

W201 The Individual and the State

Study notes on fraud and making off

Fraud by making a false representation (Section 2 Fraud Act 2006)

Definition

“dishonestly makes a false representation and intends, by making the representation to make a gain for himself or another, or to cause loss to another or to expose another to a risk of loss”

Punishment 10 years (compare Theft which has been 7 years since 1991)

Actus reus

1. Make
2. False representation

Mens rea

3. Dishonestly
4. Intent by making the representation to make a gain for himself or another, or to cause loss to another or to expose another to a risk of loss
5. Know that it is, or might be, untrue or misleading.

1 Make

You still ‘make’ a representation if you do it to a machine instead of a human being. Section 2(5) extends the meaning of ‘make’ to communications to any system or device designed to work with or without human intervention.

2 False representation

False

False is defined in Section 2(2) as untrue or misleading. The Act does not define ‘untrue’ or ‘misleading’. This will be left to the courts.

Representation

Section 2(3) defines this as “any representation as to fact or law, including a representation as to the state of mind “ of any person.

Section 2(4) states it may be express or implied.

Implied representations are frequently made by conduct (with no words being spoken). If the old law on deception is followed the following will be treated as representations by conduct.

DPP v Ray Lords 1974 – accused and others entered a restaurant intending to pay but after eating their meal decided not to. They sat in their seats for ten minutes before leaving while

the waiter was in the kitchen. The court found there was a representation by conduct that the previous intention to pay continued.

Cheques and credit cards

MPC v Charles 1977 Lords held that writing a cheque involved a representation that the cheque will be met and that a cheque guarantee card if used was used with authority.

R v Lambie 1982 Lords held that using a credit card involved a representation that the spending was within the card's limit.

A duty to speak up!

Where an accused makes a statement which is originally true but due to a change in circumstances it becomes false there can be a duty to correct it. **R v Rai** 2000 C A (application for council grant for bathroom for elderly relative - relative died before bathroom installed - accused who had made original application said nothing).

There is no requirement in the Fraud Act that anyone believes the false representation or is affected by it.

Mens rea

3 Dishonestly

This will be determined by the Ghosh test:

- Was what was done dishonest by the ordinary standards of reasonable and honest people?
- Must the accused have realised that what he was doing was, by those standards, dishonest?

The partial definitions of dishonesty in Section 2 of the Theft Act relate to 'appropriation' and therefore apply to the offence of theft only (not to fraud).

For example if an accused believes he has in law the right to make a gain or cause a loss no reference is made to Section 2(1)(a) instead the jury apply the Ghosh test.

4 Intent by making the representation to make a gain for himself or another, or to cause loss to another or to expose another to a risk of loss

Gain and loss are defined in Section 5.

Section 5(2)(a) provides that both extend only to gain and loss in money or other property (real or personal including things in action and other intangible property).

The gain or loss may be temporary or permanent – Section 5(2)(b).

Gain includes a gain by keeping what one has, as well as a gain by getting what one does not have (Section 5(3)) and loss includes a loss by not getting what one might get, as well as a loss by parting with what one has (Section 5 (4)).

The accused must intend to make the gain or cause the loss **by making** the false representation.

5 Knowing that it is, or might be, untrue or misleading

This is required by Section 2(2)(b)) before a representation is false for the purposes of Section 2. This means it is not enough to make a representation which happens to be untrue or misleading. For it to be a “false representation” the prosecution must also prove that the person making it knows that it is, or might be, untrue or misleading.

Comment

The new Fraud Act offences are generally easier to prove than the deception offences they replace.

There is no longer any need to prove:

- that any one knew of the representation
- that they were deceived
- that any property was obtained

This means that the element of dishonesty becomes crucial as it will often be the main barrier between an accused and conviction.

In 1968 when the Theft Act replaced the Larceny Act a decision was made to deal with fraud not by a single widely drawn offence but by specific more narrowly drawn deception offences to avoid the risk of criminalizing commercial behaviour. After problems and having to redraw some of these offences in 1978 and 1996 parliament has now accepted recent Law Commission proposals and has gone back to the drawing board and set out on a new path with a widely drawn fraud offence.

Offences repealed by the Fraud Act 2006

Theft Act 1968

- Section 15 (obtaining property by deception);
- Section 15A (obtaining a money transfer by deception);
- Section 16 (obtaining a pecuniary advantage by deception);
- Section 20 (2) (procuring the execution of a valuable security by deception);

Theft Act 1978

- Section 1 (obtaining services by deception);
- Section 2 (evasion of liability by deception).

Making off without payment (Section 3(1) Theft Act 1978)

Definition

“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” Section 3(1) Theft Act 1978.

Punishment 2 years

Actus reus

1. Goods supplied or service done
2. Makes off
3. Without having paid as required or expected

Mens Rea

4. Dishonestly
5. Knowing that payment on the spot was required or expected.
6. With intent to avoid payment

Actus reus

1. Goods supplied or service done

Taxis filling stations restaurants and hotels are included but not illegal services.

2. Makes off

The departure may be sudden and unexpected but it doesn't have to be. It must be “from the spot where payment is required”.

3. Without having paid as required or expected.

Using a worthless cheque is not good payment but using a credit card without authority but so that the retailer is still paid would be sufficient.

A dishonestly obtained agreement to postpone payment will mean that payment is not expected on the spot **R v Vincent** 2001 C A.

Mens rea

4. Dishonestly

The Ghosh test will apply.

5. There must be knowledge that payment on the spot was required or expected

6. With intent to avoid payment

Avoiding payment is different from postponing payment. **R v Allen** 1985 Lords (accused left hotel owing £1286 - two days later he phoned offering to return and stating he expected to be able to pay - held avoid means avoiding altogether or permanently).