Dyson S.C.J. gave some hints as to the rationale for protecting legitimate expectations. His Lordship held that "[t]he breach of a representation or promise on which an applicant has relied…is a serious matter" (para. [42]). His Lordship went on to hold that "[f]airness, as well as the principle of good administration, demands that [an interference] needs to be justified" (ibid.). This hints at a broadly "dignitarian" concern as a motivating force behind the judgment in *Paponette*: interferences with individuals' expectations should, as a matter of fairness, be justified to them. Dyson S.C.J. did repeatedly mention reliance on the part of the appellants, but this does not appear to have been an essential element of a legitimate expectation action, but rather a means to "reinforce" such a claim (para. [37]).

One issue which was not finally resolved by the Privy Council was the standard which must be reached to show that it was lawful to frustrate a legitimate expectation. In *R.* v. *North and East Devon Health Authority, ex p. Coughlan* [2001] Q.B. 213 (para. [57]), Lord Woolf MR held that the test is whether the actions of the authority are "so unfair… [as] to amount to an abuse of power". What will constitute an abuse of power is not altogether clear. In *R. (on the application of Nadarajah)* v. *Secretary of State for the Home Department* [2005] EWCA Civ 1363, Laws L.J. held that the test is one of proportionality. By contrast, in *R. (on the application of Bancoult)* v. *Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61; [2009] A.C. 453, Lord Mance stated, at para. [53], "I prefer to reserve for another case my opinion as to whether it is helpful or appropriate to rationalise the situations in which a departure from a prior decision is justified in terms of proportionality".

The judgment of Dyson S.C.J. does not deal with this issue in detail. His Lordship quoted with approval the passage from *Nadarajah* in which Laws L.J. recommended a proportionality approach, but the point that Dyson S.C.J. drew from this quotation was one relating to burden rather than standard of proof: that an individual does not need to prove that the action of the authority was not in the public interest. Conclusive resolution of this question would bring considerable clarity to this area of the law.

ALISTAIR MILLS

CAN PROSCRIBED DRUGS BE THE SUBJECT OF THEFT?

IF you had asked any criminal lawyer whether an individual's proprietary interest in proscribed drugs was protected by the law of theft before the decision of the Court of Appeal (Criminal Division) in

R. v. *Smith* [2011] EWCA Crim 66, you would have received the answer, expressed with some confidence, "of course it is". He might have added, "even a thief has a protected interest in law". It is slightly surprising, then, that leave was given to argue the point in *Smith*. The appellant and two accomplices had been convicted of robbery (which is theft committed by force) when they attacked a drugs dealer and stole £50 worth of heroin. Initially, they were charged with stealing "cash to the value of £50" but this was amended at the trial to substitute "drugs", which is what they actually took. The proposed change prompted the defence to argue that a person cannot be convicted of stealing something which it is unlawful for anyone to possess. The argument did not persuade the trial judge, and it was pursued in the Court of Appeal, which also rejected it.

The first strand in the argument was that proscribed drugs are not "property" within the meaning of the Theft Act 1968. This was never going to hold. There is virtually no physical thing that cannot count as property for these purposes – the living human body being the clearest acknowledged exception. Human beings are not capable of being owned, although severed parts and waste products may become so in certain circumstances. Drugs are clearly at least capable of being the subject of ownership even though the ownership is tainted by the illegality of their proscription.

The second part of the argument was that a thing that would otherwise be regarded as property for the purposes of the Theft Act ceases to be so because its possession or control is, for whatever reason, unlawful or illegal or prohibited. Counsel appeared, in other words, to be seeking to read in to the language of the Theft Act some sort of requirement that the person from whose possession the robbery took place could legally vindicate that interest. That line was not going to tempt the Chief Justice either, since in the early case of *R.* v. *Turner (No 2)* [1971] 1 W.L.R. 901, the Court said that there was no ground for qualifying the language of the recently enacted legislation, and that applied equally in this instance.

It is true that this faithfully reproduces what was said in *Turner*, but as the Chief Justice acknowledged, that decision has been strenuously criticised, not least by the late Sir John Smith. Turner was the man whose car had been repaired, and who then covertly retrieved his car from the repairer without making any payment or intending to make any payment. He was convicted of stealing his own car. The repairer had a lien over the car, and was entitled to retain possession of it until paid for the work that he had done. But the Court in that case said that the jury was not to be troubled with such civil law concepts and that Turner had been properly convicted. This approach is problematic. Applied to a logical conclusion, it would mean that a person might be

convicted of stealing his own property even though nobody else had a protected interest of any sort. It adds interest to the story that the repairer in *Turner* had in fact discovered the car parked in the street by Turner, driven it back to his workshop, removed the engine and then towed it back to the street where he had found it. On the Court's reasoning, he could probably have been convicted of theft too (at least of the engine), since at the time he took the car, it was again in Turner's possession.

The Theft Act 1968 marked a significant shift in the criminal law protecting property interests. The old crime, larceny, was essentially crafted through the common law to protect possession rather than ownership. By recognising that there are different levels of interest that might exist in property (ownership, "any proprietary right or interest", possession and control are the ones identified in the Act itself), the law was brought more into accord with the civil law around which it must operate. This change in the law was a welcome development, but it does give rise to the possibility that there might be conflicting interests in a particular article or thing that becomes at issue in a theft or robbery. That may generate the further complication that the civil law and the criminal law are sometimes at risk of speaking with different voices, giving different answers to essentially the same question.

But that is not the situation that confronted the court in *Smith*, and it is a pity that the Court has breathed some life into a precedent that, taken at face value, makes very little sense. In *Smith*, unlike *Turner*, the appellant had violently helped himself to property over which he had not the slightest entitlement and in which he had no prior legal interest. Even if the victim in that case did not have a right that could be vindicated in legal proceedings, he had a better right to the drugs than did Smith, who was rightly convicted of robbery for that reason.

A.T.H. SMITH

BUILDING CONTRACTS – IS THERE CONCURRENT LIABILITY IN TORT?

IN *D. & F. Estates Ltd* v. *Church Commissioners for England* [1989] A.C. 177, the House of Lords rejected a claim in negligence by the current owners of a flat against the original builders, for the cost of rectifying defective plasterwork. As is well known, this denial of a duty of care for pure economic loss in the context of defective building work was later endorsed in *Murphy* v. *Brentwood District Council* [1991] 1 A.C. 398, where the House of Lords held that a local authority surveyor owed the purchaser of residential property no duty of care