The Fraud Act 2006

The crackdown on Fraud continues: No gain, No matter


Not only does the Act overhaul, and potentially widen, the array of criminal offences available in respect of fraudulent and deceptive behaviour, but it is also highly likely to simplify the prosecution process.

Companies should welcome the Act as, taken together with other recent initiatives and developments such as the formation last year of the Serious Organised Crime Agency (SOCA), the publication of the Government's Fraud Review (which highlighted the need to focus more attention and resources on the detection and prosecution of fraud) and the latest drive to enable complex fraud matters to be tried without a jury, it is likely to increase the chance of successful prosecution of dishonest individuals and employees and the recovery of the estimated £14billion annual cost to the economy of fraud.

There is also good news for companies seeking to pursue fraudsters in the civil courts as the Act strikes a major blow to the prospects of defendants seeking to avoid disclosure of documents and information which may be crucial to a claim on the grounds that to do so might incriminate themselves.

Summary

Whilst the offence of conspiracy to defraud is well known, no offence of fraud per se existed prior to the coming into force of the Act. The Government considered that the various old statutory deception offences were too specific and overlapped in certain areas, allowing defendants to prosper with technical arguments.

The Act brings about a complete change to the law of fraud, repealing various offences under the Theft Acts and instead creating a general offence of fraud which can be committed in different ways.

New Offence of Fraud
The new offence, punishable by imprisonment of up to 10 years and/or an unlimited fine for a conviction on indictment, can be committed in three different ways. However, for each of the variants, the relevant behaviour must:

- be dishonest (i.e. the defendant was dishonest according to the ordinary standards of reasonable, honest people and he also realised that his actions were dishonest according to those standards); and
- intend to secure either a gain for the defendant or a loss or risk of loss to another of money or any other property.

It is to be noted that unlike the old substantive statutory deception offences no gain or loss need actually be suffered for the new offence to be committed. This is truly a conduct crime and is likely to reduce the need to charge defendants with attempts or find conspirators where the scheme is ultimately unsuccessful.

**Variant 1 - Fraud by false representation**

**Prohibited Conduct**

Making a false representation (by words or conduct as to any fact, law or state of mind of any person) whether express or implied either:

- knowing that the representation is false or misleading; or
- being aware that it might be.

**Impact**

This provision would make it clear that doubts as to the accuracy of any warranty, representation or assertion could lead to a criminal charge if accompanied by the appropriate guilty intent. Existing offences which criminalise misleading representations but which suffer from technical elements which need to be proved or defences not available under this provision (e.g. section 397 of the Financial Services and Markets Act 2000 which can require proof of "material" falsity and a connection to prescribed investments) may fall into disuse in favour of this, simpler, offence.

The section also includes representations made to any systems designed to receive or respond to communications (with or without human intervention). This enables the Act to deal with modern forms of fraud perpetrated via electronic transactions such as those over the internet or through automated banking systems.

What is also worthy of note is that the victim of the representation need not actually rely upon it.

**Variant 2 - Fraud by failing to disclose information**

**Prohibited Conduct**

Failing to disclose information where there is a legal duty to do so (e.g. statutory, contractual, custom from a trade or market, or a fiduciary relationship).

**Impact**

Clearly those who fail to make full disclosure pursuant to legal obligations will be at risk of prosecution. This could catch companies and directors who fail to make disclosures, for example to the market, in breach of the Listing or Disclosure Rules requirements. The offence may also be used vigorously to pursue those who fail to disclose taxable income or assets to HM Revenue & Customs.

**Variant 3 - Fraud by abuse of position**

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Where the defendant occupies a privileged position such that he would be expected to safeguard the victim's financial interests, and the defendant abuses that position. Such an abuse is capable of being committed by omission.

**Impact**

The types of relationships which might lead to the expectation are:

- employer and employee;
- trustee and beneficiary;
- director and company;
- professional and client;
- agent and principal;
- partnerships;
- family relationships; or even
- voluntary work.

The director or employee who covertly fails to act in the best financial interests of his company, its staff or its clients (e.g. by failing to take up the opportunity of a crucial contract) could therefore fall foul of this proposed provision, if the other requisite elements are present.

**Other Offences**

The Act also provides other new offences:

- Obtaining services dishonestly (with intent to avoid making due payment and no deception is required) (penalty – up to 5 years imprisonment);
- Possessing equipment or making /supplying articles (including computers and computer programmes) for use in the commission of frauds (up to 5 years and 10 years respectively); and
- Extension of the existing offence of fraudulent trading to non-corporate traders (the maximum penalty for this and the corporate version being increased to 10 years).

Despite the original proposal that the common law offence of conspiracy to defraud be abolished, opposition during the consultation period, largely from prosecuting authorities, saw its reprieve. The offence will remain as a fall back position.

**Corporate Liability - Liability of Officers**

The Act explicitly recognises that a corporate body may commit the offences and also provides that any director, manager, secretary or other similar officer of the company (or any person purporting to act in such a capacity) will also commit the relevant offence if the company's offence is proved to have been committed with the consent or connivance of that individual. Clearly this is of importance for directors as it would lead to the risk of prosecution for those who merely acquiesce in, as opposed to positively promote, dishonest conduct (of the type outlined above) by their company.

**The effect of the Act on the victim's recovery of losses sustained through fraud**

Civil fraud claimants have traditionally encountered difficulties in attempting to recover damages and, in particular, to avail themselves of interim remedies such as search orders and orders for disclosure in aid of a freezing injunction where defendants claim the privilege against self-incrimination.

However, the Government's intention behind the Act and other initiatives is to get, and stay, one step ahead of fraudsters by pre-empting new methods of fraudulent behaviour rather than by further piecemeal, reactionary reform. Reducing the use of technical defence arguments, and enabling prosecutors to secure convictions on the basis of the guilty conduct alone (rather than the gain
or loss occasioned), may increase the chances of a successful prosecution.

These prospects are likely to be further enhanced by developments such as the constitution of SOCA, the authority set up in April last year to focus upon serious crime and for whom fraud is one of its top priorities. Prosecutors are also being encouraged to make greater use of the availability of compulsory powers to obtain information, plea-bargaining and offers of immunity in return for cooperation to increase conviction rates. To these need to be added the new Fraud (Trials without a Jury) Bill which seeks to bring into force in amended form a dormant provision of the Criminal Justice Act 2003 to enable applications to be made to have complex fraud matters tried by High Court Judge sitting without a Jury. This increase in the weapons available to combat fraud may be reflected in a greater focus on fraud by the law enforcement agencies. The Fraud Review trumpeted the need to set up specialist units in the mould of the City of London Police Fraud Squad around the country and focus on investigating and seeking greater penalties for fraud. The future for fraudsters seems bleaker at least.

Proof of convictions is also likely to benefit civil claimants in pursuit of damages for fraud or unlawful acts, to the extent that loss can be shown to the civil standard of proof. For the same reasons, to the extent that gain or loss is occasioned, the Act could have a positive impact upon the ability of the Assets Recovery Agency, (which will be merged into SOCA) to take the profit out of crime.

However, for civil litigants perhaps the biggest change is in the limitation of privilege against self-incrimination.

**Privilege against Self-Incrimination**

The privilege against self-incrimination (“PASI”) has hampered civil fraud claimants in their attempts to secure the interim remedies mentioned above. Insofar as it relates to civil proceedings, common law PASI is restated in section 14 of the Civil Evidence Act 1968 as “the right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty...”. Where PASI applies, it is a right and the exercise of that right cannot be denied by the court as a matter of discretion. The operation of PASI in civil proceedings has been the subject of much criticism including from judicial sources.

Recognising the difficulties, a number of statutes disabuse, in relation to offences under those statutes, the operation of PASI outside of criminal proceedings but grant a “use immunity” preventing answers obtained by compulsion from being used in other proceedings. Given that many search orders and freezing injunctions are granted in the context of civil proceedings arising out of fraudulent or dishonest conduct, one of the most important of these abrogations is that set out in section 31 of the Theft Act 1968. Section 31 prevents a person, in civil proceedings for the recovery or administration of property, or for the execution of any trust or for an account of any property or dealings with property, from answering any question put to that person or from complying with any order made in such proceedings on the grounds that to do so would incriminate him (or his spouse or civil partner) in relation to an offence under the Theft Act 1968. Statements or admissions made by a person in answering a question or complying with an order are, however, inadmissible in criminal proceedings for an offence under the Theft Act 1968.

While this abrogation goes some way to reduce the tension between the operation of PASI and the ability of a victim of fraud effectively to pursue civil proceedings, the abrogation set out in section 31 does not encompass proceedings for forgery or for conspiracy, as these are not offences under the 1968 Act. This has also been the source of much judicial frustration and criticism.

**Section 13 of the Act**

In our response to the Government's Consultation on the Fraud Bill, we suggested that the Bill be used to extend the scope of section 31(1) of the Theft Act so as to remove PASI in relation to all civil claims relating to property.
Section 13 of the Fraud Act 2006 now provides that a person is not to be excused from answering any question put to him, or complying with any order, in proceedings relating to property on the ground that doing so may incriminate him (or his spouse or civil partner) of an offence under the Fraud Act or a related offence. Crucially, "related offence" is widely defined to mean conspiracy to defraud and "any other offence involving any form of fraudulent conduct or purpose". Any statement or admission made by the person in answering such a question or complying with such an order is, however, inadmissible in evidence against him (or his spouse or civil partner) in proceedings for such an offence.

This new legislative provision is welcome news for all victims of fraud seeking redress through civil proceedings, and should prevent defendants in civil proceedings from refusing to indicate the whereabouts of misappropriated property or documents.

Conclusion

In summary the Act should be welcomed as a valuable tool which will be of substantial assistance in the fight against fraudsters in both the criminal and civil courts.

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