

Critically Analysis of the Fraud Act 2006

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Abstract: It will first analyse what problems existed with the previous law: for example, the problems arising from its overly technical nature and the problem of credit card fraud. On this basis, the paper analyses the relevant parts of the Fraud Act of 2006 and concludes that the Fraud Act of 2006 goes some way to addressing the problems of the previous law. The paper proceeds to analyse new issues arising from the Fraud Act 2006 that have an impact on adjudication, such as the definition of dishonesty and the meaning of misrepresentation.

Keywords: Fraud Act 2006; Credit Card Fraud; Deception; Financial Crime.

1. Introduction

Since the Fraud Act 2006 was enacted, it has received positive as well as negative reviews. “Whilst the Fraud Act 2006 is a welcome development in the modernization of the law of Fraud it does not go far enough in resolving the key failings of the previous law and is already outdated and in need of reform.” This essay mainly focuses on this statement. In the beginning, this essay analyzes some of the issues that were present with the previous laws, such as the fact that it was too technical, the inability to classify as a criminal offence the act of obtaining a property that does not belong to another person via the use of fraudulent means, and the issue of credit card fraud in relation to the prior laws. It is essential to address these concerns because of the considerable impact they have had on how fraud is defined [1]. Following this, this essay conducts an analysis of the relevant parts of the Fraud Act 2006 and arrives at the conclusion that the Fraud Act 2006 has, to some extent, solved the issues that were present with the previous laws. However, at the same time, the Fraud Act of 2006 also brings up new difficulties, such as the definition of dishonesty and the meaning of misleading, all of which might have an effect on the convictions that are handed down.

2. The Introduction of the Fraud Act 2006

The Fraud Act 2006, which was passed on January 15, 2007, was a reform that was proposed by the Law Commission and was based on the Theft Acts of 1968 and 1978. It was enacted through secondary legislation. “The Government’s policy on the reform of the criminal law of fraud is largely based on the Law Commission’s Report on Fraud”, The report published by the Law Commission in 2002 and the consultation paper published by the Law Commission in 1994 both served as the inspiration for the Act [2].

3. Key Failings of the Previous Law

At the time, the most significant complaint raised against the prior law was that it contained an excessive number of distinct fraud offences. “By relying on a range of specific fraud offences, defined with reference to different types of consequences, the law is left vulnerable to technical assaults”. In order to figure out if a certain action constituted fraudulent

behavior, it was necessary to specify the sort of consequence that should have been taken, and it was not an easy task to establish which crime the accused should be charged with. On top of this, it is frequently quite difficult to prosecute the person who committed the crime. As a consequence of this, the prosecution is forced to depend largely on the common law offence of conspiracy for deception whenever it is possible to do so.

(1) “Too technical”

Before the Fraud Act of 2006 was passed into law, those who engaged in fraudulent activities were often prosecuted under Section 17 of the Theft Act of 1968, which covered the three categories of false accounting, fraud, and common law conspiracy to defraud. On the other hand, fraudulent offences were difficult to prosecute because they were “too technical”.

There is a seminal case on the topic known as *Preddy* [1996] AC 815, in which the defendant was the subject of judicial review under section 15 of the Theft Act of 1968 (obtaining property belonging to another by fraud). This case is considered a classic on the topic [3]. The case featured typical mortgage fraud, in which the defendant got a mortgage from lenders on the basis of a fraudulent representation that they made to them.

The Court of Appeal determined that the defendant had dishonestly and illegally arranged a transaction that resulted in the debt being transferred to his own bank account, but that the defendant had not fraudulently obtained property belonging to another person. The debt that was owing to the victim by his bank had been canceled out, and the debt that the defendant had acquired was a new debt that was owed to him by the bank; he did not acquire property that belonged to another person. What was at stake in this case was not a single piece of property but rather two distinct legal rights, which, while perfectly acceptable from a jurisprudential perspective and presenting a very clean and logical argument, presented a significant challenge for the court to resolve. The whole legal and banking sector is concerned that those who “misappropriate” bank balances are immune from prosecution since there is no crime in the criminal case to match such behavior. This is because there is no offense in the criminal case to match such behavior [4].

The Theft (Amendment) Act of 1996 added a new section 15A to the Theft Act of 1968. This section removed the requirement to prove the acquisition of property “belonging to another person”. It is irrelevant whether the property

acquired by the offender is the same as that of the victim, as long as the balance was transferred by deception. In other words, the requirement to prove the acquisition of property “belonging to another person” was eliminated. In addition to this, the Act of 1968 was revised by the Theft Act of 1978, which created several additional criminal offenses, including acquiring services by fraud, escaping liability by deception, and fleeing without payment. However, the overly technical nature of the Act was not improved by these changes; rather, the issue of overly specific offences was made worse.

(2) The deception had to be “operative”

The prosecution must demonstrate that the victim would not have behaved in that manner except for the deception, which means that the victim's loss was due to the belief in the ‘deception’. This was a requirement under the old law, and it is another important point to consider. The old law stipulated that it was necessary to prove that the deception had an effect on the victim. As an example, in the case of *R v. Lavery*, the defendant altered the license plate of a vehicle while selling it to the victim. The Court of Appeal came to the conclusion that it was necessary to vacate the conviction of the defendant because the prosecution had failed to prove that the change of number plate had any effect on the victim; more specifically, there was no evidence that the victim was prejudiced by the deception [5]. As a result, the Court of Appeal held that it was necessary to vacate the conviction.

However, when there is more than one victim and it is difficult to identify who the victim is, the problem produces a more serious and confusing situation among all those involved. In *R v. Doukas*, a case in which a hotel sommelier pretended that his drink was the hotel's drink, the Court of Appeal said that “the hypothetical customer must be reasonably honest as well as being reasonably intelligent and it seems to us incredible that any customer, to whom the true situation was made clear, would willingly make himself a party to what was obviously a fraud by the waiter on his employers” The court also ruled without delay that there was usually an implied statement of enforcement [6].

Nevertheless, the rules of the old law have made things more difficult in light of the advancements that have been made in science and technology. Some of the payment methods that have been increasingly popular include credit cards and payments made through the internet. As an example, if a buyer pays for an item with a credit card, the seller does not take into consideration the credit card issuer when determining whether or not to accept the payment from the buyer. It was decided in the case of *R v. [7]. Lambie* that making a payment using a credit card indicated not only that the credit card company would make the payment but also that the person was authorized to use the card.

4. Does the Fraud Act 2006 Solve the Problems?

(1) The deception doesn’t have to be ‘operative’ anymore

The Fraud Act 2006 provides that “A person is guilty of fraud if he is in breach of any of the sections listed in subsection (2)”, that is, fraud by misrepresentation under section 2, fraud by non-disclosure under section 3 and fraud by abuse of position under section 4. The most likely cause of action is fraud by misrepresentation in section 2. “A person is in breach of this section if he - (a) dishonestly makes a false representation, and (b) 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 [8].”

It is noteworthy that the attempted fraud provision in the Act seems to be more of a solution. As long as the defendant's subjective intention is to make a profit, he is guilty of an offence, whether or not he has gained a benefit through the false representation. This certainly provides good regulation of certain offences and protects the victim to a certain extent. It is more accurate to assess the liability of the offender if one recognizes that the outcome has an impact on culpability, but in fact this is more difficult to achieve in the Fraud Act 2006. Furthermore, in some cases, the deception will have no effect at all and therefore no apparent harm will result, but the extent of the harm may provide guidance as to the appropriate sentence [9].

(2) Credit card fraud

Since there is no requirement for deceit in Section 2 of the Fraud Act 2006, the controversy about the previous Act and its application to machines has been satisfactorily resolved. For the purposes of Section 2 of the Fraud Act 2006, an example of this would be an offender entering the victim's microchip and password into a system device. This would be considered a representation [10]. In addition to this, a representation can be made whenever it is supplied in any form to a system device that is designed to receive, communicate, or reply to communications, with or without the intervention of humans (s.2(5)). In the ongoing battle against fraudulent use of credit cards, this is an encouraging new development.

In addition, a research study has shown that the Fraud Act of 2006 has made a significant improvement to internet governance by making it easier to bring people to justice for stealing other people's identities online.

(3) When the deception occurs after the benefit has been obtained

When the deception occurs after the benefit has been acquired, the offender is required to be charged with evading liability or, according to section 3 of the Act, departing without payment, in accordance with the provisions of section 2(1) of the Theft Act of 1978 [11].

In the case of *R v. Collis-Smith*, the perpetrator fills up the tank at the gas station and then pretends to pay for it, for example, with a stolen cheque. According to the previous law, the criminal did not obtain the gasoline by deception in this case. This is because ownership was lost when the gasoline reached the tank, and the offender received the gasoline prior to the deceit. But now this situation can be charged as fraud by misrepresentation under the Fraud Act 2006. This is because he did intend to gain by dishonest misrepresentation in relation to the retention of his own money and caused loss to the victim. The above explanations all rely on the “intention to obtain and cause loss” explanation, which includes keeping one's own property or services and depriving the victim of something he never had. This change in the law is also worthy of praise [12].

(4) “Belonging to another person”

As was mentioned earlier, under the previous law, the conduct of the defendant in the case of *Predy* could not be considered an offence in violation of section 15 of the Theft Act of 1968. This was due to the fact that the property that the defendant ultimately acquired was not the property that belonged to another person, but rather a newly created debt in the defendant's own account [13]. However, if a case same to this one were to emerge in contemporary society, the

defendant would be charged with dishonest intent to obtain and cause loss under section 2(1) of the Fraud Act 2006, and it would not be necessary to prove that the property obtained belonged to another person so as to be accused of this charge. It would appear that a significant issue with the prior law has been satisfactorily addressed because of the Fraud Act of 2006.

5. Some Problems of the Fraud Act of 2006

The Act goes some way to solving the problem, but there are still some issues worth noting.

First, under the new rules, a statement will be called false if it is not true or gives the wrong impression. Fraud is based on making claims that aren't true, but it's not so clear what "misleading" means. There are times when a true statement can be confusing because the context in which it is given to the listener is different from the context in which the speaker thinks it is given [14]. The law says that the person accused must know that a statement is or could be false. But this also applies when a suspect thinks what he says is true, but the listener might be fooled by it. In these situations, it is not dishonest to say that the defendant could not have stopped the viewer from getting confused.

This brings us to the second issue: dishonesty. Since the beginning, the new Act has used this concept but has not explained it. Professor Ian Dennis said that "the new Act contains no definition of dishonesty. Presumably, therefore, the courts will continue to apply the Ghost test, and leave factfinders to apply whatever they conceive the current standards of honesty to be" [15]. This essay will not discuss whether the Ghosh test is adequate for different situations, but it has to be said that the Fraud Act 2006 is not perfect and needs to be reformed accordingly in terms of dishonesty.

This leads to the third issue, regarding failure to disclose information. Section 1(2)(b) of the Fraud Act 2006 provides that fraud can be committed by failing to disclose information. The section 3 mode of fraud by failing to disclose information is as follows: "A person is in breach of this section if he— (a) dishonestly fails to disclose to another person information which he is under a legal duty to disclose, and (b) intends, by failing to disclose the information— (i) to make a gain for himself or another, or (ii) to cause loss to another or expose another to a risk of loss". The definition of this offence still involves the point of dishonesty and relies heavily on the concept of dishonesty. What circumstances are involved in dishonesty also have a significant impact on the offence of failing to disclose information. Therefore, the law should continue to be reformed and improved with regard to the interpretation of dishonesty [16].

6. Conclusion

The Fraud Act 2006 effectively addresses the problems of the previous law. The Fraud Act 2006 provides for fraud in three areas, namely misrepresentation, non-disclosure and abuse of position, and to some extent addresses the problem of being too technical. Whereas previously it was not possible to recognize as an offence the acquisition by fraud of property that did not belong to another person, under section 2(1) of the Fraud Act 2006 a defendant can be convicted without

having to prove that the property acquired belonged to another person if he or she is accused of dishonestly intending to acquire and causing loss. As for the issue of credit cards, the Fraud Act 2006 does not have a requirement for fraud, so the use of someone else's credit card constitutes a form of misrepresentation and is a good solution to the previous problem of not being able to establish credit card fraud. In addition to this, in cases where the deception occurs after the benefit has been obtained, the new law includes this as "intent to obtain and cause loss", which can be directly characterized as fraud.

Therefore, the Fraud Act 2006 effectively addresses most of the issues, but at the same time, there are some areas where the Act needs improvement. The first is the meaning of "misleading". If a person's statement is completely true, should it be characterized as false if it is misleading because the listener misunderstands it? Then there is the definition of "dishonesty", which is not defined in the Fraud Act 2006, and which places a burden not only on the practicalities of the situation but also on the offence of "failure to disclose information", which relies heavily on the definition of "dishonesty".

All in all, this essay argues that the Fraud Act 2006 does go far enough in resolving the key failings of the previous law, but it is not completely outdated. However, some reforms are needed to address those weaknesses.

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