Mendelsohn, James

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James Mendelsohn considers the fraught issue of acts of theft and dishonesty by company directors.

In September 2013, Paul Ellis was jailed for stealing nearly £65,000 from Limen Construction Ltd, a company of which he had been a director. Unknown to the other directors, he had taken company money for his own purposes. The headlines generated by such incidents sometimes obscure considerable legal difficulties.

Theft

Under section 1(1) Theft Act 1968 ('the Act'), 'A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it'. In *R v Lawrence* 55 Cr App R 73, Megaw LJ identified four elements: '(a) a dishonest (b) appropriation, (c) of property belonging to another, (d) with intention of permanently depriving the owner of it.' The first three need careful examination in cases involving companies. They are considered below in reverse order.

Property belonging to another

A sole trader, who spends his money recklessly, cannot be guilty of theft, even if he becomes unable to pay his business creditors. Nor can partners in a partnership, who agree to act in a similar fashion. Both the sole trader and the partners are disbursing their own property. Whilst they may be guilty of participating in fraudulent business (s9 of the Fraud Act 2006), they do not 'steal', since they are not dealing with 'property belonging to another'.

A company has separate legal personality (*Salomon v Salomon & Co Ltd* [1897] AC 22 (HL)). Its property does not belong to its shareholders or directors – even where there is only one shareholder who is also the sole director (*Macaura v Northern Assurance Co* [1925 AC 619) (HL)). A sole director who helps himself to company assets therefore takes 'property belonging to another' for the purposes of s1(1) of the Act and potentially commits theft.

Appropriation

Section 3(1) defines 'appropriation' as 'any assumption by a person of the rights of an owner'. Paul Ellis's case was straightforward, since he acted without the knowledge or authority of the other directors, and therefore without the knowledge or authority of the company itself, to whom the directors' knowledge and authority would be imputed.

Situations involving sole directors are more complex, particularly where they are also sole shareholders, with complete control of their companies. Under the 'identification principle', their thoughts and intentions are attributed to the company itself, making it possible to convict a company for *perpetrating* a crime (*Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 (HL)). Can such directors argue the converse, that since their mind is effectively the mind of the company, the company consents to them taking the property and therefore they have not 'assumed' but have been validly consigned 'the rights of an owner', meaning that there is no appropriation?

In *R v Roffel* [1985] VR 511, the defendant was charged with stealing from a company of which he and his wife were sole shareholders and directors. The Court of Criminal Appeal of Victoria held that Roffel's consent could be attributed to the company. The company itself had therefore 'consented' to Roffel taking its property. Consequently, there was no appropriation. Crockett J commented, 'By the instrumentality of the only person through which it could effectively act, [the company] consented to entry into the impugned transactions.'

In *R v Philippou* (1989) 5 BCC 665, two directors withdrew £369,000 from a company account. They used it to buy properties, which they then transferred to another company which they controlled. Questioning *Roffel* and upholding their conviction for theft, the Court of Appeal rejected the argument that, since they were the mind and will of company, the company had therefore consented to the transfers.

In *DPP v Gomez* [1993] AC 442 (HL), the House of Lords affirmed *Philippou* and overruled *Roffel*. The court ruled that appropriation was possible even if the owner consented to the property being taken. Following *Gomez,* a director who authorises himself to take company property cannot argue that there is no appropriation.

Dishonesty

Even where a director appropriates company property with the intention of permanently depriving the company of it, he cannot be convicted for theft if he has not done so 'dishonestly'. Section 2(1) states that '[a] person's appropriation of property belonging to another is not to be regarded as dishonest (a) if he appropriates the property in the belief that he has in law the right to deprive the other of it, on behalf of himself or of a third person; or (b) if he appropriates the property in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it.'

In *Attorney-General's Reference (No 2 of 1982)* [1984] QB 624, X was charged with theft from F Ltd, of which he was the sole shareholder, and of which he and his wife were the directors. X and Y were also charged with theft from other companies of which they were joint shareholders and directors. Citing the identification principle, they argued that since they were the sole directors, they had the companies' consent and so had not acted dishonestly, according to section 2(1)(b). The trial judge accepted this argument, withdrew the case from the jury on the grounds that no reasonable jury could find their acts dishonest, and ordered an acquittal. The Attorney General referred two questions to the Court of Appeal: could a sole shareholder, who was also a sole director, steal from his company? And could two persons, acting in concert, steal from a company of which they were sole directors and shareholders?

The Court of Appeal answered 'yes' to both questions. Kerr LJ stated that the identification theory did not apply where the company was the victim rather than the perpetrator of a crime , that is, where he appropriation of its money was by its directors. The defendants could not rely on s2(1)(b) because, if they were to argue that they and the company were in all respects identical, the 'consent' would be their own , which would then be attributed to the company rather than that of a meaningful 'other'. He therefore held that the accused could be convicted of theft if they had acted dishonestly, which was for the jury to decide. The defendants could only seek to rely on s2(1)(a) by arguing that they honestly believed they were entitled to withdraw company money for their own purposes.

The approach of leaving 'dishonesty' to the jury was followed in *Philippou* and confirmed in *Gomez,* where Lord Browne-Wilkinson remarked: 'The pillaging of companies by those who control them is…

common. It would offend both common sense and justice to hold that the very control which enables such people to extract the company's assets constitutes a defence to a charge of theft from the company. The question… must be whether the extraction of the property from the company was dishonest, not whether the alleged thief has consented to his own wrongdoing.' In *R (A) v Snaresbrook Crown Court* [2001] EWHC Admin 456, Lord Woolf ruled that a director can be guilty of theft even where the taking of company property had been authorised by all the company's directors, if the taking was dishonest – which, again, was for the jury to decide.

Muddy waters?

Questions about dishonesty remain, particularly where directors who take company property are also the sole shareholders. Some argue that such directors cannot in good faith claim the benefits of separate personality and limited liability whilst simultaneously treating company assets as their own. Others argue that the dishonesty needs to be directed towards the owner of the property, namely the company itself. According to this argument, the directors may well be acting dishonestly towards the company's creditors, but they are not the owners of the company's property. They are not acting dishonestly in relation to the shareholders, because they are those shareholders, who, in any event, are not the owners of the company's property either. If they are not acting dishonestly towards the shareholders, it is difficult to view them as acting dishonestly towards the company itself, which exists for the shareholders' benefit. Arguably, none of the above cases consider this issue thoroughly, even though it was first raised in 1991 (see DW Elliott, 'Directors' Thefts and Dishonesty' [1991] Crim LR 732). Whilst directors who pillage company assets for their own benefit may be liable for other offences, convictions for theft are therefore, arguably, doctrinally unsound. Clear judicial or parliamentary guidance on the issue would be welcome.

James Mendelsohn teaches Company Law at the University of Huddersfield.