

FRAUD ACT 2006

The New Offences - An article by Jonathan Lennon and Aziz Rahman

FRAUD UNDER THE NEW FRAUD ACT 2006

Much of the 'old' law on fraud was to be found in the Theft Acts of 1968 and 1978 as well as some common-law offences (i.e. developed in case-law rather than by Parliament). Many of the statutory provisions led to technical arguments and difficulties in practical application. It was clear that the law on fraud needed updating and the Law Commission produced a report on the topic in 2002. That report led to the Fraud Act 2006 which came into force on 15/1/07. Its provisions apply to conduct committed on or after that date. The Act widened and simplified the law of fraud, though Parliament has still kept in place some of the common-law offences such as conspiracy to defraud and conspiracy to cheat the revenue.

We cannot in this short article hope to give a detailed account of all the 'new' offences created by the Act. However, the centre piece of the Act is undoubtedly the creation in section 1 of a new single offence of fraud - a single offence that can be committed in one of three different ways. **Fraud by False Representation:** a person is in breach of this section if he dishonestly makes a false representation with intent to gain or cause loss to another, or to expose another to risk of loss.

This offence carries no requirement for actual loss or even the risk of loss and in fact no requirement of even causing an alleged victim to believe the false representations. For a 'representation' to be 'false' the maker of the statement must "know that it is or might be, untrue or misleading". This latter part is designed to catch representations such as the promotion of a scheme involving "high yield investments". In such a case it would be difficult to prove that a Defendant knew in advance that this representation was in fact untrue, but easier to show that he was aware that it might be misleading. This offence can be used to prosecute so-called 'boiler room' frauds.

However, the new law does cause the prosecution some difficulties. For example, if you are facing this as a substantive charge (rather than a conspiracy to misrepresent) then the Act is worded in such a way that the prosecution really have to draft each single representation as a separate count where the allegation is that each representation was made for separate gain/loss. This is because each occasion constitutes a different offence whereas under the old law there could easily be one single offence of obtain-

ing by deception under s15 of the 1968 Act.

Fraud by Failure to Disclose: a person is in breach if this section if he "*dishonestly fails to disclose to another person information which he is under a legal duty to disclose and he intends thereby to make a gain for himself or cause a loss, or risk of loss, to another*". This offence requires the Crown to first of all establish that the Defendant was under a duty to make some kind of disclosure. The Crown will try to establish this by evidence of the relationship between the Defendant and the alleged victim, e.g. a legal duty to disclose can arise as a result of a contract between two parties or because of the existence of a particular type of professional relationship between them; for example, a solicitor/client relationship. The intention behind the non-disclosure must be to make a gain or cause loss, or risk of loss to another. Thus this offence is complete as soon as the Defendant fails to disclose information that he was under a legal duty to disclose, together with the requisite dishonest intent. It does not matter whether or not any one is deceived or any property is actually gained or lost.

The CPS's website suggests that the necessary "duty" is established by the Judge and not the jury. Quite why the Crown say this is not clear - it certainly does not say that in the statute and maybe a point for the Court of Appeal as this provision has not yet been tested in the appeal Courts. It is certainly not a matter we would yet concede as this offence can risk criminalising what would have been purely civil disputes prior to the implementation of the 2006 Act.

Fraud by Abuse of Position: this offence is committed by a person who occupies a post in which he or she is expected to safeguard, or not act against, the financial interests of another and then dishonestly abuses that position intending to make a gain for him or herself or to cause loss, or risk of loss, to another. Examples given by the CPS include an employee of a software company who uses his position to clone software products for his own personal gain or an employee who grants contracts/discounts etc to friends, relatives or associates. This offence would cover the corruption type cases of back-handers and bribes and will invariably boil down to the question of honesty.

Other offences: The Fraud Act creates other offence such as possession of articles for use in fraud (ss7) and dishon-

estly obtaining services (s11). This latter offence replaces the old offence in the 1978 Act of obtaining services by 'deception' - it is now 'dishonesty' not 'deception'. This just means the prosecution do not have to prove that any of the deceptions were operative or had any effect on the victim - it is what is in the Defendant's mind that counts.

OTHER FRAUDS

We still see non Fraud Act offences being prosecuted given the implementation date of the Act and the very long investigate periods which applies in complex fraud cases. Whether old or new the principals are, by and large, the same though the precise legal tests maybe different. The offence of conspiracy to conspiracy to defraud must be mentioned however as it still exists and will continue to exist despite the Fraud Act and we still have fraudulent trading, false accounting, tax and Cheating the Revenue, (MTEC frauds and the like).

EVIDENCE & EXPERTS

Broadly speaking, defenders in financial allegation cases will look at patterns of behaviour of the Defendant and of his business practices. 'Honesty' will usually be the central issue - one "dodgy" invoice might be a mistake but several may be deliberate. It may be that an accountant, or auditor with a particular knowledge of some business area, can help explain to the jury that what appears odd, or commercially risky, may be acceptable in a particular line of business.

In the case of forensic accountants it is worthwhile for solicitor and counsel to appreciate at an early stage what the issues are for the accountant to concentrate on. The temptation may be to simply instruct an accountant and pass him the prosecution Case Summary along with the papers and a vague outline of the defence case and ask him or her to 'have a look'. That is not the right approach. The lawyers, must understand what the accountant is being asked to do and why. The expert's evidence may be critical and he or she should have his energies focussed on the right (and identified) areas. It maybe, for example, that a man who appears to be trying to split monies between a number of bank accountants before withdrawing it can demonstrate, through the accountant witness, that in fact historically he is behaving more or less as he has done in the past when his behaviour was not in question - thus taking the sting out of the allegation of dishonesty. Audit trails may be poor, but armed with the right banking records and purchase invoices etc an accountant may be able to help present a case that, for example, a particular business venture was, or could have been, commercially successful and was by no means the obvious scam the prosecution make out.

CONCLUSION

There is simply no room in this article to go through all

the offences created by the Act however it will be appreciated that the Act may clarify and simply the law in many ways but it also creates problems. The Court of Appeal has been largely untroubled by the Fraud Act up to now but that will inevitably change as the higher Courts test the challenges taken by pro-active defence litigators. As always the motto has to be early preparation maximises performance..

AUTHORS

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