Magnificent 7?

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The Fraud Act 2006 will have been in force for seven years when 2014 begins. Aziz Rahman looks at the major changes it brought, the effects it has had on prosecutions and the duties it places on defence teams.

Since coming into force on January 25 2007, the Fraud Act 2006 has changed the landscape of fraud. From a defendant's perspective, it makes the offence much simpler to understand. And from the Crown's perspective, it has made fraud much easier to prosecute.

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 – those developed in case law rather than by Parliament. Many of the statutory provisions led to technical arguments and diffi culties 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. Its provisions apply to conduct committed on or after 15/1/07.

The Act widened and simplifi ed 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 centrepiece 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:

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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. In fact, it carries 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 diffi cult to prove that a defendant knew in advance that this representation was in fact untrue – it’s far easier to show that he was aware that it might be misleading.

This offence can be used to prosecute so-called ‘boiler room’ frauds. More commonly though, and especially in the current climate, this is the offence used to prosecute alleged mortgage fraud.

Fraud by Failure to Disclose:

A person is in breach of 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. This offence is complete, therefore, as soon as the defendant fails to disclose information that he was under a legal duty to disclose, providing they have 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 theCrown say this is not clear – it certainly does not say that in the statute and it may be 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 crimininalising 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 fi nancial 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 or other favours 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 offences, such as possession of articles for use in fraud (ss7) and dishonestly 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

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We still see non-Fraud Act offences being prosecuted. This is due to the implementation date of the Act and the very long investigative periods that often apply in complex fraud cases. Whether old or new, the principles are, by and large, the same although the precise legal tests maybe different. The common law offence of conspiracy to defraud must be mentioned, however, as it still exists and will continue to exist despite the Fraud Act. We also still have fraudulent trading, false accounting, tax and cheating the Inland Revenue through the likes of MTIC frauds etc.

EVIDENCE & EXPERTS

Broadly speaking, defenders in financial allegation cases will look at patterns of behaviour for the defendant and 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 cases where forensic accountants should be called in to aid the defence effort, 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, pass him the prosecution case summary along with the papers and a vague outline of the defence case and then 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 the accountant should have his energies focussed on the right areas – areas that have been correctly identifi ed before he was brought in. For example, a man who appears to be splitting monies between a number of bank accounts before withdrawing it can demonstrate, through the accountant witness, that he is behaving as he often has in the past when his behaviour was not in question.

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This then takes the sting out of the allegation of dishonesty. Audit trails may be poor, but armed with the right banking records, purchase invoices andother documentation 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 makes out.

PROFESSIONALS IN THE DOCK

On the subject of accountants, we sometimes deal with these as clients as well as witnesses. There seems to be an increased appetite for prosecuting professionals who are dragged into court behind their clients. For example, accountants who have acted for clients accused of tax fraud or conveyancing solicitors in a mortgage fraud allegation. These will usually be professionals who worked in the 'regulated sector' under the Proceeds of Crime Act 2002 – those who are required to inform on their clients by way of a Suspicious Activity Report (SAR) if they are suspicious about where they get their money from.

On the one hand, the Crown will claim that the absence of a SAR suggests that the accountant – or solicitor or whichever professional it is that is accused - is actually a party to the conspiracy to defraud. That, the Crown will argue, is why he or she did not report what is blatantly suspicious. On the other hand, if a SAR is made about a particular transaction on a precautionary basis, the prosecution may say that, as a SAR was made, the professional in question cannot possibly say that he or she was not at least suspicious about where the money was coming from.

This then could lead to a charge of money laundering, if not involvement in the principal offence.

These are thorny practical issues.

There is no one-size-fits-all answer. Often it will be a case of comparing industry practice to the rest of that business's accepted, legitimate practice in order to make the point that the professional has done no more and no less than he or she would have done for a different client or if he or she was working with a different firm.

The Court of Appeal has been largely untroubled by the Fraud Act up to now. But even after nearly seven years since its implementation, challenges can still be expected. As always, the motto has to be that early preparation maximises performance

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