

NOTES ON THE FRAUD ACT 2006

INTRODUCTION.

The Act came into force with effect from 15th January 2007 in England and Wales and Northern Ireland only and provides for a general offence of Fraud with three ways of committing it: -

- False representation – Section 2
- Failing to disclose information – Section 3
- Abuse of position – Section 4

It also contains new offences of obtaining services dishonestly and possessing, making and supplying articles for use in fraud.

There are additional offences of fraudulent trading applicable to non-corporate traders. A number of previous Acts or parts of Acts dealing with such offences are repealed.

The effect of the new legislation is to criminalise the conduct of the fraudster rather than to look at the consequences of the fraudsters activities.

The Act applies to conduct following the Act coming into force. Past practice would suggest that offences committed before the Act came into force would be dealt with under previous legislation but as it has been repealed this might not be the case.

FRAUD (Section 1)

Section 1 of the Act creates a new general offence of fraud and introduces three possible ways of committing the offence as outlined above. These will be discussed in more detail below.

The defendants conduct must be found to be dishonest and the intention must be to make a gain or cause a loss or the risk of a loss to another. No gain needs to have been made.

The current definition of dishonesty was established in *Ghosh, R v* (1982) EWCA Crim 2 (05 April 1982); [1982] Q.B.1053 which sets a two stage test: -

1. Would the defendant's behaviour be regarded as dishonest by the ordinary standards of reasonable and honest people: If YES
2. Was the defendant aware that his conduct was dishonest and would be regarded as dishonest by reasonable and honest people?

The penalty for fraud is a maximum custodial sentence of 10 years. In Magistrates Courts the maximum custodial sentence is 6 months but it is intended to increase this to 12 months.

FRAUD BY FALSE REPRESENTATION (Section 2).

It is an offence to commit fraud by false representation. The false representation must be: -

- made dishonestly;

- with the intention of making a gain or causing loss or risk of loss to another. The gain or loss does not actually have to take place.

A representation is false if: -

- it is untrue or misleading; and
- the person making it knows that it is, or might be, untrue or misleading.

“Representation” means any representation as to fact or law, including a representation as to the state of mind of: -

- the person making the representation, or
- any other person.

A representation may be express or implied. It can be stated in words or communicated by conduct. There is no limitation to the way in which a representation must be expressed. It may be written or spoken or posted on a website.

For this section of the Act 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).

The offence is complete as soon as the false representation is made, provided that it is made with a dishonest intent.

Examples.

- A person claiming disability benefit intentionally misrepresents their pre disability earnings in order to receive the maximum benefit.
- A person claiming disability benefit intentionally misrepresents the limitations imposed by their illness or accident in order to convince the insurer that they meet the definition for a valid claim.

FRAUD BY FAILING TO DISCLOSE INFORMATION (Section 3)

A person is in breach of this section if he: -

- dishonestly fails to disclose to another person information which he is under a legal duty to disclose, and
- intends, by failing to disclose the information to: -
 - i) make a gain for himself or another, or
 - ii) cause loss to another or to expose another to a risk of loss.

There is no requirement that the failure to disclose information must relate to “material” or “relevant” information. If a person discloses only part of the information the offence would be complete. It is no defence that the person was ignorant of the existence of the duty to disclose, neither is it a defence in itself to claim inadvertence or incompetence. However, the prosecutor must be able to demonstrate dishonesty.

The legal duty to disclose information can arise as a result of a contract between two parties or because of the existence of a particular type of professional relationship.

The expression “legal duty” has three elements: -

- i) Whether the facts as alleged are capable of creating a legal duty is a matter for the judge.

- ii) Whether the relationship that would create any legal duty exists on the facts alleged is a matter for the jury directed by the judge.
- iii) If the matter is not in issue the judge may direct the jury that a legal duty exists.

Contracts of insurance are contracts of Uberrima Fide (Utmost Good Faith) and an applicant is required to disclose all information in their knowledge. Notes on Application Forms make the position clear.

Claim Forms make it clear that insurers require the disclosure of all Material information.

Examples.

- At the application stage a person intentionally fails to disclose that they have a serious medical condition when applying for disability insurance.
- At the claim stage a person claiming disability benefits intentionally fails to disclose that they are continuing to work.

FRAUD BY ABUSE OF POSITION (Section 4)

A person is in breach of this section if they: -

- occupy a position in which they are expected to safeguard, or not act against, the financial interests of another person,
- dishonestly abuses that position, or
- intends, by means of the abuse of that position: -
 - i) to make a gain for themselves or another, or
 - ii) to cause loss to another or to expose another to a risk of loss.

A person may be regarded as having abused his position even though his conduct consisted of an omission rather than an act.

“GAIN” AND “LOSS”

- Extend only to gain or loss in money or other property;
- Include any such gain or loss whether temporary or permanent;

And “property” means any property whether real or personal (including things in action and other intangible property).

“Gain” includes a gain by keeping what one has, as well as a gain by getting what one does not have.

“Loss” includes a loss by not getting what one might get, as well as a loss by parting with what one has.

EVIDENCE (Section 13)

A person is protected from incriminating himself or his spouse or civil partner for the purpose of offences under the Act and related offences, while nonetheless being obliged to co-operate with certain civil proceedings relating to property. Related Offences” are defined as conspiracy to defraud and any other offence involving any form of fraudulent conduct or purpose.

SUMMARY.

This is new legislation and there is no Case Law to guide us. It will be necessary to proceed with caution and where fraud is suspected legal advice should be sought at an

early stage to ensure that evidence is compiled in the correct manner. It will be necessary to gather factual evidence and to demonstrate that there was dishonest intent.

The new Act does appear to enable insurers to take action where a person effects an insurance policy or claims benefits in a fraudulent manner. It is unlikely that the Financial Ombudsman Service will investigate policyholder complaints where there is a prima facie case of fraud. However, insurers should consult with their legal advisors before making allegations of fraud.

June 2007

These notes are based on Health Claims Bureau Group's current understanding of the Act and we cannot be responsible for omissions or errors.