

**Chief Legal Officer :**  
**M. F. N. Ahmad, MBA, LL.M, Barrister**

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# BRIEFING

## FRAUD ACT 2006

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The Fraud Act 2006 came into force in January 2007. It creates a new general offence of fraud with a maximum custodial sentence of 10 years. It replaces many previous Theft Act 'deception offences'.

"The Act replaces the existing complicated array of over-specific and overlapping deception offences" said a Home Office statement. "These offences have proved inadequate to tackle the wide range of possible fraudulent activity today or keep pace with rapidly developing technology."

The Act also creates new offences of obtaining services dishonestly, and replaces the 'going equipped' offence by criminalising the act of possessing or making material for use in frauds.

Sole traders can now be prosecuted for fraudulent trading, whereas previously it was corporate entities only.

### The New Fraud Offence

The new offence can be committed in three ways:

- i) Fraud by false representation;
- ii) Fraud by failing to disclose information; and
- iii) Fraud by abuse of position

For each of the above, it is important to remember that to be guilty of the offence, the person must have intended to either make a gain for himself or another, or alternatively intended to cause loss to another or expose another to a risk of loss. It is not a defence if the gain or loss does not in fact occur – it is the thought that counts.

This gain or loss must relate to money or other property. This need not be on a permanent basis, it can also be temporary. Gain can include keeping what one already has, just as loss can include not getting what one might have got.

#### i) Fraud by false representation

A person is guilty of this offence if he expressly or impliedly dishonestly makes a false representation.

To decide whether a person has behaved dishonestly we need to apply a two stage test which was set out in the case of *R v Ghosh*. Firstly, we ask whether the person's behaviour would be regarded as dishonest by the ordinary standards of honest and reasonable people. If that question is answered positively, we go on to ask whether the person was aware that his conduct was dishonest and that it would be regarded as such by honest and reasonable people.

The representation is 'made' if it (or anything implying it) is submitted in any form to any system or device designed to receive or convey or respond to communications (with or without human intervention). It may be spoken, posted on the internet, written or communicated by conduct – there is no limit to how it may take place. The main purpose of this provision is to ensure that fraud can be committed where a person makes a representation to a machine and a response can be produced without any need for human involvement.

The Act defines a representation as being false if it is untrue or misleading. The person making the representation must also know that it is or might be, untrue or misleading.

An example of a false representation through conduct would be if a person dishonestly misuses a credit card as payment for items. By tendering the card, he is falsely representing that he has the authority to use it for that transaction.

### **ii) Fraud by failing to disclose information**

This offence applies if a person fails to disclose information which he is under a legal duty to disclose. There are a variety of situations in which someone may be under a legal duty to disclose information.

The Law Commission's Report on *Fraud* provides the examples of a duty to disclose deriving "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".

For example, a person not telling his life assurance company of his terminal heart condition would be guilty of this offence.

### **iii) Fraud by abuse of position**

To be guilty of this offence, the person must occupy a position in which he is expected to safeguard, or not act against, the financial interests of another person. He must dishonestly abuse that position. This may be through a positive act of doing something, but also by not doing something ie an omission.

The Law Commission explain the meaning of 'position' as "the necessary relationship will be present between trustee and beneficiary, director and company, professional person and client or employee and employer. It may arise otherwise, for example within a family, or in the context of voluntary work."

An example covered by this offence is where someone who is employed to care for an elderly person has access to that person's bank account and abuses his position by transferring funds to invest in a high-risk business venture of his own.

An example of committing this offence through an omission would be an employee who fails to take up the chance of a crucial contract in order that a rival company can take it up instead, at the expense of the employer.

## **Old Offences**

The Act replaces many of the previous Theft Act deception offences, including:

- i) Obtaining property by deception;
- ii) Obtaining money transfer by deception;
- iii) Obtaining pecuniary advantage by deception; and
- iv) Obtaining services by deception

However, if any relevant part of the offence occurred before the Fraud Act came into force, the old deception offences will apply and will not be affected by the new Act.

## **New Related Offences**

### **i) Possessing, making or supplying articles for use in frauds**

The offence of being in possession of articles for use in frauds replaces the old 'going equipped' offence. If found guilty of this offence, a person may face up to five years in prison. There is no need to prove that the defendant intended the article for some specific fraud, rather it will suffice to prove a general intention to commit fraud.

It is also an offence to make, adapt, supply or offer to supply any article knowing that it is designed or adapted for use or connection with fraud, or intending it to be used to commit or facilitate fraud.

The term 'article' in these offences can include computer programs and data.

### **ii) Participating in fraudulent business carried on by a sole trader**

This new offence parallels the existing offence that applies in the case of fraudulent businesses carried on by companies.

It is an offence if a person is knowingly party to the carrying on of non-corporate business with either intent to defraud creditors or for any other fraudulent purpose.

### **iii) Obtaining services dishonestly**

Obtaining services dishonestly is another new offence which, if convicted, can lead to a term of imprisonment not exceeding five years. The Act makes it an offence for any person, by any dishonest act, to obtain services for which payment is required, with intent to avoid payment. The person must know that the services are made available on the basis that

they are or might be chargeable. This offence cannot be committed by omission.

An example would be if a person climbs over the wall to watch Birmingham City play without paying the entrance fee. He is guilty of obtaining services dishonestly because he has obtained a service (watching football) only provided on the basis that spectators have to pay. It is immaterial that the football club is not deceived.

**iv) Liability of company officers for offences by company**

This offence applies if a person has a specified role within a corporate body such as director, company secretary, manager or other similar officer, and the body corporate has committed one of the Fraud Act offences. If the officer gave his consent to the committing of the offence or he was party to it, then he will also be liable for the offence along side the body corporate.

For further advice on this paper, please contact:  
Lauren Kemple, Criminal Litigation, Legal Services Office on:-

**Tel: 0121 303 1454**

**Fax: 0121 303 1323**

**Email: [lauren.kemple@birmingham.gov.uk](mailto:lauren.kemple@birmingham.gov.uk)**