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Fraud and making off without payment

Overview

The Fraud Act 2006 abolishes a number of offences of deception under the Theft Acts 1968 and 1978 as amended, notably obtaining (1) property, (2) a money transfer, (3) services, (4) a pecuniary advantage by deception, (5) evading liability by deception, and procuring the execution of a valuable security by deception. These are replaced by a general offence of fraud, which can be committed in three ways: by false representation, by failure to disclose information, or by abuse of position. If the defendant commits any one of these three wrongs, dishonestly, with intent to make a gain or cause a loss, he commits the offence. The Fraud Act 2006 also replaces the offence of obtaining services by deception with that of obtaining services dishonestly. The gist of the offence is managing, by dishonesty, to obtain services without paying as required, with intent to avoid paying in full or in part.

14.1 Fraud: the law which it replaces

The Fraud Act 2006 abolishes a number of offences of deception under the Theft Acts 1968 and 1978 as amended, notably obtaining (1) property, (2) a money transfer, (3) services, (4) a pecuniary advantage by deception (5) evading liability by deception, and procuring the execution of a valuable security by deception.¹ These offences had certain common elements. The first common element was the deception itself. Deceiving is inducing a person to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. The deception could be as to fact, law, or intention. It could be express, implied or by conduct. Silence would not amount to a deception unless a duty of disclosure exists. The nub of the matter was the intentional or reckless creation of a false impression, whether by words or deeds. The second element was that the prohibited result must be caused by the deception. It would not be so unless another person was induced to act in a particular way as a result of the deception, say, to buy a car because of a false description. The requirement of a human 'dupe' meant that the offence would not be committed if the relevant trickery involved a machine, as in putting a foreign coin in a vending machine to obtain chocolate. It would also not take place if the deception was not operative because, for example, it was not believed or not taken account of. The final element was dishonesty, the test for which was the *Ghosh* test. The provisions relating to dishonesty in Section 2 Theft Act 1968 were not applicable in deception offences.

¹ In addition the Theft Act 1968 included three offences largely designed to cover different forms of company fraud, such as false accounting (s 17), the making of false statements by company directors (s. 19) and suppression of documents (s 20 (1)).

14.2 The individual offences

As these offences provide the background context to the new offences and because they will continue to be charged in relation to pre-2007 cases they will be dealt with in summary form before turning to the new offences.²

A Obtaining property by deception

Section 15 made it an offence to obtain property by deception. Apart from the common elements discussed above, the prosecution had to prove that there was an obtaining. This included obtaining ownership, possession or control of the property, whether for oneself or another. Property was more broadly defined than for theft and included land, largely excluded from section 4, as well as money, and personal property. It did not include financial advantages falling short of actual property, such as services, a loan, a bank transfer, an overdraft facility, or the cancellation of a debt. These latter were the subject matter of separate offences under one of the other provisions of the Theft Acts.

B Obtaining a money transfer by deception

Section 1, Theft Act 1978 rendered the obtaining of a loan a new category of obtaining services by deception. It also inserted into section 15 of the 1968 Act a new offence, punishable by a maximum of ten years' imprisonment, of obtaining a money transfer by deception. The essence of the 15A offence was any transaction by which one account is credited at the expense of the other whether by means of CHAPS, telegraphic transfer,³ or the paying of a cheque into an account.

C Obtaining services by deception

Services were obtained, for the purpose of section 1, Theft Act 1978, where another conferred a benefit by doing some act (e.g. giving a haircut) or causing some act to be done (e.g. arranging for a tour company to provide a holiday) or permitting some act to be done (e.g. allowing entrance to a cinema). Liability did not arise under section 1 where the benefit was provided free, that is, where the service-provider provided the service without any expectation that it had been or would be paid for. If a deception operated to render the service free, liability may have arisen under section 2 of the Theft Act 1978. Any deception was sufficient. It did not have to be a deception as to the fact that one has paid for the relevant service or that one is willing to do so.

D Evading liability by deception

Section 2 of the 1978 Act created three offences. In each case it had to be proved that there was an operative deception which enabled a debtor to secure the advantage of evading a liability to pay which had, or would otherwise have, accrued. In each case it was enough

² A topical example is that of Mr Darwin, the 'back-from-the-dead' sea canoeist, who on January 9 2008, along with his wife, was charged with obtaining money and a money transfer by deception in relation to a life insurance policy.

³ Cf. *Weiss v Government of Germany* [2000] Crim LR 484.

that the advantage be enjoyed by another. In section 2 (1) (a) the advantage secured was the creditor agreeing to **cancel** a debt or part of it. In section 2 (1) (b) it was the creditor being induced not to demand **payment** of a debt, whether permanently or temporarily. This latter offence was only committed where the deceiver's intention was to make permanent default. In section 2 (1) (c) it was the debtor obtaining an **exemption** from a present or future liability to pay or **securing a diminished** liability.

E The problem with the deception offences

The major problem with the scheme of liability for fraud under the Theft Acts was that it was unduly technical and complicated. At least part of the problem was that the initial offences introduced under section 16 of the Theft Act 1968, namely obtaining a pecuniary advantage by deception, were not fit for purpose, being a veritable counsel of confusion. Although the replacement offences created by the Theft Act 1978 solved some of the problems of application they tended to deal with the problems reactively, and in piecemeal fashion. They could not keep up with the increasingly complex world of fraud, for example those involving the internet.

Questions were raised at an early stage, therefore, as to whether these individual cases of fraud would be better addressed by a generalised fraud offence.⁴ After all everyone knows a fraud when they see one, don't they? The problems posed by the creation of such an offence proved, however, fairly intractable. Should such an offence be constituted by conduct? If so, what should be the outcome of such conduct? Causing someone financial loss, prejudicing their financial interests, securing a financial gain? Again, is a deception of the essence? Or is it enough that there is some sort of behaviour which induces a false belief, causing the victim to act to his detriment, etc.? If the latter, how could such an offence be formulated so as to criminalise only those actions which would otherwise be regarded as serious wrongdoing? Or should it be constituted by mental element, criminalising any dishonest securing of a benefit or causing of another to act to his financial detriment? If so, how can dishonesty be defined so as to prevent stigmatizing the kind of everyday sharp practice which individuals can always be expected to get up to, and their victims to guard against? The Law Commission rejected such a broad approach in their 1999 Consultation Paper on the basis that any such offence would likely be insufficiently 'certain to comply with the requirements of the European Convention on Human Rights.'

Although not without its problems, the undoubted merit of the old system was that the law addressed forms of wrongdoing which both reflected and articulated existing social norms. This ensured consistency of treatment, fair warning and fair labelling.⁵ But clearly the tide was turning. In 2002 the Law Commission was recommending the enactment of a new fraud offence recognizably similar to that which has now been enacted.⁶

⁴ See, for example, G.R. Sullivan, 'Fraud and the Efficacy of the Criminal Law: A Proposal for a Wide Residual Offence' [1985] Crim LR 616; Law Commission Consultation Paper No 155 *Fraud and Deception* (1999); Law Com 276 *Fraud* (2002).

⁵ See generally Law Commission Consultation Paper No 155 *Fraud and Deception* (1999) and the useful commentary of D. Ormerod, 'A Bit of a Con: The Law Commission's Consultation Paper on Fraud' [1999] Crim LR 789. Law Com 276 *Fraud* (2002).

⁶ Law Com 276. The offence of fraud would be committed where a person dishonestly makes a false representation, or wrongfully fails to disclose information, or secretly abuses a position of trust with intent to make a gain or to cause loss or to expose another to the risk of loss.

432 Chapter 14 Fraud and making off without payment**F The solution**

By section 1 Fraud Act 2006 a general offence of fraud is created which can be committed in one of three ways, namely (a) section 2 (fraud by false representation), (b) section 3 (fraud by failing to disclose information), and (c) section 4 (fraud by abuse of position). Fraud itself is not defined in the Act but the essence of fraud, as envisaged by the new offence, appears to be nothing more than dishonest conduct designed to cause loss or gain. In short, it approaches the general offence of dishonesty, rightly rejected by the Law Commission in their 1999 Consultation Paper. As we shall see, it differs from the earlier Theft Acts scheme of liability in not requiring the victim to have duped or for his/her conduct to have *caused* any relevant gain or loss. It is the dishonest conduct and intentions which are criminalised, rather than the outcome. In Chapter 2 it was questioned whether, outside cases of serious non-consensual violence, there was any uncontroversial test for determining whether a given activity was suitable for criminalization. In particular, given that both the civil and criminal law vindicate the interests of the victims of other people's wrongdoing, what determines whether the vindication takes the form of punishment or compensation? Fraud is a good illustration of the difficulty of producing a satisfactory answer to this question. It criminalizes a range of conduct which, in many cases, is little more than a self-serving lie or other sharp practice.

G The new offence of fraud**1 Fraud by false representation**

The core of the new offence of fraud is fraud by false representation (Section 2(1), which is committed where a person:

- (a) dishonestly makes a false representation, and
- (b) intends, by making the representation –
 - (i) to make a gain for himself or another, or
 - (ii) to cause loss to another or to expose another to a risk of loss.

(a) Actus reus

The *actus reus* of the offence is making a false representation. Of key concern here, as has been explained, is the fact that neither harm nor gain need actually accrue from the representation so long as this is the intention.⁷ It is not even necessary that the representee is taken in, or is otherwise influenced. This is a far cry from the traditional notion of fraud which has the protection of property interests, and therefore the effectiveness of the misrepresentation, at the core of the offence. It seems almost as if the offence were designed to cope not with the heartland of traditional fraud but rather its modern and ghostly reflections, particularly in technological scams, such as phishing, where unseen, unseeable computer crooks try to tempt individuals into parting with sensitive information by representing themselves to be their bank or other trusted custodian of their financial interests. David Ormerod queries what the wrong is which the offence is trying to address. It clearly

⁷ See note 6.

is not the intentional causing of harm or the risk of harm to the other as the wrong is made out irrespective of such harm or potential. He concludes: 'the wrong seems to be the act of lying or misleading with intent to gain or cause loss: the harm might be construed as destabilizing society's processes of property and financial transfers.⁸ Even if this is sufficient to warrant criminalisation, is it properly called fraud?'

(i) *A representation*

The *actus reus* requires the defendant to have made a false representation. As with the Theft Acts which preceded it, a representation is not defined, presumably because it is a straightforward enough concept. The nearest synonym, where the representation is verbal, is 'statement'. More generally, a useful synonym is 'making out'. So if A hands a ticket inspector a bus pass with his name and photograph on it he is 'making out' or 'representing' that he is a pensioner and that he is entitled to the advantages conveyed by the pass. The Fraud Act assumes such meaning and concentrates on disclosing what kinds of representations are covered and what it is for such representations to be considered false.

- (2) A representation is false if –
 - (a) it is untrue or misleading, and
 - (b) the person making it knows that it is, or might be, untrue or misleading.
- (3) 'Representation' means any representation as to fact or law, including a representation as to the state of mind of –
 - (a) the person making the representation, or
 - (b) any other person.
- (4) A representation may be express or implied.
- (5) For the purposes of this section a representation may be regarded as made if it (or anything implying it) is submitted in any form to any system or device designed to receive, convey or respond to communications (with or without human intervention).

By this it is clear is that there can be no fraud in the absence of a representation which is either false or misleading.

Case 1

Adam advertises his car for sale. Eve asks to see it. As the car has a nasty scratch on the side, Adam tells Eve to come at 9 pm, when it is dark. She does not notice the scratch and buys the car.

Adam does not commit fraud by false representation as he has made no representation to her, whether expressly, impliedly or by conduct. The false impression she gets of the car is due to the dark rather than anything expressed or implied by Adam. The principle applicable here, to which there are exceptions, is that silence will not generally count as a representation.

The corollary is that a false representation is practised for the purpose of the Fraud Act in any of the following situations:

⁸ D. Ormerod, 'The Fraud Act 2006: Criminalising Lying' [2007] Crim LR 193.

434 Chapter 14 Fraud and making off without payment**Case 2**

A, a 16-year-old boy, tells B, a publican, that he is 18 in order to obtain beer in a pub.

The representation is by words and as to facts, namely that A is 18. This representation is false. A's statement amounts to fraud because he makes the statement 'intending to gain for himself' (a pint of beer). Note that the fraud is made out although there is no specifically financial trickery involved and there is no loss to B.

Case 3

A, who is emigrating to Australia at the end of the month, needs money to pay for his flight. He asks his bank manager for an overdraft, telling him that he intends to pay off the overdraft by working for six months at his local supermarket.

Here an express representation is made as to A's 'state of mind'. This refers to his future intentions, namely to pay off his overdraft. He makes another express representation as to his state of mind, namely that he intends to stay in England. Both these representations are false and they are both made with the intention of making a gain for himself (the overdraft).⁹

Case 4

A, a crooked solicitor, tells a client that the latter is not entitled to recover his deposit when a house purchase falls through, though A knows this is his legal entitlement. A keeps the deposit.

Here the representation is express and as to the law. It is false and made with a view to making a gain for himself (keeping the deposit).

Case 5

A, a crooked car dealer, turns back the odometer reading on a car prior to selling it. B, a customer, asks him if the reading is genuine. A says that he does not know but that he thinks it is.

A makes two representations here. The first is a representation by conduct, namely his action of turning back the odometer reading. By doing this he is representing the car to have done fewer miles than it has done. It is therefore a false representation. The second is an express (or verbal) representation as to A's state of mind, namely the fact being that A **believes** the reading to be genuine. This is false.¹⁰ He does not believe the reading to be genuine. Both representations are made with a view to making a gain for himself (making the sale).

Case 6

A, a 14-year-old boy, dons a false moustache in order to induce a shopkeeper to sell him a packet of cigarettes.

The representation is by conduct and as to facts, namely his age. The representation is false and made with the intention of gaining a packet of cigarettes.

It is important, particularly in the case of deception by conduct, to pinpoint exactly what false representation was made with intent to gain or cause loss.

⁹ Note that the advantage is the obtaining of the overdraft facility rather than the actual money received.

¹⁰ Cf. King [1979] Crim LR 122.

Case 7

A pays for goods in a shop with a cheque backed by her own cheque guarantee card, but having lost the bank's authority to use it.

In cases involving the use of a cheque guarantee card the bank is required to honour the cheque notwithstanding the customer's abuse of authority. What representation is A making here? Quite a few, as it turns out, and not all of them are false. A is implying that

- (a) She has an account with the bank on which the cheque is drawn – this is true.
- (b) She is the holder of the cheque card – this is also true.
- (c) She has authority to use the cheque card – this is untrue.
- (d) The bank will honour the cheque – this is true.

A makes only one untrue representation then, namely that she has the bank's authority to draw the cheques. By creating this false impression, she intended to obtain the goods, and increase her indebtedness to the bank.¹¹ Assuming dishonesty, she has committed the offence.

The representation will sometimes be difficult to discern. In *DPP v Ray*¹² the defendant D was a student who consumed a meal in a Chinese restaurant and then decided not to pay for it. D stayed in his seat until the waiter left the room and then made off. The House of Lords ruled that he was guilty of evading a debt by deception, which was an offence under section 16¹³ of the Theft Act 1968 and is now covered by section 2 of the 2006 Act.¹⁴ By sitting, saying nothing, the defendant had made an implied representation that his earlier honest intentions were continuing when, in fact, they were not. Using our earlier terminology, he created a false impression that he continued to be an honest customer who intended to pay for his meal even after the contrary intention was formed. *Ray* tells us that a representation may change from being true to false with a change of circumstances.

On the other hand, as Case 1 indicates, there must be a representation. It is not enough that someone is unaware of certain facts and for someone else to have conducted themselves so as to induce that state of ignorance. For comparable reasons a person does not make a false representation by remaining silent about things of which he, but not the other, is aware. He does not make a false representation by failing to inform a purchaser of his car that it is about to fall apart, for example, or that the odometer reading is inaccurate.¹⁵ An exception is where A is under a duty to disclose the relevant information. This is specifically provided for under section 3 of the Fraud Act but also will usually be covered by section 2. Sometimes, saying nothing is the same as saying something untrue.

Case 8

A takes his friend B to A's golf club for a round of golf. Club rules require all members to inform a senior club official when guests are invited, so that they can charge a green fee. A does not do so.

¹¹ Cf. *MPC v Charles*.

¹² [1974] AC 370.

¹³ Obtaining a pecuniary advantage contrary to s 16 (2) (a), now repealed.

¹⁴ The offence of obtaining property (the meal) by deception had not been committed because the dishonest intention was only formed after the property had already been obtained. He did not, therefore, create the false impression that he intended to pay in order to get the meal.

¹⁵ Unless he has first changed the reading.

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The effect of the rule is to place A under a duty to the club to inform them that B is not a member. If he omits to do so he will be making a false representation by his conduct in taking his friend onto the course.¹⁶ By not informing the golf club of the true state of affairs, A is creating a false impression. He is saying in effect to anyone who sees him either 'I have paid this chap's green fee', or, 'This chap is a member and so does not need to pay a green fee'.

A further exception is where the circumstances giving rise to a representation change so that the original representation no longer accurately describes the true state of affairs. The representor will make a false representation if he fails to apprise the representee of the change of circumstances:

Case 9

A truthfully tells B, a purchaser, that his car is in good working order. Subsequently, before the contract is concluded,¹⁷ he discovers that the car is faulty. He concludes the sale without informing B.

A's failure to 'undeceive' B amounts to a false representation. This is, in effect, what happened in *DPP v Ray*. A's initial implied representation that he was an honest customer who intended to pay for his meal was true. When he later decided not to pay, the original representation no longer reflected the true state of affairs but he still continued to make the same representation. By continuing to sit in the restaurant, he was representing himself as the honest customer he once was. This was untrue. On the same principle it was held to be a false representation for a house owner to fail to inform his local council that his elderly mother had died so as to obtain the benefit of having a downstairs bathroom installed which had been granted for her benefit.¹⁸

Another troublesome case concerns the question of overcharging. In *Silverman* a builder who had done work over a period of several years for two elderly women put in a bill for a job which was grossly excessive.¹⁹ He was convicted of obtaining the money by deception, the deception being that he was charging a fair and reasonable amount for the work. Although the appeal was allowed on other grounds, the Court of Appeal accepted that in the right circumstances overcharging could amount to making a false representation. Those circumstances are that the defendant is in a strong position *vis-à-vis* the other to know

- (a) that the figure he is charging is grossly excessive, and
- (b) that the other, through inexperience or trust, is relying upon him to supply an honest estimate or bill.

His knowledge that this is the case means that he knows that he is creating a false impression of the true value of the job when he gives his figure. It should be noted that *Silverman* is not authority for the proposition that overcharging amounts to a false representation, only that it may do if the (over)charger exploits the trust or inexperience of another. Otherwise, tradespersons should not stand at risk of prosecution for doing to excess what most other tradespersons do less obviously. As Griew puts it: 'there is a world of difference between

¹⁶ Cf. *Firth* (1990) 91 Cr App R 217.

¹⁷ Logically it should also be a deception if the discovery of the true state of affairs occurs after the contract is concluded but before the contract price is handed over, but cf. *Wheeler* (1990) 92 Cr App R 279.

¹⁸ *Rai* [2000] Crim LR 192.

¹⁹ (1988) 86 Cr App R 213.

fraud (with which this discussion is concerned) and exploitation (with which it is not).²⁰ Unfortunately this difference has been substantially attenuated by the Fraud Act 2006.

(ii) *A false representation*

By subsection (2) A representation is false if –

- (a) it is untrue or misleading, and
- (b) the person making it knows that it is, or might be, untrue or misleading.

The major problem posed by this definition is that it further blurs the gap between the traditional notion of fraud and everyday sharp practice. It covers not only false statements but misleading statements. Sellers and tradespeople traditionally exercise a great deal of ingenuity in coming up with statements which encourage people to part with money. Such statements may be exaggerations of the truth or ‘half truths’. ‘Making exaggerated claims and being economical with truth’ in advertising a product’s qualities is usually considered regrettable but rarely punishable.

Case 10

Adam goes into Virtualworld Computers and asks to see some computers. One attracts him particularly and he asks Eve, the salesperson, ‘is this the latest model?’. ‘Yes,’ says Eve, although she knows it will be withdrawn from stock and replaced by another model next week.

It appears that Eve has made a false representation for the purpose of section 2, although it is spot on in terms of accuracy and although it is the kind of ‘half truth’ which society has traditionally condoned as being part and parcel of the seller’s repertoire of selling practices. The phrase *caveat emptor* – ‘Buyer beware’ is still so widely used that it implies that society expects sellers to try to gull buyers and so also expects that buyers will take responsibility for their interests, as sellers do theirs. So also overenthusiastic marketing ‘puffs’ are covered by section 2, although few sensible people would think these are meet for criminalization. Does anybody believe the claim that a certain type of lager is ‘probably the best lager in the world’; that a particular soap powder washes whitest; that ‘in tests, 9 out of 10 cats preferred’ a particular kind of cat food? If not, where is the harm in saying it? If so, does the claim nevertheless constitute conduct which conforms to the widely accepted criteria of criminalization referred to in chapter 2, namely that the conduct

- (1) is generally viewed as constituting a social threat and is not condoned;
- (2) is amenable to control by the criminal law;
- (3) could not reasonably be dealt with by other means;
- (4) if it were criminalized, will not produce any likely harmful side effects.²¹

Even on a generous view not all of these criteria are satisfied in connection with the outer limits of section 2. In practice, and running counter to Article 7, this will mean that whether or not a person stands at risk of conviction in these kinds of cases will be largely determined by prosecutorial discretion and the common sense and fair play of individual juries. This should not be so. At the very least the wrong should be clearly identifiable as a

²⁰ Griew (1995) at 155.

²¹ Herbert L. Packer, *The Limits of the Criminal Sanction*, London: OUP (1969), p. 296.

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matter with which the law, civil or criminal, should concern itself. Further, there is no coherent demarcation of the boundary between civil and criminal wrongs. For example, if a person obtains goods or services and then decides not to pay for them, his liability is limited to an action for breach of contract. If, however, he tries to dupe his victim into allowing him to avoid paying he is criminally liable. Why is the line between public and private wrongs drawn in this way? In both cases a person has acted dishonestly. In both cases a person's financial interests are under attack, but no rights lost. In both cases the victim retains a remedy against the wrongdoer enforceable in the civil courts, but only where there is a false representation is the activity criminalized.

(iii) Making the representation

Under the previous law it was of the essence of deception that the false representation was acted on by the victim. There is no longer any such requirement, as has been explained. Indeed, astonishingly, there is not even a requirement that the representation be communicated to another. So if A falsely represents to B that the car he is selling is in good condition the offence is committed, although B does not hear the statement, or receive the letter which communicates this belief to B. The offence is made out as soon as the statement or other representation is made. Under the old law such conduct would have amounted, at best, only to an attempt.

It was also not possible to make representation to a machine under the Theft Acts. The essence of the deception offences was the tricking of a human mind. Thus, no representation occurred in the case of inserting a dud coin into a chocolate machine, transferring funds in a bank account by computer hacking, or feeding in false information to an Inland Revenue computer to reduce tax liability.²² This requirement left a significant gap in the law of fraud, but it was thought not necessary to close it due to the usual availability of other offences such as theft, making off without payment, computer misuse or, in the case of manipulating an electrically operated machine, abstraction of electricity.²³ The Fraud Act now, rightly, makes it possible to commit fraud via a machine, since a representation is regarded as having been made 'if it (or anything implying it) is submitted in any form to any system or device designed to receive, convey or respond to communications, with or without human intervention.' As Ormerod remarks, this is wider than would appear absolutely necessary and desirable. It means that a person commits fraud as soon as he types the false representation into a computer for later transmission.²⁴ Strangely this would not even have constituted an attempt under the Theft Acts, and so would not have constituted any criminal offence, given that the representor's acts are not, at this stage, intended to induce a false belief in anyone or anything.

(b) Mens rea

There are three *mens rea* elements in section 2, namely the person making the representation must (1) know that it is, or might be, untrue or misleading; (2) Intend, by making the

²² Unless the information is first checked by an Inland Revenue official; *Moritz* 1961, unreported, cited in Arlidge and Parry at 49; for discussion see J.C. Smith (1997) 4–09–12.

²³ See Law Commission No. 228 *Conspiracy to Defraud* (1994), London: HMSO, paras. 4.40 ff.

²⁴ *Op. cit.*, 200.

representation, to make a gain for himself or another, or to cause loss to another or to expose another to a risk of loss; (3) the representation must be dishonestly made.

(i) *Knowledge that the representation is, or might be, untrue or misleading*

On the face of it this provision seems to mean that the defendant cannot be liable for fraud if, notwithstanding the falsity of the statement, he believes it to be true. However, it means more than this. It is clear, for example, that a person falls foul of this section if, although he believes his statement to be true, he knows it might not be:

Case 11

Adam, an art dealer, places an inscription on the wall next to a painting stating, as this is his belief, that the painting is by Rembrandt.

Although Adam believes the painting to be a Rembrandt he makes a false representation. Attributing paintings to Rembrandt is a notoriously tricky business, and all dealers know this, given the number of copies and workshop pieces in existence. Adam, therefore, **knows the painting might not** be a Rembrandt. Liability here depends simply upon proof of dishonesty (and the untruth of the representation). Once again, the criminal liability of the defendant must be decided *ex post facto* by the view the jury takes as to whether this kind of practice discloses dishonesty. What if a dealer sells not a Rembrandt, but a Warhol, having bought it himself as a Warhol for a very high sum? Suppose, because attributing Warhols is less speculative than Rembrandts, he fails to make the kind of inquiries which sellers usually do on selling high-priced paintings which, like Warhols, are easily clonable. Does he have constructive knowledge of the things he would have found out if he had done so? This is unclear but, as Ormerod suggests, the courts are customarily willing to impute such knowledge to dealers.²⁵

(ii) *Dishonesty*

The test for dishonesty is the *Ghosh* test. Section 2 does not apply to property offences other than theft. Normally dishonesty will be easy to infer from the fact that a false representation has occurred. In some cases, however, making a false representation may be consistent with honesty. An obvious example is where it is made for the purpose of satisfying a claim of right.

Case 12

Adam owes Eve £1,000. Desirous of its return, Eve tells Adam that she needs it immediately to pay for hospital treatment for her sick husband. This is untrue.

It seems clear that Eve's claim of right is as inconsistent with dishonesty for the purpose of fraud as it is for theft.²⁶ The question arises as to whether, instead of the *Ghosh* test, the judge should direct the jury explicitly that dishonesty is negated wherever a false representation is made in order to recover property to which one believes oneself entitled. Under the old law it was held that it is unnecessary for the judge to direct the jury in such

²⁵ *Op. cit.* 203 citing *Roper v Taylor's Garage* [1951] 2 TLR 284.

²⁶ J.C. Smith (1997) paras 4–29, 30.

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terms when the substance of the defendant's case is a claim of right.²⁷ The implication is that both tests naturally lead to the same result. Most commentators disagree.²⁸ A *Ghosh* direction is by no means straightforward for the jury to apply in cases where a person's deception was gross and the claim of right unimpressive. What would they make of Case 12, for example, if the £1,000 was a gambling debt which Eve required to satisfy another gambling debt, and Adam was only able to satisfy by taking his child out of her (fee-paying) school?

(iii) Intention to make a gain or cause a loss

The key difference between the old and the new notion of fraud is the replacement of an element in the *actus reus* of the old deception offences with a *mens rea* element. The offence is now constituted, not by securing the relevant gain or loss, but by forming the intention so to do. The defendant's liability hangs upon his (ulterior) intention:

- (b) . . . by making the representation –
 - (i) to make a gain for himself or another, or
 - (ii) to cause loss to another or to expose another to a risk of loss.

The meaning of gain and loss is defined in section 5 of the Act as follows: (2) 'Gain' and 'loss' –

- (a) extend only to gain or loss in money or other property;
- (b) include any such gain or loss whether temporary or permanent;

and 'property' means any property whether real or personal (including things in action and other intangible property).

- (3) 'Gain' includes a gain by keeping what one has, as well as a gain by getting what one does not have.
- (4) 'Loss' includes a loss by not getting what one might get, as well as a loss by parting with what one has.

This definition effectively covers all the mischief contained in the old deception offences, other than the obtaining of services. It is intended to cover the same ground as the notion of gain and loss contained in section 34 (2) (a) Theft Act 1968. So, for example, it covers misrepresentations designed to gain money or property, real or personal. It also covers the obtaining of services if the false representation is made with a view not to pay for those services (a gain by 'keeping what one has'). The notion of gain covers keeping what one has as well as getting what one does not have. Section 2 (2) is applicable if the gain was a gift, loan, or other transfer of money, a gift, loan or other transfer of personal or real property. It is applicable if the gain was the keeping of money or property already in the person's possession or control whether permanently or temporarily. For example, the offence is committed where a debtor spins a creditor a false hard-luck story in order to get extra time to pay or to avoid payment entirely. Under the previous law this was an offence only if the debtor's intention was to make permanent default which, again, seems a more apt basis for criminalisation. To see how these different elements in fraud hang together, consider the following hypothetical:

²⁷ *Woolven* (1983) 77 Cr App R 231.

²⁸ See e.g. A.T.H. Smith 17–141; Griew (1995) 176–7.

Case 13

Adam, having eaten a meal in Fatgirls Restaurant, discovers that he has left his cash at home. When asked for payment by Eve, Adam says that he does not intend to pay because the food was so awful, although in fact he had found it delicious. Eve, in an attempt to placate Adam, tells Adam that he does not have to pay and gives him a glass of wine 'on the house' which he accepts. Adam then orders and consumes a pudding, for which he pays with a cheque backed by a guarantee card, although he knows that he has exceeded his credit limit and so does not have his bank's authority to pay by cheque.

Adam has committed fraud in relation to the debt. His false representation has enabled him to avoid paying the bill. Adam has not committed theft in relation to the food as he did not intend to gain this by making a false representation. Has Adam committed fraud in relation to the wine? This depends upon whether he made a representation intending **by that representation** to gain it. It appears that he has not. The representation he made was intended to enable him to avoid paying the bill, not to gain the wine. In *Wakeling*,²⁹ a wastrel tried to avoid work by pretending he had no shoes. In fact he had two suitable pairs. A parish officer gave him some shoes to encourage him to work. It was held that he was not guilty of obtaining the shoes by false pretences because his statement was not designed to obtain shoes but to avoid work. The position arguably should be similar in relation to Case 13. It may be argued, however, by analogy with *DPP v Ray*, that his failure to tell Eve the truth about the situation was a false representation. Having created a (continuing) false impression that he was a disgruntled customer, when he was not, this representation continues until he leaves the restaurant. In order to be guilty of fraud in relation to the wine his representation must be intended to enable him to gain the wine, however. Was it? Adam will say not. He will say he accepted the wine (not to **gain** the wine but) to reassure the restaurant of his continuing good will. The counter argument is that such intention is nevertheless consistent with having an (indirect) intention to cause **loss** to the restaurant since Adam knows this will be the inevitable consequence.³⁰ Adam would commit fraud in relation to the pudding, which counts as a gain (of a pudding) to him, and, although the restaurant will still get paid, a loss (of a pudding) to the restaurant, as a result of a false representation made to Eve that he has the bank's authority to write cheques. Adam commits fraud in relation to the overdraft. By falsely representing to Eve that he had authority to draw on the cheque he caused a loss to the bank.³¹

That liability hangs on the dishonest intent rather than the result is another reason to query the aptness of criminalising what may turn out to involve a deed involving imperceptible harm and questionable fault. It is true that other property offences criminalise what may be an imperceptible harm. Section 9(1) (a) burglary, for example, is capable of extending to entering a shop with intent to 'shoplift'. But the harm caught by section 2 is even further removed from what we ordinarily expect of serious stigmatic offences. There are four possible cases of this *mens rea* requirement. The first, which will be the most usual, is the intention to make a gain for oneself by false representation. **Cases 2–7** are examples of this. The second is the intention to make a gain for someone else.

²⁹ Cited, with a helpful analysis, by A.T.H. Smith 17–153.

³⁰ It should be noted that no oblique intention existed in *wakeling* since, at the time of making the statement, W did not foresee the obtaining of the shoes as a virtual certainty.

³¹ Cf. *MPC v Charles*.

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Adam secures a guarantee on Eve's bank loan by showing Eve's bank false credit references indicating that he is creditworthy.

Adam makes a false representation with intent to make a gain for Eve.

The third case is where the representor intends to cause a loss to another. It will be rare that this will occur in the absence of an intention to make a gain, either for oneself or for another.

Case 15

Adam, who dislikes Eve, recommends that she buys shares in X company, although he believes that company to be insolvent.

Adam intends not only to cause loss to Eve, but also, assuming indirect intention suffices for fraud, to make a gain for the company. Compare **Case 16**:

Case 16

Adam, an economic journalist, anxious to demonstrate his power over the market, writes a column urging readers to invest in a financially fragile company, stating it is a 'sure fire winner'.³²

Adam here intends not to cause others loss but to expose others to the risk of loss and, assuming dishonesty, is guilty on this basis if not for his indirect intention to make a gain for the company.

Case 17

Adam is the owner of Hollywood House, a stately home open to the public. Desirous of providing some interest to bored visitors he digs a well and places next to it a sign which reads, 'Ye Olde Wishing Welle. Throw a coin down the well and your wish will come true.'

This representation is obviously false and Adam knows it. In a change from the previous law of deception Adam may be guilty of fraud although no one is taken in, although he does not intend to gain, and although no one throws money down the well. This is because he intends to cause people to throw money down the well, that is, to cause them a loss. His guilt depends upon the view the jury take as to whether his action is dishonest. Although it is unlikely such conduct would provoke a criminal prosecution and unlikely the jury would find him to be dishonest, what he does is surely too trivial to even justify the risk of criminal conviction.

2 Fraud by failing to disclose information

Strictly speaking, this is an unnecessary provision as it is clear that a failure to disclose information which one has a duty to disclose, as in Case 8, counts as a representation for the purpose of section 2. Section 3 was included in order to simplify the proof of guilt. It does not require an untutored jury to understand how by failing to make one disclosure

³² The Law Commission give *Allsop* as an example. The defendant deceived a finance company into accepting risky loan applications. It was no defence to fraud that the defendant expected all the money to be repaid since the defendant intentionally exposed the company to financial risk.

one can at the same time be making another (false) disclosure. Section 3 allows a conviction simply upon proof of the duty to disclose and the failure to do so with the relevant intent. It provides as follows:

A person is in breach of this section if he –

- (a) dishonestly fails to disclose to another person information which he is under a legal duty to disclose, and
- (b) intends, by failing to disclose the information –
 - (i) to make a gain for himself or another, or
 - (ii) to cause loss to another or to expose another to a risk of loss.

The important aspect of section 3 is the requirement that the defendant be under a legal duty of disclosure. A moral duty is not enough, although the Law Commission felt that it should be, at least in cases where the person was being trusted to make disclosure.³³ Eve, in the *Virtualworld* case, is not covered by section 3, as she is under no legal duty of disclosure. Her liability, if any, depends upon the notion of ‘misleading’ for the purpose of section 2. The question then presents as to when a legal duty of disclosure arises. The explanatory notes to the 2006 Act provide the following guidance:

The concept of ‘legal duty’ is explained in the Law Commission’s Report on *Fraud*, which said: ‘... Such a duty may derive from statute (such as the provisions governing company prospectuses), from the fact that the transaction in question is one of the utmost good faith (such as a contract of insurance), from the express or implied terms of a contract, from the custom of a particular trade or market, or from the existence of a fiduciary relationship between the parties (such as that of agent and principal).

For this purpose there is a legal duty to disclose information not only if the defendant’s failure to disclose it gives the victim a cause of action for damages, but also if the law gives the victim a right to set aside any change in his or her legal position to which he or she may consent as a result of the non-disclosure. For example, a person in a fiduciary position has a duty to disclose material information when entering into a contract with his or her beneficiary, in the sense that a failure to make such disclosure will entitle the beneficiary to rescind the contract and to reclaim any property transferred under it. For example, the failure of a solicitor to share vital information with a client within the context of their work relationship, in order to perpetrate a fraud upon that client, would be covered by this section. Similarly, an offence could be committed under this section if a person intentionally failed to disclose information relating to his heart condition when making an application for life insurance.’

Case 8, as above, would be an example of fraud by failure to disclose, the legal duty arising by virtue of Adam’s membership of the club. *Firth*³⁴ is another example. A hospital consultant failed, in breach of his contract with the health service, to disclose to the hospital that he was using its facilities for the benefit of private patients. As a consequence they omitted to charge him or the patients.

³³ ‘For example, an antique dealer calls on vulnerable people and buys their heirlooms at unrealistically low prices, making no misrepresentation as to the value of the items but exploiting the victims’ trust. There may be no legal duty to disclose the truth, but there is clearly a moral duty to do so. If the dealer’s failure to do so is regarded by the fact-finders as dishonest, we see no reason why he should not be guilty of fraud.’ LC 276 *Fraud* (2002) para 724.

³⁴ (1990) 91 Cr App Rep 217.

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(a) *Mens rea*

The *mens rea* for section 3 is as for section 2. There is no requirement that the defendant be aware that he is under a legal duty of disclosure so such lack of knowledge will not avail Adam, in Case 8, although evidence of lack of awareness will, no doubt, influence the jury's assessment of dishonesty.

3 Fraud by abuse of position

The third form of fraud is the most controversial as it is here that fraud is cast adrift from a clearly identifiable fraudulent context. The thinking behind the section is that people in positions of trust can advance their own interests or damage the interests of others without having to 'to enlist the victim's co-operation in order to secure the desired result.' The major problem with the offence is an absence of clarity as to the intended scope of the relevant 'positions of trust'. The Law Commission made clear that it was envisaging a broader coverage than traditional fiduciary duties:

The essence of the kind of relationship which in our view should be a prerequisite of this form of the offence is that the victim has voluntarily put the defendant in a privileged position, by virtue of which the defendant is expected to safeguard the victim's financial interests or given power to damage those interests. Such an expectation to safeguard or power to damage may arise, for example, because the defendant is given authority to exercise a discretion on the victim's behalf, or is given access to the victim's assets, premises, equipment or customers. In these cases the defendant does not need to enlist the victim's *further* co-operation in order to secure the desired result, because the necessary co-operation has been given in advance. The necessary relationship will be present between trustee and beneficiary, director and company, professional person and client, agent and principal, employee and employer, or between partners. It may arise otherwise, for example within a family, or in the context of voluntary work, or in any context where the parties are not at arm's length. In nearly all cases where it arises, it will be recognised by the civil law as importing fiduciary duties, and any relationship that is so recognised will suffice. We see no reason, however, why the existence of such duties should be essential.³⁵

In other words the potential coverage of the abuse of position form of fraud is extensive and capable of constituting many unlikely relationships as contexts within which fraud may be committed. Section 4 provides as follows:

- (1) A person is in breach of this section if he –
 - (a) occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person,
 - (b) dishonestly abuses that position, and
 - (c) intends, by means of the abuse of that position –
 - (i) to make a gain for himself or another, or
 - (ii) to cause loss to another or to expose another to a risk of loss.
- (2) A person may be regarded as having abused his position even though his conduct consisted of an omission rather than an act.

The question whether a person occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person is, so the Law Commission insisted, not a matter simply for the jury. The judge will have the overall control, by directing the jury as to whether, by virtue of his position, he is expected to safeguard the

³⁵ Para 7.38.

interests of the other. The following constitute some scenarios, outside standard fiduciary positions such as trustee/beneficiary, lawyer/client, director/company, in which the offence might be committed:

Case 18

Adam, who lives with his mother who suffers from dementia, collects her pension weekly and uses it to defray all household expenses. He gives £5 of the money to charitable causes each week.

Case 19

Adam, Eve's father, puts £5 per week into her account to build up a nest egg for the future. After 10 years of so doing the account is worth £5,000. Being a little hard up he withdraws £500 from her account to help pay for the family holiday.

Case 20

Adam, who works for Eve, always skips off work half an hour early when Eve is out of the office.

Case 21

Adam, who works in Eve's pub, routinely, and against Eve's strict instructions, uses the cheapest spirits when serving friends their drinks, in order to save them money.

Case 22

Adam, who works in Eve's pub, brings in cigarettes to sell to customers at cost price because Eve refuses to stock cigarettes.³⁶

Case 23

Adam, Eve's selling agent for cricket bats, also runs his own cricket school on the side. He gives preferential credit terms, within his discretion as agent, on bats to those who sign up for courses at his school.

Case 24

Adam, Eve's flatmate, has an arrangement with Cain, a friend of his, that when Eve goes away on holiday that Cain can use Eve's room. Cain pays Adam £10 for the privilege.

As can be appreciated, in each of these cases it is possible that Adam has committed fraud as in each Adam is in a position where he might be expected not to act against the financial interests of another, intending to make a gain or cause loss by means of abuse of that position. Even Case 21, where Eve suffers no real, if any, loss and Adam makes no real gain, is potentially covered. Although it is a requirement of section 4 that Adam is in a position where he is expected to safeguard the financial interests there is no requirement that the abuse of his position will lead to damage or even the risk of damage to those interests, so long as the necessary intention to make a gain or cause a loss exists. In Case 22 it does. Adam abuses his position, intending to gain the price of the cigarettes, which is a gain although he makes no profit on the transactions. Case 24 shows the full potential uncertainty attaching to section 4. Is Adam in a position where he is expected not to safeguard or not act against the financial interests of Eve? One would possibly think so, and yet this

³⁶ Cf. *Doukas* [1978] 1 All ER 1061.

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is far away from the kind of fiduciary relationship which should surely lie at the core of the offence of fraud. In each case the potential for liability is present because of the means adopted to delimit the scope of liability which indeed seems to cover, potentially, most relationships. Although the jury can be expected to filter those who deserve punishment from those who do not *via* a finding of lack of dishonesty, it is unacceptable that the wrong in fraud is so insecurely defined, so capable of stretching beyond its core meaning and so apt to criminalise the undeserving.

(a) Mens rea

The *mens rea* for section 4 is as for section 2. There is no requirement that the defendant be aware that he is under a duty to safeguard the other's financial interests, so such lack of knowledge will not avail Adam, in Case 23, although evidence of lack of awareness will, no doubt, influence the jury's assessment of dishonesty.

14.3 Obtaining services dishonestly

Section 11 replaces section 2 Theft Act 1978. It differs from that section in that it is not necessary for the service to be obtained as a result of false representation. Under the old law it would not be an offence to sneak into a cinema without paying because the services obtained (being able to watch the film) were not obtained as a result of a false representation. This will be an offence under the Fraud Act, since the services are obtained dishonestly. The section would also cover cases where the services were obtained via the use of a machine. So, for example, obtaining a parking space in a pay-on-entry car park by putting a foreign coin in the slot, or using an unauthorised credit card to purchase train tickets from an automated ticket vending machine, are examples of a section 11 offence.

It differs from sections 2, 3 and 4 of the Fraud Act in requiring the benefit actually to be obtained (not merely to have been intended). There is, however, a big overlap with section 2 Fraud Act 2006, which will make it possible to proceed under either section where the relevant services were indeed obtained as a result of a false representation and with intent to avoid paying. Where section 11 will come into its own will be in those cases where the services were dishonestly obtained otherwise than by a false representation.

- (1) A person is guilty of an offence under this section if he obtains services for himself or another –
 - (a) by a dishonest act, and
 - (b) in breach of subsection (2).
- (2) A person obtains services in breach of this subsection if –
 - (a) they are made available on the basis that payment has been, is being or will be made for or in respect of them,
 - (b) he obtains them without any payment having been made for or in respect of them or without payment having been made in full, and
 - (c) when he obtains them, he knows –
 - (i) that they are being made available on the basis described in paragraph (a), or
 - (ii) that they might be, but intends that payment will not be made, or will not be made in full.

The offence is punishable with a maximum five years' imprisonment on conviction on indictment and twelve months' imprisonment on summary conviction.

A *Actus reus*

1 Services

Not every dishonest obtaining of services is an offence. By section 2 (a) the services covered are restricted to those made available on the basis that payment has been, is being or will be made for or in respect of them.

Case 25

A asks B, his neighbour, to cut his lawn for him, falsely representing that he has hurt his back. B does so.

Case 26

A, an old-looking 50-year-old, visits B, a hairdresser advertising 'free haircuts for pensioners'. Prior to his hair being cut (for free) he asks 'you are still doing those free haircuts, aren't you?' B answers in the affirmative.

Case 27

A, a female nurse at a local hospital, is late for work. She sticks a pillow down her trousers and hails a taxi. She tells the driver that she is pregnant and needs the hospital. The driver takes her there for free.

What the subsection means, in effect, is that the obtaining of free services dishonestly is not an offence. In none of these examples, therefore, has the section 11 offence been committed. In each case there has been a dishonest obtaining of a benefit but in each case the services were not made available on the basis that they had been or would be paid for. Quite the opposite. Cases 26 and 27 are covered by section 2 of the Fraud Act 2006. Case 25 is not covered by any provision of the Fraud Act.³⁷ Some other examples follow:

Case 28

A induces B, a travel agent, to organise transport to and from the airport on her trip abroad, telling him, falsely, that this will be paid for on her return.

The offence is committed here since A has obtained services, namely his transportation to and from the airport on the understanding that it would be paid for.

More broadly, the section is satisfied wherever the person is allowed to do something for free which would otherwise have to be paid for. This would cover entering and viewing a game, show or spectacle, using an automatic car wash, playing a round of golf, hiring a car or taking goods on hire purchase.³⁸

B *Mens rea*

The *mens rea* elements for section 11 are dishonesty, knowledge that payment is required or might be, and an intention not pay for the service or not to pay in full. Dishonesty is established on the basis of the *Ghosh* test and is covered above.

³⁷ The Law Commission have recommended a partial extension of section 1 to meet such cases. Law Commission Consultation Paper No. 155 *Fraud and Deception* (1999).

³⁸ *Widdowson* [1986] Crim LR 233.

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The offence is only made out where the defendant knows that payment is required or might be. In the usual case this requirement is superfluous as such cases will generally negate dishonesty. So a person does not commit the offence, therefore, if he parks his car in a public car park believing that it is a free car park both because he is not dishonest and also because he does not know that payment is required.

Finally the offence is only made out if it is the defendant's intention not to pay or not to pay in full. It is unclear whether this means an intention never to pay the relevant amount or simply not to pay at the time. For example:

Case 29

Adam parks his car in a pay and display car park. He has no money and so resolves to pay later when he returns from his shopping, and does so.

With respect to the offence of making off without payment it seems that the offence is not committed unless the intention not to pay is a permanent one.³⁹ For consistency's if not reason's sake it is likely that such a stance should be taken here.

14.4 Making off without payment

Section 3 provides

- (1) Subject to subsection 3 below, a person who, knowing that payment on the spot for any goods supplied or service done is required or expected from him, dishonestly makes off without having paid as required or expected and with intent to avoid payment of the amount due shall be guilty of an offence.
- (2) For purposes of this section 'payment on the spot' includes payment at the time of collecting the goods on which work has been done or in respect of which service has been provided.
- (3) Subsection (1) above shall not apply where the supply of the goods or the doing of the service is contrary to law, or where the service done is such that payment is not legally enforceable.

The criminal law does not generally penalize dishonest breaches of contract, whether a failure to deliver goods or services contracted for, or failure to account for such benefits once received. An exception is sometimes made where a deception is involved since this mental element is thought to mark the conduct as particularly culpable. In one case a dishonest non-payment of debt is penalized even in the absence of deception. This is where the debtor dishonestly makes off, so as to evade paying the amount due. The justification for criminalization in this circumstance is the perceived social menace of the activity known as 'bilking'. People who **consume** goods or services and then make off without paying may be difficult to trace. For this reason a power of arrest is granted to any person, e.g. the provider of the goods or services, who has good reason to suspect an offence is being committed.⁴⁰ Even if the bilker is traced, there may be problems of proof in establishing an operative **deception or dishonest intention** formed prior to the consumption of the goods

³⁹ Allen [1985] AC 1029.

⁴⁰ Section 3 (4).

or services sufficient to establish either deception or theft. The section 3 offence allows for a conviction in the absence of one or more of the elements of theft or deception as long as it can be shown that the accused has dishonestly made off without paying. The offence is triable either way and carries a maximum sentence of two years' imprisonment and a fine of £2,000.⁴¹

A *Actus reus*

1 Making off

Making off takes no particular form. A person can make off by stealth, as in slipping out of a restaurant when the waiter is not looking⁴² or by trumpeting his departure, as when a dishonest motorist honks his horn in triumph when driving away after filling up at a petrol station. A question surrounds the status of permitted departures, as when a customer dupes a creditor into allowing him to depart by pretending to have left his wallet at home. This is sometimes argued not to be a making off which meaning is thought restricted to cases of 'decamping or sudden or hasty departures'.⁴³ Probably the best view is that a departure, consented to or otherwise, will be a making off if the manner of departure renders it difficult for D to be traced but otherwise not.⁴⁴ This ensures that the offence does not overreach itself to cover routine cases of dishonest debtors. Thus if D leaves a dud cheque as payment with his name and address on the reverse, or if D is well known to the creditor, the offence is not committed.⁴⁵

(a) *From the spot where payment is due or expected*

To make off requires simply that D departs from the spot where payment is due or expected.⁴⁶ Two questions must be asked in each case therefore:

- (i) where is the spot where payment is due?
- (ii) has D made off from it?

In *McDavitt* D was apprehended in a restaurant making for the door. The spot where payment was due was held to be the restaurant. Since D had not quit the restaurant he could only be guilty of an attempt. Presumably it would be different if D had departed the restaurant for the lavatory to avoid payment since the spot where payment was due was the restaurant whence D had made off.⁴⁷ In *Moberley v Alsop*⁴⁸ D travelled on a train without paying for a ticket. He was apprehended having gone through the ticket barrier. The spot where payment was due was held to include not only the place where D should have paid (the departure hall ticket office) but also the spot where D should have later made good his default (the destination ticket barrier). As D had made off from this latter spot, the offence

⁴¹ Section 4 (2) and (3).

⁴² Cf. *DPP v Ray* [1974] AC 370, above.

⁴³ A.T.H. Smith 20–93; F. Bennion, 'Letter to the Criminal Law Review' [1980] Crim LR 670; for a contrary opinion see Griew (1995) 13–16, J.C. Smith (1997) 5–02.

⁴⁴ J.R. Spencer, 'The Theft Act 1978' [1979] Crim LR 24; J.C. Smith 5–03.

⁴⁵ *Hammond* [1982] Crim LR 611: a submission of no case to answer succeeded on such facts although for other reasons.

⁴⁶ *McDavitt* [1981] Crim LR 843.

⁴⁷ Cf. *Brooks and Brooks* (1983) 76 Cr App R 66.

⁴⁸ (1991) *The Times*, 13 December (DC).

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could be committed.⁴⁹ The upshot of this case is that there may be more than one spot where payment is due.

2 Payment for goods supplied or service done

The offence is constituted upon the successful completion of the creditor's part of the bargain, whether the supply of goods or the provision of services. The offence is not committed where payment would not be required or expected due to the other's breach of contract or if the supply of goods or services was contrary to law. It would not be an offence, then, for a punter to make off without paying a prostitute.⁵⁰ Further, no offence appears to be committed where the relevant benefit was not 'supplied' or 'done' as where it was abstracted secretly.

Case 30

A, knowing that a green fee is required at his local 'pay and play' golf course, decides to avoid paying by climbing over the fence on the third hole and climbing back over the fence on the penultimate hole.

It seems that the offence is not committed here since although A has received the benefit of fifteen holes of golf, this was not the result of any provision of services to him.⁵¹ In short, A has not made off without having paid as required or expected since he was given nothing to pay for.

3 Without having paid as required or expected

The offence is only constituted where the defendant makes off knowing that payment on the spot is required or expected. The offence is not committed, therefore, where D deceives the creditor into agreeing to postpone payment of the bill since, deception notwithstanding, the creditor's agreement means that D is not required or expected to make payment.⁵² A particular problem concerns the case where the debtor purports to pay by means of a dud cheque. It was explained above that such a practice is consistent with the debtor 'making off' even though his departure is consented to. Has a person who purports to satisfy the debt in this way 'paid' as required or expected? It may be argued that this depends upon the nature of the dud cheque. If it is forged, for example, it seems clear that no payment has been made any more than if the currency rendered was toy money. On the other hand, if the cheque is 'dud' only because it was not authorized by the debtor's bank, it is arguable that a 'payment' of sorts sufficient to satisfy section 3 has been made because rights attach to it.⁵³ The safest course of action for prosecutors will be to charge under s 2 (1) (b).⁵⁴

⁴⁹ Although not in this case, as he had a season ticket.

⁵⁰ Section 3 (3).

⁵¹ Griev (1995) 213.

⁵² *Vincent* [2001] Crim LR 488.

⁵³ G. Syrota, 'Are Cheque Frauds Covered by Section 3 of the Theft Act 1978?' [1980] Crim LR 412.

⁵⁴ Griev (1995) 216–17.

B *Mens rea*

The *mens rea* for section 3 is dishonesty and an intention to avoid payment of the amount due. Significantly, the section does not state that the intention must be to make permanent default. Nevertheless the House of Lords held, in *Allen*, that liability required proof of an intention permanently to avoid paying the amount due. So a hotel customer who checked out without paying would not commit the offence if he was temporarily financially embarrassed and intended to pay later.⁵⁵ Given the mischief the section was designed to counter and the absence of the word 'permanently' from the definition, the decision does not appear to be a good one.

Summary

The Fraud Act 2006 replaces a number of different offences under the Theft Acts 1968 and 1978 with a general offence of fraud which can be committed in one of three ways: by false representation; by failing, in breach of legal duty, to disclose information; and by abuse of position. Dishonesty is of the essence in each case, as is an intention, by the relevant act or omission, to make a gain or cause a loss. By contrast with the previous law it is not necessary to show that the gain was made or the loss caused for the offence to be made out. It is only necessary to show that this was the defendant's intention in making the representation/failing to disclose the information/abusing his position. In addition the Fraud Act criminalises a number of other acts, including the offence of possessing articles for use in fraud. This replaces the offence of 'going equipped to cheat' in section 25 Theft Act 1968. The Fraud Act also incorporates an offence of obtaining services dishonestly. This replaces the previous offence of obtaining services by deception. The important difference is that any dishonest obtaining of services is covered. There is no need for any human person to be 'duped' into providing the service. Indeed it can be effected by means of a machine. Only services made available on the basis that they have been or will be paid for are covered.

By section 3 Theft Act 1978, it remains an offence for a person dishonestly to make off without paying for goods or services when he knows that payment is there and then required or expected, if he does so intending to avoid paying. This is not an offence requiring proof of a false representation. 'Making off' can be done blatantly or by stealth but is probably not committed where the person has the creditor's consent to leave. The intention must be to make permanent default.



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⁵⁵ *Allen* [1985] AC 1029.