

ANNEX B – PROBLEMS WITH THE EXISTING LAW OF FRAUD

1. The main problems with the existing law of fraud are detailed below in an analysis that draws on that made by the Law Commission in Part III of their 2002 report.

Range of separate offences

2. Problems have arisen because the existing statutory offences in the Theft Acts are too specific and overlapping. These offences include:

- (1) theft, defined as the dishonest appropriation of property belonging to another with the intention of permanently depriving the other of it; and
- (2) eight offences of deception, committed by a person who dishonestly and by deception
 - obtains property belonging to another
 - obtains a money transfer
 - obtains services
 - secures the remission of an existing liability to make a payment
 - induces a creditor to wait for payment or to forgo payment with intent to permanently default on the debt
 - obtains an exemption from or abatement of liability to make a payment
 - obtains a pecuniary advantage
 - procures the execution of a valuable security

3. This multitude of different, over-particularised deception offences leads to a position where a defendant could face the wrong charge, or too many charges. For example, in *Duru*¹ the deception resulted in a bank making out a cheque in the defendant's favour. He was charged with obtaining property by deception, when the correct charge was procuring the execution of a valuable security. Where the "belt and braces" approach is taken to charging, the indictments may become overly complex and result in excessively lengthy trials.

4. Having a range of particularised offences also makes it very difficult to charge a defendant with an attempted offence when the deception does not result in money being paid over to him. Where a defendant unsuccessfully makes a false representation to obtain money

¹ [1974] 1 WLR 2

from another person but is indifferent as to how the money is to be paid (by cash, money transfer or cheque for example), it is unclear which offence under the Theft Act 1968 he has attempted – section 15, section 15A or section 20.

5. The range of specific fraud offences, defined with reference to different types of consequence, also leaves the law vulnerable to technical assaults. This was evidenced in *Preddy*² where the defendants made false representations when applying for mortgages and were charged with obtaining property by deception. The House of Lords held that the credit balances in the defendants' accounts were choses in action which had never belonged to the lender but were entirely new property. Consequently, there was no appropriation of property "belonging to another". Although section 15A of the 1968 Act was enacted to deal with this particular loophole, other similarly technical problems have arisen³ and may continue to arise as a result of the specificity of the deception offences. The changing nature of technology is almost certain to continue to outgrow the context specific offences in the Theft Acts. For example there is a lack in clarity in the law as to whether or not the *Preddy* problem arises in the financial markets, such as with Eurobonds or any system where title to securities or shares is held in a pool by a broker or a clearing system and not by individuals. While this lack of clarity can be overcome by the ability to charge conspiracy to defraud that charge is not universally available as it depends on there being more than one person involved.

6. That is why fraud needs to be dealt with in a more general offence that targets the nature of fraudulent behaviour, rather than particular instances of such behaviour in a set of defined circumstances. The *Preddy* difficulty also suggests that fraud should cover situations where there is loss to a victim, whether or not the defendant or anyone else obtains (or appropriates) what the victim has lost.

Cases where there is no deception

² [1996] AC 815

³ In *Klineberg and Marsden*³ the defendants (company directors) were charged with various counts of theft for misapplying money received from time share purchasers. The defendants appealed on the basis of *Preddy*. It was held that where the purchasers were told that their money would be held in a stakeholding trust company pending completion, section 5(3) of the 1968 Act applied so that the money was property belonging to another. However where the contract was on the basis that the money would go straight to the defendants' solicitors' firm, the defendants were acquitted, despite both sets of victims being told similar lies. Arguably even the decision relating to s.5(3) was wrong as money paid into another's account by telegraphic transfer or CHAPS is not "proceeds" of the victim's property.

7. Many of the Theft Act offences require deception. To say that a defendant has deceived another implies that the other person believed in the truth of the defendant's false representation. As a result of this there is a loophole in the current law in that no offence can be charged for providing false information to a machine in order to gain services, as it is impossible to "deceive" anything but a human mind. Therefore it is not an offence for example to buy insurance on line by providing false credit card details.

8. Second, sometimes a person will act on a defendant's false representation without considering whether or not it is true (or indeed caring). This argument has arisen in relation to credit cards, debit cards and cheque guarantee cards which the defendant was using without authority (either because it was stolen or the transaction exceeded his credit limit). In these circumstances, the merchant will be paid for the goods or services he provides by the card issuer in any event. The House of Lords has held in *Charles*⁴ and *Lambie*⁵ that the cardholder does commit the offence of obtaining goods or services "by deception" in such cases. It held that an implied representation is made by the defendant in handing over the card that he has authority to use it; and even if the merchant did not address his mind to whether the card holder had such authority, it can be assumed that he would not have accepted the card if he had known it was tendered without authority and this is sufficient to make out "deception". This reasoning is widely thought to be artificial, and can lead to acquittals if for example, the merchant gave differing evidence to that presupposed by this reasoning in cross-examination.

9. The problem arises because the concept of deception focuses on the operative effect of the representation on the victim's mind. In various cases where a person would have acted in the way they did regardless of the false representation (for example where a bank manager signs whatever is put in front of him), an inference therefore has to be posited that the false statement was the operative inducement. This is unsatisfactory.

10. It has been suggested that there are examples where persons within an organisation can make dishonest gains through use of normal business procedures without committing any obvious deception.⁶ An example is where excessive and unauthorised advances were made to the directors of

⁴ [1997] AC177

⁵ [1982] AC 449

⁶ Fraud and the Efficacy of the Criminal Law: a Proposal for a Wide, Residual Offence by Professor GR Sullivan 1985 CLR

a bank which lead to its liquidation, to the detriment of its depositors and investors. A further example is where unit trust managers issued personal instructions to brokers to acquire shares in order to sell them on to the fund at a higher price.

Services

11. There is a further gap in respect of services provided where the provider does not expect to be paid, but does expect a future financial gain either for himself or another. This gap was exposed in the case of *Halai*⁷ where the defendant had opened a building society account with a bad cheque but was acquitted of the section 1 offence because the building society did not charge for the opening of an account. The building society did however expect to receive a future financial benefit from the opening of the account.

Intention to permanently deprive

12. The offence of obtaining property by deception does not cover victims who are temporarily deprived of their property. However, such deprivation can often be damaging. A person may replace the property, at their own cost, in the period before it is returned or the item may have lost its value by the time it is returned. In the case of *Scott*⁸ the defendant temporarily obtained copies of films from projectionists in order to make pirate copies. This could have been charged as theft were it not for the requirement of the intention to permanently deprive.

13. It is also odd that where money is concerned in a case of obtaining property by deception, even if the defendant intends to repay the victim, he is very unlikely to be returning the same banknotes he took and so intention to permanently deprive is made out. (Of course, the intention to repay would go to the issue of dishonesty, so would be relevant but the situation is still odd.)

Abuse of position of trust

14. In *Tarling*⁹ the House of Lords held that the company directors' failure to disclose a secret profit made in breach of fiduciary duty, even if dishonest, did not amount to conspiracy to defraud. However, in *Adams*¹⁰

⁷ [1983] Crim LR 624

⁸ [1975] AC 819

⁹ *Tarling (No.1) v Government of Singapore* (1978) 70 Cr App R 77

¹⁰ [1995] 1 WLR 52

the Privy Council held that a company director had been rightly convicted for conspiracy to defraud by dishonestly making a secret profit. The distinction seems to be that in *Adams*, the defendant not only failed to disclose the transactions constituting the abuse of position, but also took positive steps to conceal them. This leaves a gap in cases where the defendant abuses his position but takes no steps to conceal it (perhaps because there is no need to). Where the benefit is obtained by an abuse of trust and the victim remains in ignorance of the loss until after the event, the benefit is not obtained by deception so no statutory offence is available, and conspiracy to defraud is only available where the defendant is acting in agreement with others and they took steps to deliberately conceal their actions.

15. In the *Attorney General's Reference No. 1 of 1985* it was held that there could be no theft of a secret profit made by an employee at his employer's expense because it was not property belonging to another. If the employee had taken specific steps to conceal his side-line from his employers and if he had conspired with another, conspiracy to defraud would have been available.

Deception which causes a loss and a gain which do not correspond

16. This can occur where there is fraudulent business practice. An example would be where a person starts a false rumour as a result of which his business rival's profits suffer. Although the defendant is motivated by a desire to make money at the victim's expense, the loss and gain will not relate to the same property and will not even be of corresponding value. A more sophisticated example is the Guinness fraud where Guinness plc and Argyll Group plc were competing to take over Distillers Company plc. Both made offers partly based on their own share price and the Guinness directors entered into a fraudulent share support scheme to make their offer appear more valuable. The victims included Argyll, Distillers, their shareholders, those who bought Guinness shares at falsely inflated prices, and other indirect losers for example other companies who would have received more investment without the false enthusiasm for Guinness shares. The existing deception offences could not reflect the way the gains and losses were caused. Conspiracy to defraud could have done (but could not be charged at that time for technical reasons that no longer apply).¹¹

¹¹ In *Ayres* [1984] AC 447 the House of Lords ruled that conspiracy to defraud was only available if the facts did not reveal a statutory conspiracy. This decision was reversed by section 12(1) of the Criminal Law Act 1987

Deception which only prejudices another's financial interests

17. The case of *Wai Yu-Tsang*¹² involved an agreement to conceal a bank's losses or liabilities from its shareholders, creditors and depositors. This put their economic interests at substantial risk even though it was not done for the defendants' gain or to cause loss. Putting economic interests at risk without causing actual loss is not sufficient for a deception offence. It is covered by conspiracy to defraud, provided more than one person is involved. *Scott*¹³ defined conspiracy to defraud as "an agreement by two or more by dishonesty to deprive a person of something which is his, or to which he is or might be entitled and an agreement by two or more, by dishonesty, to injure some proprietary right of his".

¹² [1992] 1 AC 269

¹³ (1975) 2AER 162