

The Fraud Act 2006: The E-Crime Prosecutor's champion or the creator of a new inchoate offence?

Maureen Johnson

Senior Lecturer, University of Hertfordshire, School of Law

M.C.1.Johnson@herts.ac.uk

Kevin M Rogers

Lecturer in Law, University of Hertfordshire, School of Law

Member, Law Society's Electronic Law Committee

K.Rogers@herts.ac.uk

Introduction

After a considerable gestation period, the Fraud Act 2006 came into force on 15th January 2007¹. It introduces a new general offence of fraud in section 1, with a maximum penalty of 10 years' imprisonment. This offence can be committed by false representation (section 2), failure to disclose information (section 3) and by abuse of position (section 4)². The introduction of general offences is intended to provide a substantial scope for ensure that technologically focused crime can be targeted by this provision. This covers 'newer' offences such as *inter alia* phishing and spoofing.

However, it is argued that whilst the sentiments behind the new Act are to be welcomed, it is argued that there are a number of deficiencies in the new Act, which could lead to considerable problems. The deception offences in sections 15, 15A, 16 and 20(2) of the Theft Act 1968³ and sections 1 and 2 of the Theft Act 1978⁴ are repealed. Initially, this is to be welcomed as there is a shift in focus away from deception problems (notably that deception of a machine or computer is not legally possible⁵) it moves towards the concept of dishonesty, as defined in *R v Ghosh* (1982)⁶ The two-stage test was outlined by Lord Lane, who stated:

"In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was

¹ A full version of the Fraud Act 2006 can be found at: <http://www.opsi.gov.uk/acts/acts2006/20060035.htm>.

² There are further new offences included in the Act, such as possessing articles for the use in frauds (section 6), making and supplying articles for the use in frauds (section 7) and obtaining services dishonestly (section 11), but this article focuses upon the general fraud offence.

³ Respectively: obtaining property by deception, obtaining a money transfer by deception, obtaining a pecuniary advantage by deception and procuring the execution of a valuable security by deception

⁴ Respectively: obtaining services by deception and evasion of liability by deception. (A full list of repeals and revocations can be found in Schedule 3).

⁵ *DPP v Ray* [1974] AC 370. Lord Morris stated (at page 384): "For a deception to take place there must be some person or persons who will have been deceived." Further, in *Re London and Global Finance Corporation Limited* [1903] 1 Ch 728, Buckley J stated (at page 732): "To deceive is...to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows and believes it to be false."

⁶ [1982] QB 1053.

done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails. If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing by those standards dishonest.”⁷

However, this is problematic in itself as there already exist a number of “...*powerful criticisms*”⁸ surrounding the *Ghosh* decision. The Act also makes a number of fundamental alterations to the general understanding of fraud. The offence moves from being that of a result crime to a conduct crime. This has the advantage of the law stepping in at an early stage to prevent further criminality, although at the same time provides a completely new concept of the criminal act of fraud in a statute that does not provide specific definitions of key concepts, such as ‘fraud’, ‘false’ or ‘abuse’.

The purpose of this article is to unravel the key provisions of the Act and to examine specifically the likely effect it will have on ‘e’-crimes. Whilst Barty and Carnell (2005) are of the view that there will be more persecutions for technology-related crimes⁹, it is the contention of the authors that the Act poses problems, which may restrict the law’s ability to cope to online criminality.

Rationale for the Act

Arguably, the key reason for the introduction of the Fraud Act was the history of complexity and uncertainty concerning offences involving deception. Smith spoke about the need to “...*tidy up the shamble of section 16 of the Theft Act 1968*”¹⁰, while Ormerod is also clear in his criticism as he states:

“The deception offences were notoriously technical. Although overlapping, they were over-particularised, creating a hazardous terrain for prosecutors who, in charging, could be tripped up by something as subtle as the fraudster’s method of payment. The interpretive difficulties were substantial.”¹¹

The problems centred on the case law that has determined that the implication within the statutory words which describe the offence is that the deception must be played upon a human mind¹². Coupled with the interpretive

⁷ Ibid, page 1064.

⁸ Ormerod, D *The Fraud Act 2006 – Criminalising Lying* (March 2007) Criminal Law Review, pages 193-219, at page 200.

⁹ “With identity theft and credit card scams a growing concern, the new legislation is likely to be welcomed by the financial and banking sector and, once passed, should result in a considerable increase in the number of prosecutions of technology related crime.” Barty, S & Carnell, P *Fraud Bill offers new protection against technology abuse* (July 2005) World Internet Law Report, volume 6, number 7, pages 20-21, at page 21.

¹⁰ Smith, A. T. H. *Reforming Section 16 of the Theft Act* (1977) Criminal Law Review, page 259.???

¹¹ *Supra* n.8, page 194.

¹² *Supra* n.5.

difficulties seen in the application of the deception offences¹³ the judiciary were also critical of the state of the law. Edmund-Davies LJ in the case of *Royal* stated:

“Despite the aim of the still-youthful Theft Act to simplify the law, we feel that the time has already come to declare that so obscure is section 16 that it has already created a judicial nightmare.”¹⁴

The Law Commission in 2002 published a report entitled ‘Fraud’¹⁵ and commented that due to number of potential statutory provisions, which could be used in fraud trials, a number of wider problems could arise. The judicial minefield it caused – most notably with technical arguments – led to occasional swift responses to plug loopholes. The decision in *R v Preddy*¹⁶ is a good example of this (with the focus of the decision being based upon whether the mortgage loans were strictly property belonging to another as required under section 15 of the Theft Act). The decision in this case led to the addition of section 15A of the Theft Act. However, the problem with plugging loopholes when they appear is that the law is continually playing ‘catch-up’ with criminality. The Law Commission refer to the words of Lord Hardwicke in 1759, who stated:

“Fraud is infinite, and were a court once to...define strictly the species of evidences of it, the jurisdiction would be cramped, and perpetually eluded by new schemes which the fertility of man’s invention would contrive”¹⁷

Furthermore, the Home Office Consultation Paper on Fraud Law Reform argued that the existing statutory provisions relating to fraud were “*overlapping*”, [In a] “*...state of untidiness*” and fails to define exactly what “*fraud*” means.¹⁸ These sentiments are shared by Bainbridge, who referred to the deception offences as being “*...of doubtful application to computer fraud.*”¹⁹

Academic and judicial criticism aside, there are wider reasons for the introduction of new legislation. It is without doubt that in recent years, technology-based crimes have been on the increase. The government-backed *Get Safe Online Report* published in October 2006²⁰ suggested the around one in ten people (about 3.5 million) in the UK had been the victim of an

¹³ See, for instance, the House of Lords’ decision in *R v Preddy* [1996] AC 815.

¹⁴ (1971) 56 Cr.App.R 131, at page ?????

¹⁵ The Law Commission *Fraud* (Report No. 276), July 2002. The Report is available at: http://www.lawcom.gov.uk/lc_reports.htm#2002 [Accessed 23rd May 2007].

¹⁶ *Supra* n.13.

¹⁷ *Supra* n.15, page 16, para. 3.14.

¹⁸ Home Office Consultation Paper *Fraud Law Reform* May 2004. Available at: <http://www.homeoffice.gov.uk/documents/cons-fraud-law-reform/> [Accessed 23rd May 2007].

¹⁹ Bainbridge, D *Criminal law tackles computer fraud and misuse* (2007) Computer Law and Security Report, Volume 23, Issue 3, pages 276-281, at page 280.

²⁰ Available at: http://www.getsafeonline.org/media/GSO_Cyber_Report_2006.pdf [Accessed 24th May 2007]. *Get Safe Online* is the United Kingdom’s first internet security awareness campaign and is backed by the government and leading industry figures.

online fraud in 2006, which cost on average £875 per person. Losses related to phishing were estimated to have cost £23.2 million in 2005, while identity theft continues to increase. Although, it is fair to say that figures relating to fraudulent activity are invariably changeable. In the last six months it has been reported that UK fraud costs more than £20bn per year,²¹ while at the same time credit card fraud is on the decrease.²² Meanwhile, a survey by Infosecurity Europe advises that around one-third of companies do not even bother to report their information security crimes and breaches.²³ Thus, any attempt to provide specific statistics on the relative increase (or decrease) in technology-based fraud is fraught with difficulty and almost impossible to achieve. What can be stated with some certainty is that the opportunity to engage in crime over the Internet or by alternative electronic methods is growing, while the ingenuity of perpetrators continues to stretch boundaries. The Fraud Act is an attempt to provide flexibility within the legislation by providing a broad net where a number of 'fraud' offences can be caught. However, the relative effectiveness of the provisions and the underlying principles is doubted – indeed it is the contention of the authors that there are wider concerns than simply adding new legislation to an already over-burdened statute book.

Even the most cursory read through of the Fraud Act 2006 reveals two big changes to the law of England and Wales. The first is that fraud is now a conduct as opposed to a result crime. Under the sections of the Theft Acts now repealed there had to be the obtaining of a money transfer, or property, or a service, as a result of a dishonest deception – the defendant had to gain, or the victim had to lose - control or ownership of property. Without the gain or loss, a possible charge of an attempted crime could result, as long as the defendant had gone beyond a 'more than merely preparatory act' towards the commission of the full offence²⁴, and subject to the mens rea of intention to commit the particular actus reus. The Fraud Act 2006 removes the need for gain or loss, or even that a property right be endangered, by focussing solely on the conduct of the defendant. For s2 – likely to be the most widely used section, particularly in respect of on-line criminal behaviour – this means that a defendant has to dishonestly make a representation which he knows or suspects may be untrue or misleading with the intention to cause a loss to another or a gain to himself (or another).²⁵ It can be seen that this *modus operandi* does away with the need for a victim altogether, indeed nobody need even believe the false representation made. Although much internet fraud, such as phishing or pharming relies on sheer weight of numbers to make it profitable, the Fraud Act catches - the universally trashed 'miracle weight loss car – diet while you drive!' and the much responded to 'hot stock

²¹ BBC News Press Release *UK Fraud costs 'top 20bn a year'* 7th March 2007. Available at: <http://news.bbc.co.uk/1/hi/business/6425963.stm> [Accessed: 14th March 2007].

²² BBC News Press Release *Reduction in card fraud in 2006* 14th March 2007. Available at: <http://news.bbc.co.uk/1/hi/business/6445409.stm> [Accessed 14th March 2007].

²³ See: PublicTechnology.net Press Release *One third of UK firms do not report their security crime* 5th April 2007. Available at: <http://www.publictechnology.net/modules.php?op=modload&name=News&file=article&sid=8540> [Accessed 10th April 2007].

²⁴ Criminal Attempts Act 1981 s 1(1)

²⁵ "Gain" and "loss" are widely defined in s5 FA 2006

tips from New York' - without distinction. Presumably it is a concern of the sentencing judge how much property has been fraudulently gained by the false representation, but it clearly is not a requirement, or a concern of s2 whether any has been gained (or lost) at all. The shift of the fraud offence into the realms of the conduct crime should not be underestimated. Conduct will now be caught and criminalised which would not even have sufficed for an attempted offence prior to the Act, and as a result fraud has become a very wide offence indeed. In his article on the Law Commission proposals for Fraud, Sullivan²⁶ describes the much maligned common law offence of conspiracy to defraud as an 'offence of startling breadth'...whose broadness is ... 'both a blessing and a curse'. In s2 we may be seeing an offence in which the actus reus is still easier to commit. Conspiracy to defraud is at least restrained by the requirement of two or more persons having an 'agreement'²⁷ – there is no such restraint on s2. Indeed, a person will not even have to send his enticing e-mail into his victims in-box in order to have committed the offence, since

*'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)'*²⁸

This suggests that a person who has written, but not yet sent, an email which he suspects may be untrue or misleading – subject to mens rea - is already within the parameters of s2. The actus reus of the general fraud offence, particularly under s2 is shockingly wide – a market stall holder shouting that his potatoes are 'local' when he suspects they may not be, a job interviewee who 'pads' his CV with a (fictional) stint of charity work in a poor region of India, a gallery which advertises 'genuine Picasso's' when they have a stock of prints to clear and are aware that the strapline may be misleading – all, under the FA 2006, have potentially committed the actus reus of fraud by making a representation which they know is, or may be untrue or misleading. As a move away from the fussy and over-particularised Theft Act offences it is a model of straightforward syntax. The Fraud Act seems to have sewn up the loopholes in the TA which have allowed the phishers and pharmers to escape and for this it must be welcomed, but a phishing or pharming website has already been declared a breach of s3 of the Computer Misuse Act 1990²⁹, and the net of the Fraud Act may have been spread so wide that it sweeps into its mesh that which is not properly called fraud at all. People shouldn't, in an ideal world, lie or mislead, but should the job hunter be a fraudster, a criminal? Is he the person the FA was designed to catch? Is the market trader a fraudster? Or has he properly gauged his market and is indulging in a little 'creative advertising'? It is submitted this will come down to a single, - poorly defined – point. Are they dishonest?

²⁶ G. R. Sullivan – Fraud – The Latest Law Commission Proposals. JoCL 67 (139)

²⁷ Criminal Law Act 1977 s1

²⁸ FA 2006 s2(5)

²⁹ Re Yarimaka(2002) EWHC 589

The second big change which needs to be discussed is the straightforward removal of the concept of deception from the offence of Fraud. While the exorcism of deception will bring cheer to those prosecuting fraud by sole use of a computer – which cannot be deceived³⁰ - it leaves fraud dangerously dependant on the concept of dishonesty. When the Law Commission Revision Committee published its eighth report concerning the (then) new Theft Act 1968 to replace the Larceny Act 1916, it debated the concept of dishonesty which replaced ‘fraudulently’ as a MR requirement. It said

“Dishonesty’ seems to us a better word than ‘fraudulently’. The question ‘Was this dishonest?’ is easier for a jury to answer than ‘Was this fraudulent?’. Dishonesty is something which laymen can easily recognise when they see it, whereas ‘fraud’ may seem to involve technicalities which have to be explained by a lawyer.³¹

Perhaps this sentiment was still very much on Parliaments mind when the FA 2006 was passed, but in spite of being part of the Theft Act 1968 for nearly 40 years, there is still no satisfactory definition of dishonesty in criminal law and juries are left to depend on the common law description which comes from the cases of Feely³² and Ghosh. Interestingly, Ghosh concerned charges of deception offences, but the problem faced by the jury, did not concern the definitional elements of deception, but of dishonesty. The reasoning behind the Ghosh test³³ is (in)famous – faced with no legal³⁴ definition of dishonesty Lord Lane CJ instructed the jurors

‘There are, sad to say, infinite categories of dishonesty. It is for you. Jurors of the past, and, whilst we have criminal law in the future, jurors in the future to set the standards of honesty.’³⁵

The test, and the comments by Lord Lane, assume that there is a standard of honesty in society that plainly isn’t there. It also assumes that this neperous quality of ‘honesty’ can then be used to define ‘dishonesty’ – but as we have no recognised legal definition of the one, ergo, we have no definition of the other. The concept of dishonesty continues to exasperate lawyers and academics alike with its forays into (previously) immoral rather than strictly illegal behaviour,³⁶ and juries confusion over the perceived dishonesty of the conduct as opposed to the dishonesty of the defendants state of mind. However, far from the Law Commission and Parliament shrinking from this unfathomable concept, it has been included as a major definitional component in an important and long awaited Act which is likely to be well used and the actus reus of which, as we have seen, is foolishly easy to commit. What now stands between the CV padder or the market trader and a fraud conviction is

³⁰ See fn 5 above and note s2(5) FA 2006 ‘with or without human intervention’ which appears designed to put this problem beyond doubt.

³¹ Criminal Law Revision Committee, Eighth Report, Cmnd. 2977 at para 39

³² R v Feely [1973] QB 530

³³ See above at page ??????

³⁴ The defendant's honesty is a question of fact for the jury to decide – R v Feely [1973] 1 All ER 341

³⁵ [1982] 2 All ER 689 at 691

³⁶ See Hinks[2000] 3 WLR 1590

how the jury in that particular case choose to define the mens rea of the offence. This, it must be remembered, is a retrospective definition, as the jury, (the Reasonable Man) will not sit and decide what dishonesty (or honesty) is until trial, months and possibly years after the actus reus took place. It is therefore impossible for the defendant to know in advance of his trial the level of honesty which he had to live up to in order to avoid breaching the criminal law of fraud under the FA 2006. A retrospective offence, such as one based on dishonesty is likely to be, may well be in breach of the principle of legal certainty contained within Articles 5 and 7 of the European Convention of Human Rights. This fact was acknowledged by the Joint Parliamentary Committee on Human Rights in their 2004/5 session, but the Committee also decided that

*'the new general offence of fraud is not a general dishonesty offence, rather, it embeds dishonesty as an element in the definition of the offence.'*³⁷

It is submitted, that, as prosecutors and defendants alike have found in the law of Theft, the jury's decision on the guilt of the accused will ultimately come down to whether or not they think his *conduct* was 'dishonest' – whatever that means. In a case like that of *Boggeln v Williams*³⁸ where a Ghosh direction may have to be given, juries will have to be reminded that they are trying to perceive the *state of mind* of the defendant and not the honesty - or otherwise - of his conduct. Still, the point is made, a celebrity sending spam to endorse a charity he has never heard of claiming 'it changed my life – give now to help others' and waiving his fee, is unlikely to be guilty of a s2 offence. A trader 'over-egging' the wonders of his product with an eye to a profit may be caught, even if he claims that his advertisement was 'mere puff'. Here the actus reus is present on both occasions, the other two mens rea requirements, knowledge that the statement is or may be untrue or misleading and intention to make a gain or loss likewise. The only thing that separates them is whether the jury thinks each is guilty of what Lord Lane CJ referred to as 'sharp practice'³⁹. Ormerod⁴⁰ wonders if trades or professions traditionally seen as 'less honest' in popular modern mythology – such as second hand car salesmen or estate agents or politicians will be treated less favourably by juries or whether exaggerated claims for a products benefits, previously firmly in the *caveat emptor* camp are now of legislative concern. He asks, quite simply, 'Is it fraud?'

As far back as 1703 English courts have been quoted as saying, 'the law ought not to indict a man for making a fool of another.'⁴¹ The Fraud Act 2006, while largely to be welcomed, may make it much more of a possibility.

In it's Fraud and Deception Consultation Paper number 155, the Law Commission took issue with conduct being characterised as dishonest under Ghosh which did not in fact give rise to civil liability,

³⁷ Joint Parliamentary Committee on Human Rights Fourteenth Report.

³⁸ [1978] 1 WLR 873

³⁹ R v Ghosh [1982] 2 All ER 698 at 691

⁴⁰ The Fraud Act 2006 – Criminalising Lying . [2007] Crim LR Mar 193 - 219

⁴¹ Jones 1703

*'In general, we believe that the criminal law should take a robust view of what is to be allowed in the market place; and in particular we think it wrong that conduct which is not actionable (that is, which gives rise to no remedy at civil law) should be regarded as a substantive crime of dishonesty.'*⁴²

It is unlikely that the market trader would be open to an action for misrepresentation, but, it could be argued, that it is unlikely that a charge of fraud would be brought against him either. Any legislation depends on the prosecution using it wisely in order not to bring the legislation, and the system itself, into disrepute. It may be however, that the Fraud Act 2006 has gone too far, and it's quest for breadth and in order to prophylactically envelope those who delight in new ways of fraudulent behaviour it has built on the somewhat shaky foundations of a concept the meaning of which continues to confound it's champions and it's detractors alike.

COOOO MMME OOOONN KEEEEVIIIINN NNNNNN!!!!!!!

(like a football chant – it's not easy to spell!)

(The article will now progress to highlight some of the key problems of the new Act.)

(Ignore this bit: (I found it earlier and liked it, but have nowhere else to put it at present!)

Second part – what is e-crime, problems:

Jerry Fishenden, National Technology Officer for Microsoft UK pointed **CLSR (2007), volume 23, issue 3, pages 211-226** Microsoft and the open source community agree more must be done to make reporting cyber-crime easier, part 1.12.

We believe it is necessary to have as easy a reporting mechanism as possible so that when people are victims of cyber-crime or attempted cyber-crime there is a streamlined reporting structure and ideally one body with responsibility for receiving those complaints and having appropriate resources to investigate and potentially initiate prosecutions where appropriate. My understanding is that the United States does have a single point of reporting established by the FBI back in the late 1990s, the Internet Crime Complaints Centre, which takes some 10,000 plus complaints a year and has the authority and resources to actually look into those complaints....Establishing that type of scheme, as

⁴² Legislating the Criminal Code: Fraud and Deception Law Commission Consultation Paper Number 155 (1999)

happened in the States, would also enable us to get a much better grip on the scale of the problem in the UK. If I walked in to a police station tomorrow to report an on-line phishing attack, would it be treated in the same way as an attempted pick-pocketing? Is that a model we want to move to or do we want to have cyber-crime handled at the centre?