

## Appraising the Market Overt Exception

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**Abstract:** Under what circumstances can a sale of goods by a person, who is not the owner of the goods, nonetheless confer good title on the purchaser? The common law rule “*nemo dat quod non habet*” embodies the principle that the transferee of goods cannot get better title than that of the transferor. In other words, if goods are sold by a person who does not have title to the goods (for example, because he had obtained the goods by theft), then he would be unable to pass title to a subsequent purchaser since he did not have title to begin with. The *nemo dat* rule thus protects the true or original owner of goods. One of the exceptions to this rule under the Hong Kong Sale of Goods Ordinance is the market overt exception, which seeks to protect innocent purchasers. This article first considers the meanings of and rationales behind the *nemo dat* rule and the market overt exception respectively. Problems with the existing market overt exception will next be discussed. A suggestion will then be made that the market overt exception be replaced with a rule that protects innocent buyers who deal as consumers and who have purchased goods from shops or markets in Hong Kong.

**Keywords:** Market Overt, Nemo Dat Rule, Sale of Goods, Consumer Protection, Hong Kong.

### 1. Introduction

“This case raises the ever-recurring question: which of the two innocent parties is to suffer by the fraud of a third? It is the familiar contest between the original owner who had been deceived into parting with this property, and the innocent purchaser who has been deceived into buying it.”

Lord Justice Denning in *Central Newbury Car Auditions Ltd v Unity Finance Ltd* (1957)

Imagine a situation where goods have been stolen from their owners and are then sold by the rogue to a purchaser who is unaware that these are stolen goods. The thief then disappears. Who should have title to the goods? The original owners would argue that they deserve title to the goods as the goods have been stolen from them. On the other hand, the innocent purchasers would argue that they had acted in good faith and had paid for the goods, and so should be allowed to retain the goods.

The common law principle *nemo dat quod non habet* (the “*nemo dat*” rule) protects the original owners. This maxim embodies the idea that no one can give what he does not have. Applying the principle to our scenario above, the thief has no title to the stolen goods and thus has nothing to pass to the purchasers. Title therefore remains with the original owners who can reclaim the goods from the purchasers. The *nemo dat* rule is embodied in section 23 of the Hong Kong Sale of Goods Ordinance (Cap. 26). There are, however, various exceptions to the *nemo dat* rule, as contained within the Sale of Goods Ordinance and the Factors Ordinance (Cap. 48). These exceptions generally seek to protect bona fide purchasers of goods in certain specified circumstances. One of these exceptions is the market overt exception in section 24 of the Sale of Goods Ordinance.

This article first considers the rationale behind the *nemo dat* rule and the market overt exception. It next considers the problems that the market overt exception creates. It will then suggest reforms to the law in the light of these considerations, for the consideration of legislators, the business community, the Consumer Council and other interested parties (such as the Hong Kong Department of Justice).

### 2. The *nemo dat* rule and its exceptions

“In the development of our law, two principles have striven for mastery. The first is for the protection of property: no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a better title.”

Lord Justice Denning in *Bishopsgate Motor Finance Corporation v Transport Brakes* (1949)

The nemo dat rule embodies the idea that the transferee cannot get a better title to goods than that of his transferor. It thus favours the original owner over the innocent purchaser. The nemo dat rule is given statutory effect in section 23(1) of the Sale of Goods Ordinance, which provides that where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had. This rationale of this rule is thus to protect ownership rights.

However, in order to maintain the balance between the original owner and the innocent purchaser, various exceptions to the nemo dat rule have evolved, as contained in the provisions of the Sale of Goods Ordinance and the Factors Ordinance. Amongst the exceptions contained in the Sale of Goods Ordinance are exceptions relating to estoppel (section 23), sales in a market overt (section 24), sales under a voidable title (section 25) and sales by seller or buyer in possession (section 27). An innocent purchaser, faced with a claim for a return of the goods from the original owner, would attempt to argue that one of these exceptions to the nemo dat rule applied to his situation, enabling him to keep the goods.

Of course, the purchaser could also look to the person from whom he bought the goods, on the basis that the seller of goods lacked title to the goods. As against his immediate seller, the purchaser could argue that there has been a breach of the implied contract term with regard to title under section 14 of the Sale of Goods Ordinance. Section 14(1)(a) of the Sale of Goods Ordinance provides that in every contract of sale, there is an implied condition on the part of the seller that in the case of the sale, he has a right to sell the goods, and in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass. However, often under such circumstances, the person from whom the purchaser bought the goods has either disappeared or has insufficient funds. This would then make impossible or meaningless a contract law-based claim. There would then be a contest between the original owner and the innocent purchaser as to who has title to the goods, and it is in this context that the exceptions to the nemo dat rule become significant.

### **3. The Market Overt Exception**

The market overt exception is contained in section 24 of the Sale of Goods Ordinance. Pursuant to this section, where goods are openly sold in a shop or market in Hong Kong, in the ordinary course of business of such shop or market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller. The purpose of the market overt exception is to protect commercial transactions. As Goode (2004) explains, the market overt exception was designed to promote the integrity of the market.

The first impression that one might have on considering this exception is that its terms appear to have a very broad scope. However, the scope of the market overt exception has been steadily narrowed by the interpretation given it in Hong Kong courts. One example of this may be seen in the Hong Kong Court of Appeal decision of *Au Muk-Shun v Choi Chuen-Yau* (1988). In this case, 43 tons of pig-iron had been stolen from the appellants. The thieves then sold the pig-iron to a third party who in turn sold the goods to the respondent.

The issue in that case was whether the appellants or the respondents should have title to the pig-iron. In the judgment of Vice-President Cons, the meaning of the term “shop” in section 24 was considered. It was noted that the term was not defined in the Sale of Goods Ordinance, and the learned judge did not propose to lay down any definition of shop. Rather, it was a question of fact to be considered in the context of the section. The judge emphasized that a key aspect of a “shop” is its retail nature, and reasoned that it could not possibly be said that the sale of 43 tons of pig-iron was a retail sale. The respondents in this case were thus unable to rely on section 24 of the Sale of Goods Ordinance in order to claim the pig-iron. The court in this case thus effectively narrowed the scope of section 24 of the Sale of Goods Ordinance by interpreting the phrase “shop” to be confined to retail sales.

The scope of section 24 of the Sale of Goods Ordinance was further narrowed in the Hong Kong High Court case of *R v Tai Shing Jewellery* (1983). The applicant in this case was a jewellery company, who had bought some silver coins at its premises for full market value from a seller who had in fact obtained the coins in the course of a robbery. The applicant was unaware of this fact. The seller was then convicted for robbery and the applicants applied for an order that the silver coins be returned to them, on the basis that the situation fell within the scope of section 24 of the Sale of Goods Ordinance.

Judge Penlington took a purposive view of section 24 of the Sale of Goods Ordinance. The judge opined that the legislation did not intend to afford protection for a shopkeeper who purchased goods in his own shop. Rather, the judge emphasized that section 24 was designed to ensure that a member of the public who uses a shop to buy goods in the normal way gets a good title. It was not intended to protect a shopkeeper who buys from the public just because he happens to use his shop premises to do so. This purposive interpretation of section 24 thus confines section 24 to sales to members of the public, despite the fact that this is not explicitly stated in section 24.

#### 4. The rationale for the market overt exception

The market overt exception protects innocent purchasers against the claims of their original owner. It has its roots in England, going back to Anglo-Saxon times. As Guest (2002) explained, “this ancient rule applied to sale from shops in the City of London and, outside the City of London, to sales from any open, public and legally constituted market, including fairs”. Smith (1997) pointed out that the market overt exception “appears to have been generated by practical considerations born out of a desire to encourage and facilitate commercial activity by protecting purchasers of goods who bought openly in those places which were authorized for the buying and selling of goods.” Goode (1982) further explains that the owner of goods “was expected to look for his goods in the market; and if he did not intervene at the market prior to the sale of the goods, the bona fide buyer was given an assurance of good title”.

It has been largely acknowledged that this rationale for the market overt exception is poorly suited to modern times. Indeed, as noted by Sealy & Hooley (2003), the market overt exception has “come to be regarded as archaic and quaint”. In older times where transportation was more limited, it would have been feasible for a person whose goods had been stolen to expect to find them being sold at a market nearby. However as transportation became more developed, “thieves can easily dispose of goods at the other end of the country” (Howells, 1995).

Indeed, a key criticism of the market overt exception has long been recognized as promoting trade in stolen goods. In explaining the abolition of the market overt exception in England, Goode (2004) said that “a rule designed to promote honesty among buyers and the integrity of the market came to be seen as providing a charter for thieves”. This point is also raised by Sealy & Hooley (2003), who said that the rule had “attracted criticism because it facilitated, and perhaps even encouraged, trafficking in stolen goods.”

This problem is exacerbated by the increasing importance of internet sales. The literal words of section 24 of the Sale of Goods Ordinance do not preclude internet sales. Persons who have stolen goods may seek to dispose of these goods via the internet, hoping to benefit from the relative anonymity and privacy that the internet allows. If the particular factual matrix falls within the scope of section 24, such rogues may then rely on section 24 to pass good title to innocent purchasers. It is thus arguable that the practical applicability of section 24 of the Sale of Goods Ordinance has widened as a result of the growth of internet sales.

#### 5. Further difficulties arising from the market overt exception in Hong Kong

Another difficulty of the market overt exception as embodied in section 24 of the Sale of Goods Ordinance relates to the fact that the narrow interpretation given it by Hong Kong courts (as discussed above) is not reflected in the words of the section, which are at face value very broadly expressed. This is against the grain of purpose of the Sale of Goods Ordinance as a codifying ordinance. The Long Title of the Sale of Goods Ordinance states that it is an ordinance “to codify the law relating to the sale of goods”. The general aim of a codification exercise is to increase accessibility to the law, by compiling and organizing the law in respect of a particular field in one statute. This makes it easier to ascertain what the law is, as one would merely need to have recourse to the particular codifying statute, rather than sift through a large body of case law. The case of *Bank of England v Vagliano Brothers* (1891) offers some guidance on how a code should be interpreted. In that case, Lord Herschell said that the purpose of a codifying statute “surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of...roaming around a vast number of authorities”. The general idea is that in order for codification to be meaningful, the words of the code should accurately reflect the legal position. There is thus a discrepancy between the broad terms of section 24 of the Sale of Goods Ordinance and the narrow interpretation of the courts, which does not sit well with the idea of the Sale of Goods Ordinance as a codifying ordinance.

It is also confusing that section 24 of the Sale of Goods Ordinance is titled “Market Overt”, when this term does not in fact appear in the words of the section itself. It is important to note at this juncture that the words of section 24 of the Sale of Goods Ordinance differ from the market overt exception that used to exist (but has since been repealed) under the English Sale of Goods Act. The now-repealed section 22(1) of the English Sale of Goods Act pertained only to goods sold in a market overt. As Mark (1971) explained, all shops in the city of London were regarded as market overt for the purposes of their own trade, while outside the city of London, markets overt could exist by grant or prescription. In contrast, section 24 of the Sale of Goods Ordinance is wider in scope as it applies to “shops and markets” and is not confined to sales in a market overt. It is thus confusing that section 24 of the Sale of Goods Ordinance is still titled “Market Overt” when the words of that section in fact cover a broader scope.

## 6. Possible Alternatives

It seems clear that the market overt exception should be abolished, given the problems and difficulties as discussed above. Indeed, the market overt exception has been described as “highly technical in its application and replete with artificiality” (Guest (Ed.), 2002) and has already been abolished in England.

In Hong Kong, the Report on Contracts for the Supply of Goods (2002) prepared by the Law Reform Commission of Hong Kong has recommended that the market overt exception be similarly abolished, without also recommending any replacement provision that might offer some comfort to purchasers. (The recommendations of this Report, made six years ago, have yet to be implemented, without any reasons provided for the delay, as far as the author is aware).

However, this recommendation might be criticized as tilting the balance too heavily against consumers, striking another blow at the protection of consumers, who are already in a disadvantaged position as a result of the *nemo dat* rule. In making this recommendation, the point was made that as between the original owner and the innocent purchaser, the owner was more vulnerable. It was thus reasoned that since the owner was more vulnerable, there was no need for a replacement provision for the protection of purchasers. In particular, it was observed that while a buyer could make enquiries as to the source of goods or go to more reputable shops, there were times when burglary and robbery could not be prevented regardless of how cautious the owner had been.

It is submitted with respect that this view does not fully represent the vulnerability of the purchaser. A buyer’s enquiries as to the source of goods are unlikely to yield illuminating results if the seller is a rogue who is determined to hide the true provenance of the goods. Such unscrupulous sellers may exist even in reputable shops. Moreover, a reputable shop may itself have obtained the stolen goods unknowingly from a supplier and then passed them on to an innocent buyer. Thus merely making enquiries and buying from respectable shops would not be enough to protect a buyer. This difficulty is exacerbated if the sale is made on-line. It is arguably harder to tell whether the persons behind an internet site or e-mail address are trustworthy, as there is no face-to-face contact between buyer and seller which would enable the buyer to assess the respectability and trustworthiness of the seller.

It is also important to consider the position of consumers as a special class of buyers. Consumers may be in a particularly disadvantaged position as they may well have less bargaining power and may be less well-informed of their rights and entitlements. As Salomons (2007) observed, “in the final analysis, rules on bona fide acquisition deal with risk apportionment”. Owners of goods are in a better position in this regard, as they can not only take better care of their goods to prevent theft, but also arrange for insurance against theft.

## 7. Suggested amendments to the Sale of Goods Ordinance

In the light of these considerations, it is suggested that the existing market overt exception in section 24 of the Sale of Goods Ordinance be replaced with a rule to protect buyers who deal as consumers and who have purchased goods in good faith in the ordinary course of business of a shop or market in Hong Kong. The phrase “deals as a consumer” is already defined in section 2A of the Sale of Goods Ordinance. Pursuant to section 2A (1) of the Sale of Goods Ordinance, a party to a contract of sale “deals as consumer” in relation to another party if (a) he neither makes the contract in the course of a business nor holds himself out as doing so; (b) the other party does make the contract in the course of a business; and (c) the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption. It is noted that this is a comprehensive definition that covers the respective features of buyer, seller and goods that would have to be satisfied in order for the buyer to be regarded as dealing as a consumer. Section 2A (2) of the Sale of Goods Ordinance provides that the buyer in a sale by auction or competitive tender would not be regarded as dealing “as a consumer”. Section 2A (3) then deals with the burden of proof, providing that it is for the person claiming that a party does not deal as consumer to prove that he does not. The advantage of the proposed legislative amendment is that it would sit well with the pre-existing framework of the Sale of Goods Ordinance, by employing the use of a key concept already defined therein.

It is submitted that such an amendment would be a step in the direction of greater consumer protection in Hong Kong. The protection of the rights of innocent consumers would be conducive to business and retail trade. Owners would be encouraged to take better care as to the security of their goods and to insure valuable goods if necessary, thus resulting in pro-active risk management. Such an amendment is most unlikely to create a sudden spike in the sale of stolen goods, given that this amendment would be narrower than the existing market overt exception which is not confined to consumers.

Another point for consideration is whether a time limit should be imposed within which original owners must reclaim their stolen goods. Such time limits for the revendication of stolen goods exist in some European jurisdictions (Salomon, 2007). These time limits may encourage owners to take prompt action upon realizing that they have lost their goods, and conversely would give consumer peace of mind after the time period lapses.

However it is submitted that this additional time limit is not necessary, in the light of the fact that there are already general statutory limitation periods under the Limitation Ordinance (Cap. 347).

Instead, it is suggested that, where the facts fall within the scope of the proposed new provision enabling the innocent consumer to claim the goods in question, original owners could nonetheless be given the right to buy back the goods from the consumer. This would give owners who have parted with goods that are of particular sentimental value the right to get the goods back, without substantively depriving consumers of the protection offered under the proposed amendment. This small concession would offer original owners some limited comfort, and bring some balance between the rights of original owners against innocent consumers.

## 8. Conclusion

“It is, of course, a frequent occurrence that the courts have to decide which of two innocent parties is to suffer by the fraud of a third”.

Lord Justice Lloyd in *Shaw v Commissioner of Metropolitan Police*

While the market overt exception may have outlived its usefulness, it is submitted that the demands of consumer protection and the protection of trade would require that the market overt exception be replaced with a new exception to the *nemo dat* rule, as detailed in this article. It is always a tough call when there is a choice between two innocent parties. A delicate balance must be maintained between the rights of original owners and the rights of innocent purchasers. It is hoped that the proposals in this article will represent one way in which this balance may be rationally maintained.

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