Taking advantage of a shopkeeper's error - bargain or theft?

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It is often the case that errors occur in consumer transactions. The price charged may be incorrect, or the charge tendered may be too much or too little. In this article, Simon France considers the impact of a recent High Court decision which has held that knowingly taking advantage of a shopkeeper's error can be criminal conduct. The author argues that such a conclusion from the legal viewpoint is not inevitable, and from the policy viewpoint is not desirable.

I. INTRODUCTION

In *Dronjak*,[1] the accused decided to purchase a stereo. He took it to the cash register where, because of a second label on the goods, the assistant requested $38.88, a price substantially less than the true asking price (the difference was $656.95). When he took the goods to the counter Dronjak was unaware of the second label and was prepared to pay the full price. The shop assistant's error presented him with the opportunity for what he saw as a bargain, and he seized it. On these facts he was charged with theft. In the High Court, Hillyer J ruled that as property in the goods had passed to Dronjak, there could be no prosecution for theft. However, his Honour felt the situation was one of obtaining by false pretences and substituted a conviction for that offence.

The case raises several interesting issues. From the substantive law aspect there is scope for debate as to whether property does pass in such a situation, and, whatever the answer, whether this situation can be seen as either theft or false pretences. Then, from the more general viewpoint, there arises the wider question of what role the criminal law should play in this very common situation. The reality is that most of us within the space of a year will be faced with a similar situation, although probably the scale of the error on the part of the shop assistant will not be as great as in *Dronjak*. The question posed is whether a shopper should be placed under a *legal* duty to advise a shopkeeper of an error with the omission to do so carrying the possibility of conviction for theft or false pretences?

II. THE LEGAL ISSUES

Three legal issues are presented by this situation. In relation to the charge of theft, it must first be decided whether property has passed. If it has, no prosecution for theft is possible. If, however, the answer is no, the issue for theft then becomes whether D's

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1 (1988) 3 CRNZ 141.

conduct can be seen as a conversion without colour of right. On the alternative charge of false pretences, the issue is whether D's 'conduct' amounts to a false pretence.

A. *Has property passed?*

In *Dronjak*, Hillyer J held that there could be no conviction for theft because property in the goods had passed to the accused. A necessary preliminary step to this is a finding that there is a contract. The ruling was based on two separate grounds: (i) the application of the Contractual Mistakes Act 1977 and (ii) the application of the common law.

(i) The Contractual Mistakes Act 1977

Concerning the application of the Contractual Mistakes Act 1977, Hillyer J first held that *Dronjak* came within section 6(1)(a)(i) which provides:

> A Court may... grant relief to any party to a contract
> (a) If in entering into that contract:
> (i) That party was influenced in his decision to enter into the contract by a mistake that was material to him, *and the existence of the mistake was known to the other party...(*my italics*)*

His Honour then noted section 2(3) of the Act, which deems that there is a contract for the purposes of the Act if there would have been a contract but for the mistake.[2] The effect of applying this to *Dronjak* was to hold that for the purposes of a criminal law prosecution also, there was a valid contract under which property passed.

The issue raised by such an analysis is whether it is correct to extend the provisions of the Contractual Mistakes Act 1977 to the criminal law. Leaving aside the broader questions as to what effect the Act has on the rules relating to transfer of property, the key is that section 2(3) is described as being "for the purposes of this Act"; it must be questionable, therefore, whether that provision can be used to base a finding that in a criminal law/sale of goods situation there is also a contract. The purpose of section 2(3) of the Contractual Mistakes Act 1977 would seem to be to ensure the applicability of the Act to mistaken contracts without reference to issues of void/voidable. Hillyer J's desire to protect the criminal law from such distinctions is certainly laudable and from a criminal law point of view has considerable attraction. However, insofar as the decision suggests that the Contractual Mistakes Act 1977 can be used in situations other than proceedings under that Act, it is a doubtful precedent.

(ii) The Common Law Position

As noted earlier, his Honour concluded that under the common law also, a contract was formed and property in the goods passed.[3] It is submitted that on closer

2 Above n 1, 143-144.
3 Above n 1, 144.

examination this conclusion is at least arguable. Further, the uncertainty which exists in contract theory creates real concern at the prospect of such theory being imported into criminal law. On the other hand, it also has to be acknowledged at the outset that theft is a property offence and that such difficulties as exist in concepts of transfer of ownership may be unavoidable.

Contract theory seems to recognise three possible responses to the facts presented by *Dronjak*. First, from an objective standpoint, there was a contract and property passed when the money was handed over. Second, although there was a contract, it was on the mistaken party's terms and property in the goods did not pass until the full sum was paid. Third, there was no contract at all, there being no consensus ad idem. Hillyer J chose the first of these options. He argued that there was a contract between the parties, and that, under section 19 Sale of Goods Act 1905, property passed when it was intended by the parties to pass. In this situation, that would be when the money was handed over.[4]

The conclusion that Dronjak did obtain property was based primarily on passages from *Middleton*[5] and *Moynes*[6]. In the former case, a post office teller looked at a wrong letter of advice when paying over money. As a result he gave the accused a much larger sum than he was entitled to. Middleton realised the error but nevertheless took the money. The Chief Justice (in a passage subsequently cited by Hillyer J) observed:[7]

> Now it is established that where a bargain has been made between the owner of a chattel and another, by which property is transferred to the other, *the property actually passes although the bargain has been induced by fraud.* (my emphasis)

Further on, the Chief Justice added:[8]

> [t]here are accordingly many cases, of which the most recent is *R* v *Prince*(11 Cox CC 193), which decide that in such a case the guilty party must be indicted for obtaining the goods by false pretences, and cannot be convicted of larceny.

This was of course the procedure followed in *Dronjak*. It is significant, though, that the Court in *Middleton* did not itself follow this route, holding instead that in the circumstances before it property had not passed:[9]

> In the present case the property still remained that of the Postmaster-General, and never did vest in the prisoner at all. There was no contract to render it his which required to be rescinded; there was no gift of it to him; for there was no intention to give it to him or anyone. It was simply a handing it over by a pure mistake, and no property passed.

4 See *Lacis* v *Cashmarts* [1969] 2 QB 400.
5 (1873) 12 Cox CC 417, LR 2 CCR 38.
6 [1956] 1 QB 439.
7 Above n 5, 420.
8 Above n 5, 421.
9 Above n 5, 421.

Why, then, did the Court in *Middleton* not see its own facts as being an example of the type of fraud under which property nevertheless passes? It is true that *Middleton* involves overpaying and *Dronjak* under charging, but little would seem to turn on such a distinction. Rather, it is more likely that the Court had in mind cases such as those of mistake of identity where fraud is intended from the outset rather than being a chance happening. Indeed the *Prince* case referred to by the Chief Justice is an illustration of planned fraud, the accused there having presented a forged cheque.

In the second case relied on by Hillyer J, *Moynes* v *Cooper*, the accused was overpaid in his wage packet. Earlier in the relevant week, he had obtained an advance on his salary. The pay clerk was not advised of this and so gave the accused the normal wages. The accused did not know of the error until he opened his packet. On discovering it, he decided to keep the money. He was charged with theft. The passage cited by Hillyer J is very similar to that taken from *Middleton*:[10]

> *Where a transfer of property is obtained by fraud there is no doubt but that the property does pass,* subject however to the right of the defrauded party on discovering the fraud to disclaim the transaction and reclaim his property. (my emphasis)

It is submitted that the issue still remains what is meant by a case of fraud. Significantly, this passage also immediately follows a discussion of *Prince* and again it is very arguable that the fraud referred to is one of deliberate preconceived misrepresentation.

Perhaps the strongest authority for the view that property passes is *Kaur*[11], an English Divisional Court case. There the accused selected a pair of shoes from a rack labelled £6.99; she noticed at the time that while one shoe of the pair had the correct price tag, the other bore a £4.99 tag. She took the shoes to the counter, saying nothing and waiting to see what eventuated. The cashier looked at the shoe bearing the lower tag and charged Kaur accordingly. Kaur was subsequently prosecuted for theft. The case turned mainly on the interpretation of "appropriation" in the English legislation. However, in the course of acquitting Kaur, Lord Lane CJ held that ownership in the goods passed to Kaur.[12]

10 Above n 6, 445.

11 [1981] 2 All ER 430. This decision has subsequently been doubted, by Lord Lane himself amongst others, such doubts turning on the Court's interpretation of the relevant Theft Act (UK) provisions (*Morris* [1983] 3 All ER 288,294).

12 Above n 11, 433. JC Smith argues the *Kaur* is correctly decided, although he believes that the contract was on the mistaken party's terms, namely the higher sum of £6.99 ([1981] Crim LR 259,261). On the other hand, Williams disagrees both with Smith on the contract point and with the decision in *Kaur* ([1981 Crim LR 666. See also, below n 19).

On the other side of the ledger, direct authority can be found for the proposition that property has not passed. In *Gilks*[13], the accused was overpaid by a bookmaker's clerk. The Court of Appeal (Criminal Division) observed:[14]

> [H]e [the Deputy Chairman] held that it was unnecessary for the prosecution to rely on s 5 (4) because the property in the £106.63 never passed to the appellant. In the view of this Court that ruling was right.

This is consistent with the orthodox contract theory that where one party to a "contract" knew that the other party was mistaken as to the terms, there was no consensus and therefore no contract. As Hannen J said in *Smith* v *Hughes*:[15]

> [I]f by any means he knows that there was no real agreement between him and the promisor, he is not entitled to insist that the promise shall be fulfilled in a sense to which the mind of the promisor did not assent.

However, it has also been noted that:[16]

> [L]egal theory is still in a state of confusion. For example, where there is an apparent contract (i.e. the parties are to all outward appearances agreed) but one party is aware that the other party is mistaken as to an important term, *the usual understanding* is that the objective principle is displaced and, there being no true consensus ad idem, the apparent contract is a nullity. There is some support for the view, however, that there is a contract on the mistaken party's terms. (my emphasis)

Clearly, then, there is no agreement within contract theory as to the appropriate response to the *Dronjak* situation. The more favoured view seems to be that property does not pass. Whatever, there would seem to be warning signals that this issue is one it would be preferable for the criminal law to avoid. If no other option proves available, legislation may be needed.

What are the consequences of the differing approaches? If property is taken as having passed, it would do so only conditionally. If the owner of the goods rescinded the contract before the recipient passed them on to an innocent third party, the contract would be avoided ab initio, and property would be regarded as not having passed. What effect this might have on a prosecution for theft is uncertain. At the time the goods were obtained property passed, albeit conditionally. At this stage then, as Hillyer J held, no prosecution for theft could lie. It surely could not be the case that, by application of rescission under contract law, at a later date the accused could become criminally liable. The uncertainty in such a situation would be unacceptable; the rogue who dealt with the

13 [1972] 3 All ER 280.

14 Above n 13, 282.

15 (1871) LR 6 QB 597, 610. For a discussion of this issue, see N Rafferty "Mistaken tenders: An Examination of the Recent Case Law" (1985) 23 Alberta LR 491.

16 D McLauchlan "Mistake as to Contractual Terms under the Contractual Mistakes Act 1977" (1986) 12 NZULR 123,124.

goods or whose contract was never rescinded could not be charged with theft, whereas the person whose contract was rescinded could be liable. The better view from the criminal law aspect is to accept, as Hillyer J did, that property passes at the time, albeit conditionally under the common law, and that a theft prosecution will not lie. This being the case, the option is to charge the accused with false pretences, when the issue becomes whether there been a false representation by the accused.

What of the other view, namely that property does not pass and that, accordingly, that barrier to a theft prosecution is lifted? For an analysis of the consequences, it is necessary to set out the relevant statutory provision. Section 220 Crimes Act 1961 provides:

> (1) Theft or stealing is the act of fraudulently or without colour of right taking or converting to the use of any person, anything capable of being stolen, with intent-
>
> (a) to deprive the owner...permanently of such thing
>
> (2) ..."taking" does not include obtaining property in or possession of anything with the consent of the person from whom it was obtained, although that consent may be induced by a false pretence; but a subsequent conversion of anything of which possession only is so obtained may be theft.

The key provision is subsection (2). Dronjak's possession was consensual, so he could not be caught by the first limb of section 220(2). Accordingly, to be guilty of theft, he must come within the 'subsequent conversion' limb. Curiously, that limb refers back to 'false pretences' ("so obtained"). This means that to be guilty of theft Dronjak must have first obtained possession by a false pretence, and then have converted it. In the final analysis then, a key issue, however one resolves the property passing point, is whether Dronjak's conduct amounts to a false representation.

B. *A false pretence?*

In *Dronjak* Hillyer J was able to find the necessary false pretence:[17]

> [H]is silence and his paying the amount, in my view, was a representation that the correct price had been rung up, and was being charged. He deliberately refrained from drawing the checkout operator's attention to the fact that the price was $695.83, not $38.88. That was a false pretence.

17 Above n 1, 146.

This ruling is not without controversy. It is, in essence, a decision that silence in relation to a mistake that you have not induced can be a false pretence. Concerning this, JC Smith has observed:[18]

> [169] *There must be conduct of some kind* - D is generally under no duty to correct any misunderstanding by P, even though D is fully aware of it. "The passive acquiescence of the seller in the self-deception of the buyer does not entitle the buyer to avoid the contract." [Smith v Hughes (1871) LR 6 QB 597]. A fortiori, it cannot amount to a criminal offence.
>
> [170] *Deception by implied statement* - The most difficult question is as to how far statements should be held to be implied in words or conduct... A customer in a supermarket who tends goods to the counter represents that the price label on the goods is that which he believes to be authorised by the management, so that there is a deception if he knows that the label has been switched by himself or another.

Smith's observations would seem to assist Dronjak. Looking at the supermarket example, it cannot be said that Dronjak was aware of the dual labels; accordingly his placing the goods on the checkout counter is not an act of deception. Even if this were not the case, it must be suggested that the basic stance illustrated by the above passages represents an extraordinary imposition on the consumer. Is it realistic to claim that in taking goods to a cashier, a customer is representing that they are labelled in accordance with the management's desire? It is quite a different situation where the customer has changed the labels, but in the ordinary course of consumer affairs it seems an unreal analysis of transactions.

Glanville Williams would go further than Smith. He argues that the *Kaur* situation, where the accused put the shoes on the counter knowing of the two labels, is also not a case of deception.[19]

> What is the deception? If the wrong label was put on by the supermarket company, there would be no deception on the customer's part merely in tendering the article with the wrong label. ...One cannot spell out a deception from the customer's act in tendering to the supermarket its own unaltered article. The customer's moral guilt, if any, is in not disclosing his knowledge that the marked price is wrong, but non-disclosure is not deception. This is an important restriction upon the law of deception which must be preserved. A great many people would be in peril if they were put under a legal duty to reveal errors in the store's own pricing, on pain of being convicted of obtaining by deception if they did not.

Williams's words are prophetic, for the effect of *Dronjak* is indeed to put a great many people at risk. It is submitted that the better view is that silence in relation to a

18 JC Smith *The Law of Theft* (5 ed, Butterworths, London, 1984) para 169-170.

19 [1981] Crim LR 666, 678. This was also the view of the Court in *Kaur*. Lord Lane observed, "... this was not a case where there was any deception at all perpetrated by the appellant". Above n 11, 432.

mistake that one has not induced is not conduct amounting to a false representation. Accordingly a prosecution for either theft or false pretences should not succeed.

This finding that Dronjak's silence amounted to a false pretence is the essence of the case. It settles the legal issues and provides the nexus to the 'moral' aspects. Many would accept that Dronjak was under a moral obligation to advise the shop assistant of her error. The finding that his failure to do so amounted to a false pretence makes it also a legal question.

C. *Summary*

The legal issues presented by *Dronjak*, and an alternative view as to their possible resolution, are:

(i) a conviction for theft can only lie under the definition which captures subsequent conversion of property initially obtained by a false pretence;
(ii) a conviction for this requires, as does a charge of false pretences, a finding that silent acquiescence in another's self-generated error is conduct amounting to a false pretence. Such a finding is taking the concept of deception too far;
(iii) if it is held that there has been a false pretence, the choice between prosecution for theft and prosecution for false pretences turns on whether property has passed. If it has a conviction for theft is not possible;
(iv) whether property has passed remains an issue of contention in contract law, and therefore necessarily in criminal law. The preferred view is that property has not passed.

III. THE POLICY ISSUES

A. *The Potential Width*

The width of this decision is uncertain. Potentially, it means that there is no such thing as an unwitting bargain. If one party to a contract, the seller, is operating under a mistake of which the buyer is aware, the latter is arguably now under a duty to advise the mistaken seller of the error. Put another way, the situations covered by s6(1)(a) Contractual Mistakes Act 1977 could all now also represent situations of obtaining by false pretences. Further, there is no real reason why the mistake should be limited to price. What if the error is as to the quality or nature of the goods? For example, the price clearly indicates that the seller regards what he is selling as a copy whereas it is in fact an original. If the buyer is aware of this, applying *Dronjak* arguably means that she cannot buy the goods without telling the seller. If she does, she will be guilty of false pretences (theft), punishable where the value is over $300 by seven years in prison. Finally, the precedent could (and for consistency's sake should) extend to sellers. What if the seller has overheard a conversation that makes it clear the buyer believes the goods have a greater capacity or quality than they actually possess? Consistency requires that he be under a duty to advise the buyer of the error or otherwise suffer the pain of conviction for false pretences. In essence then, the effect of capturing the *Dronjak* situation as a false pretence is to enforce through the criminal law an obligation of

candour, a duty on the knowledgeable party to a contract to advise the other party that he is operating under some mistake.

B. *The Policy Issues*

The challenge presented by *Dronjak* is that it is a situation all of us will face. Through no effort of our own we will be presented with an opportunity to take advantage of another's mistake. In this discussion, I will begin by assuming that society wants the potential beneficiary to turn the opportunity down.[20] Reasons for this basic position will vary; it may be due to a belief that society will be a better place if everyone acts more charitably, or it may be for pragmatic reasons that the needs of the marketplace are best served by people not taking advantage of such mistakes. Whatever, if it is assumed that this is what society wants, the question that must then be asked is whether that desire should be supported by the use of the criminal law.

The initial focus of the inquiries should be the behaviour that is being brought under the umbrella of the criminal law. Of course, such conduct cannot be divorced from its context or its consequences, but these are secondary to the initial inquiry. Thus, I would argue that while the existence of some loss is a necessary ingredient, the size of the loss should be a factor relevant only to sentence and not to the initial use or intrusion of the criminal law. True, one baulks at the size of the error in *Dronjak*. However, it is not of itself sufficient to merit a different response in the substantive criminal law from the response it would give to an error over a packet of cigarettes.

My underlying philosophy is that the criminal law is not necessarily the correct, or even the desirable, vehicle to ensure that everyone acts as society might desire them to. This point of view was well put by the Canadian Law Reform Commission when it began its exhaustive review of the Canadian Criminal Code. It observed:[21]

> Criminal law, then, serves to affirm fundamental values. In practice it does so to a poor and limited extent.... To bring about a match of theory and reality, we have to realise the reason for the gulf between them. The reason can be found in one word: *overkill*.... for this the remedy is restraint. We must keep regulatory offences in their proper place and confine "real" criminal law to its own proper job. That job is that of acting as an instrument of last resort for reaffirming values.... What counts is not the number of bodies being processed through the system, but rather the nature of those processes. The key is quality not quantity. To get this quality we have to use restraint: restraint in making criminal laws and criminal offences, in burdening people with criminal liability, in processing conflicts through the criminal courts, and finally in our use of our penalty of last resort, inprisonment.

My context then is that the criminal law should be used with this restraint, and only in situations where it is clearly demonstrable that it has an accepted role to play.

20 I shall discuss this assumption herein.

21 Law Reform Commission of Canada *Our Criminal Law* (Information Canada, Ottawa, 1976) 17.

When these criteria are applied to the *Dronjak* situation, no compelling case for the use of the criminal law emerges. To take the issue of alternative remedies, there is a statute specifically designed to deal with *Dronjak*. One of the very objects of the Contractual Mistakes Act 1977 was to try and alleviate the existing difficulties in the law, and to ensure an avenue of redress for exactly this situation. Of course, the fact that alternative remedies exist is not of itself a sufficient basis for excluding the criminal law. For example, assault victims can look to accident compensation, and theft victims can use civil remedies, but it is not suggested the criminal law has no role there. However, these remedies fall to be considered within the context of the nature of the activity it is planned to bring under the wing of the criminal law. In our situation, one party to a contract has taken advantage of another's mistake; they have if you like seized the opportunity of a bargain presented to them. They have not actively sought the bargain, nor have they induced it or set out to be fraudulent. It is within this framework that the case for reliance on other remedies can be made.

It may be argued in response that all this is rather unrealistic. The retail world is now so big and the turnover so immense that redress to the law of contract is impractical. Further, the size of the mistake will usually be insufficient to warrant incurring the costs of litigation. These are real issues, but they can be viewed from another angle. Should the criminal law be used to redress these problems? Such a role has never been suggested as a general means of ensuring debtors pay their debts, or creditors recover all that is owing to them. Creditors are essentially left to their civil remedies. Furthermore, in today's retail world sellers usually recognise the risk of loss by mistake and no doubt build this in as a factor in their pricing policies. There seems nothing inherent in the *Dronjak* situation to warrant isolating it as a special situation and using the criminal law as a response.

What of my basic assumption that society believes the potential beneficiary should reject the opportunity presented? I doubt there is significant public support for the involvement of the criminal law. Of course, claims about what the public thinks or feels are easy to make and almost impossible to prove. However, I have over the past year conducted a 'survey', one of those informal surveys that sociologically are so inadequate they do not merit the word. What I did was to raise the issue whenever I could, becoming, I fear, the classic party bore. Vehement debates did however result, and two discernible, largely predictable camps emerged.

The smaller group argued that the criminal law had a role to play. The argument was mainly by analogy, the most telling comparison being to the situation where a bank wrongly places money in an account. If the recipient realises the error and spends it, the argument went, that would be seen as theft and where is the difference? The response from the larger group (what I call the "consumer lawlessness group") was not always convincing. One approach was to try and distinguish the two by arguing that rather than being a passive recipient as in *Dronjak*, the "offender" had to take the money from the bank in order to use it. This is not a telling retort. In the shopping situation one has to hand over the money to obtain the goods and the actions seem very similar. Perhaps a stronger distinction might be found by a loose reference to concepts of consideration. In the *Dronjak* situation, there is an exchange; a deal is struck, albeit on a mistaken basis, and money is handed over in return for goods. However, in the bank situation, there is

no such exchange; rather money has mistakenly been directed at you, in the same manner as someone leaving their wallet in your house. There is no intention for you to have the money, no desire to set up an exchange situation at all. A second approach was to accept the aptness of the bank account analogy, and argue that it also ought not to be the subject of the criminal law. The bank can recover the money[22], and has no right to expect the criminal law to protect it from its own incompetence.

Up to now I have had the consumer lawlessness group on the defensive. However, this was by far the larger group and certainly its members were not defensive. Their view was one of swings and roundabouts. All could recount tales of being the victims and beneficiaries of pricing errors; many had their favourite tales about their local dairy or their supermarket. Their approach was that sometimes you win and sometimes you lose, but in the end it evens out. Not everyone, however, justified it in these terms. Some saw it in terms of their view of a market economy; namely, you take the best deal you can. Some shops will price their goods higher in the hope that customers will not shop around and realise; others will refrain from disabusing customers of their illusions as to the use to which goods can be put. If the customer sometimes has the opportunity to be similarly reticent, then that is consistent with the spirit of consumerism.

Overall, then, there would seem to be a division as to the acceptability of the criminal law being involved in the *Dronjak* situation. It may be that one cannot rely too much on one's sense of public feeling, but as will be argued, there are at least some important messages on the function of the law as educator.

In the final analysis, the need for restraint must prevail. Punitive means cannot always be used as the standard way to encourage people to act as society, or sections of it, want. Further, it is arguable whether what people want is all that clear in this situation. Given this fact, given the availability of specific alternative civil remedies, and most importantly given the nature of the conduct, it is submitted that the case for the use of the criminal law is not established.

One final point. Clearly, the contrary can be argued. It may be the case that a higher code than perhaps exists now ought to be imposed through the criminal law. Certainly, the law can be used in an educative role - although many times it seems to be assumed that education will occur without taking steps to actively assist the process. In this situation, my view is that many people do not see the conduct as criminal, and would be surprised to learn that they had broken the law. If it is to be the subject of a prosecution, it is suggested that a new offence which better labels the activity should be created. Theft or false pretences seems enormously overstated for conduct concerning which the Court observed, " the fact that the penalty was so light will be an indication that the Courts did not take a very serious view of the matter, such as a term of imprisonment

22 A restitutionary remedy is available, subject to various defences. See *Australia and New Zealand Banking Group Ltd* v *Westpac Banking Corporation* (1988) 62 ALJR 292, for the most recent example.

would have indicated."[23] One possibility is a consumer offence which could be called 'unfair dealing'; in this way, at least, the reality of what was involved might be better understood. If we are to label conduct such as this as criminal - and that is what a false pretences conviction surely does - then whatever stigma is contained in that word will be lost.

23 Above n 1, 147.