

TO: Oliver Jones

FROM: Moustafa Soliman

MATTER: Case of William Brown

DATE: 7 May 2021

I am writing to discuss the case of William Brown who is charged with two offences of theft. The total amount involved is £3,000. One charge relates to the theft of cash and the other to the theft of a quantity of wine and spirits. My client previously worked William Brown was formerly as the bar secretary at a rugby club. His functions included ordering and checking stock levels, paying suppliers, and checking and banking the takings. The cash is alleged to have been stolen from the takings following a beer festival organised at the club.

The theft of the stock, consisting of ten cases of wine and two cases of gin, is alleged to have been covered up by falsified stock records.

My client is currently on unconditional bail and is and is due to make his first appearance in court in two days' time. He intends to plead not guilty.

Section 1(1) of the Theft Act 1968 (TA 1968) states that 'A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.' If found guilty of this offence, the client could be sentenced, under category 4 (low value goods stolen (up to £500) and little or no significant additional harm to the victim or others) and taking into account any previous offences (there are none) a medium level community order – 36 weeks custody. This would be tried at Magistrate's Court.

The actus reus needs three elements: appropriation, property and property belonging to another.

Appropriation is defined in s.3(1) Theft Act 1968 as including any assumption of the rights of an owner. It also covers later assumption where property has been innocently acquired. For an appropriation to take place, there is no requirement that all the rights of an owner are assumed, one right is sufficient.' An example of this is the case of *R v Morris*, *Anderton v Burnside* [1983] 3 WLR 697 House of Lords where both defendants were involved in the switching of price labels in supermarkets. Morris was arrested after paying a lower sum for certain items, Burnside was arrested before paying for the goods. The question for the Lords to decide was whether an appropriation required the assumption of all rights of an owner and also if there was an appropriation at what point in time did this occur. It was decided that 'there need not be an appropriation of all the rights of an owner. The appropriation took place when there was an adverse interference with or usurpation of the rights of an owner which was at the point of switching the label, not at the point of taking the goods from the shelf.'

Property includes money and all other property, real or personal, including things in action and other intangible property including notes and coins. An example of this is the case of *R v Velumyl* [1989] Crim LR 299 who was a company director. He took money from the company's safe and said that he intended to return it after the week-end. It was decided that, unless he intended to pay back the exact notes and coins, he had the aim to permanently deprive the company of the money.

Belonging to another means property regarded as belonging to any other person having possession or control of it. This can mean that a person may be liable for theft of their own property if it is deemed in the possession or control of another. An example of this is the case of *Davidge v Bennett* [1984] Crim LR 297 who was given cheques from her flat mates to pay for the communal gas bill. She spent the money on Christmas presents and left the flat without paying the gas bill. It was decided that she was liable for theft as the cheques had been given with instruction that the money was to pay the gas bill.

The mens rea involves two elements: dishonestly and intention of permanently depriving.

Dishonesty means that someone takes property in the belief that he has, in law, the right to deprive the other of it, the person believes would have the other's consent if the other knew of the property is being taken and the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.

An example of this is the case of Ivey v Genting Casinos (UK) Ltd [2017] UKSC 67. This involved Ivey, a professional gambler, who won £7.7 million playing 'Punto Banco' (a form of Baccarat) at Crockford's Casino in Mayfair. He did so using a technique called 'edge sorting' which is where he convinced an unsuspecting croupier to turn the edges of the 'good' playing cards (claiming they were lucky) before they were returned to the deck. This meant that all the 'good' cards were turned around in the same way so that he could work out when 'good' cards were dealt in later rounds. This significantly increased his odds of winning. He was found to be dishonest and this case has had an impact on other cases.

Intention to permanently deprive is when a person is considered as having the necessary intention if they treat the property as their own regardless of the owner's rights. This was shown in the case of R v Marshall, Coombes & Eren [1998] 2 Cr App R 282 where the appellants got unexpired travel tickets from passengers on the London Underground and sold them on to others. The trial judge ruled that the tickets were the property of London Underground, that there had been an appropriation with intent to permanently deprive. The defendants pleaded guilty as it was decided that they had intended to treat the tickets as their own to dispose of regardless of the other's rights.

I draw your attention to the above definitions and cases to show you the laws and previous outcomes of cases dealing with theft. My client is of previous good character. He is a serving member of the Territorial Army. He is currently undertaking a postgraduate teaching qualification, and his total net income is approximately £12,000 per annum. He has recently inherited a sum of £50,000 from his late grandmother.

I point this out because he does not financially need to take the money and assets from the rugby club, he can afford the items and pay for them himself. I intend to advise my client to plead not guilty, as he wants to, due to the following reasons. One of the five elements for theft under Theft Act 1968 states that of the intention to permanently deprive. This is defined under the act under Section 1. In this case it would be difficult to prove the mens rea (intention) that my client permanently intended to take the money and assets, especially as he could afford them. 'If someone takes cash without the owner's consent intending to repay it then the fact that they intend to repay it may go to the issue of dishonesty but will not negate the intention to permanently deprive, unless the defendant intends to return the very same notes or coins to their owner'.

I intend to advise my client to plead not guilty of the charge of theft but to ask for the charge to be changed to fraud under The Fraud Act 2006, Fraud by abuse of position (Section 4) which states that a defendant: 'occupies a position in which he was expected to safeguard, or not to act against, the financial interests of another person, abused that position, dishonestly, intending by that abuse to make a gain/cause a loss'.

Section 4 focuses on the defendant who carries out the act that is the abuse of his position. It is immaterial whether or not he is successful in his enterprise and whether or not any gain or loss is actually made. Consequences will be very material to sentence, compensation and confiscation. If found guilty and sentenced then this would be a category 5 - Discharge – Medium level Community Order.

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the Guilty Plea guideline. Cases are always considered on their own facts which can sometimes result in very different sentences for what appear to be similar offences.

The judge will consider what harm has been caused (what was the actual intended loss to the victim as a result of the fraud? What impact did the fraud have overall)? Also culpability – what was the accused person's role in the fraud, i.e. was there an extensive plan and strategy behind the alleged crime or was the fraud opportunistic? What is the monetary value of the case? What are the aggravating and mitigating factors of the case? Mitigating factors will be taken into consideration too such as the defendant's character/ conduct including any previous offences, any remorse, if money/assets have been returned, mental illness and if the person was under any pressure at the time.

As mentioned previously, the intention (mens rea) can often decide the court's decision.

Please contact me if you need any further information.

^{*} <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/theft-general/>

<https://www.cps.gov.uk/legal-guidance/fraud-act-2006>

<https://www.janes-solicitors.co.uk/areas-of-expertise/serious-and-complex-fraud/fraud-act-sentencing.html>