft is, however, not explained nor explicitly extrapolated upon thus leaving the reader having to piece the three essays together himself. While the two substantive essays stand on their own without reference back to this first chapter, the monograph as a whole would be more internally consistent if the application of the play to the legal topics considered in the later essays was made more clearly.

What follows then is this reviewer's understanding of the relationship Millett seeks to draw between *The Merchant of Venice* and circular transactions and identity theft. Whether it be what Millett really intended is unfortunately not clear from the essays themselves.

Choosing to classify the play as a tragic-comedy, rather than as one or the other as has traditionally been the case, Millett concludes that it is not Shylock who is the villain of the piece. Most of Millett's rebuke is aimed squarely at Portia. Perhaps most obviously she has committed the theft of identity: she has forged a letter appearing to be from Bellario and she falsely impersonates someone learned in the law and thus assumes the role of judge. But, having assumed the role, she has also abused the legal system from within, both at a procedural

and a substantive level.

Yet a careful reading of the text yields a darker tale. For Portia is not an advocate. She has no business to be cross-examining Shylock at all. She is not, as the audience might assume, counsel for Antonio. She is the Judge; and far from seeking to give a just and impartial verdict, she deliberately sets out to ruin Shylock and makes fraudulent use of the justice system to achieve her purpose. (page 4)

At a procedural level, while Portia is called on to determine the case, Millett charges her with assuming the role of advocate when questioning Shylock. It may be that she would defend herself by saying that she is merely judging in an inquisitorial, albeit aggressive, manner. But, in addition, as Millett points out, she is clearly impartial and self-interested. She is seeking to avoid entirely any requirement of Bassanio to pay the debt. Indeed, in ordering Shylock to forfeit all his goods, one half to the state and the other to Antonio, Millett opines that her object is selfish: "Knowing Antonio's generosity of spirit when disposing of other people's property, she probably assumes that Antonio will pass anything he receives to her husband, Bassanio."

At a substantive level, Millett argues that Portia's rejection of Shylock's claim to imply a term into the bond; her refusal to allow Shylock and Bassanio's attempts to settle the claim; and even her ruling of attempted wrongful killing, all in the name of applying strict legal principles, are all wrong in law and are illustrations of Portia's manipulation of the legal system. All of the court's decrees, issued by Portia, are the machinery used to practice her fraud on Shylock.

While Portia is ultimately unsuccessful in making a gain for herself (the Duke and Antonio intervening to require that Shylock's possessions be given to his daughter and her lover and not forfeited personally to Antonio and the state), her attempt to use the justice system to achieve her purpose is similar to the motivations of those who employ circular transactions, the topic of the second essay in the book.

Circular transactions occur where money (or other resource) passes around the parties in a way that would appear to have achieved nothing but in fact alters the parties' legal positions. One example arises out of a Hong Kong case which Millett discusses in his essay.<sup>1</sup> Mr Pong wanted to settle his assets, consisting of land in Hong Kong, on trust for his children and wished to avoid any estate duty in the process. Estate duty was not payable in respect of property situated outside of Hong Kong so Mr Pong formed a foreign company to purchase the land and Mr Pong then received and settled the proceeds from sale on trust in an overseas jurisdiction. A circular transaction was devised to achieve this. Mr Pong's wife borrowed money from an offshore bank and lent it to the newly formed offshore company which used it to pay for the land. Mr Pong gave the proceeds to the trustees who used them to buy shares in the company which then used them to repay Mrs Pong who repaid the bank. The effect of the transactions was simply to change the ownership structure of the land so that any settlement would avoid tax.

Such transactions are generally stigmatised as fraudulent and which therefore ought to be declared invalid by the courts. Millett's thesis is that the appearance

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<sup>1</sup> *Shiu Wing Ltd v Commissioner of Estate Duty* [2000] 3 HKFCAR 215.

of circular transactions should not be taken as conclusive of their invalidity. Instead, such transactions must be individually analysed rather than reverting all too quickly to “rhetorical abuse and judicial indignation”, such as the use of the notion of sham. “There is no substitute for analysis.”

Circular transactions are usually marked by the lack of any real funds flowing through the parties and by a large number of parties, who are often related to each other in various ways. At the outset of his essay, Millett makes two claims: first, an absence of formalities, including real money, does not make a transaction invalid; and secondly, the number of parties to a transaction should not affect its validity. Instead, the identification of a circular transaction as valid or void should be a matter of verifying the purpose of the transaction:

We should consider whether the transaction is honest or dishonest, and whether the circularity is of the essence of the transaction or merely incidental. We should examine each of the payments that make up the circle, identify the critical payment, and consider whether, in the circumstances in which it was made, it achieved its object.

At times, the various factual scenarios outlined in the essay require something close to mental acrobatics to fully comprehend and Millett’s discussions of circular transactions moves very quickly through four specific contexts in which they commonly arise: provision of a company’s share capital using an external source of funding; provision of a company’s capital using the company’s own funds; tax avoidance schemes; and funding arrangements for producing films. Despite the quick pace, the author’s arguments are well made and there is no doubt in this chapter of his conclusions. His approach of substance over form is surely the right one. For example, in the case discussed above, the Hong Kong Court of Final Appeal upheld the validity of the scheme. Mr Pong’s purpose was to move his assets offshore before settling them for his children. The critical transaction was the sale of the land to an offshore entity. The circular arrangements adopted to effect this transaction were not essential – a simple transfer of the land to the company in exchange for shares in the company would have achieved the same outcome. The substance of the scheme was therefore valid albeit that the method used appeared circular. There ought to be nothing wrong with circular monetary movements if the underlying object achieved is entirely legitimate.

The third essay in the book concerns theft of identity, a theme that can be more readily extracted from *The Merchant of Venice* given Portia’s deception. Millett’s concern in this essay is with the effect of fraudulent impersonation upon the validity of contracts consequently entered into. Although traditionally contracts subject to false impersonation are usually categorised as cases of mistake rendering the contract void, Millett’s view is that they ought to be analysed as instances of fraud and therefore only voidable at the election of the victim. Whether the resulting contract is void or merely voidable will affect innocent third parties who have acted in reliance on the contract, for example, by buying goods acquired by the impersonator from his victim (and making it too late for the victim to avoid the contract). Classifying fraudulent impersonation as mistake, rather than fraud, results in inconsistency. If the deception is as to identity (for example, A masquerades as B using B’s genuine credit reference),

then a mistake has occurred and the contract is void. If the deception is as to something else that is nevertheless equally effective in inducing contract (for example, A uses a forged and false credit reference), the result is that the contract is voidable for fraud.

Millett argues that the legal response should be the same to both types of fraud as a matter of justice – “surely the precise mechanics of the fraud should not affect [the third party], who has no means of inquiry”. Unfortunately, in the United Kingdom, the authorities are against Millett and he spends most of the essay explaining why they are wrong, placing weight mainly on the requirement of correspondence between offer and acceptance.<sup>2</sup>

In New Zealand, this issue of the apparent injustice of a contract being automatically void on the basis of mistaken identity is overcome by the Contractual Mistakes Act 1979 which replaces the common law with significant remedial discretion granted to the court. However, Millett’s arguments are still worthy of consideration for their emphasis on the importance of maintaining conceptual coherency, in this case in the formation of contracts, and on analysing problems from first principles.

While the book provides a valuable insight into the views of a brilliant, now unfortunately retired, Law Lord on two particular areas of fraud, it must nevertheless be borne in mind that the essays were not written primarily to be read but to be heard from the author himself. There are several places in the essays that do not flow especially well and this reviewer found herself having to double-back to clarify what was being said. This is probably reflective of the nature of the material as a series of lectures intended to convey the author’s thoughts and opinions to a listening audience. Intonation of voice, the saying of some sentences as doubtful propositions and others as confident statements, facial expressions, and other body language of the speaker are all sorely missing from the printed word and the reader must do his best to overcome their absence.

The lectures for 2007 in the McPherson Lecture Series were given by Professor Peter Cane of Australian National University and published under the title “The Political Economy of Personal Injury Law”. The 2008 series will be presented by Justice Spigelman AC, Chief Justice of New South Wales. The contribution which this series makes to the fostering of legal research and its accessibility to the wider legal community is commendable and, it is hoped, will continue to provide much food for thought in the years to come.

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<sup>2</sup> *Cundy v Lindsay* (1878) 3 App Cas 459; *Shogun Finance Ltd v Hudson* [2004] 1 AC 919.