

**THE LAW REFORM COMMISSION  
OF HONG KONG**

**REPORT ON  
CREATION OF A SUBSTANTIVE OFFENCE OF FRAUD  
(TOPIC 24)**

**July 1996**

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## REPORT ON

## CREATION OF A SUBSTANTIVE OFFENCE OF FRAUD

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# Introduction

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## The impact of fraud

1. It has been said that the different types of fraudulent activity "are as diverse as man's infinite capacity to invent them."<sup>1</sup> One international law enforcement agency has estimated that it handles more than 50 separate categories of fraud offence, ranging from insider-dealing and share manipulation to the use of bogus qualifications.<sup>2</sup>

2. Although this type of crime is one of the most under-reported forms of criminal offence,<sup>3</sup> it has enormous impact, both socially and economically, with figures for fraud losses vastly exceeding those from violent crime.<sup>4</sup> A survey carried out in 1995 by KPMG Peat Marwick of the top 1,000 companies in Hong Kong, based on the number of employees, found that 32% of respondents were aware of frauds within their organisations during the previous year. Of those who had experienced fraud, 65% had detected losses of more than \$100,000, while 34% reported frauds aggregating \$1,000,000 or more.<sup>5</sup> It is estimated that losses from commercial crime world-wide in the years from 1980 to 1990 involved over HK\$120 billion, 20 times the figure lost from bank robberies.<sup>6</sup> Hong Kong in particular suffered during this period when economic turmoil was caused by a spate of company collapses, many of which allegedly involved fraud.<sup>7</sup> The legal repercussions of this period are still being felt today.

## The new fraudsters

3. In addition to the dramatic scale of some offences, fraudulent activity in general has taken a "quantum leap" in sophistication in recent years.<sup>8</sup> Developments in technology have opened up enormous opportunities

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<sup>1</sup> Grossman, "Who's fooling who," *The New Gazette* (April 1993), at 26.

<sup>2</sup> Anderson, "Interpol and fraud," *Commonwealth Law Bulletin* (April 1992) 719, at 720.

<sup>3</sup> Booth, "Commercial crime: an approaching iceberg?" *The New Gazette* (Feb 1993) 25. This is said to be the case particularly for computer-related crimes such as fraudulent transfer of funds or damage caused by computer viruses, "for fear of public loss of confidence in computerized systems": Anderson, *op cit*, at 721.

<sup>4</sup> Booth, *op cit*, at 25.

<sup>5</sup> *Fraud Survey Results 1995 Hong Kong* KPMG Peat Marwick.

<sup>6</sup> Statistics from the FBI indicate that while the average bank robber might steal US\$3,500, an average computer-related crime will lose a bank US\$500,000. Similarly, "the average employee embezzlement costs US\$25,000 while the average computer-assisted employee embezzlement costs US\$430,000": see *ibid*, at 26.

<sup>7</sup> Ie, the Carrion and Eda groups and the Overseas Trust Bank: see Litton, "The Carrion trial: cause for concern," (1988) 18 HKLJ 5, at 8; and Litton, "Complex Commercial Crimes Ordinance 1988," *ibid*, at 462. In the case of the Carrion Group alone, the charges of fraud involved some HK\$6 billion: Booth, *op cit*, at 25.

<sup>8</sup> Anderson, *op cit*, at 720.

for the clever but unscrupulous,<sup>9</sup> with a disturbing increase in involvement by both those in management and the professions.<sup>10</sup> As one writer has commented, however:<sup>11</sup>

*"Do not be misled by the exotic names commonly attributed to these crimes. They are perpetrated by ruthless and pitiless criminals. Although the tools of their trade are computers rather than coshes, these criminals are morally and culpably no more than glorified muggers."*

### **The problems**

4. The fact that modern commercial crime now takes a great variety of forms<sup>12</sup> and knows no territorial boundaries<sup>13</sup> poses major challenges for the investigators, lawyers, judges and administrators tasked with fighting the rising tide of crime in this area.

5. An exacerbating factor is said to be the "cacophony" of different approaches which countries take in tackling fraud.<sup>14</sup> It has been observed that:

*"Fraud flourishes in confused and complex situations in which rules, regulations, practices and procedures are badly understood ... There is a pressing need to harmonise sanctions and laws relating to fraud in the whole industrialised world."<sup>15</sup>*

6. In particular, jurisdictions do not share a common definition for the fraud offence. Indeed some, England and Hong Kong included, have no definition of fraud at all:

*"Contrary to popular belief, English law knows no crime of fraud. Instead it boasts a bewildering variety of offences which might be committed in the course of what a layman (or for that matter a lawyer) would describe as a fraud."<sup>16</sup>*

Another writer comments:

*"In almost every other area of the law, the definition of a crime is quite specific: how did the development of the criminal law leave*

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<sup>9</sup> See Hill, "Whither criminal justice? Conspiracy and intent," 1985 *Law Lectures for Practitioners* (1985, HKLJ) 1.

<sup>10</sup> Hill, *op cit*, at 1.

<sup>11</sup> Grossman, *op cit*, at 28.

<sup>12</sup> The Economic Crime Group of Interpol is estimated to handle more than fifty categories of fraud offence: see Anderson, *op cit*, at 720.

<sup>13</sup> *Ibid*, at 723. See also Hill, *op cit*, at 228.

<sup>14</sup> Anderson, *op cit*, at 722.

<sup>15</sup> *Idem*.

<sup>16</sup> Arlidge and Parry, *Fraud* (1985, Waterlow) at 1

*this one common law offence stranded on a plateau of its own, with virtually no visible horizon around it?"<sup>17</sup>*

It is in this context, of seeking to define the offence of fraud, which our present study lies.

## **Terms of reference**

7. On the 31st of March 1988 the Chief Justice and the Attorney General referred the following matter to the Law Reform Commission:

*"To consider whether a substantive offence of fraud should be created and, if so, to recommend the constituent elements of the offence and the maximum penalty."*

## **The LRC sub-committee**

8. The Commission appointed a sub-committee in May 1988 to research, consider and advise on the present state of the law in this area and to make proposals for reform. The sub-committee members were (with their designations at that time):

Dr Henrietta Ip OBE JP (Chairman)	Commission Member (1983-1989).
Mr Henry Litton OBE JP (Vice-Chairman)	Queen's Counsel.
Mr Malcolm Barnett	Legal Adviser, The Hongkong and Shanghai Banking Corporation Limited.
Mr Ross Dalglish (up to January 1989)	Senior Crown Counsel, Attorney General's Chambers.
Mr Michael Grimsdick	Accountant, Ernst & Young.
Mr Michael Jackson	Lecturer-in-law, University of Hong Kong.
Mr R J Mason	Chief Staff Officer (Adm.), Royal Hong Kong Police.

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<sup>17</sup> Litton, "The difference between a naked lie and a false pretence," *1991 Law Lectures for Practitioners* (1991, HKLJ) 77, at 81.

Mr Michael McMahon  
(from January 1989)

Senior Assistant Crown Prosecutor,  
Attorney General's Chambers.

Mr E W D Radcliffe

Solicitor,  
Wilkinson & Grist.

9. The sub-committee considered its reference over the course of twenty-five meetings. The majority concluded that there was a need for a new substantive offence of fraud but that this should be restricted to circumstances where there had been a "scheme of fraud". The sub-committee proposed that a "scheme" should be defined as "a plan, design or programme of action, whether of a repetitive or non-repetitive nature." They argued that this approach would allow the prosecution to adequately reflect the scope of an accused's criminality where he had embarked on a course of fraudulent conduct on his own. A minority of the sub-committee, however, did not favour this option for a number of reasons, not least because they regarded it as vague and uncertain. The sub-committee's deliberations are discussed further in Chapter 5.

10. The Commission considered the sub-committee's report in detail and were conscious that the sub-committee's final recommendations were the result of much anxious debate. The Commission reached the view, however, that the approach favoured by the majority of the sub-committee was not without difficulty. After careful consideration, the Commission concluded that the problem should be looked at afresh, laying particular emphasis on an examination of the law in those jurisdictions which already possess a substantive offence of fraud. As a result of its initial deliberations, the Commission reached the conclusion that a substantive offence of fraud should be introduced and incorporated its reasoning and a formulation of the proposed offence in a consultation paper which was issued for public comment in May 1995.

11. The report which follows is the result of careful consideration of the responses which we received to our consultation paper, and to further detailed discussion of our original proposal within the Commission. We should make clear at the outset that the views contained in this paper are the Commission's alone, and should not be taken as in any way attempting to reflect those of the sub-committee. The responsibility for this report and the recommendations contained in Chapter 5 rests with the Commission.

## **Acknowledgements**

12. In completing this report we have been greatly assisted by the advice and comments generously given by lawyers and experts both in Hong Kong and in a number of other jurisdictions. In Hong Kong, we are particularly grateful to all those who responded to our consultation paper and whose comments helped to shape this final report. The individuals and organisations who responded are listed at Annexure 1. Overseas, we wish to

express our thanks in particular to the following, without whose help this paper could not have been completed:

Ms Phyllis Atkinson, Senior Advocate, Office for Serious Economic Offences, Cape Town, South Africa

Mr Richard Buxton, QC, Law Commission, England.

Mr A R Chigovera, Deputy Attorney General, Zimbabwe.

Mr C Dickson, Senior Assistant Director, Serious Fraud Office, London, England.

Ms Helen Garlick, Serious Fraud Office, London, England.

Zainal Adzam B. Abd. Ghani, Attorney General's Chambers, Kuala Lumpur, Malaysia.

Mr Brian Gill, QC (now Lord Gill, Senator of the College of Justice), Edinburgh, Scotland.

Mr W Henegan, Secretary, South African Law Commission.

Dato' Stanley Isaacs, Attorney General's Chambers, Kuala Lumpur, Malaysia.

Mr F W Kahn, SC, Attorney General, Cape Province, South Africa.

Mr J E Lowe, Chief Legal Adviser, Department of Justice, Wellington, New Zealand.

Mr Norman McFadyen, Deputy Crown Agent, Edinburgh, Scotland

Mr R G Neighbour, Deputy Director, Commercial Affairs Department, Ministry of Finance, Singapore.

Noraini Bt. Abdul Rahman, Commissioner of Law Revision, Malaysia

Mr Roger Rose, Director, the Commonwealth Legal Advisory Service, London, England.

Mr D J Rossouw, Vice-chairman, the Goldstone Commission, Cape Town, South Africa.

Sheriff J E Young, Dundee, Scotland.

Finally, we extend our thanks to the members of the Fraud sub-committee who laboured long and hard on this reference and whose considerable efforts we greatly appreciate.

# Chapter 1

## Background to fraud in Hong Kong

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### Types of fraudulent behaviour

1.1 Fraudulent behaviour can take a great variety of forms. Interpol has indicated that it handles more than 50 separate categories of fraud offence,<sup>1</sup> some of which include: theft and counterfeiting of cheques, travellers-cheques and credit cards; insurance frauds (such as self-provoked accidents or exaggerated value of damages incurred); tax frauds (such as falsely reporting the origin of goods to avoid taxation); use of bogus qualifications; forged or stolen bonds or letters of credit; the issuing of false prospectuses; insider-dealing and share manipulation. 80% of those responding to a 1995 survey on fraud in Hong Kong conducted by KPMG Peat Marwick believed fraud would become more of a problem in the future, and cited "the weakening of social values, economic pressures and the impending change of sovereignty in 1997."<sup>2</sup> The problem is not unique to Hong Kong. A recent discussion paper issued by the Institute of Chartered Accountants in England and Wales pointed out that in England in 1992 "losses from reported fraud totalled £8,500 million. In contrast, figures for reported burglary totalled just under £500 million, retail crime £560 million and vehicle crime £700 million."<sup>3</sup>

1.2 Types of fraudulent activity which commonly occur in Hong Kong include "long firm frauds" and "Ponzi scams".<sup>4</sup>

1.3 **Long firm fraud** In this type of fraud, the perpetrator sets up in business (ostensibly as an ordinary trading concern), orders goods from suppliers (which he pays for promptly at first to establish good credit standing), then places very large orders with the suppliers on credit. As soon as the goods are delivered, they are sold off, large sums are withdrawn from the business (leaving little to satisfy creditors) and the fraudster "folds his tents and steals off into the night."<sup>5</sup>

1.4 **The Ponzi scam** In a Ponzi scam, "early investors are paid artificially high returns with money raised from later investors. Such schemes

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<sup>1</sup> See Anderson, "Interpol and fraud", Commonwealth Law Bulletin (April 1992) 719, at 720.

<sup>2</sup> KPMG Peat Marwick, *Fraud Survey Results 1995 Hong Kong*, at 2.

<sup>3</sup> *Taking Fraud Seriously*, Audit Faculty of the Institute of Chartered Accountants in England & Wales, January 1996, at 7.

<sup>4</sup> Grossman, "Who's fooling who", The New Gazette (April 1993) 26, whose "random eclectic choice" of frauds practised in Hong Kong also includes: "brokered loan funds," "boiler room operations," "churning", "bucketing of orders", "clipping" and "trading ahead": *ibid*, at 26-28.

<sup>5</sup> *Ibid*, at 27. (Apparently easy credit makes this a particularly prevalent type of fraud in Hong Kong *idem*.)

ultimately collapse when the supply of new investors dries up."<sup>6</sup> Apparently this type of fraud is common here because of high levels of disposable income "seeking the best possible return."<sup>7</sup>

## Danger signs

1.5 Although one would usually identify fraudsters as being those in high financial positions, such as company directors:

*"The growth in commercial crime is not confined to 'big fish'. The most common example is the accountant, clerk or bookkeeper who has been trusted too much."*<sup>8</sup>

Examples would be the employee who:

- misuses signed cheques left with him by the authorised signatory
- secretly adds his relatives to the payroll
- without permission uses his employer's money to meet his personal expenses.<sup>9</sup>

1.6 In relation to company accounts, the danger signs for an auditor that fraud may be afoot have been noted as follows:<sup>10</sup>

- failure on the part of the company to correct serious weaknesses in internal control
- unauthorised transactions
- unusual recording of transactions
- unusual transactions near year end
- transactions not supported by normal documentation
- discrepancies between related accounts
- loosely controlled suspense or expense accounts
- high volume of correcting entries near year end
- problems regularly given to the same employee to correct

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<sup>6</sup> *Idem*

<sup>7</sup> *Ibid*, at 26-27.

<sup>8</sup> Booth, "Commercial crime: an approaching iceberg?" *The New Gazette* (Feb 1993) 25.

<sup>9</sup> *Idem*.

<sup>10</sup> Palin, "Company accounts some practical points," *1980 Law Lectures for Practitioners (1980, HKLJ) 92*, at 123.

- difficulties in obtaining information
- lack of co-operation
- glib or guarded replies to audit questions.

1.7 The 1995 KPMG Peat Marwick survey on fraud found that "poor internal controls were identified as the cause of frauds ... in more than half of the cases." Most of the frauds uncovered were discovered through internal controls. Next most common means of detection were notification by customer, internal audit review and discovery by accident.<sup>11</sup>

## Environment for large scale frauds

1.8 As to Hong Kong's economic situation generally, one writer has commented:

*"In a developing economy such as Hong Kong, fairly sharp financial cycles are to be expected. Creating an economy which, starting from post-war chaos, has given the presently enjoyed living standards to our [six] million people has been a remarkable achievement."*<sup>12</sup>

1.9 In the wake of such economic development, however, large-scale business collapses have occurred in which fraud (via "massive exercises in false accounting"<sup>13</sup>) has been alleged to have played a part. The particular factors in the economic environment which led to these occurrences are outlined below.

1.10 **1980s economic factors** In the early 1980's there was a dramatic growth in the number of banks and deposit-taking companies registered in Hong Kong. This elevated the level of competition amongst lending institutions, some of which made loans to customers whose financial standing was less than secure and whose activities related largely to property development.

1.11 Spiralling interest rates meant that by 1982 many of these institutions' customers were unable to service their loans. The collapse in the property market around that time meant that the asset value of their security also fell. Insolvencies followed (for example, the Carrian and Eda groups).

1.12 Some local banks and deposit-taking companies found themselves in sudden liquidity difficulties and a number of them collapsed. The Government stepped in to provide financial support for some of these and

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<sup>11</sup> *Op cit*, at 2.

<sup>12</sup> Fell, "Recent developments in banking regulation," *1986 Law Lectures for Practitioners* (1986, HKLJ) 165, at 167.

<sup>13</sup> Booth, *op cit*, at 25.

a public outcry ensued over the cost (particularly as fraud was suspected in some cases, which was subsequently borne out).

1.13            ***The legal consequences***    It was in this context that a number of problems came to light concerning the prosecution of fraud offences. Modern technology, and in particular the instantaneous transfer of funds across national borders, created difficulties for law enforcement agencies due to the insular nature of rules regarding jurisdiction.<sup>14</sup> Many of the suspects were now living overseas in countries where extradition was not possible. Even in cases where they could be extradited, the terms of the relevant extradition treaty might mean that the appropriate charge (of conspiracy to defraud) could not be laid. There were possibly even difficulties in charging conspiracy to defraud where the suspects were apprehended in Hong Kong.

1.14            The scope of the law in this area and the particular problems which may arise are the subject of the next two chapters.

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<sup>14</sup> This concern is not limited to the fraud topic covered in this report but extends to other areas (eg, laundering of drug money and computer misuse).

## Chapter 2

# The law of fraud in Hong Kong

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### The concept of fraud

2.1 As noted previously, the term "fraud" "is probably one of the widest in the law."<sup>1</sup> In Hong Kong, as in England, there is no general offence of "fraud" as such; there is instead a broad concept of fraud and what it means to defraud someone.<sup>2</sup> This has been defined as:

*"dishonestly to prejudice or to take the risk of prejudicing another's right, knowing that you have no right to do so."*<sup>3</sup>

2.2 The elements of "fraud" are not fixed. Fraudulent activity may include "deception" of some kind, though this is not essential;<sup>4</sup> there will usually be some financial loss to the victim, but not always.<sup>5</sup>

*"The factor which lends this protean concept some semblance of unity is not so much what is actually done as the character of what is done, the element of disregard for the rights of others and for ordinary standards of conduct. This feature is commonly and conveniently referred to as 'dishonesty'."*<sup>6</sup>

2.3 The legal concept of "dishonesty" is itself highly complex,<sup>7</sup> being both objective and subjective.<sup>8</sup> It is objective in asking the question of whether, according to the ordinary standards of reasonable and honest people, what was done was dishonest. It is at the same time subjective insofar as the defendant must have realised that what he was doing was dishonest by those (objective) standards.<sup>9</sup>

2.4 It follows from the breadth of the fraud concept that the different types of behaviour constituting fraud may be "many and various."<sup>10</sup> In Hong Kong, cases involving aspects of fraudulent behaviour are dealt with either as specific offences under the Theft Ordinance (Cap 210), or, where a criminal agreement between two or more persons can be proven, by means of a

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<sup>1</sup> Litton, "Commercial crime," *1989 Law Lectures for Practitioners* (1989, HKLJ) 147, at 148.

<sup>2</sup> Arlidge and Parry, *Fraud* (1985, Waterlow), at 1.

<sup>3</sup> Archbold, *Criminal pleading, evidence and practice* (1992 ed, Sweet & Maxwell), at paragraph 17.89.

<sup>4</sup> *Idem.*

<sup>5</sup> *Idem.*

<sup>6</sup> Arlidge and Parry, *op cit*, at 1.

<sup>7</sup> *Idem.*

<sup>8</sup> See the English Court of Appeal's decision in *Ghosh* [1982] QB 1053.

<sup>9</sup> *Idem.*

<sup>10</sup> Arlidge and Parry, *op cit*, at 3.

charge of "conspiracy to defraud." These different types of fraud offence are discussed below.

## The Theft Ordinance offences

2.5 The Theft Ordinance contains a range of specific offences relating to fraud,<sup>11</sup> including:

section 17:	Obtaining property by deception
section 18:	Obtaining pecuniary advantage by deception
section 18A:	Obtaining services by deception
section 18B:	Evading liability by deception
section 18C:	Making off without payment
section 18D:	Procuring false entries in records of banks and deposit-taking companies
section 19:	False accounting
section 22:	Suppression of documents.

2.6 These offences are based largely on similar provisions in the English Theft Acts of 1968 and 1978. The "offences of criminal deception" form part of the basic scheme of these Acts and combine the elements of "deception" and "dishonesty" with certain activities.<sup>12</sup>

2.7 **Obtaining property by deception (section 17)**<sup>13</sup> Under this provision:

*"Any person who by any deception (whether or not such deception was the sole or main inducement) dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for 10 years."*

2.8 As the obtaining must be by deception, the false statement, etc, involved must actually deceive the victim into parting with his property.<sup>14</sup> Consequently:

*"... if P knows that the statement is false, or if he would have acted in the same way even if he had known it, or if he does not rely on the false statement but arrives at the same erroneous conclusion from his own observation or some other source, or, of course, if he does not read or hear the false statement ... D is not guilty of obtaining."<sup>15</sup>*

<sup>11</sup> The full text of these provisions is given at Annexure 2 to this report.

<sup>12</sup> For a useful discussion of the English equivalent sections, see English Law Commission, "Conspiracy to defraud," Working Paper No 104 (1987), at 19 *et seq*.

<sup>13</sup> Based on section 15 of the Theft Act 1968.

<sup>14</sup> Smith, *The Law of Theft* (6th ed, 1989, Butterworths), at paragraph 161.

<sup>15</sup> *Idem*. (He may however be guilty in each case of an *attempt* to obtain by deception.)

2.9 "Deception" is defined very widely in the section to mean:

*"... any deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including a deception relating to the past, the present or the future and a deception as to the intentions or opinions of the person using the deception or any other person."*<sup>16</sup>

2.10 "Property" also is used in a very general sense and may include land, chattels, money or "valuable security."<sup>17</sup> Indeed, one writer has commented, "whatever can be transferred from one person to another is in practice within section [17], for deception can induce its transfer."<sup>18</sup>

2.11 The following situations would be examples of this type of offence:

- "establishing the outward appearance of a genuine business or enterprise and thereby inducing people to supply goods that will not be paid for;"<sup>19</sup>
- a person who sells property to another knowing it is not his to sell (and where the buyer would be unlikely to buy if he knew the "seller" had no title) and who thereby obtains the money from the "sale" by deception;<sup>20</sup>
- a taxi driver who (dishonestly) tells a passenger that the usual route to his destination is blocked and uses a longer route to obtain a larger fare.<sup>21</sup>

2.12 A Hong Kong case involving this offence was *Man Ping-wong*,<sup>22</sup> in which the defendant shop-assistant falsely represented to the victim that a cassette radio he was about to purchase (and subsequently did purchase) was covered by an international warranty.

2.13 It should be noted that the section will only apply where there is an intention on the part of the accused to permanently deprive the other of the property. Thus, a mere borrowing by an individual of another's property, even if it is unauthorised or the result of deception, will not suffice to found a charge under section 17, nor will it fall within the ambit of a conspiracy. Such conduct

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<sup>16</sup> See section 17(4) of the Ordinance.

<sup>17</sup> Archbold, *op cit*, at paragraph 21.140.

<sup>18</sup> Griew, *The Theft Acts 1968 and 1978* (6th ed, 1990, Sweet & Maxwell), at paragraph 7.03.

<sup>19</sup> Griew, *op cit*, at paragraph 7.22. Note that "[L]ong firm] frauds of this kind are often large-scale operations in which several people are involved. They are commonly prosecuted as conspiracies - either to commit offences (as obtaining property by deception) or to defraud": *idem*.

<sup>20</sup> Eg, *Edwards* [1978] Crim LR 49 (a case of a squatter "letting" a room).

<sup>21</sup> *Levine v Pearcey* [1976] Crim LR 63.

<sup>22</sup> [1988] 2 HKLR 609.

could, however, be covered by the new substantive offence of fraud we recommend in chapter 5.

2.14 Similarly, there may be difficulties under section 17 where the accused has dealt with property in his possession "dishonestly" but there is no offence because the property did not "belong to another". The case of *Lewis v Lethbridge*<sup>23</sup> provides an example. In that case, the accused obtained sponsorship from a colleague to run in the London Marathon and then failed to pass on the sums collected to the charity concerned. The court held that the accused could not be said to have appropriated a debt which he himself owed simply by not paying it. Again, it would seem that this conduct would be met by our proposed substantive offence.

2.15 ***Obtaining a pecuniary advantage by deception (section 18)***<sup>24</sup> This section provides that:

*Any person who by any deception ... dishonestly obtains for himself or another any pecuniary advantage shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for 10 years."*

2.16 "Pecuniary advantage" is defined in section 18(2) to include the provision of (or an improvement to or extension of) credit facilities granted by banks or deposit-taking companies, as well as overdrafts, insurance policies or annuity contracts.<sup>25</sup> It also includes cases where the defendant "is given the opportunity to earn remuneration or greater remuneration in an office or employment, or to win money by betting."<sup>26</sup>

2.17 As noted above, the "deception" involved must be effective in securing the pecuniary advantage obtained,<sup>27</sup> however, the fact that the person deceived has suffered no loss as a result of the deception is irrelevant.<sup>28</sup>

2.18 Examples of this offence might include:

- an impecunious bank customer deceiving a bank manager into granting him an overdraft facility,<sup>29</sup>
- a bank customer, with a fully overdrawn account, using his cheque card to guarantee a cheque drawn on the account - thereby obtaining a pecuniary advantage because the bank is obliged to honour the cheque,<sup>30</sup>

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<sup>23</sup> [1987] Crim LR 59.

<sup>24</sup> Based on section 16 of the Theft Act 1968.

<sup>25</sup> Section 18(2)(a) and (b).

<sup>26</sup> Section 18(2)(c).

<sup>27</sup> Archbold, *op cit*, at paragraph 21.182.

<sup>28</sup> *Ibid*, at paragraph 21.184.

<sup>29</sup> Eg, *Watkins* [1976] 1 All ER 578.

<sup>30</sup> *Metropolitan Police Commissioner v Charles* [1977] AC 1 (HL).

- a person obtaining employment and collecting wages by falsely claiming to hold certain qualifications,<sup>31</sup>
- a person deceiving a bookmaker into accepting a bet and then collecting the winnings once the horse wins.<sup>32</sup>

2.19            **Obtaining services by deception (section 18A)**<sup>33</sup>            This provision states that:

*"A person who by any deception ... dishonestly obtains services from another shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for 10 years."*

2.20            Under section 18A(2), "services" are "obtained" where the other person "is induced to confer a benefit by doing some act, or causing or permitting some act to be done, on the understanding that the benefit has been or will be paid for." Examples would include:

- the defendant "commissioning" the victim to do repair work for him;
- the victim allowing the defendant to take goods on hire-purchase,<sup>34</sup>
- the defendant obtaining the services of a prostitute without intending to pay her.<sup>35</sup>

2.21            Difficulties arise if this section is used to attack a deception aimed at securing loan facilities. In *Halai*<sup>36</sup> O'Connor LJ said:

*"In our judgment, a mortgage advance cannot be described as a service. A mortgage advance is the lending of money for property and can properly be charged under [section 17], if the facts support it."*

There has been considerable criticism of this judgment. The difficulty would, we suggest, be avoided by the introduction of a substantive offence of fraud such as we propose later.

2.22            **Evasion of liability by deception (section 18B)**<sup>37</sup>            This section provides that an offence is committed where a person by deception: dishonestly secures the remission of the whole or a part of any existing liability to make a payment; dishonestly induces a creditor to wait for, or to forgo, payment of an existing liability (while intending to default on the liability in whole or in part); or dishonestly obtains any exemption or abatement of

<sup>31</sup> See Griew, *op cit*, at paragraph 10.14.

<sup>32</sup> Cf *Clucas* [1949] 2 KB 226.

<sup>33</sup> Based on section 1 of the Theft Act 1978.

<sup>34</sup> *Widdowson* [1986] Crim LR 233.

<sup>35</sup> See Griew, *op cit*, at paragraph 8.13.

<sup>36</sup> [1983] Crim LR 624.

<sup>37</sup> Based on section 2 of the Theft Act 1978.

liability to make payment. Such a person "shall be liable on conviction upon indictment to imprisonment for 10 years."

2.23 An example of this offence would be "the debtor who persuades his creditor by a lying hard-luck story to let him off the debt."<sup>38</sup> The liability concerned must be legally enforceable, however.<sup>39</sup> Accordingly, "no offence under the section can be committed against a bookmaker or other party to a gaming transaction [or] against a prostitute."<sup>40</sup> Nor may a minor who purports to take on such a liability (which would therefore be unenforceable against him) commit the offence.<sup>41</sup>

2.24 ***Making off without payment (section 18C)***<sup>42</sup> An offence under this section is committed where:

*"... a person who, 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 of the amount due shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for 3 years."*

Again, this provision only applies in situations where the supply of goods or services is legally enforceable.<sup>43</sup>

2.25 A Hong Kong example where this offence was alleged was the case of *Hamilton*,<sup>44</sup> where the defendant, who had booked into the YMCA, appeared to make off without paying her bill for nearly three weeks' accommodation. On appeal, it was emphasised that the intention must be to permanently avoid payment or to avoid payment altogether. Consequently, "an intent to delay or defer payment [is] not sufficient to prove the charge."<sup>45</sup>

2.26 ***Procuring entry in certain records by deception (section 18D)***<sup>46</sup> This provision makes it an offence to procure dishonestly by deception the making, omission, altering, abstracting, concealing or destruction of an entry in a banker's record or the record of a deposit-taking company, where such action is for the purpose of gain or with the intent to cause loss to another. A person found guilty of this offence "shall be liable on conviction upon indictment to imprisonment for 10 years."

2.27 In the Hong Kong case of *Sze Sing-ming and Others*,<sup>47</sup> the defendants were charged with a number of offences, including "procuring the

<sup>38</sup> Griew, *op cit*, paragraph 9.10.

<sup>39</sup> Section 18B(2).

<sup>40</sup> Griew, *op cit*, paragraph 9.06.

<sup>41</sup> *Idem*.

<sup>42</sup> Based on section 3 of the Theft Act 1978.

<sup>43</sup> Section 18C(3).

<sup>44</sup> [1988] 1 HKLR 138.

<sup>45</sup> *Ibid*, at 142.

<sup>46</sup> This provision was introduced by section 3 of the Theft (Amendment) Ordinance 1986 (Ord No 46 of 1986).

<sup>47</sup> [1991] 2 HKLR 481 (CA).

making of an entry in a record of a bank by deception, contrary to section 18D." It was alleged that the parties composed "an entirely fictitious bill of lading which gave details of a non-existent ship and cargo" in order to negotiate a draft drawn under a letter of credit. The amount of the bank entry in this case was nearly 3 million Hong Kong dollars.

2.28 **False Accounting (section 19)**<sup>48</sup> This section creates two offences, one of falsifying accounts and the other of using false accounts. These offences are committed where:

*"... a person dishonestly, with a view to gain for himself or another or with intent to cause loss to another -*

*(a) destroys, defaces, conceals or falsifies any account or any record or document made or required for any accounting purpose; or*

*(b) in furnishing information for any purpose produces or makes use of any account ... record or document ... which to his knowledge is or may be misleading, false or deceptive in a material particular ... ."*

If convicted, the defendant "is liable on conviction upon indictment to imprisonment for 10 years."

2.29 It is said that the purpose of this section is to supplement the law of theft and deception and the law of forgery and using false instruments.<sup>49</sup>

*"If D fraudulently doctors a cash-book or destroys copy invoices and other sales records, he may not obtain or intend to obtain any property thereby. His conduct may rather be designed to cover up offences already committed. But the particular crime concealed by the false accounting may be hard or impossible to identify; or, though it may be clear, for instance, that D has systematically 'milked' an enterprise of which he is a member or an employee, it may not be possible to frame an indictment for theft. For such reasons the criminal law is provided with a weapon which strikes at the falsification of the accounts rather than at the dishonest gain that those accounts assist or conceal."<sup>50</sup>*

2.30 A Hong Kong case on point, which went on appeal to the Privy Council, was *Lee Cheung-wing and Another*.<sup>51</sup> The defendants in this case were both employed by a securities company. They sought to circumvent a company rule prohibiting them from operating futures contracts on margin accounts by persuading a friend to allow them to open an account in his name.

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<sup>48</sup> Based on section 17 of the Theft Act 1968.

<sup>49</sup> Griew, *op cit*, paragraph 11.01.

<sup>50</sup> *Idem*.

<sup>51</sup> [1991] 2 HKLR 220.

Once established, they used the account to trade extensively in futures contracts. They withdrew profits from the account by signing withdrawal slips in the friend's name. Both defendants were convicted of seven counts of false accounting contrary to section 19(1)(a). Their convictions were upheld on appeal.

2.31 In another example, an offence under section 19(1)(b) was alleged in the case of *Sze Sing-ming*, above. There the defendants had furnished false information in the form of the "fictitious" bill of lading for the purpose of negotiating a bank draft drawn under a letter of credit.

2.32 ***Suppression, etc, of documents (section 22)***<sup>52</sup> This section, like section 19, incorporates two offences. Section 22(1), which to some extent resembles section 19(1)(a), provides that an offence is committed by a person who dishonestly, and for gain to himself or loss to another, destroys, defaces or conceals any of the following documents:

*"any valuable security, any will or other testamentary document or any original document of or belonging to, or filed or deposited in, any court or any government department ... ."*

If convicted, the defendant "is liable on conviction upon indictment to imprisonment for 10 years."

2.33 The second offence under this head relates to the procuring of valuable securities. Section 22(2) states:

*"Any person who dishonestly, with a view to gain for himself or another or with intent to cause loss to another, by any deception ... procures the execution of a valuable security shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for 10 years."*

2.34 "Valuable security" is defined in subsection (4) to mean:

*" ... any document creating, transferring, surrendering, or releasing any right to, in or over property, or authorizing the payment of money or delivery of any property, or evidencing the creation, transfer, surrender or release of any such right, or the payment of money or delivery of any property, or the satisfaction of any obligation."*

2.35 This has been held to apply to:

- cheques<sup>53</sup>
- forged travellers cheques,<sup>54</sup>

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<sup>52</sup> Based on section 20 of the Theft Act 1968.  
<sup>53</sup> *Young and Kassim* [1988] Crim LR 372 (CA).  
<sup>54</sup> *Beck* [1985] 1 WLR 22 (CA).

- an irrevocable letter of credit;<sup>55</sup>
- stolen US Treasury social security orders.<sup>56</sup>

In *Manjadarria*<sup>57</sup>, however, the court held that a telegraphic transfer was not a "valuable security" for the purposes of the equivalent section of the Theft Act 1978 in England. This has considerable significance as increasing ways are developed of transferring funds from one account to another electronically.

## The conspiracy to defraud charge

2.36 In cases where two or more persons are involved in committing fraud, the Theft Ordinance offences are supplemented by the common law offence of conspiracy to defraud. This offence:

*"is wide enough to embrace, not only agreements to commit many offences under the Theft [Ordinance] ... but also any other agreement to act dishonestly to the prejudice of the proprietary rights or economic interests of another or others."*<sup>58</sup>

2.37 **The Scott case** The leading authority in this area is the 1974 decision of the House of Lords in *Scott v Metropolitan Police Commissioner*,<sup>59</sup> a case involving film piracy. The defendant in this case admitted bribing cinema employees to lend him films for the purpose of making illegal copies. He was charged, along with others, with conspiracy to defraud the owners of the copyright and distribution rights. The defendant's argument was that the element of deceit was essential to establish the offence of conspiracy to defraud (ie, a victim could not be said to have been defrauded unless he had been deceived). In this case, the copyright owners had no knowledge that the cinema operators were being bribed to allow the film piracy to take place.

2.38 The House of Lords rejected the defendant's argument and held that deception was not an essential element of conspiracy to defraud.<sup>60</sup> Instead, the court held that the dishonest means by which the conspirator's purpose was to be achieved (ie, the bribery involved) was sufficient. Viscount Dilhorne stated:

*"[I]n my opinion it is clearly the law that an agreement by two or more by dishonesty to deprive a person of something which is his or to which he is or would be or might be entitled and an agreement by two or more by dishonesty to injure some*

<sup>55</sup> *Bernstead and Taylor* (1982) 75 Cr App R 276 (CA).

<sup>56</sup> *Nanayakkara* (1986) 84 Cr App R 125 (CA).

<sup>57</sup> [1993] Crim LR 73.

<sup>58</sup> Griew, *op cit*, at paragraph 6.11.

<sup>59</sup> [1975] AC 819.

<sup>60</sup> The well-known dicta of Buckley J in *Re London and Globe Finance Corporation* [1903] 1 Ch 728, at 732 and 733, that "to defraud is by deceit to induce a course of action," was held not to be exhaustive: *Scott*, at 836.

*proprietary right of his, suffices to constitute the offence of conspiracy to defraud.*<sup>61</sup>

2.39 Lord Diplock elaborated further on this definition:

*"Where the intended victim of a 'conspiracy to defraud' is a private individual<sup>62</sup> the purpose of the conspirators must be to cause the victim economic loss by depriving him of some property or right corporeal or incorporeal, to which he is or would or might become entitled. The intended means by which the purpose is to be achieved must be dishonest. They need not involve fraudulent misrepresentation such as is needed to constitute the civil tort of deceit. Dishonesty of any kind is enough."*<sup>63</sup>

2.40 **Results of the decision** The Scott case implied the following:

- the offence of conspiracy to defraud is extremely broad;
- it is broader than the corresponding tort of deceit which requires fraudulent misrepresentation and consequential damage;
- the offence extends to conduct which would not amount to an offence if committed by a single individual; and
- being a common law offence, its exact parameters are unclear and emerge over time on the basis of the particular fact situations which come before the court.

2.41 **Dishonesty as an ingredient of conspiracy** The case also confirmed that "dishonesty" is an essential ingredient of conspiracy to defraud at common law.<sup>64</sup> After some conflicting case law, the test for dishonesty in conspiracy to defraud was firmly established to be the same as that for theft, obtaining by deception, etc.<sup>65</sup> In the context of conspiracy to defraud, this means: (a) that the objectives of the parties must be dishonest according to ordinary standards of reasonable and honest people, and (b) that the parties to the agreement must themselves have realized that their objectives were by those standards dishonest.<sup>66</sup>

<sup>61</sup> *Ibid*, at 840.

<sup>62</sup> As opposed to someone fulfilling public duties. His Lordship distinguished between these two types of cases, stating as to the latter, that, "it is sufficient if the purpose is to cause him to act contrary to his public duty, and the intended means of achieving this purpose are dishonest. The purpose need not involve causing economic loss to anyone." (Note however the recent Privy Council decision of *Wai Yu-tsang* [1992] 1 HKCLR 26, where it was stated that persons performing public duties are not to be regarded as a special category (as implied by Lord Diplock) but rather as an example of the general principle that conspiracies to defraud are not restricted to cases of intention to cause the victim economic loss (*Welham v DPP* [1961] AC 103, at 124, per Lord Radcliffe, referred to).)

<sup>63</sup> *Ibid*, at 841 (emphasis added).

<sup>64</sup> See also *Landy* (1981) 72 Cr App R 237, at 247.

<sup>65</sup> *Ghosh* [1982] QB 1053.

<sup>66</sup> A recent Hong Kong decision which considered this test is *Lam Yee-foon & Anor* (1993) CA, Crim App No 475 of 1990, in which the Court of Appeal held that even in the highly specialized

2.42 The case of *Wai Yu-tsang* made it clear that the motive of the parties is irrelevant in deciding whether or not a conspiracy to defraud has been committed. In *Wai Yu-tsang* the accused believed that his actions would prevent a run on the bank. Lord Goff of Chieveley said:

*"... it is enough ... that ... the conspirators have dishonestly agreed to bring about a state of affairs which they realise will or may deceive the victim into so acting, or failing to act, that he will suffer economic loss or his economic interests will be put at risk. It is however important ... to distinguish a conspirator's intention (or immediate purpose) dishonestly to bring about such a state of affairs from his motive (or underlying purpose). The latter may be benign to the extent that he does not wish the victim or potential victim to suffer harm; but the mere fact that it is benign will not of itself prevent the agreement from constituting a conspiracy to defraud."*<sup>67</sup>

2.43 ***Developments in England subsequent to Scott*** It was long recognised that there were problems in principle with the common law offence of conspiracy; in particular, the issue of whether an action should become criminal merely because two or more persons agreed to perform it. In 1977, following recommendations from the English Law Commission,<sup>68</sup> Parliament enacted a statutory offence of conspiracy to replace the offence at common law. Henceforth, conspiracy was only to be an offence if the object of the agreement would necessarily amount to a criminal offence.

2.44 The particular usefulness of the common law offence of conspiracy to defraud was recognised, however, and this was retained as an exception to the principle<sup>69</sup> until such time as a replacement could be found.<sup>70</sup> The 1977 legislation went on to provide that a person charged with conspiracy to defraud at common law could not be charged also with the statutory

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world of banking, the standards for determining whether conduct was honest or dishonest were those of ordinary and decent people.

<sup>67</sup> [1992] 1 AC 269, at 280.

<sup>68</sup> "Report on conspiracy and criminal law reform" (1976) Law Com No 76, at Part I.

<sup>69</sup> Criminal Law Act 1977, section 5(2).

<sup>70</sup> Ie, "pending further consideration by the [English] Law Commission of the steps that would need to be taken, to avoid unacceptable gaps in the criminal law, if it were abolished," Griew, *op cit*, at paragraph 6.10.

offence.<sup>71</sup> This rider was to cause much difficulty<sup>72</sup> and was eventually repealed.<sup>73</sup>

2.45 **Uses of the conspiracy charge** As noted earlier, the definition of common law conspiracy to defraud under the Scott formula might be described as "wide and amorphous."<sup>74</sup> Being judge-made law, it continues to be refined and developed in the process of being applied from case to case. The following examples illustrate some of the situations where the charge of conspiracy to defraud might be brought and some of the complexity of the law in this area.

2.46 **Banking fraud** In one case,<sup>75</sup> C, a businessman, was charged with six counts of conspiring with the chief manager of a bank (who was deceased at trial) to defraud the bank by dishonestly causing it to grant loan facilities without adequate security, guarantee or provision for the payment of interest.

2.47 C and the chief bank manager were close personal friends. C had for many years held accounts at the bank and so too did companies controlled by him. In 1984, the bank (and the chief bank manager personally) were in financial difficulties. C alleged at trial that in order to assist both his friend and the bank he agreed to borrow money from the bank (totalling \$25 million) which his friend would have the use of; provided he, and not C, paid the interest due under the loans.

2.48 The loans were made either by way of extensions to overdrafts on C's personal accounts or to the companies he controlled. As regards security for the loans, his personal overdrafts were secured (though the extension of the overdrafts came close to the limit of the security) and C signed guarantees in respect of the other loan facilities. The proceeds from the loans were in turn paid over to the chief bank manager's personal accounts or to the accounts of two companies which he controlled.

2.49 The issue at trial was whether the facts showed beyond doubt that C's actions had been dishonest. Although C himself had made no

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<sup>71</sup> Criminal Law Act 1977, section 5(2).

<sup>72</sup> See in particular the judgment of the House of Lords in *Ayres* [1984] AC 447 (especially at 459 *per* Lord Bridge) where the provision was applied, a decision which later prompted comment that it created the risk of "a build-up of a case history of thwarted or inappropriate prosecutions for major frauds," *Report of the Fraud Trials Committee* (1986), (the Roskill Committee) at paragraph 3.11. In the subsequent House of Lords decision of *Cooke* [1986] AC 909 (especially at 918 *per*, again, Lord Bridge) it was recognised that the finding in *Ayres* needed to be modified. Accordingly, the Lords held that where it could be shown that there had been an agreed course of fraudulent conduct going beyond an agreement to commit specific offences, it was legitimate to charge either conspiracy to defraud or both conspiracy to defraud and a statutory conspiracy to commit a specific offence.

<sup>73</sup> In 1987, Parliament "laid to rest [the] notorious difficulty deriving from the unhappy original wording" of subsection 5(2) (*Griew, op cit*, at paragraph 6.10) by reversing its earlier ruling and providing that conspiracy to defraud could be charged even if some other offence had been committed: Criminal Justice Act 1987, section 12.

<sup>74</sup> *Litton, op cit*, at 155. The excessive breadth of the charge of conspiracy to defraud has led to the criticism (discussed in detail in the following chapter) that in some cases it may be used inappropriately by prosecutors.

<sup>75</sup> *Cheung Tse-soon* [1989] 1 HKLR 421.

financial gain out of the transactions, the true nature of the facilities was concealed from the bank, ie, that the real recipient of the money was to be the chief manager. The jury found C guilty of conspiracy to defraud.

2.50 On appeal, it was held that the trial judge had misdirected the jury as to what the Crown was required to prove: ie, that C knew that the chief manager intended to defraud the bank (by obtaining the bank's funds under the pretext that they were being borrowed by C and secured by him, while in fact they were to be used by the chief manager for his own purposes).

2.51 In its decision, the Court of Appeal noted that a properly directed jury might or might not have come to the conclusion that C's actions were dishonest. Clearly his conduct required an explanation and he had given a satisfactory one in evidence.<sup>76</sup>

2.52 **Company fraud** In another case involving conspiracy to defraud,<sup>77</sup> the three accused were charged with conspiracy to defraud shareholders and creditors of a company. The first count alleged that two of the accused conspired together to defraud shareholders and creditors of the company involved, by dishonestly causing and permitting false entries to be made in the company's books. The second count related to the records of the company. The accused were convicted at trial.

2.53 On appeal, it was held that the convictions on the first count were unsafe and unsatisfactory as there had been both misdirection and an absence of direction on the element of economic risk. The court observed during the course of its judgment that the relevant law was "a minefield."

2.54 Further, in relation to one of the accused, the court held that what she was shown to have done was at least as consistent with an agreement to further the economic interests of the company, as with the charge of putting those interests at risk.<sup>78</sup>

2.55 **Long firm fraud** As noted earlier, another typical scenario where conspiracy to defraud might be charged is in the "long firm fraud" case. In these instances the conspirators, ostensibly acting as an ordinary trading concern, gain the confidence of creditors to obtain large quantities of goods on credit. With no prospect or intention of paying for the goods, they are sold off, usually at a reduced price; the conspirators then extract large sums of money from the business and disappear, leaving no assets from which the creditors can be paid.

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<sup>76</sup> On analysis, there were difficulties in using the conspiracy to defraud charge in this case, and perhaps a more appropriate charge would have been conspiracy to contravene the Banking Ordinance (Cap 155). However, one reason why such a charge probably was not laid was because the penalties under the Banking Ordinance are much less severe than the penalty for conspiracy to defraud, which is presently fourteen years.

<sup>77</sup> *Wong Chun-loong & Others* [1992] 1 HKCLR (CA) 120.

<sup>78</sup> This case clearly illustrates some of the difficulties inherent in using the conspiracy to defraud charge: see discussion below, at chapter 3.

2.56 In these cases there is almost always a deception within the meaning of section 18 of the Theft Ordinance. Accordingly, it may be possible at least to say that there was a conspiracy (assuming at least two persons were involved) to commit the offence of dishonestly obtaining property or services by deception. However, it is sometimes difficult for the prosecution to establish exactly what act of deception induced, or was intended to induce, the victim to part with property and even in some cases the precise facts which constituted the deception.

2.57 **Letter of credit fraud** Yet another example where the common law conspiracy to defraud charge is useful is in a typical letter of credit fraud. In Hong Kong this often involves false bills of lading and other shipping documents being presented to banks for negotiation of bills under letters of credit, when in fact no goods have ever been shipped.

2.58 This type of offence is usually charged as a conspiracy to defraud. It is facilitated by the fact that banks deal typically in documents and not in the goods themselves.

2.59 It can be seen from the above cases that the conspiracy to defraud charge can prove a useful prosecutorial tool in the area of complex frauds. In particular, in a complex case it is often difficult to pin-point particular transactions and to establish specific deceptions, even when the fraudulent character of the scheme as a whole, taking into account all of the evidence, is perfectly obvious.

2.60 There are also, however, a number of shortcomings which can be identified in relation to the conspiracy to defraud charge. These, and other areas of concern in the law of fraud, are considered in the next chapter.

## Chapter 3

### Defects of the existing law

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#### Introduction

3.1 In the course of the discussion of the law in the previous chapter, reference was made to some of the criticisms which have been made of the law of fraud. A number of defects and anomalies have been identified, particularly in relation to the conspiracy to defraud charge.<sup>1</sup> This chapter examines these in detail.

3.2 The particular defects of the law in this area may be summarised as follows:

- the fact that the offence does not apply to one person acting alone;
- the artificiality of the charge;
- the breadth of the charge (and its possibly expanding nature);
- the practical difficulties in charging conspiracy to defraud;
- the difficulties concerning fraud with a foreign element; and
- the fact that extradition from certain countries may be unavailable in conspiracy to defraud cases.

#### Not applicable to one person acting alone

3.3 The first objection to the offence of conspiracy to defraud is that it conflicts with the principle<sup>2</sup> that an act which is lawful if done by one person should not become unlawful simply because more than one person has agreed to commit it.<sup>3</sup>

3.4 As we have seen, conspiracy to defraud allows two or more persons who are party to a fraudulent scheme to be prosecuted on the basis of the whole scheme, though under a single charge. The significance of this

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<sup>1</sup> See also the useful discussion of these issues by the English Law Commission in, "*Conspiracy to defraud*," Working Paper No 104 (1987), at Part V.

<sup>2</sup> As "enshrined" in the English Criminal Law Act 1977, section 1.

<sup>3</sup> Note however that there are exceptions to this principle, such as the offences of riot or violent disorder, which are specifically formulated to require the participation of more than one offender: English Law Commission, *op cit*, at paragraph 5.2.

is that the full extent of the defendants' criminality can be exposed to the court at trial.

3.5 One person acting alone, however, may not be dealt with in this way. Such a person's conduct must fall within an existing (specific) fraud offence, as a fraudulent scheme may only be established through the use of multiple counts.

3.6 The English Law Commission has commented that if the conduct constituting conspiracy to defraud is to continue to be penalised by the criminal law, "a more principled approach would seem to require that conspiracy to defraud should be abolished and replaced by an offence or offences of fraud capable of being committed by an individual acting alone." This would necessarily imply extending the present criminal law, however, which may or may not be justified,<sup>4</sup> and would require careful consideration of the form of words chosen for the new substantive offence.<sup>5</sup>

### **Artificiality of the common law conspiracy to defraud charge**

3.7 The conspiracy to defraud charge is, in essence, an inchoate offence.<sup>6</sup> Criticism has been levelled at the artificiality of the charge where the fraud has actually been committed and the fraudster has achieved his ends. As the charge is conspiracy, the indictment must necessarily refer to an agreement by two or more persons to carry out the criminal purpose. However, more often than not the fact of an agreement is inferred from the fact that the object of the agreement has already been achieved. If a crime has been committed, why charge the parties with an agreement to commit the crime? If no crime has been committed, how could an agreement to perform such acts be criminal?

### **Breadth of the charge**

3.8 The breadth of the charge is inherent in its definition: that it can consist of an agreement to do an unlawful (though not necessarily criminal) act or an agreement to do a lawful act by unlawful means.

3.9 Conspiracy to defraud "embraces almost every offence in the Theft [Ordinance] provided the defendant has conspired with another to carry

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<sup>4</sup> English Law Commission, *op cit*, at paragraph 5.4.

<sup>5</sup> In this regard, the sub-committee attempted to distill from the definition of conspiracy to defraud those parts of it found acceptable, with the aim of defining a substantive offence of fraud. Its efforts in this regard are described below, in chapter 5.

<sup>6</sup> An inchoate offence is charged where the relevant *mens rea* ("guilty mind") is present, but the other elements of the offence (ie, the *actus reus*) are not sufficiently made out to charge the full, substantive offence. Another example of an inchoate offence is an "attempt" to commit a particular offence, eg, murder.

out the conduct in question."<sup>7</sup> On this point, the English Law Commission has commented:

*"In principle overlapping offences should be avoided unless there is some reason which makes the overlap acceptable. The objection is stronger, however, where it is not merely a question of overlap but a total subsumption of other offences."*<sup>8</sup>

3.10 Another aspect of the breadth of the offence of conspiracy to defraud is that it covers certain conduct which arguably ought not to be criminal at all. The English Law Commission has observed that the continued existence of the common law offence "may in some circumstances make nonsense of the limitations attaching to a number of existing offences."<sup>9</sup>

*"Where [the legislature] has given careful consideration to the limits to be placed on conduct which is to be made criminal [as it has done in the Theft Ordinance in relation to specific fraud offences], it is difficult to justify the retention alongside of an offence whose boundaries ... go beyond those limitations."*<sup>10</sup>

3.11 The Commission also noted that the definitions of conspiracy to defraud put forward by the House of Lords in *Scott* were not intended to be exhaustive.<sup>11</sup>

*"Another objection to conspiracy to defraud which may therefore be raised is that because of the uncertain boundaries of the offence it offers insufficient guidance as to what can or cannot lawfully be done and consequently infringes the principle that the criminal law should be knowable in advance regarding the conduct to be penalised."*<sup>12</sup>

The Commission commented that, arguably, the criminal law should "have no place" for an offence which is so imprecise that one cannot say with reasonable certainty whether a particular combination of facts constitutes the offence.<sup>13</sup>

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<sup>7</sup> The English Law Commission, *op cit*, at paragraph 5.6, referring to the definitions of the offence contained in the House of Lords' decision in *Scott v Metropolitan Police Commissioner* [1975] AC 819, discussed above, in chapter 2.

<sup>8</sup> *Op cit*, at paragraph 5.6. Arguably such subsumption allows too much discretion to prosecutors as to which charge to bring. The Commission notes, *idem*, that in England, this objection is recognised in guidelines which have been issued to prosecutors in relation to conspiracy to defraud. These state that:

*"... where the essence of the offence is not really fraud at all ... it would be wrong to charge conspiracy to defraud relying upon the wide category of offences which loosely include an element of fraud."*

(See (1987) Law Society's Gazette, at 2666.)

<sup>9</sup> *Ibid*, at paragraph 5.7.

<sup>10</sup> *Idem*.

<sup>11</sup> *Ibid*, at paragraph 5.8.

<sup>12</sup> *Idem*.

<sup>13</sup> *Idem*. A contrary argument, however, is that the ingenuity of fraudsters is infinite and the courts' powers should be flexible enough to deal with new variations in the conduct of fraudsters as they arise.

## Practical difficulties in charging conspiracy to defraud

3.12 There are practical difficulties in the prosecution of conspiracy to defraud charges. These range from the selection of charges to the length of trials.

3.13 **"Rolled-up" conspiracy v individual conspiracies** Under the law of conspiracy, it is the conspiratorial agreement itself which is the crime. The individual offences (if any) which might have been committed are simply the ways in which the underlying agreement was carried out.

3.14 The problem in a multi-transactional offence is whether there is only one underlying agreement (and therefore all of the transactions which took place are part of that agreement, sometimes called a "rolled-up" conspiracy),<sup>14</sup> or whether the conspirators decided to conduct their criminal activities on a transaction-by-transaction basis and participated in a number of separate conspiracies.

3.15 There are cases where the evidence would not establish either way whether there was a single conspiracy or a number of individual conspiracies. In these circumstances, the appropriate charge could be couched as a single conspiracy with the individual conspiracies charged in the alternative. The advantage of a "rolled-up" conspiracy is that there would be only one trial: the repetition of evidence which is common to all the accused is avoided, as is the injustice which can result from inconsistent verdicts based on the same evidence in different trials.

3.16 There are drawbacks, however, with a "rolled-up" conspiracy. In some cases, smaller and more manageable sub-conspiracies (to be tried separately) are more appropriate. Not all defendants may be parties to the same alleged conspiracies. In appropriate cases, the overall wrongdoing of the accused can be sub-divided into several trials, or some of the charges can be left on the file to be resurrected only if the accused is acquitted on the ones charged. In one English case,<sup>15</sup> the Court said that "nothing short of the criterion of absolute necessity can justify the imposition of the burdens of a very long trial," and concluded that, "in a jury trial, brevity and simplicity are the hand-maidens of justice, length and complexity its enemies."

3.17 All criminal charges must contain particulars of the alleged offence, such as the date of the offence and the place where it was committed. In charges of conspiracy to defraud the prosecution has to particularise its case in such a way that the ambit and terms of the conspiracy are fully described.

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<sup>14</sup> A "rolled-up" conspiracy can be contrasted with individual conspiracies as follows: with the rolled-up conspiracy, the prosecution charges one agreement underlying all the various transactions involved; the alternative, depending on the facts, is to charge a number of separate conspiracies based on more than one agreement.

<sup>15</sup> *Novac* (1976) 65 Cr App R 107, at 118 (CA).

3.18 Generally speaking, a conspiracy can only be proved by inferring the terms of the agreement from the acts which the parties subsequently carried out. These are sometimes called the overt acts of the conspiracy. However, as Viscount Dilhorne said in *Scott*: "One must not confuse the object of a conspiracy with the means by which it is intended to be carried out."<sup>16</sup>

3.19 ***Peripheral defendants*** It may be quite clear from the evidence that there was a conspiracy (or conspiracies) and that the primary defendants can be proved to have been involved in the whole ambit of the conspiracy. In some cases, however, there may be evidence that an individual has committed an offence (such as false accounting) in furtherance of the conspiracy or part of it, but the evidence connecting him to the conspiracy itself is not strong.

3.20 Where there are a number of such individuals it can result in a series of separate trials. This will necessitate the same evidence (which might be evidence of a formal nature relating to areas of proof common to the separate trials) being called at each trial at considerable expense and inconvenience.

3.21 ***Proof of the agreement to defraud*** The essence of the conspiracy to defraud charge is the agreement between the co-conspirators. The prosecutor must draw a line between adequately proving the connection of each individual conspirator with the conspiracy, and not overloading his case with evidence which will complicate his presentation and affect the jury's understanding.

3.22 ***Presentation of the conspiracy to defraud case in court*** There is a tendency for conspiracy to defraud cases to present more complexity in their presentation than other criminal offences. The prosecutor must take great care in preparing an orderly and coherent presentation of the case. In particular, it is often a challenge for the prosecutor to call his evidence before a jury (many of whom may have no commercial experience) so as to ensure that the jury understands sufficiently the business procedure and sometimes complicated facts which are the background to the fraud.

3.23 ***Summing-up and appeal*** Judicial directions to juries which relate to conspiracy to defraud charges have shown themselves (at least in Hong Kong) to be more prone to error generally than directions relating to substantive offences. As one judge has commented:

*"The law applicable to conspiracy to defraud is a mine-field ... It is a notoriously difficult charge to bring home. The jury needed to be very carefully directed."*<sup>17</sup>

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<sup>16</sup> *Op cit*, at 839.

<sup>17</sup> Silke VP in *Cheung Tse-soon* [1989] 1 HKLR 421, at 423.

3.24 The judge is required to organise into coherent order the large volume of evidence against individual defendants and, against this complex background, instruct the jury on the principles of law involved.

3.25 **Length of trial** Conspiracy to defraud cases may be complicated and lengthy. The longer the case, the more likely it is that jurors will be lost through sickness, emigration, business reasons, etc. If sufficient jurors are lost then the jury is discharged and the case must start again.

3.26 This problem has been mitigated by an amendment to the Jury Ordinance (Cap 3) which allows for a maximum of nine jurors to be appointed in exceptional cases.<sup>18</sup> As the minimum number of jurors to return a verdict is five, up to four jurors may be lost from a case before a new jury need be called.<sup>19</sup>

3.27 **The "scheme of fraud"** In the prosecution of commercial crime, one practical difficulty in drawing up indictments is satisfactorily charging individuals who have involved themselves in a "scheme of fraud." (This is because the scheme is often constituted by a number of people combining together in a criminal enterprise which might, in reality, involve a large number of individual transactions.<sup>20</sup>)

3.28 Where an individual has combined with others in an agreement to perpetrate the fraud, the prosecution is generally able satisfactorily to reflect the whole of the criminality in a charge of conspiracy to defraud. Where, however, the individual has acted alone in a scheme of fraud, or the dishonest involvement of others cannot be proved, the prosecution must charge substantive offences. The difficulty here is in charging sufficient substantive offences to reflect the scheme of dishonesty, without "overloading" the indictment.

3.29 Criminal charges must be framed against a defendant in sufficient detail to allow him to know precisely the nature and extent of the offence he is alleged to have committed. The prosecution is not allowed to include within one charge allegations that amount to more than one offence. Each charge must relate to a specific offence. If it does not, then it is usually "bad for duplicity." In the absence of a substantive offence of fraud, when the prosecution charges an individual in relation to a scheme of fraud, it must charge him with a specific series of existing Theft Ordinance offences (assuming there is no provable conspiracy with others).

## **Practical difficulties concerning fraud with a foreign element**

3.30 **The present law** The traditional common law approach to criminal jurisdiction is territorial: courts assume jurisdiction only if the offence

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<sup>18</sup> See Ordinance No 3 of 1986, section 2.

<sup>19</sup> Jury Ordinance (Cap 3), section 24(3)(b).

<sup>20</sup> See Hill, "Whither criminal justice? Conspiracy and intent," *1985 Law Lectures for Practitioners* (1985, HKLJ) 1, at 3-4.

is regarded as having "taken place" in the jurisdiction in which the court sits. A crime is regarded as having "taken place" where the last act necessary to its completion took place.<sup>21</sup>

3.31 Difficulties and illogicalities can arise in this area, and some of these are illustrated by the following English cases.

3.32 **Contrasting cases of Harden and Bevan** The crime of obtaining property by deception is regarded as committed where the property is obtained, rather than necessarily where the deception took place. In *Harden*,<sup>22</sup> the deception was in documents posted in England to a company in Jersey. The company posted cheques to the accused in England. It was held that he had obtained the cheques when they were received by the postmaster in Jersey and, accordingly, that the English court did not have jurisdiction. The countervailing rule, however, is that a person does not normally obtain property until it reaches his hands.

3.33 **Bevan**<sup>23</sup> involved the offence of dishonestly, by deception, obtaining a pecuniary advantage. There the accused presented cheques abroad supported by his cheque card at a time when he was not authorised to overdraw. The English court was found to have jurisdiction on the ground that the accused had obtained the pecuniary advantage (of a borrowing by way of overdraft) in England.

3.34 **Thompson** The case of *Thompson*<sup>24</sup> is an example of transferring money dishonestly across national boundaries. A computer operator in Kuwait fraudulently programmed the bank's computer to debit a customer's account and credit his own. After returning to England, he wrote to the bank requesting it to telex the amounts to his bank accounts in England. The Court of Appeal held that the obtaining of property by deception had taken place in England. If the money had been posted, the court might not have had jurisdiction. The element of "obtaining" is of little practical significance in this regard.

3.35 **Osman** In *Osman*,<sup>25</sup> a charge of theft, the court concluded that sending a telex from England could amount in itself to a usurpation of a third party's rights, the alleged intention being to debit the third party's account abroad. Even though the account had not at that stage been debited, the place of sending the telex was the place of the necessary element of appropriation.

3.36 **Criticisms of the law** These rules require analysis of factual issues relating to jurisdiction (eg, whether the parties expressly or impliedly

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<sup>21</sup> This "location" rule is modified in relation to result crimes (crimes requiring not only conduct but also a particular result). In such cases, the court has jurisdiction if some part of the prohibited result takes place in the jurisdiction.

<sup>22</sup> [1963] 1 QB 8.

<sup>23</sup> (1986) Cr App R 143.

<sup>24</sup> [1984] 1 WLR 962.

<sup>25</sup> [1988] Crim LR 611.

agreed that delivery of money or property to the postal services is equivalent to personal delivery) which can present difficulties both before and during trial.

3.37 The application of the rules may be particularly difficult in relation to the inchoate offences, such as conspiracy to defraud where the offence is completed as soon as the parties reach agreement. If, for example, an agreement to defraud a Hong Kong bank is made in the USA, would the Hong Kong courts have jurisdiction to try the case?

3.38 Fortunately, a shift has been taking place in recent years away from a strict interpretation of the common law rules on jurisdiction.<sup>26</sup> In relation to the example given above, authority would tend to indicate that the case may be triable in Hong Kong, regardless of whether any steps had actually been taken here to implement the fraud, because the object of the conspiracy was based in Hong Kong.<sup>27</sup>

3.39 **Parallel statutory reform** The Criminal Jurisdiction Ordinance was enacted by the Hong Kong Legislative Council on 8 December 1994. It is modelled upon the recommendations of the English Law Commission in its report entitled "Criminal Law: Jurisdiction over offences of fraud and dishonesty with a foreign element".<sup>28</sup> The Ordinance is intended to overcome many of the problems created by the emphasis placed on the location where a crime is said to have occurred. The Ordinance deals with jurisdiction in relation to, *inter alia*, offences under sections 17, 18, 18A, 18B, 18D, 19 and 22(2) of the Theft Ordinance (Cap 210)<sup>29</sup> (referred to in the Ordinance as "Group A offences"), and conspiracy to commit any of those offences or conspiracy to defraud (referred to as "Group B offences"). As far as Group A offences are concerned, jurisdiction can be founded in Hong Kong if a "relevant event" occurred in Hong Kong. A relevant event is defined in the Ordinance to be:

*"any act or omission or other event (including any result of one or more acts or omissions) proof of which is required for conviction of the offence."*<sup>30</sup>

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<sup>26</sup> In the 1990 Privy Council case of *Somchai Liangsirprasert v Government of USA* [1990] 2 HKLR 612, it was stated, at 626, that:

*"Unfortunately in this century crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face this new reality. Their Lordships can find nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England. Accordingly a conspiracy entered into in Thailand with the intention of committing the criminal offence of trafficking in drugs in Hong Kong is justiciable in Hong Kong even if no overt act pursuant to the conspiracy has yet occurred in Hong Kong."*

<sup>27</sup> *Idem*.

<sup>28</sup> Law Comm No 180, 1989.

<sup>29</sup> In other words, all of the offences relating to fraud under the Theft Ordinance referred to in the previous chapter except section 18C and section 22 other than section 22(2) are Group A offences.

<sup>30</sup> Section 3(1)

As far as Group B offences are concerned, there will be jurisdiction in Hong Kong if:

- "(a) a party to the agreement constituting the conspiracy, or a party's agent, did anything in Hong Kong in relation to the agreement before its formation; or
- (b) a party to it became a party in Hong Kong (by joining it either in person or through an agent); or
- (c) a party to it, or a party's agent, did or omitted anything in Hong Kong in pursuance of it,

*and the conspiracy would be triable in Hong Kong but for the offence or fraud which the parties to it had in view not being intended to take place in Hong Kong.*<sup>31</sup>

### **Lack of availability of extradition for conspiracy to defraud**

3.40 Extradition arrangements with foreign countries enable suspected persons to be returned to Hong Kong to face trial if certain conditions are met. Usually the principle of "reciprocity" will apply and states will only consent to the extradition to Hong Kong of those within their jurisdiction where the offence alleged in Hong Kong is one recognised by the law of the state from which extradition is sought. In some cases, specific offences may be listed in the relevant international treaty governing extradition.

3.41 Hong Kong has most of its extradition traffic with the USA. This is governed by treaty.<sup>32</sup> The Treaty lists fraud as a separate offence, but since Hong Kong does not have a substantive offence of fraud, extradition cannot be obtained under this heading. Conspiracy is only extraditable if it is conspiracy to commit a substantive offence listed in the Treaty. The present position on extradition is unclear, but the US has surrendered fugitives wanted in Hong Kong for conspiracy to defraud. This is because the test is not the name of the offence but whether the conduct alleged by Hong Kong is an offence under US law in accordance with their interpretation of the list of offences in the Treaty. There would be more likelihood of difficulties if the USA sought extradition of an offender from Hong Kong and the conduct alleged by the US only amounted to conspiracy to defraud. This is, however, an unlikely eventuality.

3.42 Similar problems arise in almost all treaties with foreign states which include fraud in a list of specified offences. The drafting of the substantive offence invariably reads:

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<sup>31</sup> Section 6(1)

<sup>32</sup> *The United Kingdom - United States of America Extradition Treaty 1972* UKTS No 16 (1977; cmnd 6723, US No 2 (1985; cmnd 9565). A discussion of this treaty appears in: Brabyn, "An analysis of Hong Kong's extradition procedure with specific reference to United States' requests," (1990) HKLJ 31.

*"Fraud by a bailee, banker, agent, factor, trustee, director, member or public officer of a company."*

This offence is in addition to offences of obtaining property by deception or false accounting.

3.43 The conspiracy aspect is further complicated by the fact that most European countries only accept conspiracy as an offence within strict limitations, and no crime is committed unless some step has been taken beyond a mere agreement to commit the substantive offence.

3.44 As far as Commonwealth countries are concerned, the wording of the Fugitive Offenders Act permits the extradition of fugitives for conspiracy to defraud.

3.45 The fact that "conspiracy to defraud" is a non-extraditable offence with many of Hong Kong's extradition partners sometimes results in the substitution of that charge by charges of substantive crimes or conspiracies to commit those individual crimes. This raises the difficulty that the fugitive can then only be tried for the crimes for which he was returned even though the conspiracy charge might have been the most appropriate.

## Chapter 4

### The law of fraud in other jurisdictions

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#### Introduction

4.1 The preceding chapters have outlined the existing law in Hong Kong and endeavoured to identify its shortcomings. Our terms of reference enjoin us to consider whether a substantive offence of fraud should be created and, if so, to recommend the constituent elements of such an offence. Before attempting to formulate an answer to this reference, we think it would be helpful to examine the law in other jurisdictions, both those which already possess a substantive offence of fraud and those where consideration has been given to its introduction.

#### Australia

4.2 Australia is a federation of states in which limited and defined legislative powers are given to the Commonwealth of Australia under the constitution. As a result, criminal law in Australia is generally a matter for each state whilst the Commonwealth of Australia has enacted, usually, parallel criminal laws covering matters under its jurisdiction. New South Wales, Victoria and South Australia have retained common law systems, while Queensland, Tasmania, Western Australia and Northern Territory have criminal codes.<sup>1</sup>

4.3 There is no single general offence of fraud covering the whole of Australia.<sup>2</sup> However, the Crimes Act 1914 of the Commonwealth provides in section 29D that:

*"A person who defrauds the Commonwealth or a public authority under the Commonwealth is guilty of an indictable offence."*

There is a similar offence in section 86A for conspiracy to defraud the Commonwealth. Fraud is given its ordinary meaning in everyday language.<sup>3</sup>

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<sup>1</sup> Queensland Criminal Code Act 1899 (as amended); Tasmanian Criminal Code Act 1924 (as amended); Western Australian Criminal Code Act 1913 (as amended) and Northern Territory of Australia Criminal Code Act 1983.

<sup>2</sup> English Law Commission, *"Conspiracy to defraud"* (Working Paper No 104, 1987), at 203.

<sup>3</sup> *R v Eade* (1984) 14 A Crim R 186.

Dishonesty according to the standards of right-minded people is an essential element of conspiracy to defraud the Commonwealth.<sup>4</sup>

4.4 Each state has a statutory offence of obtaining by false pretences, "the essence of which is that the defendant, with intent to defraud, obtains property from the victim by misrepresentation,"<sup>5</sup> as well as a range of statutory provisions covering specific types of fraudulent conduct.<sup>6</sup>

4.5 The states with criminal codes also have statutory offences of conspiracy to defraud<sup>7</sup> and of "cheating."<sup>8</sup> Queensland is an example. Conspiracy to defraud is provided for in section 430 of the Criminal Code:

*"Any person who conspires with another by deceit or any fraudulent means to affect the market price of anything publicly sold, or to defraud the public, or any person, whether a particular person or not, or to extort any property from any person, is guilty of a crime, and is liable to imprisonment with hard labour for seven years."*

Section 429 deals with cheating:

*"Any person who by means of any fraudulent trick or device obtains any other person anything capable of being stolen, or pay or to deliver to any person any money or goods, or any greater sum of money or greater quantity of goods than he would have paid or delivered but for such trick or device, is guilty of a misdemeanour [the maximum penalty for which is two years' imprisonment]."*

4.6 The Tasmanian Code provision reads:

*"Any person who conspires with another ... to cheat or defraud the public, or any particular person, or class of persons ... is guilty of a crime."<sup>9</sup>*

## Canada

4.7 Canada's Criminal Code contains a comprehensive range of provisions dealing with property rights offences, including several offences dealing with fraud.

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<sup>4</sup> *Einem v. Edwards* (1984) 12 A Crim R 463.

<sup>5</sup> *Ibid*, at 204.

<sup>6</sup> Eg, passing worthless cheques, obtaining credit by fraud and fraudulent misappropriation of trust funds.

<sup>7</sup> Ie, Queensland Code, section 430; Western Australian Code, section 412; Tasmanian Code, section 297(1)(d); Northern Territory Code, section 284. In South Australia, New South Wales and Victoria, the offence has been retained at common law.

<sup>8</sup> Eg, Queensland Code, section 429.

<sup>9</sup> Section 297(1)(d).

4.8            **The basic fraud offence**        An offence to replace statutory conspiracy to defraud was introduced in Canada in 1948. The present provision is section 380(1) of the Code which states:

*"Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security,*

*(a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding ten years, where the subject matter of the offence is a testamentary instrument or where the value of the subject matter exceeds one thousand dollars; or*

*(b) is guilty [of an indictable offence punishable to two years' imprisonment or of a summary offence] where the value of the subject matter of the offence does not exceed one thousand dollars."<sup>10</sup>*

4.9            **The elements of the offence**        In *R v Olan, Hudson and Harnett*,<sup>11</sup> the landmark Canadian case in this area, it was held that the essential elements of this offence were "deprivation" and "dishonesty."

4.10            The accused had taken over a company and substituted its blue chip portfolio with speculative investments. The recipients of the investments had then made the funds available to the accused to pay the purchase price of the company taken over, which in turn benefitted the accused. It was held that the risk of financial loss to the company constituted deprivation to the company and, given the evidence of dishonesty in using corporate funds for personal ends, there was therefore evidence of fraud.

4.11            The court defined "deprivation" as "proof of detriment, prejudice, or risk of prejudice to the economic interests of the victim. It [was] not essential that there be actual economic loss as the outcome of the fraud."<sup>12</sup>

4.12            The concept of "dishonesty" was held to *subsume* those of "deceit" and "falsehood," and "other fraudulent means" to encompass "all other means which can properly be stigmatised as dishonest."<sup>13</sup>

4.13            The scope of the Canadian offence is therefore very wide and, in line with the House of Lords decision in *Scott v Metropolitan Police Commissioner*,<sup>14</sup> "there need not be some form of relationship or nexus

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<sup>10</sup> In addition to a number of other specific fraud offences, the Code also contains two further basic fraud offences, namely, obtaining property by false pretences (section 362(1)(a)) and obtaining credit by false pretences or fraud (section 362(1)(b)). Other than in the Code, numerous fraud and fraud-related offences occur in other statutes.

<sup>11</sup> (1978) 41 CCC (2d) 145 (SCC).

<sup>12</sup> *Ibid*, at 150. This provision was also held to apply in a case where the conduct of the accused had diminished the victims' chances of making a profit (even where the likelihood of profit was not certain): *Kirkwood* (1983) 5 CCC (3d) 393 (Ont CA).

<sup>13</sup> *Ibid*, at 149.

<sup>14</sup> (1974) Cr App R 124.

between the accused and the victim" (at least where "or other fraudulent means" is relied on).<sup>15</sup> **The elements of the Canadian offence therefore appear to be:**

- (i) economic prejudice or risk of such prejudice**
- (ii) to the public or any person**
- (iii) caused dishonestly.**

4.14 **Subsequent developments** The Canadian Law Reform Commission has recommended the introduction of a new fraud provision to replace the existing substantive offence.<sup>16</sup> The Commission proposed two drafts of the new offence as it was undecided on the proper place that the concept of "dishonesty" should occupy:

*"Everyone commits a crime who dishonestly, by false representation or by non-disclosure, induces another person to suffer an economic loss or risk thereof."<sup>17</sup>*

or

*"Everyone commits a crime who, without any right to do so, by dishonest representation or dishonest non-disclosure induces another person to suffer an economic loss or risk thereof."<sup>18</sup>*

4.15 The significance of these proposed provisions is that they omit the reference to "other fraudulent means" and thereby limit the type of conduct which will constitute fraud. Either proposed offence would require proof of a specific form of conduct (ie, representation or non-disclosure as defined in the proposed new code) which lends itself to being described as inherently "fraudulent."

4.16 The Commission has defined representation and non-disclosure in line with the *Olan* decision. Accordingly, a "representation" may be either express or implied (and includes impersonation) as to a past, present or future fact, but does not include "puffery" (ie, exaggerated statements of opinion concerning the attributes or quality of something).

4.17 "Non-disclosure" in this context means failure to perform a duty to disclose arising from: (a) a special relationship entitling the victim to rely on the defendant; or (b) conduct by the defendant (or another person acting with him) creating or reinforcing a false impression in the victim's mind or preventing him from acquiring information.

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<sup>15</sup> Greenspan (ed), *Martin's Annual Criminal Code 1994*, (1993, Canada Law Book Inc), at 555.

<sup>16</sup> "Recodifying Criminal Law," (1987, Report No 31) chapter 13.

<sup>17</sup> *Ibid*, at 80.

<sup>18</sup> *Ibid*, at 81.

## England and Wales

4.18 While the law of England does not recognise a general offence of fraud, there has been considerable debate over the years as to whether such an offence should be introduced. In 1987, the English Law Commission issued a Working Paper on conspiracy to defraud which examined a number of options for reform.<sup>19</sup> One of these was the creation of a general offence of fraud capable of being committed by an individual acting alone. The Law Commission suggested that such an offence should be defined as follows:

*"Any person who dishonestly causes another person to suffer [financial] prejudice, or a risk of prejudice, or who dishonestly makes a gain for himself or another commits an offence."<sup>20</sup>*

4.19 The Law Commission took as their starting point for the definition the existing offence of conspiracy to defraud.<sup>21</sup> In the light of the decision in *Scott v Metropolitan Police Commissioner*<sup>22</sup>, this leads to the somewhat startling conclusion that a general offence of fraud should be formulated without reference to deceit. ***The essential elements of the draft offence appear to be divided into two limbs. Either:***

- (i) financial prejudice or a risk of prejudice suffered by another;***
- (ii) caused dishonestly;***

***Or***

- (i) a gain to the accused or another;***
- (ii) made dishonestly.***

4.20 The Law Commission considered including as an element in the offence inducing a person to do or refrain from doing any act. They rejected this option on the basis that it would extend the offence beyond the protection of economic interests and that it would cover conduct not penalised by conspiracy to defraud.<sup>23</sup> It is clear that the reference to "prejudice" in the Law Commission's formulation of the fraud offence was intended to be linked purely to economic loss.<sup>24</sup>

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<sup>19</sup> Law Commission, "*Conspiracy to defraud*," *op cit*. The Law Commission published its final report on this subject in December 1994 ("*Criminal Law: Conspiracy to Defraud*", Law Commission No. 228). Unless expressly indicated to the contrary, we refer in our discussion to the Working Paper rather than the report because it is in the former that the arguments are more fully canvassed for the creation of a substantive offence of fraud. The Law Commission conclude that there are practical reasons for retaining the offence of conspiracy to defraud at least for the time being. It is the Commission's intention to embark on a "comprehensive review of offences of dishonesty" and that the question of conspiracy to defraud will have to be looked at "afresh during the course of our forthcoming major review." The Commission's report is therefore something of an interim measure.

<sup>20</sup> *Ibid*, at 133.

<sup>21</sup> *Ibid*, at 132.

<sup>22</sup> [1975] AC 819.

<sup>23</sup> "*Conspiracy to defraud*," *op cit*, at 134.

<sup>24</sup> *Ibid*, at 138 to 139.

4.21 The Law Commission concluded that dishonesty was "probably best left undefined."<sup>25</sup> They thought it would be undesirable if the term were to be defined differently in relation to different offences. The Commission rejected the suggestion that the word "fraudulently" should be used instead of "dishonestly", largely because of their desire not to import a requirement of deceit into the new offence. The Commission's reasoning only serves to reinforce the view that an attempt to define fraud without reference to deceit requires a bizarre disregard for the everyday meaning of the term "fraud".

4.22 An alternative formulation of a fraud offence was suggested by G R Sullivan in 1985.<sup>26</sup> The essence of the offence was:

*"A person would be guilty of fraud if, with intent to gain for himself or another, he dishonestly caused a loss to any person with foresight that such loss would be the certain or probable consequence of acquiring the gain."*<sup>27</sup>

4.23 While Sullivan's formulation is similar to that of the Law Commission in relying on dishonesty rather than deception, it differs in other ways. ***The elements of his offence appear to be:***

- (i) a loss to any person;***
- (ii) caused dishonestly;***
- (iii) intent that there should be gain for the accused or another; and***
- (iv) foresight by the accused that the loss would be the certain or probable consequence of acquiring the gain.***

4.24 Like the Commission, Sullivan appears to have taken as his starting point the boundaries of the existing crime of conspiracy to defraud and the decision in *Scott*. His offence is only intended to apply to cases where the loss exceeds £5,000 (or where there would have been such a loss if the fraud had been carried out in accordance with the accused's intentions).<sup>28</sup> It is clear that Sullivan intended his offence to be applied primarily to economic concerns. He suggests that, while " 'Gain' would be confined to gain in money or other property", " 'Loss' would be confined to loss of money, property or a right to which a person is or would have been entitled."<sup>29</sup>

4.25 A third variation on a theme is to be found in the report of the English Bar Council's Working Party on Long Fraud Trials.<sup>30</sup> The Working Party propose an offence along the following lines:

*"A person commits an offence if, whether alone or jointly with another person, he dishonestly (a) does any act or series of acts,*

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<sup>25</sup> *Ibid*, at 143.

<sup>26</sup> "Fraud and the efficacy of the criminal law: a proposal for a wide residual offence," [1985] Crim LR 616.

<sup>27</sup> *Ibid*, at 623.

<sup>28</sup> *Ibid*, at 624.

<sup>29</sup> *Ibid*, at 626.

<sup>30</sup> December 1992.

or (b) wilfully fails to perform a duty (of whatever nature) to which he knows he is subject, knowing in either case that the financial interests of some other person will thereby be prejudiced."<sup>31</sup>

4.26 Apart from noting with surprise the unnecessary inclusion of the words "whether alone or jointly with any other person" and "or series of acts", Archbold points out that the criticism which can be levelled at both the Law Commission's and the Bar Council's formulations is that "the full weight of these well-intentioned provisions is taken by the word 'dishonestly'."<sup>32</sup> This is because:

*"Life, and particularly commerce, is a competitive business in which it is permissible, even virtuous, to 'cause another person to suffer financial prejudice', certainly to 'make a gain for [oneself]'; to be in business is to be in the business of doing acts 'knowing that the financial interests of some other person will thereby be prejudiced.'"*<sup>33</sup>

4.27 It should be noted that Archbold's criticisms are directed at the formulation of the offence, rather than at the concept of a substantive offence of fraud. As the article points out, "there seems to be developing a broad consensus in favour of the creation of a general offence of fraud, capable of being committed by an individual."<sup>34</sup>

## Jersey

4.28 The question of whether or not a substantive general offence of fraud exists in the law of Jersey has recently been examined in the case of *AG v Foster*<sup>35</sup>. ***The Channel Islands Court of Appeal decision in Foster would appear to have established that a general offence of fraud exists in Jersey with the following ingredients:***

- (i) a false representation;***
- (ii) actual prejudice to someone;***
- (iii) actual benefit to the accused or another; and***
- (iv) a causal link between the false representation and the prejudice and benefit.***

It is also clear that the false representation must have been made deliberately, and with the intention of causing actual prejudice and actual benefit.

4.29 ***AG v Foster*** In the *Foster* case, an executive director of the Hong Kong and Shanghai Bank was charged with "criminally and fraudulently

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<sup>31</sup> *Ibid*, at paragraph 10.13.

<sup>32</sup> "Comment", *Archbold News* (February 26 1993) at 5.

<sup>33</sup> *Idem*.

<sup>34</sup> *Idem*.

<sup>35</sup> 1989 JLR 70.

inducing the Bank to purchase [a] property ... for the sum of £700,000 by (i) withholding from the Bank the material fact known to him that the Bank could have purchased the said property for the sum of £310,000 or thereabouts; (ii) withholding from the Bank the material fact known to him that the said property was offered for sale at £367,500 ..." The defence argued that no general offence of fraud was known to the modern law of Jersey. The court could not look outside the English Larceny Act 1916 and the specific fraudulent offences it contained to recognise a general offence of fraud. The prosecution argued in reply that the original Norman common law principles (which recognised an offence of fraud) should continue to apply and, since these were based on Roman law, it was appropriate to look to authorities in other jurisdictions, such as Scotland and South Africa, which were based on Roman law for guidance, rather than the English common law. The Larceny Act did not provide a definitive list of offences and the earlier common law principles survived it.

4.30 The court at first instance held that a general offence of fraud had always existed, and continued to exist, in Jersey. In determining that question, it was legitimate to look to the development of the law in respect of fraud in other jurisdictions where the law, like Norman customary law, had been based on Roman law. In the course of his judgment, Bailiff Crill said:

*"... there was an underlying belief at the English Bar in the efficacy of English law for all people and lands, and it was an article of faith in the breasts of some judges that English law was the best possible law for everyone, an attitude that was parodied by W S Gilbert in 'Iolanthe'. Contrary to the conclusions of the Commissioners, we feel that this court can, with propriety, invoke the customary Norman law, which, through adaptation and growth through the civil law, based as we have said on the Roman law, has a great deal in common with the laws of two of the three countries we have mentioned, namely Scotland and South Africa, in its ability to grow and not be stifled by statutory definition or judicial restraint, and adapt itself to the needs of the 21st century."<sup>36</sup>*

4.31 The defendant appealed to the Channel Islands Court of Appeal. The Court of Appeal adopted a less radical approach to the issue. After an examination of the Jersey case law, the Court was satisfied that a general offence of criminal fraud existed in Jersey. It was unnecessary to look to other jurisdictions for guidance on this and, indeed, "the practical difficulties [of doing so] would in any case be overwhelming."<sup>37</sup> The Court of Appeal laid out the elements of the offence of fraud in Jersey as follows:

*"... in our judgment the cases cited to us justify the proposition that to establish criminal fraud it is necessary to show that the defendant deliberately made a false representation with the intention of causing thereby, and with the result in fact of*

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<sup>36</sup> *Ibid*, at 88.

<sup>37</sup> *AG v Foster*, Channel Islands Court of Appeal, 20 January 1992, at 33.

*causing thereby, actual prejudice to someone and actual benefit to himself or somebody else.*"<sup>38</sup>

4.32 The Court of Appeal examined the charge against the appellant and found that "the ingredients which we have found to be essential to the offence of fraud were ... present." The Court went on:

*"It remains necessary to consider whether in the particular circumstances alleged those ingredients did constitute the offence. In our judgment they did. We say that because the conduct was similar to that in earlier cases of loss inflicted, or benefit gained, by false representations.*"<sup>39</sup>

Leave to appeal to the Privy Council was subsequently refused.

## Malaysia and Singapore

4.33 The present criminal law of Singapore and Malaysia has its roots in the British colonial codes of the 19th century. Consequently, the Singapore Penal Code<sup>40</sup> and the Malaysia Penal Code,<sup>41</sup> respectively, are based on largely identical provisions in the Indian Penal Code.<sup>42</sup> As a result, Indian text books and articles are relevant and Indian case law is highly persuasive. The commentaries to the Indian Penal Code are also pertinent. In addition, cases decided in Malaysia are important to Singapore courts, and *vice versa*.

4.34 Provisions relevant to our study of fraud include those dealing with "cheating"<sup>43</sup> and "criminal breach of trust."<sup>44</sup> In relation to the provisions on cheating, Canagarayar has commented that these "were included in the Penal Code in order to provide additional reinforcement to the remedies available in civil law."<sup>45</sup> Consequently, "prosecutions for cheating were more likely in instances where damages were substantial and an order for damages in civil law would be inadequate to repair the harm done or the likelihood of obtaining damages was remote."<sup>46</sup>

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<sup>38</sup> *Ibid*, at 25.

<sup>39</sup> *Ibid*, at 35.

<sup>40</sup> Chapter XVII, Cap 224 (1985 ed).

<sup>41</sup> Chapter XVII (1986 ed).

<sup>42</sup> Act XIV of 1860.

<sup>43</sup> Sections 415 to 420. The Codes also contain provisions dealing with a range of other fraud/theft-related offences, including theft itself: sections 378 to 382A; criminal misappropriation: sections 403 to 404; fraudulent deeds and dispositions of property: sections 421 to 424; forgery: sections 463 to 477A (which includes falsifying of accounts: section 477A), as well as "criminal conspiracy" (sections 120A and 120B).

<sup>44</sup> Sections 405 to 409 of both Codes.

<sup>45</sup> In "Dishonoured cheques and the offence of cheating - a Singapore perspective" (1987) 29 *Malaya Law Review* 41, at 42.

<sup>46</sup> *Idem*. It is interesting to note that Macaulay, who drafted the original Indian Code, apparently admitted that "the effects of this penal policy would be felt more by the poorer and less privileged members of Indian society. However ... given the unfamiliarity of natives with English ways of conducting transactions, an approach similar to that in England had to be adopted in order to promote honesty in transactions that related to property and contract rights": *idem*. (Canagarayar comments, somewhat drily, that "Such it seemed was the urgency to promote higher degrees of

4.35            **Cheating**        The offence of cheating is one of the offences against property under the Penal Code. It states:<sup>47</sup>

*"Whoever, by deceiving any person, whether or not such deception was the sole or main inducement, -*

*(a) fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property; or*

*(b) intentionally induces the person so deceived to do or omit to do anything which he would not do or omit to do if he were not so deceived and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation, or property,*

*is said to 'cheat'."*

It is apparent that the scope of this provision is much wider than a simple property offence.

4.36            **The elements of the offence**    Two distinct modes of conduct are referred to in the section. ***The elements of one (described by Canagarayar as "limb I") are that:***

- (i) the accused has deceived someone;***
- (ii) that by such deception he has induced that person;***
- (iii) fraudulently or dishonestly;***
- (iv) to deliver property or consent to the retention of property by any person.***

4.37            ***Under the second (Canagarayar's "limb II"), the elements are:***

- (i) the accused has deceived someone;***
- (ii) that by such deception he has induced that person;***
- (iii) intentionally;***
- (iv) to do or omit to do something that causes or is likely to cause harm to that person in body, mind, reputation or property.***

4.38            Canagarayar refers to this second limb as "simple cheating" as opposed to the "more serious" offence contained in limb I, and notes that the sanctions differ in respect of the two offences. (The maximum term of

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<sup>47</sup> "honesty" in commerce and property transactions amongst different races with diverse religious and customary values in British India": *idem.*)  
Section 415 in both Codes.

imprisonment for limb I is ten years,<sup>48</sup> while for limb II, only five years.<sup>49</sup> Also, limb I is treated as a "seizable" offence whereas limb II is not.<sup>50</sup>)

4.39            **Deception**            Both limbs of the section require proof of *deception* by the accused which causes the victim to act, or not to act, to his detriment. Canagarayar ascribes to "deception" the meaning given to it by Buckley J in *Re London and Globe Finance Corporation Ltd.*, that "to deceive is by falsehood to induce a state of mind."<sup>51</sup>

4.40            **The mental element**            In brief, the state of mind of the accused under limb I is described in terms of "fraudulently" or "dishonestly." In limb II, the inducement must be "intentional."

4.41            Section 25 states:

*"A person is said to do a thing fraudulently if he does that thing with intent to defraud, but not otherwise."*<sup>52</sup>

The term "dishonestly" is referred to in section 24:

*"Whoever does any thing with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing 'dishonestly'."*<sup>53</sup>

4.42            **The result**            "Wrongful gain" is defined as "gain by unlawful means of property to which the person gaining is not legally entitled."<sup>54</sup> "Wrongful loss" as "the loss by unlawful means of property to which the person losing it is legally entitled."<sup>55</sup>

4.43            Canagarayar notes that there is some controversy over whether the accused should not only have intended the act which caused the inducement, but whether he should also have intended the consequences (detriment to the victim) of the inducement.<sup>56</sup> The law is still developing on a case by case basis. Particular difficulties are experienced in determining the applicability of this offence to dishonoured cheques<sup>57</sup>. One shortcoming of the cheating offence is that the person deceived must have suffered the loss,

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<sup>48</sup> Section 420 of both Codes. Note that the Codes go on to provide other specific cheat offences, such as "cheating by personation" (section 417) and cheating and causing loss to someone whom the offender is bound to protect (section 418).

<sup>49</sup> Section 417 of both Codes.

<sup>50</sup> Singapore Criminal Procedure Code, Cap 113 (1980 Rep), Schedule A. [1903] 1 Ch 728, at 733.

<sup>51</sup> See section 25 of both Codes.

<sup>52</sup> See section 24 of both Codes.

<sup>53</sup> See section 23 of both Codes.

<sup>54</sup> *Idem*. The section goes on to state:

*"A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is deprived of property."*

<sup>55</sup> Canagarayar, *op cit*, at 48-49

<sup>56</sup> Morgan, "Cheating" in Koh, Clarkson & Morgan (eds), *Criminal Law in Malaysia and Singapore: Texts & Materials* (1989) and Canagarayar, *op cit*.

rather than a third party. In commercial fraud, however, the loss may frequently be suffered by a person other than the individual deceived. Prosecutors in Malaysia have also expressed doubt as to whether a computer can be said to be deceived for the purposes of the cheating offence.<sup>58</sup>

4.44 **Criminal breach of trust** This offence<sup>59</sup> states:

*"Whoever, being in any manner entrusted with property, or with any dominion over property either solely or jointly with any other person, dishonestly misappropriates, or converts to his own use, that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person to do so, commits 'criminal breach of trust'."*

4.45 We are advised that this provision is more often used in Malaysia and Singapore in complex commercial crime cases than the cheating provisions discussed above. However, the provision appears to be more akin to a theft offence than a general fraud offence, concentrating as it does on the conduct of the accused rather than on any deception offering inducement to the victim. There appears to be some doubt about whether the offence is applicable to the unauthorised use or manipulation of automatic teller machines<sup>60</sup>. This stems from the requirement of the offence of criminal breach of trust that there be movement of the property involved and a doubt as to whether the electronic movement of funds is sufficient to constitute the completed crime.

## New Zealand

4.46 Although New Zealand does not have a substantive offence of fraud, it has codified the common law offence of conspiracy to defraud in section 257 of the Crimes Act 1961:

*"Every one is liable to imprisonment for a term not exceeding 5 years who conspires with any other person by deceit or falsehood or other fraudulent means to defraud the public, or any person ascertained or unascertained, or to affect the public market price of stocks, funds, shares, merchandise, or anything else publicly sold, whether the deceit or falsehood or other fraudulent means would amount to a false pretence as hereinbefore defined."*

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<sup>58</sup> It is thought that a computer does not fall within the definition of "person" under the Penal Code. The definition of "person" "includes any company or association or body of persons, whether incorporated or not." But see in contrast the position in South Africa at paragraph 4.72, *infra*.

<sup>59</sup> See section 405 of both Codes.

<sup>60</sup> Mary George, "Criminal Breach of Trust Under Malaysian Law: A Review" [1990] 1 CJL 10 at 26.

The elements of the offence as stipulated in section 257 of the Crimes Act 1961 are as follows:<sup>61</sup>

- (i) ***an agreement or conspiracy between two or more persons;***
- (ii) ***by deceit or falsehood or other fraudulent means;***
- (iii) ***to defraud the public or any person, or to affect the price of anything publicly sold.***

4.47 ***By deceit or falsehood or other fraudulent means*** These words define the means by which it is intended the conspiracy will be carried out. Every kind of fraudulent statement, conduct, trick or device were held to be caught.<sup>62</sup> Although the section does not provide that dishonesty is an element of the offence, the editors of *Adams on Criminal Law* noted that the English authorities have focused upon the concept of dishonesty as the essential characteristic of the means employed to carry out the conspiracy under the offence.<sup>63</sup>

4.48 ***To defraud the public or any person*** The editors of *Adams on Criminal Law*<sup>64</sup> refer to *Scott v Metropolitan Police Commissioner* which held that:

*"To defraud ordinarily means ... to deprive a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud be entitled."*<sup>65</sup>

Where the contemplated outcome of the conspiracy was to induce a course of conduct in another which put that other's economic interests in jeopardy, it does not matter that the conspirators did not intend or desire that actual loss result.<sup>66</sup>

4.49 It is sufficient to prove that the conspirators had agreed to pursue a course of conduct which would inevitably involve a breach of a statute which protects a valuable natural resource to the benefit of the public generally.<sup>67</sup>

4.50 ***Motive*** The essence of the offence is an agreement to practise a fraud on somebody. It is enough if the conspirators have

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<sup>61</sup> Section 310 also provides for the statutory offence of conspiracy to commit an offence. A conspiracy to breach a statutory provision may be charged under s257 or s310 in appropriate circumstances. Cf *R v Walters* [1993] 1 NZLR 533.

<sup>62</sup> *R v Weaver* (1931) 45 CLR 321.

<sup>63</sup> *R v Sinclair* [1968] 1 WLR 1246: "to act with deliberate dishonesty to the prejudice of another's proprietary right"; *R v Landy* [1981] 1 All ER 1172 : "What the Crown had to prove was a conspiracy to defraud which is an agreement dishonestly to do something which will or may cause loss or prejudice to another. The offence is one of dishonesty." See Robertson, *Adams on Criminal Law* (1992, Brooker & Friend Ltd, Wellington), at CA257.04.

<sup>64</sup> Robertson, *Adams on Criminal Law* (1992, Brooker & Friend Ltd, Wellington) at CA257.05.

<sup>65</sup> [1975] AC 819, 839.

<sup>66</sup> Robertson, *Adams on Criminal Law* (1992, Brooker & Friend Ltd, Wellington), at CA257.05, citing *R v Allsop* (1977) 64 Cr App R 29 as authority.

<sup>67</sup> *R v Walters* [1993] 1 NZLR 533.

dishonestly agreed to bring about a state of affairs which they realise will or may deceive a victim into so acting, or failing to act, that the victim will suffer economic loss, or his economic interests will be put at risk. A benign motive or underlying purpose will not, of itself, prevent an agreement from being a conspiracy to defraud.<sup>68</sup>

4.51 **Report of the Crimes Consultative Committee** In 1989 the Government introduced a Crimes Bill with a view to reforming the criminal law. The Bill proposed consolidating the provisions relating to crimes involving property and listing offences involving falsehood under a sub-heading. Clause 195 of the Bill dealt with conspiracy to defraud and provided that:

*"Every person is liable to imprisonment for 5 years who conspires with any other person dishonestly or by any deception to obtain for himself or herself or for any other person, whether directly or indirectly, any privilege, benefit, service, pecuniary advantage, or valuable consideration."*

4.52 The Crimes Consultative Committee appointed to examine the Bill reported in 1991 and recommended that the offence of conspiracy to defraud should be redrafted as follows:<sup>69</sup>

*"Every person is liable to imprisonment for 7 years who conspires with any other person, by deception -*

- (a) To obtain for himself or herself or for any other person, whether directly or indirectly, any property, pecuniary advantage, or valuable consideration; or*
- (b) To cause loss to any other person."*

4.53 The key difference from the Bill's original formulation is the reliance on deception alone, rather than dishonesty or deception. The Committee suggests that deception should have the following definition for the purposes of the offence:<sup>70</sup>

*"'Deception', in relation to [the offence of conspiracy to defraud<sup>71</sup>], means -*

- (a) A false representation, whether oral, documentary or by conduct; or*
- (b) A misrepresentation whether oral, documentary or by conduct; or*
- (c) An omission to disclose a material particular; or*
- (d) A fraudulent device; or*
- (e) A trick or stratagem -  
made or used with intent to deceive any person."*

<sup>68</sup> *R v Gunthorp*, unreported, 9/6/93, CA46/93, referring to *Wai Yu-Tsang v R* [1992] HKCLR 26. The benign purpose is a matter which could be taken into account at sentencing.

<sup>69</sup> *Crimes Bill 1989 : Report of the Crimes Consultative Committee* (1991), at 114, clause 195.

<sup>70</sup> *Crimes Bill 1989 : Report of the Crimes Consultative Committee* (1991), at 109, clause 176.

<sup>71</sup> The offence of "conspiracy to defraud" is renamed as "conspiracy to deceive" in the Report.

4.54 The proposed definition of deception thus incorporates the requirement of an intention to deceive any person. Tricks, stratagems and fraudulent devices are included to reflect the broad scope of the current law.

4.55 The Crimes Bill 1989 lapsed but we are advised by the Chief Legal Adviser to the Department of Justice that the current Minister of Justice has stated that he hopes to introduce a new Crimes Bill which takes into account the Committee's recommendations.

4.56 **Obtaining by false pretence** There is also an offence of obtaining by false pretence.<sup>72</sup> It is necessary to establish that there was not only a pretence known by the accused to be false but also that there was an intent to defraud.<sup>73</sup> The Crimes Consultative Committee recommended that the offence be replaced by that of obtaining by deception. "Deception", for the purposes of this offence, is defined as a false representation made by a person who knows that it is false (or is reckless as to whether it is false) and intends any other person to act upon it.<sup>74</sup>

## Scotland

4.57 In Scotland, a general offence of fraud exists at common law. In addition, almost 40 separate statutes (mostly of United Kingdom application rather than purely Scots) contain specific statutory fraud offences. These range from the Agricultural Marketing Act 1958 to the Vehicle (Excise) Act 1971.

4.58 Available statistics do not distinguish between common law and statutory proceedings, but Crown Office indicate that the vast bulk of prosecutions proceed under the common law charge. In recent years, the number of recorded cases of fraud has ranged between 19,000 and 22,000, with 3,233 individuals prosecuted in 1991.

4.59 **The elements of the offence** The common law offence of fraud is generally defined as the bringing about of some definite practical result by means of false pretences.<sup>75</sup> **There are three essential elements to the offence of fraud:**

- (i) **a false pretence;**
- (ii) **a definite practical result; and**
- (iii) **a causal link between the pretence and the result.**<sup>76</sup>

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<sup>72</sup> Section 246 Crimes Act 1961.

<sup>73</sup> *R v Miller* [1955] NZLR 1038.

<sup>74</sup> *Crimes Bill 1989: Report of the Crimes Consultative Committee* (1991), at 113, clause 192.

<sup>75</sup> See Macdonald, *A practical treatise on the criminal law of Scotland* (5th ed, 1948) at 52, referred to in Gordon, *Criminal law* (2nd ed, 1978) at 588.

<sup>76</sup> See Gordon, *op cit*, at 588.

4.60           **The false pretence**   The false pretence may be express or implied, and may be constituted by silence where there is a duty on the individual to disclose the truth to the other party. It does not include expressions of opinion, rather than fact, nor commercial "puffery", which was characterised by Lord Ardwall in *Tapsell v Prentice*<sup>77</sup> as "just the ordinary lies which people tell when they want to induce credulous members of the public to purchase goods, or to do something for them."<sup>78</sup>

4.61           **The result**   The Scottish offence of common law fraud goes beyond economic loss and extends to deceptions inducing another to act in a way he would not otherwise have done. The result of the false pretence does not need to involve any actual or potential economic loss. It is sufficient that the dupe is induced to do something which places him in a worse position than he would otherwise have been in.<sup>79</sup> It is, however, necessary that the dupe must have been induced to do something: "fraud involves more than just deceit, although it does not involve very much more."<sup>80</sup>

4.62           In *Adcock v Archibald*,<sup>81</sup> Lord Justice-General Clyde remarked that:

*"It is, however, a mistake to suppose that to the commission of a fraud it is necessary to prove an actual gain by the accused, or an actual loss on the part of the person alleged to be defrauded. Any definite practical result achieved by the fraud is enough."*<sup>82</sup>

Lord Hunter agreed with Lord Clyde and added:

*"A fraud may be committed although in the result the person defrauded may not have suffered any pecuniary loss. The essence of the offence consists in inducing the person who is defrauded either to take some article he would not otherwise have taken, or to do some act he would not otherwise have done, or to become the medium of some unlawful act."*<sup>83</sup>

4.63           Although Gordon suggests that the *ratio* of *Adcock v Archibald* may be too wide in suggesting that any practical result is sufficient for fraud, rather than "some legally significant prejudice,"<sup>84</sup> the case law suggests otherwise. In the case of *McKenzie v HMA*,<sup>85</sup> for instance, it was held that it was fraud to induce a solicitor to raise an action against a third party by giving him false instructions.<sup>86</sup> Lord Justice-Clerk Ross concluded in that case that counsel for the prosecution:

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77           (1910) 6 Adam 354.

78           *Ibid*, at 357.

79           Gordon, *op cit*, at 602.

80           *Idem*.

81           1925 SLT 258.

82           *Ibid*, at 260.

83           *Idem*.

84           Gordon, *op cit*, at 601 to 602.

85           1988 SLT 487.

86           *Idem*.

" ... was well founded when he contended that what was libelled in the present indictment was the making of false representations to solicitors which were acted on by them with the consequence that actions were raised; there were thus dishonest representations which had a practical effect."<sup>87</sup>

Gordon, in a modification of his earlier view, suggests that it may also be the case that a fraud would be constituted by inducing the police to make unnecessary investigations, or to summon a doctor or the fire brigade by a false alarm.<sup>88</sup>

4.64 **Causal link** It is an essential element of the offence of fraud that there is a causal link between the false pretence and the victim's act or omission. It is a defence to a charge of fraud to show that the victim was not influenced in his actions by the false pretence, or that he knew the pretence was false.

4.65 It is well established at Scots law that a charge of attempted fraud can properly be brought. In *McKenzie v HMA*,<sup>89</sup> the false representations which induced the solicitors to raise an unjustified civil action against a fisheries company were libelled as part of a fraudulent scheme to obtain money from the company. The charge concluded:

" ... and you did thus attempt to induce said Caley Fisheries (Partnerships) Ltd. to pay to you [a sum of money] and attempt to obtain said sum by fraud."<sup>90</sup>

4.66 **The charge** It is common practice in Scotland to include within one charge the details of a number of separate incidents of fraud which constitute a coherent scheme of fraud. An example of such an indictment appears at Annexure 3. Sometimes, as in *McKenzie v HMA*, the details of the criminal conduct alleged will appear within the body of the indictment; in other cases, the prosecutor will make use of a schedule which sets out the elements of the scheme under appropriate columns.<sup>91</sup> The form of a Scottish complaint or indictment therefore ensures that the precise nature of the alleged conduct by the accused is specified with great particularity. Consequently, the somewhat artificial complexities of the English rule against duplicity have not arisen in Scotland.<sup>92</sup> In general, there is no objection to the accumulation of charges, whether as separate charges or in schedule form. It is open to the defence to apply to the court for, and it is within the discretion of the court to order, separation of charges where the accumulation of charges is considered prejudicial to the defence. This might arise in a case of fraud

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<sup>87</sup> *Ibid*, at 489.

<sup>88</sup> Gordon, *op cit*, *Second cumulative supplement* (1992), at 55.

<sup>89</sup> *Op cit*.

<sup>90</sup> *Ibid*, at 488.

<sup>91</sup> See Renton and Brown, *Criminal procedure according to the law of Scotland* (5th ed, 1983), at 75.

<sup>92</sup> The rule has not been free from adverse comment in the English jurisdictions. See, for instance, the comment by the bench in *Pain* (1826) 7 D & R 678, at 684, that an argument on duplicity was "a very nice and subtle objection, and quite beside the merits"; and Li JA in *Wong Chi-hung* [1982] HKLR 361, at 374: "I hasten to add that my opinion is one founded entirely on a technicality. There is no moral in it."

where, for example, the prosecutor had included a charge of a totally different generic character, such as gross indecency. Crown Office is not aware of any case where separation of charges has been ordered where the offences were of a similar generic character. What the court will not allow the prosecutor to do in Scotland is to include in an indictment separate charges which cover the same subject matter. While this would not generally be expected to occur in fraud cases, it might arise where, for instance, a prosecutor sought to include accounting offences under the Companies Act as well as the substantive fraud charges.

4.67 The rationale of the English rule against duplicity is said to be to ensure that "an accused who has been accused of committing an offence should know with certainty the clear and precise details of the offence charged."<sup>93</sup> However, the provisions of the Criminal Procedure (Scotland) Act 1975 (as amended) and its predecessors set out the requirements for a competent charge. It is therefore difficult to see how a charge drafted competently in the Scottish style could realistically be said to offend against that laudable end. Indeed, Crown Office have pointed out that "far from any legal objection being taken to the schedule approach to charging fraud in complex cases it is enthusiastically endorsed by the judiciary as simplifying the presentation of indictments".<sup>94</sup>

## South Africa

4.68 The South African law of fraud appears to include a variety of forms of misrepresentation made with intent to defraud which are actually or potentially prejudicial. In *S v Isaacs*<sup>95</sup>, Henning J said (at page 188):

*"The crime of fraud in our law consists in a wilful perversion of the truth made with intent to defraud and resulting in actual or potential prejudice to another."*

He went on to say (at page 191) that "where a person makes a misrepresentation knowing it to be false, it is made wilfully." The judge then cited with approval the words of Tindall JA in *R v Henkes*<sup>96</sup>:

*"... if a misrepresentation which is capable of deceiving is made wilfully and the person making it intends to deceive the person to whom it is made, that is sufficient to prove the intention to defraud where the misrepresentation is one which causes actual prejudice or is calculated to prejudice."*

4.69 In *R v Myers*<sup>97</sup> the court summarised the requisite intent for the commission of fraud:

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<sup>93</sup> Clark and Morrow, "Duplicity: the rule and its consequences" (1987) 17 HKLJ 4, at 4.

<sup>94</sup> Extract from letter to the Commission, dated 23 November 1993.

<sup>95</sup> [1968] 2 D & CLD 187.

<sup>96</sup> 1941 AD 143, at 161.

<sup>97</sup> 1984(1) SA 375 (A)

"... for the purposes of the present case, by saying that if the maker of a representation which is false has no honest belief in the truth of his statement when he makes it, then he is fraudulent."

4.70 Hunt and Milton in their *South African Criminal Law and Procedure* characterise the modern South African law of fraud as "relatively certain and seems to be socially satisfactory".<sup>98</sup> They continue:

*"It certainly gives little comfort to people who act dishonestly. Indeed the tendency has been to regard more and more types of fraudulent misrepresentation as potentially prejudicial, and more and more types of non-proprietary harm as prejudice, with the result that though it is still inaccurate to say that the law punishes as fraud the mere making of any misrepresentation with intent to defraud, we are not very far from that result."*<sup>99</sup>

4.71 Hunt and Milton argue that it is unnecessary to include the word "wilful" in any definition of fraud: " 'intent to defraud' includes what is meant by 'wilful'"<sup>100</sup>. They suggest that fraud consists in unlawfully making, with intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudicial to another.<sup>101</sup> ***The essential elements of the offence are therefore:***

- (i) unlawfully;**
- (ii) making a misrepresentation;**
- (iii) intent to defraud;**
- (iv) causing;**
- (v) actual or potential prejudice.**

4.72 As to the first of these, Hunt and Milton suggest that authority, coercion or consent would render an otherwise fraudulent misrepresentation lawful. Misrepresentation may be by conduct or words, or by silence, as, for instance, where the relationship between fraudster and victim is one of *uberrimae fides*. There are two aspects to the intent to defraud: firstly, there must be an intention to deceive and, secondly, there must be an intention to induce the victim to alter or abstain from altering his legal position. On this, South African law adheres to the dicta of Buckley J in *Re London and Globe Finance Corporation Ltd.*:<sup>102</sup>

*"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 or believes to be false. To defraud is to deprive by deceit; it is by deceit to induce a man to act to his injury. More tersely it*

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<sup>98</sup> Hunt and Milton, *South African Criminal Law and Procedure*, Volume II, (2nd rev ed, 1989), at 713.

<sup>99</sup> *Idem*.

<sup>100</sup> *Ibid*, at 765.

<sup>101</sup> *Ibid*, at 755.

<sup>102</sup> [1903] 1 Ch 728.

*may be put that to deceive is by falsehood to induce a state of mind, and to defraud is by deceit to induce a course of action."*

As Milton and Hunt put it, "it must therefore be proved that X intended Y not merely to be deceived, but in consequence to alter or abstain from altering his legal rights. X must intend to cause Y prejudice, proprietary or non-proprietary."<sup>103</sup>

4.73 Two statutory provisions are of relevance here. Section 245 of the Criminal Procedure Act 1977 provides that where a person is charged with an offence of which a false representation is an element and it is proved that he made that false representation, he shall, unless the contrary is proved, be deemed to have made the representation knowing it to be false. The effect is that an onus is placed on the accused to prove on a balance of probabilities that he did not know the representation was false.

4.74 The second provision of interest is section 103 of the Act, which provides that in any charge in which it is necessary to allege and prove that the accused performed an act with intent to defraud, it shall be sufficient to allege and prove that the accused performed the act with intent to defraud without alleging and proving that it was the intention of the accused to defraud any particular person, and the charge need not mention the owner of the property involved or set forth the details of any deceit. It still, of course, remains incumbent on the prosecution to prove that there was actual or potential prejudice caused to someone.

4.75 The deceit must have caused actual or potential prejudice. The causal link was referred to in *S v Huijzers*, where the court said:

*"If he had not made the misrepresentation, the complainants would have paid no money at all over to him. The result of the misrepresentation was thus that the complainants, metaphorically stated, no longer had their money in their pockets, ...."*<sup>104</sup>

4.76 The inclusion of potential prejudice within the offence of fraud is important. It does not matter whether the victim believed the misrepresentation or was induced to act to his prejudice: there will usually be potential prejudice. While most fraud will involve proprietary prejudice, this need not necessarily be so. Schreiner J pointed out in *R v Heyne* that:

*"... the false statement must be such as to involve some risk of harm, which need not be financial or proprietary, but must not be too remote or fanciful, to some person, not necessarily the person to whom it is addressed."*<sup>105</sup>

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<sup>103</sup> *Op cit*, at 767.

<sup>104</sup> 1988 (2) SA 503 (A), at 510. This is a literal translation of a judgment delivered in Afrikaans.

<sup>105</sup> 1956 (3) SA 604 (AD), at 622.

4.77 It was sometimes suggested that the width of the concept of "potential prejudice" in the South African offence of fraud meant that there was no scope for the existence of an offence of attempted fraud. This has now been judicially disapproved, and Hunt and Milton suggest five situations in which an attempted fraud arises:

*"(1) Where misrepresentation is not communicated to the representee, as the letter containing it is lost in the post.*

*(2) Where the misrepresentation is communicated, but it causes no actual prejudice, and because it is so patently ridiculous it is not such as could reasonably harm anyone and there is therefore no potential prejudice either.*

*(3) Where for some other reason the misrepresentation, though communicated, contains a risk of prejudice which is 'too remote or fanciful'.*

*(4) Where as a result of a mistake of fact X thinks his representation is false, whereas it is actually true, or thinks his misrepresentation can cause prejudice, whereas prejudice is impossible.*

*(5) Where there is no proof that potential prejudice was caused."<sup>106</sup>*

4.78 Three further aspects of the South African law of fraud are worthy of mention in relation to our current study. Firstly, there is no evidence to show that the South African formulation of the offence is not capable of founding effective prosecutions against the complex, large-scale commercial frauds which are an increasing part of the modern world. Those commentators who have been kind enough to advise us on the South African law of fraud have been unanimous in their view that the nature of the substantive offence causes no difficulty in this regard. In practice, the problems which arise in the prosecution of commercial fraud stem from the rules of admissibility of evidence rather than the elements of the offence itself. In complex commercial cases, for instance, there will inevitably be evidence derived from computer records and this raises the question of its admissibility, given the traditional requirement of the rules of evidence to require direct human knowledge of the contents of the records. Specific legislative provision has been made in a number of South African statutes to deal with the problems thrown up by computer evidence.

4.79 Secondly, one criticism levelled at the creation of a substantive offence of fraud in Hong Kong is that it would necessarily overlap with a number of existing Theft Ordinance offences. This situation pertains in South Africa and a number of other jurisdictions, however, apparently without difficulty. Stratford JA observed in *R v Davies*:

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<sup>106</sup> *Op cit*, at 778.

*"As a general proposition it clearly cannot be said that the crime of fraud and that by means of false pretences are identical. A moment's reflection will show the fallacy of that proposition. Though it is true that in all cases where the latter crime is committed there are present all the elements constituting the crime of fraud, the converse is certainly not true. ... If the prejudice is actual and consists in the deprivation of another of his ownership in property capable of being stolen, and further if the accused converts that property to his own use, in such a case only is the crime also one of theft by means of false pretences."<sup>107</sup>*

4.80 Of relevance here is section 83 of the Criminal Procedure Act 1977 which provides that:

*"If by reason of any uncertainty as to the facts which can be proved or if for any other reason it is doubtful which of several offences is constituted by the facts which can be proved, the accused may be charged with the commission of all or any of such offences, and any number of such charges may be tried at once, or the accused may be charged in the alternative with the commission of any such offences."*

The effect of this is that the person drafting the charge sheet or indictment is authorised to charge the accused with all the offences which the available facts could possibly prove, even if that results in an overlap which would lead to a duplication of convictions if there were a conviction on some or all of the charges. It is, however, the function of the court to ensure "that an accused is not convicted of more than one offence if the crimes with which the accused is charged in the relevant charges rest on the same culpable fact. In short, it is the court's duty to guard against a duplication of convictions and not the prosecutor's duty to refrain from the duplication of charges."<sup>108</sup> In determining whether or not there is a duplication of convictions the court will have regard to "the test of a single intention" and "the evidence test".<sup>109</sup> As du Toit points out, a single act may have numerous criminally relevant consequences and may create numerous offences, as for instance where a father rapes his daughter, or in the case of robbery which consists of a number of constituent criminal acts. In practice, we understand that the rule against the duplication of convictions has worked satisfactorily in South Africa and does not appear to have caused any difficulty.

4.81 Thirdly, unlike the situation in Malaysia, it is clear that in South Africa a fraudulent transaction through a computer terminal will be caught by the law of fraud. In *S v van den Berg* the court held that a person who

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<sup>107</sup> 1928 AD 165, at 170.

<sup>108</sup> E du Toit *et al*, *Commentary on the Criminal Procedure Act* (1993) Juta, at 14.5.

<sup>109</sup> *Ibid*, see generally the discussion at 14.6 to 14.9.

unlawfully credits an amount to a bank account via a computer terminal is guilty of fraud. In the course of its judgment the court said:<sup>110</sup>

*"This was, in my view, a misrepresentation to the bank, and the fact that the misrepresentation was introduced into the computer system electronically differs not one whit from the clerk who, with the intention to deceive, makes a false entry with a pen into a ledger account. The account has been falsely credited and in this instance the computer system was the means by which such an entry was made and consequently it is a misrepresentation."*

The deception in the fraudulent use of a bank automatic teller machine lies in the fact that the perpetrator pretends by his conduct in entering the various instructions or information that he is authorised to use the autocard to obtain the funds.

## Zimbabwe

4.82 Fraud in Zimbabwe is a common law crime with its historical origins in the Roman-Dutch law. As advised by the Office of the Attorney-General of Zimbabwe, there is little in terms of legal literature originating from Zimbabwe on the law of fraud other than case law. The following statement of the law of fraud in Zimbabwe is therefore based on five judgements delivered by the Supreme Court of Zimbabwe, which were kindly provided to us by the Deputy Attorney-General of Zimbabwe.

4.83 ***The elements of the offence*** The five judgements show that the Zimbabwean case law on fraud is based on the jurisprudence developed by the courts in South Africa. In *Attorney-General v Paweni Trade Corp (Pvt) Ltd.*,<sup>111</sup> the Supreme Court of Zimbabwe made some observations on the law of fraud. The court stated that fraud consists in unlawfully making, with intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudicial to another; citing Volume II of Hunt and Milton's *South African Criminal Law and Procedure*<sup>112</sup> as authority. ***The elements of the offence can therefore be summarised as follows:***

- (a) ***a false representation;***
- (b) ***unlawfully made to another;***
- (c) ***with intent to defraud;***
- (d) ***causing actual or potential prejudice to another.***

4.84 ***The false representation*** The representation should be a representation of fact.<sup>113</sup> Presumably a representation of opinion or law is not

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<sup>110</sup> 1991 (1) SACR 104 (T), at 106c.

<sup>111</sup> 1990 (1) ZLR 24 (SC) at 27G to 29G.

<sup>112</sup> 2nd ed, 1989.

<sup>113</sup> *Ibid*, at 27G.

sufficient. However, it includes an expression of present intention or belief as to a matter *in futuro*.<sup>114</sup>

4.85 The representation can be express or implied.<sup>115</sup> It is not necessary that the representation be acted upon by the person to whom it is made, to his prejudice, in order to constitute the offence.<sup>116</sup>

4.86 **Unlawfully made to another** Whilst it is clear that the unlawfulness of the act committed by an accused constitutes an element of the offence,<sup>117</sup> the Supreme Court of Zimbabwe has not had the opportunity to elaborate on this requirement. However, Hunt and Milton suggest that authority, coercion or consent would render an otherwise fraudulent misrepresentation lawful.

4.87 **With intent to defraud** There must be an intention to defraud the party to whom the misrepresentation is made.<sup>118</sup> *Lawrence Chaitezvi v The State* seems to have established that the accused must also have intended the misrepresentation to be acted upon by the representee.<sup>119</sup>

4.88 The presence or lack of *bona fides* on the part of the accused may be relevant in determining whether he has the intention to defraud.<sup>120</sup>

4.89 **Causing actual or potential prejudice to another** The false representation must involve "some risk of harm, which need not be financial or proprietary, but must not be too remote or fanciful, to some person, not necessarily the person to whom it is addressed".<sup>121</sup>

4.90 The court held in *Lawrence Chaitezvi v The State*<sup>122</sup> that the "existence of prejudice must be looked at objectively in the sense that it is irrelevant that there was no possibility that the actual representee could be misled. The law approaches the matter from the wrong-doer's point of view. If he intended to deceive and makes a misrepresentation, it is of no consequence that the representee was not in fact deceived".<sup>123</sup>

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<sup>114</sup> *The State v Jakarasi* 1983(1) ZLR 218, at 224. In this case, the court did not follow the South African case of *R v Blackmore* 1959(4) SA 486 (FSC) and held that where a man goes into a store and buys goods and tenders in payment an immediately payable cheque, there is an implied representation that he believes that if the cheque is presented in the ordinary course it will be honoured.

<sup>115</sup> *Ibid*, at 224.

<sup>116</sup> *Attorney-General v Paweni Trade Corp (Pvt) Ltd.* 1990 (1) ZLR 24 (SC) at 28C.

<sup>117</sup> Eg the accused in *Lawrence Chaitezvi v The State* (SC) 135/92 was charged with committing fraud by making a misrepresentation "unlawfully with intent to defraud" and was convicted of attempting to commit fraud in the Supreme Court.

<sup>118</sup> *Attorney-General v Paweni Trade Corp (Pvt) Ltd.*, *op cit*, at 27G. Presumably, the "party" intended to be defrauded includes the employer and principal of the individual to whom the misrepresentation is made as well as the individual himself.

<sup>119</sup> *Op cit*, at 5.

<sup>120</sup> *Cecil Katazo Mbeu v The State* (SC) 208/93 at 3 to 4.

<sup>121</sup> *R v Heyne* 1956 (3) SA 604 (A), cited in *Attorney-General v Paweni Trade Corp (Pvt) Ltd.*, *op cit*, at 28F.

<sup>122</sup> *Op cit*, at 5 to 6.

<sup>123</sup> Apparently the court failed to distinguish between "deceive" and "defraud" as suggested by the South African court in *Re London and Globe Finance Corporation Ltd.* [1903] 1 Ch 728.

4.91 The prejudice can be actual or potential.<sup>124</sup> For the element of potential prejudice to be satisfied there must be a *risk* that prejudice *could* be caused. It is not required that there has to be a probability of harm, nor that prejudice *would* be caused.<sup>125</sup>

4.92 As long as the risk of prejudice is a real one, it is sufficient to constitute potential prejudice even though the risk is slight.<sup>126</sup>

4.93 There must also be a causative link between a misrepresentation and the actual or potential prejudice. However since the word "potential" incorporates in itself a test of causation, the requirement will have been satisfied if the misrepresentation is potentially prejudicial.<sup>127</sup>

4.94 **Attempted fraud** The law of Zimbabwe recognises the offence of attempted fraud. In *The State v Francis*, Fieldsend CJ said:

*"A conviction for attempt to commit fraud is competent where a misrepresentation, which would cause actual or potential prejudice were it made, is prevented from being made, provided always the facts establish that there was an attempt to make the misrepresentation with the requisite intent."*<sup>128</sup>

4.95 The situations in which attempted fraud would arise as suggested in Hunt and Milton's *South African Criminal Law and Procedure*<sup>129</sup> appear to have been adopted by the court in *Lawrence Chaitezvi v The State* as the law of Zimbabwe.<sup>130</sup>

4.96 **The law restated** In the light of the above observations, the elements of the offence of fraud in Zimbabwe can be restated as follows:

- ◆ an express or implied misrepresentation of fact (including a misrepresentation about a present intention or belief as to a matter in the future);
- ◆ unlawfully made to another person;
- ◆ with intent to defraud the representee, intending the misrepresentation to be acted upon by him;
- ◆ causing actual or potential prejudice (from the point of view of the person who made the misrepresentation) to another person, not

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<sup>124</sup> *Keen Marshall Charumbira v The State* (SC) 119/85.

<sup>125</sup> *Lawrence Chaitezvi v The State*, *op cit*, at 5.

<sup>126</sup> *Keen Marshall Charumbira v The State*, *op cit*, at 3.

<sup>127</sup> Hunt and Milton, *op cit*, at 728, cited in *Attorney-General v Paweni Trade Corp (Pvt) Ltd.*, *op cit*, at 28 to 29.

<sup>128</sup> 1980 ZLR 368 (AD), at 372B.

<sup>129</sup> *Op cit*, at 778.

<sup>130</sup> *Op cit*, at 4.

necessarily the representee,<sup>131</sup> that involves a risk of harm (whether financial, proprietary or otherwise) which is not too remote or fanciful.

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<sup>131</sup> Under this formulation, the person intended to be defrauded, ie the representee, is not necessarily the same person who is actually or potentially prejudiced. See the text in Part II above.

## Chapter 5

### A new offence of fraud

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#### Introduction

5.1 We have set out in the preceding chapters of this report an outline of the present law of fraud in Hong Kong, together with a number of its shortcomings and deficiencies. It is clear that the present law is imperfect and our terms of reference direct us to consider one specific avenue of possible reform: the creation of a substantive offence of fraud. Such an option is not without precedent, as we have seen from the examination in the previous chapter of the law in a number of jurisdictions which incorporate such an offence. It is an approach which has been the subject of much debate elsewhere, notably in England, and it is clear that there is considerable reluctance among practitioners in common law systems to adopt a model largely confined to Roman-Dutch and Civil systems of law.

5.2 We would say at the outset that the creation of a substantive offence of fraud, in whatever formulation, could not of itself be expected to remedy all the criticisms which have been levelled at the present law in Hong Kong. Some of these relate to the procedure adopted at criminal trials in our jurisdiction, rather than matters related to the nature of the offence itself. Prosecutors complain, for instance, that under the existing law there is a constant risk of "overloading the indictment" if the full extent of an accused's criminal conduct is to be adequately reflected to the judge and jury where the accused has embarked on an extensive, but inter-related, course of fraudulent transactions. That may well be a difficulty with the current law but it is not one which we believe the introduction of a substantive offence of fraud will ameliorate. The prosecution will still need to lead evidence of each of the elements of the offence to obtain a conviction. An offence of fraud does not of itself provide a means of short circuiting trial procedure.

5.3 We think it important that discussion of the pros and cons of creating a substantive offence of fraud should not be confused by unjustified expectations of what such an offence can achieve. Few legal reforms can expect to be without shortcomings: what is important is that the change should, on balance, represent an improvement on the existing position. We believe that the introduction of a substantive offence of fraud satisfies that test. The overwhelming majority of those who responded to our earlier consultation paper agreed with our provisional recommendation that there should be a new substantive offence of fraud. One commentator highlighted the importance that should be attached to the public's expectation of the law:

*"I believe that it is important in a democratic society (or quasi-democratic) society that the public expectation of what the law is should be met as far as possible. I do not believe that the man in the street finds acceptable that there is a common law offence of conspiracy to defraud, but not fraud itself. It is impossible to rationalise sensibly the existence of a common law offence of conspiracy to defraud with the absence of a substantive offence of fraud. Soundings taken amongst members of the public would, I suspect, result in, at best, disbelief and more probably voluble expressions on the theme that the law is an ass."*

We accept, however, that there are some who objected to the course we propose and we now turn to examine these objections in some detail.

## **Objections to creating an offence of fraud**

5.4 One criticism that has been levelled at the creation of a substantive offence of fraud is that it would lead to an overlap between the new offence and the existing Theft Ordinance offences. We note this concern and agree with the English Law Commission that in principle overlapping offences should be avoided unless there is some reason which makes the overlap acceptable.<sup>1</sup> Difficulties may arise, for instance, where conduct constitutes two separate criminal offences with different levels of penalty. We have considered this issue carefully and, while accepting that overlapping offences are in general undesirable, have concluded that the fact that a new fraud offence would overlap with existing offences should nevertheless not preclude consideration at this stage of whether or not the creation of a substantive offence of fraud is desirable in principle and, if it is, whether our proposed formulation is acceptable.

5.5 In reaching this conclusion we have borne two factors in mind. Firstly, the overlapping of offences is already widespread in the criminal law. A given set of facts may form the basis for a number of different charges and the prosecutor is regularly required to decide which particular charge is most appropriate and which he can most successfully present. The introduction of a substantive offence of fraud will not, in our view, present any insurmountable difficulties in this regard. We are confirmed in this view by the experience of prosecutors in those jurisdictions which possess a substantive offence of fraud, notably Scotland and South Africa, who have advised us that overlap of offences is an unexceptional feature of the criminal calendar. Crown Office in Scotland pointed out to us that the common law fraud offence overlaps, *inter alia*, with offences under the Companies Acts in relation to bankruptcy, fraudulent trading and insider dealing, and with offences under the Health and Social Security legislation. None of these overlaps appears to have caused any difficulty. Perhaps even more significantly, the effect of the recent decision in the English case of *Gomez*<sup>2</sup> is that almost every case of

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<sup>1</sup> See paragraph 3.9, *supra*.  
<sup>2</sup> [1993] AC 819.

obtaining property by deception (section 17 of Hong Kong's Theft Ordinance) automatically amounts also to theft. We note also the English Law Commission's observation on the overlap existing in the present law of conspiracy to defraud, which "embraces almost every offence in the Theft [Ordinance] provided the defendant has conspired with another to carry out the conduct in question."<sup>3</sup> We find further support for our view in the experience of the Serious Fraud Office in England who remark:

*"It is not clear why it should be a problem if offences overlap. Many offences do at present. No injustice results. Prosecutors will choose the charge that is most appropriate. Should the trial judge believe that the prosecution is behaving oppressively, he will intervene."*<sup>4</sup>

Finally, it is arguable that section 51(2) of the Criminal Procedure Ordinance (Cap 221) already acknowledges the existence of overlap when it provides that if an accused is found not guilty of the offence charged but the allegations amount to or include, whether expressly or by implication, an allegation of another offence, he may be found guilty of that other offence.

5.6 Secondly, the existing Theft Ordinance offences were enacted on the basis that no substantive offence of fraud existed. It is therefore not surprising that the introduction subsequently of such an offence should necessitate a re-assessment of the role and value of the original Theft Ordinance offences. However, that is not, in our view, a sufficient reason for declining to introduce a substantive offence of fraud. To follow this course would be to suggest that a remedial provision should not be introduced if it renders otiose provisions enacted because of the absence of such remedial provisions in the first place. We accept that there should be an examination of the existing Theft Ordinance offences and their interaction with a new fraud offence, and we think such an examination should be carried out once the concept of a substantive offence of fraud has been accepted in principle by the administration.

5.7 A second objection which has been raised to the creation of a fraud offence is that it may conflict with the rule against duplicity. In particular, it has been suggested that the practice (common in Scotland and South Africa) of including in one charge, by way of a schedule, details of a course of criminal conduct consisting of a number of separate, but related, incidents of fraud, would offend the rule. We pointed out in the previous chapter that the rule against duplicity is intended to ensure that an accused person knows with certainty the clear and precise details of the offence or offences with which he has been charged. We reiterate what was said in the previous chapter: it is difficult to see how a charge of fraud drafted in schedule form could realistically be said to leave the accused in any doubt as to the nature of the allegations against him. Nevertheless, while we are satisfied that this method of proceeding does not work any unfairness to the accused, we should stress that the use of a schedule form of charging is a separate issue to the merits of

<sup>3</sup> See paragraph 3.9, *supra*.

<sup>4</sup> Letter to the Commission, dated 15 February 1995.

a substantive offence of fraud. A schedule approach may or may not be thought desirable in Hong Kong, but that is a matter which falls to be considered separately from the question as to whether or not there should be an offence of fraud. The schedule approach is not used in all jurisdictions possessing a fraud offence (it is not, for instance, used as yet in Malaysia) and there is no compulsion on Hong Kong to follow that route if a fraud offence is adopted.

5.8 In Scotland, the court has discretion to order the separation of charges where the accumulation of charges is considered prejudicial to the defence. In South Africa, section 81(2)(a) of the Criminal Procedure Act 1977 gives the court similar discretion to order separation of charges where "in its opinion it will be in the interests of justice to do so." Section 94 of that Act permits an accused to be charged in one charge with the commission of an offence on different occasions during a particular period, where the complainant is the same on each occasion. If following the introduction of an offence of fraud it was thought appropriate to adopt the schedule method of charging, our inclination would be to recommend specific legislation to allow the use of schedules, while at the same time granting the court a discretion to order separation of charges where the court is satisfied that it is in the interests of justice so to do. This would enable the court to order separation of charges where, for instance, the court considered that the form of the charge prejudiced the accused by a lack of certainty as to the allegations against him. We emphasise once more, however, that the question of schedule charges should not be allowed to confuse the debate on the merits of an offence of fraud.

5.9 A further objection raised against the introduction of an offence of fraud along Roman-Dutch lines is that its scope is too wide, presumably because it would overlap with a number of existing Theft Ordinance offences. We do not find this argument persuasive. As the Serious Fraud Office in England pointed out to us, "there can be no reason why fraud should operate oppressively when conspiracy to defraud does not." They went on to observe that "the objections are based on an idealised view of the scope and certainty of existing offences."<sup>5</sup> A fraud offence based on deception is clearly narrower in scope than the formulation of conspiracy to defraud given in *Scott*, where the offence was held to extend to any dishonest depriving of another's property or entitlement. Nevertheless, a number of ways of restricting the scope of any new offence of fraud have been suggested in England. These include:

- a) specifying a minimum amount involved before a charge of fraud may be laid. This, it has been suggested, would ensure that the offence was confined to large-scale commercial fraud and did not encroach on the activities of the minor fraudster. We do not find this approach attractive. The scale of a person's conduct may be relevant to the level of punishment but it has no bearing on whether or not the conduct is itself criminal: to steal \$100 is

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<sup>5</sup> Letter to the Commission, dated 15 February 1995.

just as much a theft as to steal \$1 million, though the penalty will obviously differ;

- b) limiting the application of the offence to persons in particular categories, such as company directors. Again, the justification for this limitation is said to be to direct the offence of fraud specifically towards large-scale commercial fraud. We foresee difficulties with this approach in determining where the line is to be drawn. Any classification such as this will inevitably leave gaps in its cover. Frauds of considerable magnitude may be perpetrated by employees of a company, or those who are dealing with a company from the outside. There seems little reason to exclude those individuals from the scope of the new offence;
- c) requiring the consent of the Attorney General to any prosecution. This argument assumes that there is scope for abuse of the new offence by the prosecutor. We take the view, however, that the court is in the best position to guard against any such abuse and to dismiss charges improperly brought. Adding the additional procedural stage of requiring the Attorney General's consent is, in reality, a needless complication which would achieve very little.

5.10 A final objection raised to the offence of fraud is that it would not provide an effective means of prosecuting the large-scale commercial frauds which increasingly feature as a part of modern society. Our inquiries of prosecuting authorities in those jurisdictions which possess an offence of fraud indicate that there is no basis for this assertion. The Attorney General of Cape Province in South Africa replied that:

*"... the South African law relating to fraud has proved itself pre-eminently efficacious in prosecuting complex commercial crimes. The practical difficulties which arise are invariably of a factual nature, and are no more than may be expected in any criminal prosecution, where the facts in issue must be proved beyond a reasonable doubt."*<sup>6</sup>

Scotland has had similar experience and, while the number of large-scale commercial frauds is probably less in Scotland and South Africa than in Hong Kong, there is no evidence to suggest that the Roman-Dutch formulation of the fraud offence is inadequate to deal with such crimes when they arise.

## **Advantages of a fraud offence**

5.11 We outlined in Chapter 3 the defects in the existing law of fraud in Hong Kong. It is clear that fraudulent conduct has a significant social and economic impact on the community. The survey results incorporated in a

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<sup>6</sup> Letter to the Commission, dated 20 December 1993.

recent study by KPMG Peat Marwick indicate the scope of the problem.<sup>7</sup> It is clearly important that the criminal law should be effective in dealing with a problem of this perceived magnitude. The public perception that the law was inadequate in this area prompted our present study.

5.12 The English Law Commission in their report on "*Conspiracy to Defraud*" identified a number of types of criminal conduct which would no longer be subject to sanction if the existing conspiracy to defraud offence were abolished.<sup>8</sup> By analogy, those same types of conduct are not currently subject to sanction if committed by one person acting alone, in the absence of a substantive offence of fraud. The most significant of these types of conduct are outlined below.

- **Property that cannot be stolen** The definition of property in section 5 of the Theft Ordinance (Cap 210) specifically excludes land and things growing wild on land. As the English Law Commission observe, an "agreement dishonestly to move a fence, thus effectively depriving a neighbouring landowner of part of his land, would not be a conspiracy to steal but would presumably be a conspiracy to defraud."<sup>9</sup>
- **Confidential information** There is difficulty in regarding confidential information as property for the purposes of theft, not least because it is difficult to see how there can be deprivation where someone has breached another's confidence, without depriving that other of the information itself. The English Law Commission argue, however, that "if two or more people are involved there might be a conspiracy to defraud: the acquisition of confidential information is clearly an act to the prejudice of the person entitled to it."<sup>10</sup>
- **Temporary deprivation of property** It is an essential ingredient of the offence of theft that the accused should have had the intention of permanently depriving the owner of his property (see section 2(1) of Cap 210). This is subject to a number of exceptions (see sections 13 and 14 of Cap 210). The Theft Ordinance provides a number of specific instances where a temporary obtaining of property by deception will amount to an offence. The English Law Commission point out, however, that there are cases of dishonest borrowing or use which will not necessarily amount to any substantive offence and cite as an example the unauthorised use by employees of their employers' premises and equipment for their own profit.
- **No property belonging to another** There may be instances in which the accused has dealt dishonestly with property in his possession but may not have committed any substantive offence because the property does not "belong to another" within the meaning of section 6 of the Theft Ordinance. The English Law Commission

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<sup>7</sup> See paragraph 2 *supra*.

<sup>8</sup> "*Criminal Law: Conspiracy to defraud*", Law Com. No. 228, at 29 to 30.

<sup>9</sup> *Ibid*, at 30.

<sup>10</sup> *Ibid*, at 32.

suggest that "a dishonest agreement that a debtor will spend money he has borrowed, knowing that this will make it impossible for him to repay the debt, is clearly capable of amounting to a conspiracy to defraud",<sup>11</sup> but not to an existing substantive offence if carried out by one person alone.

- **Obtaining loans by deception** Though the Theft Ordinance contains an array of offences aimed at procuring various kinds of benefit by deception, these may not be adequate to catch some circumstances in which the deception has induced a loan or mortgage advance. For instance, as the English Law Commission point out, a mortgage advance was held in *Halai*<sup>12</sup> not to amount to "a service" for the purposes of the English equivalent of section 18A of the Theft Ordinance (obtaining services by deception). Equally, if an advance is paid by a direct transfer to the borrower's bank account, it is doubtful whether property is obtained on which a charge of obtaining property by deception under section 17 of the Theft Ordinance can bite. If a charge is laid under 22(2) of the Ordinance of procuring the execution of a valuable security, the decision in the English case of *Manjhadria*<sup>13</sup> that a telegraphic transfer is not a valuable security may cause difficulty.
- **Dishonest failure to pay for goods or services** Section 18C of the Theft Ordinance makes it an offence to dishonestly make off without having paid for goods or services. The House of Lords ruled in *Allen*<sup>14</sup> when considering the equivalent English provision in section 3(1) of the Theft Act 1978 that the necessary intent was only satisfied when the accused intended *never* to pay, not merely to delay payment. As the English Law Commission point out, "where, however, two or more people agree dishonestly to make off without payment, intending eventually to pay in full, it would seem that they would be guilty of a conspiracy to defraud. Their intention is dishonestly to cause prejudice by depriving their creditor of the sum due between the time when they ought to pay and the time when they intend to pay."<sup>15</sup>

5.13 Having analysed the various objections which have been raised to the creation of a substantive offence, and set out the advantages which we believe would accrue if such an offence were introduced, we now turn to consider what formulation of a fraud offence would be appropriate to Hong Kong.

## Possible formulations of a substantive offence of fraud

5.14 **The influence of Scott** In England, as we saw in the previous chapter, a number of attempts over many years have been made to

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<sup>11</sup> *Ibid*, at 35.

<sup>12</sup> [1983] Crim LR 624.

<sup>13</sup> [1993] Crim LR 73

<sup>14</sup> [1985] AC 1029.

<sup>15</sup> *Ibid*, at 48.

identify a formulation of a fraud offence which would prove generally acceptable. The approach in general has been to take as a starting point the existing law of conspiracy to defraud and to endeavour to construct a substantive offence which derives from the conspiracy offence. That inevitably means that the decision in *Scott v Metropolitan Police Commissioner*<sup>16</sup> must be reflected in the substantive offence. In our view, it is this way of approaching the issue which has bedevilled attempts in England to identify a broadly acceptable formulation of the fraud offence.

5.15 The majority of those jurisdictions we have examined which possess a substantive offence of fraud incorporate deceit as an essential element. That, it is submitted, accords with everyday usage of the language and is in line with the layman's understanding of the term. Indeed, the English Law Commission themselves appear to have acknowledged that the word "fraudulently" implies an element of deceit.<sup>17</sup> It would also seem to be in line with the approach originally adopted in English law in relation to conspiracy to defraud. The dicta of Buckley J in the English case of *Re London and Globe Finance Corporation Ltd*, to which we referred in the previous chapter, is still regarded with favour in, among other jurisdictions, South Africa as an authoritative statement of the law:

*"To defraud is to deprive by deceit; it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action."*<sup>18</sup>

5.16 The effect of the *Scott* decision has been to strain this common-sense meaning of the term fraud and to move away from an emphasis on deceit as an essential ingredient of the offence. The House of Lords held in that case that the common law offence of conspiracy was not limited to an agreement by two or more persons to deceive the intended victim. Viscount Dilhorne said:

*"... words take colour from the context in which they are used, but the words 'fraudulently' and 'defraud' must ordinarily have a very similar meaning. If, as I think, ... 'fraudulently' means 'dishonestly', then 'to defraud' ordinarily means, in my opinion, to deprive a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud be entitled."*<sup>19</sup>

On such a formulation, it is hardly surprising that English commentators have found it difficult to identify a definition of a fraud offence which differs in any meaningful way from a species of theft.

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<sup>16</sup> (1974) Cr. App R 124

<sup>17</sup> Law Commission, "Conspiracy to defraud," Working Paper No 104 (1987).

<sup>18</sup> [1903] 1 Ch 728, at 732 to 733.

<sup>19</sup> *Ibid*, at 839.

5.17 ***The sub-committee's conclusions*** We referred in the introduction to this paper to the work on this subject carried out by the Commission's sub-committee on fraud. We indicated there that a majority of the sub-committee had concluded that a new substantive offence of fraud should be created. **We agree with the majority's conclusion (and with the majority views of those who responded to our consultation paper) and favour the introduction of such an offence.** In reaching its conclusions, the sub-committee eventually narrowed the scope of its examination to two different formulations of a fraud offence. The first of these defined fraud as:

*"dishonestly by false representation or by wilful non-disclosure [to cause another] to suffer:*

- (a) economic loss or a risk of economic loss; or*
- (b) prejudice to his rights or a risk of prejudice to his rights,*

*intending that the other suffer economic loss, or prejudice to his rights, or the risk thereof."*

5.18 The sub-committee rejected this formulation, taking the view that such an offence was unnecessary and overlapped with existing Theft Ordinance offences. The majority instead favoured an alternative formulation which concentrated on a "scheme of fraud".

5.19 In this version, the nature of the fraudulent conduct was defined in the same way but its application was confined to circumstances where the accused had defrauded another "by means of a scheme". "Scheme" was to be defined for these purposes as:

*"a scheme, plan, design or programme of action, whether of a repetitive or non-repetitive nature."*

The majority of the sub-committee argued that this approach had the advantage of removing the illogicality of being able to charge a continuing fraud offence only when there was more than one person acting in dishonest combination, and that it allowed a single charge to reflect the full criminality of the accused's conduct without having to resort to sample counts.

5.20 A minority of the sub-committee, however, considered that the "scheme of fraud" proposal was "vague and uncertain". In addition, they pointed out that proving the existence of a scheme would present many of the problems associated with proving a conspiracy. The relevant "acts can only be properly adduced in evidence if they were part of the scheme alleged, yet the scheme itself can probably only be proved by adducing evidence of the acts."

5.21 We share the reservations of the minority of the sub-committee as to the desirability of the "scheme of fraud" proposal. The concept seems to us fraught with uncertainty and falls into the trap to which we alluded at the

start of this chapter of confusing procedural with substantive objectives in the formulation of a fraud offence. It would, we think, be difficult to state with certainty what conduct would fall within the scope of a scheme. On one view, the proposed definition is so wide as to encompass almost any conduct calling for conscious action. As such, it remains open to the same criticism which is levelled at the breadth of the existing offence of conspiracy to defraud. With some diffidence, we have therefore concluded that, while we agree with the majority of the sub-committee that a new substantive offence of fraud should be created, we do not believe that the sub-committee's proposed "scheme of fraud" offence is the appropriate course to follow. Instead, we think that an alternative formulation must be found.

5.22 The difficulties which have beset studies both in England and by our sub-committee have persuaded us that a new approach is needed. Rather than tying ourselves to the existing concept of conspiracy to defraud and endeavouring to extrapolate from that a new substantive offence of fraud, we have decided instead to tackle the process from the other end, and to take an independent view on what the elements of such a new offence should be. In doing so, it is instructive to look at those jurisdictions which already have an offence of fraud. That examination leads us to conclude that a fraud offence generally consists of a number of readily identified elements. In the remainder of this chapter, we examine each of these elements in turn and identify those which we believe a Hong Kong based offence should contain.

## **Fraud revisited: the elements of the offence**

5.23 Our examination in the previous chapter of the law in a number of jurisdictions possessing fraud offences enables us to identify a number of separate elements. The particular elements included in the fraud offence differ from jurisdiction to jurisdiction. In Scotland, for instance, it is at least arguable that the victim need not have suffered any prejudice at all. In contrast, South African law requires proof of actual or potential prejudice, while in Jersey there must have been actual prejudice to the victim *and* actual benefit to the perpetrator of the fraud. Narrowing the scope of the offence still further, Canada appears to restrict fraud to circumstances where there has been proprietary loss.

5.24 It is clear that any attempt to define a new offence of fraud for Hong Kong must entail a choice between differing concepts. Having considered the requirements of the present law in this area and the approaches taken overseas, ***we have concluded that the proposed general offence of fraud should comprise the following elements:***

- a) a person by deceit (whether deliberate or reckless)***
- b) with intent to defraud***
- c) inducing another***
- d) to act or make an omission***

- e) **resulting in either prejudice or a substantial risk of prejudice to another or benefit to the fraudster or another, or both such prejudice and such benefit.**

We do not pretend that these elements constitute the only practical formulation of a fraud offence for Hong Kong but, in the light of our discussions and the views expressed to us on our initial proposals, we believe that they provide a practical and workable solution to the problems identified. We will examine each of these elements in turn.

5.25 **"By deceit"** The express inclusion of the element of deceit in the offence marks our departure in this proposal from the House of Lords finding in the *Scott* case,<sup>20</sup> that deceit was not an essential element of fraud.<sup>21</sup> As we said earlier in this chapter, we believe it is the shift away from deceit which has led, at least in part, to the conceptual difficulties of commentators in England. In our view it is the element of deceit which is the key feature which distinguishes fraud from theft. Our proposed offence reflects more closely the earlier accepted formulation (expounded by Buckley J in *Re London and Globe Finance Corporation*) that "to defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury."<sup>22</sup>

5.26 Placing deceit in context *vis a vis* fraud, we would agree with Buckley J that:

*"to deceive is by falsehood to induce a state of mind: to defraud is by deceit to induce a course of action."*<sup>23</sup>

We believe that the inclusion of deceit reflects more accurately the common perception of what should amount to fraudulent conduct and we note in this regard the definition of fraud adopted in the recent KPMG Peat Marwick Fraud Survey:

*"... a deliberate deceit planned and executed with the intent to deprive another of property or rights. Silence, when good faith requires expression, constitutes deceit."*

5.27 In amplification of what we mean by "deceit" in the context of our proposed fraud offence, we intend that:

- a) it would be constituted by intentionally inducing a person to believe something to be true which in fact is false;<sup>24</sup>

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<sup>20</sup> [1975] AC 819.

<sup>21</sup> I.e., their Lordships held that the victim of the offence need not be deceived for fraud to be established; dishonesty on the part of the defendant in achieving his intended purpose was enough: see, *supra*, chapter 2, paragraphs 2.37 to 2.42.

<sup>22</sup> [1903] 1 Ch 728, at 732 to 733. Their Lordships held this definition of fraud to be "not exhaustive": *Scott*, at 836.

<sup>23</sup> [1903] 1 Ch 728, at 732 to 733.

<sup>24</sup> See Buckley J's further remarks in *Re London and Globe Finance*, at 732 to 733.

b) it may be constituted both by a positive act of deception, such as a false representation, or by an act of omission, such as wilful non-disclosure;<sup>25</sup>

c) the person practising the deceit must know or believe it to be false and must intend the victim to act upon it.<sup>26</sup>

5.28 **"Whether deliberate or reckless"** Our original formulation of the draft offence in the consultation paper did not include the alternative element of recklessness as to the deceit. On further consideration, however, we have decided that the inclusion of recklessness is sensible, and mirrors the definition of deception in the offence of obtaining property by deception in section 17 of the Theft Ordinance (Cap 210). That expression has been considered by the Court of Appeal in England and "means more than being careless or negligent and involves an indifference to whether a statement is true or false."<sup>27</sup> In the context of our proposed offence, a reckless deceit would not suffice unless accompanied by intent to defraud.

5.29 **"With intent to defraud"** We have included "intent to defraud" as a necessary element of the new offence. There are at least two possible approaches here. The first would be to impose a requirement that the fraudster intended his deception to be believed (see, for example, the proposed offence in New Zealand described in the previous chapter and (perhaps) the Scottish offence). The second approach would be that the fraudster intended that the deception should be acted upon with appropriate consequences (see, for example, the offences in South Africa, Jersey, Singapore and Zimbabwe). We have opted for the latter approach and by "intent to defraud" mean that, at the time when the fraudster practised the deceit, he must have intended that one of the results described at paragraph 5.24(e) above would ensue. The inclusion of intent to defraud reflects the views of a number of those who responded to our consultation paper, and answers concerns that the new offence might otherwise criminalise conduct not thought appropriate for such a sanction.

5.30 It is clear from the case law in Scotland and South Africa that the deceit which forms the basis of the fraud offence does not extend to mere expressions of opinion nor to commercial exaggeration. Commercial claims that a particular product is "the best" are matters better left to consumer protection measures and we do not intend that such conduct should fall within our proposed offence of fraud. By adding a requirement of "intent to defraud" to our original formulation of the new offence we believe we have achieved that end. The offence is aimed at an individual who lies with the intention of securing benefit to himself or causing loss to another and where that lie is

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<sup>25</sup> Referred to as "dishonest concealment of facts" under the notes to section 415 of both the Singapore and Malaysian Penal Codes which deals with the offence of "cheat" (see discussion, *supra*, chapter 4, paragraphs 4.33 to 4.45). An illustration provided in the Codes is:

*"A sells and conveys an estate to B. A, knowing that in consequence of such sale he has no right to the property, sells or mortgages the same to Z without disclosing the fact of the previous sale and conveyance to B, and receives the purchase or mortgage money from Z. A cheats."*

<sup>26</sup> See the *dicta* of Buckley J again, at 732 to 733.

<sup>27</sup> *R v Staines* 60 Cr App R 160

acted upon. We believe that is very different in character to a "white lie", such as where an individual lies to save himself or another from embarrassment.

5.31 Our original proposal, as set out in our consultation paper, did not include either dishonesty or intent to defraud as separate elements of the new fraud offence. As we have explained, in the light of the consultation exercise we now propose to include intent to defraud in our revised formulation of the fraud offence. A number of those who responded to the paper argued that the offence should also include a separate requirement of dishonesty, and this issue was considered at some length by the Commission. Broadly, the arguments which were put forward in favour of including dishonesty as a separate element may be summarised as follows:

- ◆ The inclusion of dishonesty would avoid criminalising "honest lies", characterised as a deceit carried out in the belief that this was in the best interests of the person deceived, or that it represented no more than a harmless joke, notwithstanding that some potential or actual prejudice might have been caused.
- ◆ Deceit alone is not enough to import a subjective fraudulent intent into the offence: dishonesty is required. By including dishonesty, a subjective element would be introduced which would enable an accused to avoid liability if no ordinary reasonable person would have regarded his conduct as dishonest.
- ◆ The omission of dishonesty runs counter to the existing understanding of the term "fraud" in the criminal sense.
- ◆ The inclusion of dishonesty as a separate element would ensure that mere commercial exaggeration did not fall within the ambit of the offence.
- ◆ The inclusion of dishonesty as an additional element to deceit or false representation is not unprecedented (see, for instance, sections 17 and 18 of the Theft Ordinance; limb 1 of the cheat offence in Singapore at paragraph 4.36 *supra*; and the Canadian Law Reform Commission's recommendations at paragraph 4.14 *supra*). The Theft Ordinance offences were familiar and had operated without difficulty for years.
- ◆ It would be more difficult for a jury to recognise the existence of deceit than that of dishonesty. "Dishonesty" is a concept readily understood by laymen.
- ◆ By adopting the dictum of Buckley J in *Re London and Globe Finance Corporation* for the definition of "deceit" (ie to deceive is by falsehood to induce a state of mind), deceit does not necessarily imply dishonesty. On the other hand, if deceit does incorporate dishonesty, there is no harm in adding dishonesty as an element, if only for the avoidance of doubt.

- ◆ Without the additional requirement of dishonesty, all activities constituting a "fraudulent misrepresentation" under the present civil law would be caught by the new offence, regardless of the degree of moral turpitude involved.

5.32 It should be said that these arguments were presented to the Commission in response to the original formulation of the fraud offence which included neither dishonesty nor intent to defraud as discrete elements. We have accepted in the light of the comments received that intent to defraud should be included in the proposed offence. A majority of the Commission believe that that vitiates to a large extent the arguments advanced for the additional inclusion of dishonesty. One member, however, remained of the view that the new offence should be constituted by "a person by deceit *dishonestly* inducing a course of action resulting in either actual prejudice (or a substantial risk of prejudice) to another, or benefit to the fraudster or another." We have carefully considered the arguments for and against such an approach and have, by a majority, concluded that there should be no separate requirement of dishonesty. In reaching that conclusion, we have noted in particular the following arguments:

- ◆ To include dishonesty would run the risk of importing into the new offence the difficulties associated with the existing conspiracy to defraud, which is founded on dishonesty.
- ◆ "Deceit" necessarily implies an element of dishonesty, though the same cannot be said of the reverse. It could not be said that someone by deceit "honestly" did something.
- ◆ The inclusion of intent to defraud as a separate requirement means that the prosecution must prove that at the time of the act of deception the deceiver intended to cause prejudice or a substantial risk of prejudice to another, or benefit to the fraudster or another. If the deceiver intentionally practised deception on the victim with the intention of bringing about certain consequences, the deception must by that very fact be dishonest.
- ◆ While the layman's perception of dishonesty is no doubt straightforward, the legal concept of dishonesty is complex and has caused considerable confusion and difficulty for the courts.
- ◆ If both deceit and dishonesty were to become separate elements of the offence, the court, in directing the jury as to what the prosecution had to prove, would have to point out that the fact that the element of dishonesty existed side by side with that of deceit meant that there must be something over and above the requirement of deceit. This would unnecessarily complicate proceedings.
- ◆ In creating a new offence, it would be preferable to incorporate elements which are objective and could therefore be readily determined by a jury, rather than rely on a fluid, subjective concept.

- ◆ To suggest that the inclusion of dishonesty as an element of the offence will avoid criminalising conduct done with good intentions, or commercial exaggeration, is to confuse motive with the objective fact of the falsity or otherwise of a statement. Motive goes to mitigation alone, not criminality. A false statement would found a charge of fraud (if there was the requisite intent), regardless of the motive which prompted it. Where the motive was a relevant consideration, that would go to sentence rather than conviction.
- ◆ It is clear that a fraud offence based on deceit accords with the public's understanding of the term "fraud" (see, for instance, the definition of fraud adopted in the KPMG Peat Marwick Fraud Survey referred to at paragraph 5.26 *supra*). It is important in a democratic society that the public expectation of what the law is should be met as far as possible.

5.33            **"Inducing another"**    There must be a causal link between the deception and the course of action followed by the victim which leads to the prejudice. It would be a defence to our proposed fraud offence to show that the deception did not cause the victim to act as he did, or that he knew the pretence was false.

5.34            **"To act or make an omission"**    We intend by these words that the scope of the new offence's application should not be restricted to circumstances where the victim has been induced to take some active step. It should suffice that the deceit has persuaded the victim to omit to act in some way

5.35            **"Prejudice or a substantial risk of prejudice to another"**  
 For the offence to be committed, there must be some "legally significant prejudice."<sup>28</sup> We do not intend, however, that the prejudice need necessarily be suffered by the particular person at whom the deceit is directed. Such a limitation has, it was pointed out to us, restricted the efficacy of the offence of cheat in Malaysia and Singapore. Instead, we think it sufficient that prejudice or risk of prejudice should be caused by the deceit to a person other than the fraudster.

5.36            We would not go so far as the Scottish approach enunciated by Lord Justice-General Clyde in *Adcock v Archibald*<sup>29</sup> that "any definite practical result is enough." We prefer to limit the ambit of the offence to prejudice or a substantial risk of prejudice. We do not intend that it should be a requirement to show actual prejudice: a substantial risk of prejudice should suffice. In our view, it is the act of deceit inducing another to follow a course of action which is the conduct which merits criminal sanction. The perpetrator is as much of a threat to society where the prejudice is potential as where prejudice is actually suffered. For the same reason, we do not think the new fraud offence should be limited to circumstances where it can be shown that the accused has

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<sup>28</sup> Gordon, *op cit*, at 601 to 602.

<sup>29</sup> *Adcock v Archibald*, *op cit*, at 260.

gained from his deceit (though we consider that that should be an alternative head).

5.37 In the initial formulation of our new offence in the consultation paper, we chose to follow the approach in Scotland and South Africa and proposed that the prejudice should not be restricted to financial or proprietary loss. We argued that such a restriction unnecessarily limited the scope of the offence and, to some extent, confused its ambit with that of theft. We referred to Burchell and Milton's observation on the South African law that:

*"[t]he effect of admitting both proprietary and non-proprietary prejudice as a basis for charges is that the crime, in South African law, protects not only the individual's proprietary interests, but protects also the state's interest in the integrity of the administration of public affairs."*<sup>30</sup>

Examples of conduct which has been held by the South African courts to constitute non-proprietary prejudice include the obtaining of a permit or privilege which would not otherwise have been granted; impairment of reputation or dignity; the use of false testimonials to gain employment; and inducing an individual to enter into a contract, even though the individual is no worse off financially than before.<sup>31</sup>

5.38 As a result of responses made to our consultation paper, and following further discussion by the Commission, we have changed our initial view and have now concluded that the "prejudice" involved in fraud should be limited to financial or proprietary loss, whether temporary or permanent. We have been persuaded in this by those commentators who have argued that to extend the scope of the offence to non-proprietary loss would be over-ambitious and would run the risk of making the offence's limits uncertain. In addition, it is clear that the major target of any new offence should be commercial fraud. We accept those arguments and now propose a more restrictive offence than we had first envisaged.

5.39 **"Benefit to the fraudster or another"** As an alternative (or in addition) to prejudice or a risk of prejudice to another, we intend that it should be sufficient that the perpetrator of the deceit or some other person should have benefited, even if there has been no prejudice to another party. In including this factor we are extending the ambit of the offence wider than that in South Africa (which restricts fraud to circumstances where there is actual or potential prejudice to another), but less so than that in Scotland (which requires only a definite practical result of the deceit). We have included benefit "to another" because we see no reason not to catch the fraudster who, for instance, carries out a deception (while acting alone) to benefit a friend or relative. Such an approach is in line with that in Jersey and the proposed formulation by Sullivan at paragraph 4.22 *supra*. As with our proposed definition of "prejudice", we intend that "benefit" should be confined to financial or proprietary benefit. We think that the circumstances in which

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<sup>30</sup> Burchell and Milton, *Principles of Criminal Law* (1991), at 523.

<sup>31</sup> See Hunt and Milton, *op cit*, at 772 to 773.

this "benefit" limb would be required to constitute fraud are unlikely to arise frequently, but our current view is that it should nevertheless be included.

5.40 A draft Bill setting out the new offence we have described in the foregoing paragraphs is at Annexure 4.

## The proposed offence applied

5.41 A principal concern expressed to us about the proposed new offence is that it should achieve fairness and justice, and prove more effective than the existing law. One aspect of this concern is the possible anomalies caused by the overlap of offences. As we explained earlier in this chapter, we agree that overlapping of offences is in general undesirable and we accept that a review of the existing offences of dishonesty should sensibly be carried out if a decision is made to introduce a substantive offence of fraud. However, we do not think that the overlapping of offences *per se* results in unfairness or injustice, nor that a decision in principle on the merits or otherwise of an offence of fraud needs to await the outcome of any full-scale review of existing offences of dishonesty. We believe that the offence we propose will effectively deal with fraudulent conduct which should properly be the subject of criminal sanction. Furthermore, we believe that the new offence is clearer than the existing conspiracy to defraud, avoiding as it does the latter's necessity to explain the concept of dishonesty to a jury. Practitioners in those jurisdictions which possess a substantive offence of fraud stress that one of its advantages is that the elements can be readily understood and presented in court.

5.42 Applying the new offence to a variety of fact situations, both "Ponzi scams" and "long firm frauds" would fall comfortably within the net.<sup>32</sup> In the case of the former, the deceit is the pretence that the business is viable, so inducing investors to part with their money. In the latter type of case, the deceit is akin to that in a common cheque fraud and is to the effect that the perpetrator intends to pay for the goods which he induces suppliers to provide to him. Looking at the specific circumstances of the case of *Cheung Tse-soon*<sup>33</sup>, it would seem that the conduct involved would more appropriately have been charged as substantive fraud under our proposed offence than conspiracy to defraud. In *Cheung*, the bank manager, Kwok, persuaded Cheung, who was a close personal friend and a customer of the bank, to help the bank manager out of financial difficulties by obtaining facilities (which Kwok granted without proper security) and thereafter diverting the loans to Kwok. Cheung made no financial gain from the transactions, and argued that he believed the arrangements were intended to assist the bank in some way, which was then in financial difficulties. In this case, it was the bank manager who deceived the bank as to the true purpose of the loan facilities, rather than the customer. The latter would appear to have been charged with conspiracy

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<sup>32</sup> See paragraphs 1.3 and 1.4 above.

<sup>33</sup> *Op cit*, at paragraphs 2.46 to 2.51.

to defraud because of the lack of a substantive offence of fraud which could have been brought against the manager alone.

5.43 Because deceit is an essential element of our draft offence, we do not think that the conduct in *Scott v Metropolitan Police Commissioner*<sup>34</sup> would be caught. In that case, while there was dishonesty, there was no deceit. We do not see this as a shortcoming, however. On the contrary, it seems to us that the facts of *Scott* amount more to a copyright offence than one of fraud.

5.44 The advantage of the draft offence is that it would enable conduct to be properly charged as a substantive offence against an individual acting alone, without the necessity of involving a secondary participant. The new offence would also avoid the artificiality of the present conspiracy to defraud charge where the fraud has actually been committed and the fraudster has achieved his ends. Finally, the new offence would place fraudulent conduct within more precise bounds by tying it to deceit rather than dishonesty.

## Conclusions

5.45 We observed at the start of this chapter that the introduction of an offence of fraud could not be expected to answer all the criticisms which have been levelled at the present law. That should not, however, in our view justify the rejection of such an offence. As we pointed out earlier, what is important is that the proposed reform should, on balance, represent an improvement on the existing position. We are satisfied that such would be the case with the introduction of a substantive offence of fraud along the lines we propose. Such an offence would remove the present absurdity that conduct planned by two persons may constitute a crime (conspiracy to defraud) when, if executed by one person acting alone, it attracts no criminal sanction. In addition, as was pointed out to us by Brian Gill, QC (as he then was), (a leading expert on the law of fraud in Scotland and an enthusiastic proponent of the Scottish approach) the breaking down of fraud into a series of specific offences under the Theft Act in England has proved to be an unnecessary complication which opens the door to technical objections where the evidence does not clearly sit within the bounds of the specific offence charged. The argument applies with equal force in Hong Kong.

5.46 **We conclude that the introduction of a fraud offence containing the elements we have identified in this chapter would represent an improvement in Hong Kong's law. We propose that the new offence of fraud should be complete when a person by deceit induces another to act or make an omission resulting in *either* prejudice or a substantial risk of prejudice (financial or proprietary) to another *or* benefit (financial or proprietary) to the fraudster or another. We intend that "deceit" could be both by a positive misrepresentation of the facts**

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<sup>34</sup> (1974) Crim App R 124

**and by a deliberate concealment of the true position.** In devising this formulation of a possible fraud offence, we have drawn on the approach adopted in particular by South African and Scottish criminal law on this question. In neither jurisdiction are we aware of any fundamental difficulties arising from the concept of the offence of fraud. We would not suggest that the proposed offence will answer all the criticisms of the present law but, as we have explained, we believe that many of these are wrongly directed at the nature of the substantive offence rather than at procedural aspects which should be addressed separately.

5.47 We referred earlier in this chapter to the practice adopted in Scotland and South Africa of including in a single charge, by way of a schedule, particulars of a number of separate, but related, incidents of fraudulent conduct. There are clear practical advantages to such an approach but we would not wish to see consideration of the merits of introducing a substantive offence of fraud clouded by this separate issue. The introduction of a fraud offence does not necessarily require the adoption of a procedural change to reflect Roman-Dutch practice and we would stress that the principal purpose of this paper is to present for consideration on its merits a possible substantive offence of fraud.

5.48 Clearly, it is only sensible that any conspiracy to defraud which follows the introduction of a substantive offence such as we have suggested should be founded on the new offence, rather than the elements of the existing offence of conspiracy to defraud. **We recommend therefore that the present common law conspiracy to defraud should be specifically repealed and replaced by a conspiracy to commit the new substantive offence.**

5.49 We referred in Chapter 3 to the question of extradition and the difficulties which the absence of a substantive offence of fraud might cause. We have sought advice from those dealing with extradition matters in the Attorney General's Chambers as to whether our proposed formulation of a fraud offence would be likely to satisfy the US requirements on extradition. The advice we have received is that the new offence would be satisfactory.

5.50 There remains one further issue from our terms of reference: the question of sentence. The sub-committee recommended that the sentence for the new offence they proposed should be 14 years, the same as that for the existing common law conspiracy to defraud. **We agree that the present sentence for conspiracy to defraud provides a realistic benchmark and we adopt the sub-committee's recommendation in this regard.**

**Individuals and organisations in Hong Kong  
who commented on the Consultation Paper**

Mr Nigel Aiken, QC  
Attorney General's Chambers, Prosecutions Division (Messrs Michael  
Blanchflower, Andrew Bruce, Grenville Cross QC, Harry Macleod, Ian C  
McWalters, D G Saw, A E Schapel, R G Turnbull and Miss Alexandra  
Papadopoulos)  
British Chamber of Commerce in Hong Kong  
Mr Cheng Huan, QC  
Mr Simon C W Chiu, Barrister  
City University of Hong Kong, Department of Law (Messrs Ian Dobinson, Phil  
Lawton and Tony Upham)  
Mr David Fitzpatrick, Barrister  
Hon Mr Justice Godfrey, Justice of Appeal  
Mr John Griffiths, QC  
Mr Clive Grossman, QC  
Hong Kong Association of Banks  
Hong Kong Bar Association  
Hong Kong Society of Accountants  
Mr Alan Hoo, QC  
Mr Adrian Huggins, QC  
Independent Commission Against Corruption  
Mr Robert G Kotewall, QC  
Law Society of Hong Kong  
Legal Aid Department  
Hon Mr Justice Leonard, Judge of the High Court  
Mr Lawrence Lok, QC  
Mr Gerard McCoy, Barrister  
Mr A M Niamatullah, QC  
Mr Gary Plowman, QC  
Royal Hong Kong Police  
Mr Seville Sarony, QC  
Hon Mr Justice Seagroatt, Judge of the High Court  
Securities & Futures Commission  
Security Branch  
Mr Simon Westbrook, Barrister

## **Theft Ordinance (Cap 210) - fraud related offences**

### **FRAUD AND BLACKMAIL**

#### **17. Obtaining property by deception**

(1) Any person who by any deception (whether or not such deception was the sole or main inducement) dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for 10 years.

(2) For the purposes of this section a person is to be treated as obtaining property if he obtains ownership, possession or control of it, and "obtain" includes obtaining for another or enabling another to obtain or retain.

(3) Section 7 shall apply for the purposes of this section, with the necessary adaptation of the reference to appropriating as it applies for the purposes of section 2.

(4) For the purposes of this section -  
"deception" means any deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including a deception relating to the past, the present or the future and a deception as to the intentions or opinions of the person using the deception or any other person.

*[cf. 1968 c.60 s. 15 U.K.]*

#### **18. Obtaining pecuniary advantage by deception**

(1) Any person who by any deception (whether or not such deception was the sole or main inducement) dishonestly obtains for himself or another any pecuniary advantage shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for 10 years.

(2) The cases in which a pecuniary advantage within the meaning of this section is to be regarded as obtained for a person are cases where -

- (a) he is granted by a bank or deposit-taking company, or any subsidiary thereof the principal business of which is the provision of credit -
  - (i) a credit facility or credit arrangement;
  - (ii) an improvement to, or extension of, the terms of a credit facility or credit arrangement; or
  - (iii) a credit to, or a set off against, an account, whether any such credit facility, credit arrangement or account -
    - (A) is in his name or the name of another person; or
    - (B) is legally enforceable or not; (*Added 46 of 1986 s. 2*)
- (b) he is allowed to borrow by way of overdraft, or to take out any policy of insurance or annuity contract, or obtains an

improvement on the terms on which he is allowed to do so, whether any such overdraft, policy of insurance or annuity contract -

- (i) is in his name or the name of another person; or
- (ii) is legally enforceable or not; or (*Replaced 46 of 1986 s. 2*)

(c) he is given the opportunity to earn remuneration or greater remuneration in an office or employment, or to win money by betting.

(3) For the purposes of this section -

"bank" means -

(a) a bank within the meaning of section 2(1) of the Banking Ordinance (Cap. 155); and

(b) bank -

- (i) incorporated by or under the law or other authority in any place outside Hong Kong, and in this respect "incorporated" includes established; and
- (ii) which is not licensed under section 16 of the Banking Ordinance (Cap. 155);

"deception" has the same meaning as in section 17;

"deposit-taking company" has the same meaning as in section 2(1) of the Banking Ordinance (Cap. 155);

"subsidiary" has the same meaning as in the Companies Ordinance (Cap. 32).

(*Replaced 46 of 1986 s. 2*)

[*cf. 1968 c. 60 s. 16 U.K.*]

### **18A. Obtaining services by deception**

(1) A person who by any deception (whether or not such deception was the sole or main inducement) dishonestly obtains services from another shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for 10 years.

(2) It is an obtaining of services where the other is induced to confer a benefit by doing some act, or causing or permitting some act to be done, on the understanding that the benefit has been or will be paid for.

(3) For the purposes of this section, "deception" has the same meaning as in section 17.

(*Added 45 of 1980 s. 3*)

[*cf. 1978 c. 31 s. 1 U.K.*]

### **18B. Evasion of liability by deception**

(1) Subject to subsection (2), where a person by any deception (whether or not such deception was the sole or main inducement) -

- (a) dishonestly secures the remission of the whole or part of any existing liability to make a payment, whether his own liability or another's;

- (b) with intent to make default (whether the default is permanent or otherwise) in whole or in part on any existing liability to make a payment, or with intent to let another do so, dishonestly induces the creditor or any person claiming payment on behalf of the creditor to wait for payment (whether or not the due date for payment is deferred) or to forgo payment; or
- (c) dishonestly obtains any exemption from or abatement of liability to make a payment,

he shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for 10 years.

(2) For the purposes of this section "liability" means legally enforceable liability; and subsection (1) shall not apply in relation to a liability that has not been accepted or established to pay compensation for a wrongful act or omission.

(3) For the purposes of subsection (1)(b) a person induced to take in payment a cheque or other security for money by way of conditional satisfaction of a pre-existing liability is to be treated not as being paid but as being induced to wait for payment.

(4) For the purposes of subsection (1)(c) "obtains" includes obtaining for another or enabling another to obtain.

(5) For the purposes of this section, "deception" has the same meaning as in section 17.

*(Added 45 of 1980 s. 3)*  
*[cf. 1978 c. 31 s. 2 U.K.]*

### **18C. Making off without payment**

(1) Subject to subsection (3), a person who, 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 of the amount due shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for 3 years.

(2) For the purposes of this section "payment on the spot" includes payment at the time of collecting goods on which work has been done or in respect of which service has been provided.

(3) Subsection (1) shall not apply where the supply of the goods or the doing of the service is contrary to law, or where the service done is such that payment is not legally enforceable.

*(Added 45 of 1980 s. 3)*  
*[cf. 1978 c. 31 s. 3 U.K.]*

### **18D. Procuring entry in certain records by deception**

(1) Any person who dishonestly, with a view to gain for himself or another or with intent to cause loss to another, by any deception (whether or not such deception was the sole or main inducement) procures the making,

omission, altering, abstracting, concealing or destruction of an entry in a record of a bank or deposit-taking company, or any subsidiary thereof the principal business of which is the provision of credit, shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for 10 years.

(2) For the purposes of this section -  
"bank" means -

- (a) a bank within the meaning of section 2(1) of the Banking Ordinance (Cap. 155); and
- (b) a bank -
  - (i) incorporated by or under the law or other authority in any place outside Hong Kong, and in this respect "incorporated" includes established; and
  - (ii) which is not licensed under section 16 of the Banking Ordinance (Cap. 155);

"deception" has the same meaning as in section 17;

"deposit-taking company" has the same meaning as in section 2(1) of the Banking Ordinance (Cap. 155);

"record" includes -

- (a) any document or record used in the ordinary business of a bank or deposit-taking company, or any subsidiary thereof the principal business of which is the provision of credit; and
- (b) any document or record so used which is kept otherwise than in a legible form and is capable of being reproduced in a legible form;

"subsidiary" has the same meaning as in the Companies Ordinance (Cap. 32).

*(Added 46 of 1986 s. 3)*

## **19. False accounting**

(1) Where a person dishonestly, with a view to gain for himself or another or with intent to cause loss to another -

- (a) destroys, defaces, conceals or falsifies any account or any record or document made or required for any accounting purpose; or
- (b) in furnishing information for any purpose produces or makes use of any account, or any such record or document as aforesaid, which to his knowledge is or may be misleading, false or deceptive in a material particular,

he shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for 10 years. *(Amended 46 of 1986 s. 4)*

(2) For the purposes of this section a person who makes or concurs in making in an account, record or document an entry which is or may be misleading, false or deceptive in a material particular, or who omits or concurs in omitting a material particular from an account, record or document, is to be treated as falsifying the account, record or document.

*(Amended 23 of 1993 s. 7)*

(3) For the purposes of this section, "record" includes a record kept by means of a computer. *(Added 23 of 1993 s. 7)*

*[cf. 1968 c. 60 s. 17 U.K.]*

## **22. Suppression, etc. of documents**

(1) Any person who dishonestly, with a view to gain for himself or another or with intent to cause loss to another, destroys, defaces or conceals any valuable security, any will or other testamentary document or any original document of or belonging to, or filed or deposited in, any court or any government department shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for 10 years. *(Amended 46 of 1986 s. 7)*

(2) Any person who dishonestly, with a view to gain for himself or another or with intent to cause loss to another, by any deception (whether or not such deception was the sole or main inducement) procures the execution of a valuable security shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for 10 years. *(Amended 46 of 1986 s. 7)*

(3) Subsection (2) shall apply in relation to the making, acceptance, indorsement, alteration, cancellation or destruction in whole or in part of a valuable security, and in relation to the signing or sealing of any paper or other material in order that it may be made or converted into, or used or dealt with as a valuable security, as if that were the execution of a valuable security.

(4) For the purposes of this section -  
"deception" has the same meaning as in section 17; and  
"valuable security" means any document creating, transferring, surrendering, or releasing any right to, in or over property, or authorizing the payment of money or delivery of any property, or evidencing the creation, transfer, surrender or release of any such right, or the payment of money or delivery of any property, or the satisfaction of any obligation.

*[cf. 1968 c. 60 s. 20 U.K.]*

### Specimen schedule indictment

.... the charges against you are that ....

26. Having formed a scheme to obtain money by fraud from Number One Insurance Limited, Hopeful House, Bank Hill, Isle of Dogs ("Number One") by causing Number One to appoint you as an agent to issue life insurance policies and pay commission to you thereon in advance of the receipt of premiums and by submitting false proposals for such policies you did at the premises at 330 Northumberland Street, Edinburgh, or elsewhere in Scotland (a) on 1 August 1990 submit to Number One an application for an agency appointment in which you pretended to be a member of FIMBRA (the Financial Intermediaries Managers and Brokers Regulatory Association), the truth as you knew being that you were not a member of FIMBRA and you did thus induce officers of Number One to cause you to be appointed as an agent and secure same by fraud; and (b) on or about the dates specified in Column 1 of the schedule hereto submit proposals for life insurance to Number One in the names of the persons shown in Column 2 of said schedule and bearing to be signed by them and to state that they were resident in the countries specified in Column 3 of the said schedule and pretend to Number One that such proposals were genuine, the truth as you knew being that such proposals were false and were not made with the knowledge or consent of the persons named therein, such persons were not resident in such countries and such signatures were forged and you did thus induce officers of Number One to cause payment to be made to you of the amounts of commission specified in Column 4 of said schedule, amounting in cumulo to £10,732 and you did thus obtain £10,732 by fraud; ....

#### SCHEDULE

Column 1	Column 2	Column 3	Column 4
Date	Name	Country	Commission
1.9.90	John A	Malta	£1440.00
21.9.90	Peter B	Norway	£1320.00
4.11.90	Ann C	Portugal	£1170.00
7.11.90	David D	Switzerland	£1960.00
12.11.90	Alan E	Spain	£1080.00
12.11.90	Alan E	Spain	£1560.00
22.11.90	Robert F	Switzerland	£1242.00
15.1.91	Arthur G	Germany	£960.00

Total : £10732.00

**Draft Fraud Bill**

A BILL

To

Create the offence of fraud, to abolish the offence at common law of conspiracy to defraud and to provide for related matters.

Enacted by the Governor of Hong Kong, with the advice and consent of the Legislative Council thereof.

**1. Short title**

This Ordinance may be cited as the Fraud Ordinance.

**2. The offence of fraud**

(1) If any person by any deceit (whether or not the deceit is the sole or main inducement) and with intent to defraud induces another person to commit an act or make an omission, which results either -

- (a) in benefit to any person other than the second-mentioned person; or
- (b) in prejudice or a substantial risk of prejudice to any person other than the first-mentioned person,

the first-mentioned person commits the offence of fraud and is liable on conviction upon indictment to imprisonment for 14 years.

(2) For the purposes of subsection (1), a person shall be treated as having an intent to defraud if, at the time when he practises the deceit, he intends that he will by the deceit (whether or not the deceit is the sole or main inducement) induce another person to commit an act or make an omission, which will result in either or both of the consequences referred to in paragraphs (a) and (b) of that subsection.

(3) For the purposes of this section –

"act" (作為) and "omission" (不作為) include respectively a series of acts and a series of omissions;

"benefit" (利益) means any financial or proprietary gain, whether temporary or permanent;

"deceit" (欺騙) means any deceit (whether deliberate or reckless) by words or conduct (whether by any act or omission) as to fact or as to law, including a deceit as to the intentions of the person practising the deceit or of any other person;

"gain" (獲益) includes a gain by keeping what one has, as well as a gain by getting what one has not;

"loss" (損失) includes a loss by not getting what one might get, as well as a loss by parting with what one has;

"prejudice" (不利) means any financial or proprietary loss, whether temporary or permanent.

### **3. Abolition of common law conspiracy to defraud**

(1) Subject to subsection (2), the offence at common law of conspiracy to defraud is abolished.

(2) Subsection (1) shall not apply for any purposes to offences committed before the commencement of this Ordinance.

## **Consequential Amendments**

### **Independent Commission Against Corruption Ordinance**

#### **4. Power of arrest**

Section 10(5) of the Independent Commission Against Corruption Ordinance (Cap. 204) is amended -

(a) by adding -

"(eb) the offence of fraud under section 2 of the Fraud Ordinance ( of 1996)";

(b) in paragraph (f) -

(i) by repealing "the offence of conspiracy to defraud and";

(ii) by repealing "or (ea)" and substituting ", (ea) or (eb)";

(c) in paragraph (g), by repealing "or (ea)" and substituting ", (ea) or (eb)".

## **Criminal Procedure Ordinance**

### **5. Punishment of indictable offences, including Conspiracies and incitements**

Section 101I of the Criminal Procedure Ordinance (Cap. 221) is amended –

- (a) in subsection (1), by repealing ", (3) and (4)" and substituting "and (3)";
- (b) by repealing subsection (4).

## **Chinese Extradition Ordinance**

### **6. List of Extradition Crimes**

Item 26 in the First Schedule to the Chinese Extradition Ordinance (Cap. 235) is amended –

- (a) in paragraph (f), by repealing the comma and substituting a semicolon;
- (b) by adding –

"(g) the Fraud Ordinance (                      of 1996),"

## **Merchant Shipping Ordinance**

### **7. Forgery, etc. of certificate**

Section 7(3) of the Merchant Shipping Ordinance (Cap. 281) is amended by repealing "a conspiracy to commit such an offence or of a conspiracy to defraud" and substituting "the offence of fraud under section 2 of the Fraud Ordinance (                      of 1996)".

## **Merchant Shipping (Certification of Officers) Regulations**

### **8. Offences and penalties**

Regulation 17(3) of the Merchant Shipping (Certification of Officers) Regulations (Cap. 281 sub. leg.) is amended by repealing "a conspiracy to commit such an offence or of a conspiracy to defraud" and substituting "the offence of fraud under section 2 of the Fraud Ordinance (                      of 1996)".

## **Merchant Shipping (Engine Room Watch Ratings) Regulations**

### **9. False pretences and supply of false information**

Regulation 7(2) of the Merchant Shipping (Engine Room Watch Ratings) Regulations (Cap. 281 sub. leg.) is amended by repealing "a conspiracy to commit such an offence or of a conspiracy to defraud" and substituting "the offence of fraud under section 2 of the Fraud Ordinance ( of 1996)".

## **Merchant Shipping (Navigational Watch Ratings) Regulations**

### **10. False pretences and supply of false information**

Regulation 7(2) of the Merchant Shipping (Navigational Watch Ratings) Regulations (Cap. 281 sub. leg.) is amended by repealing "a conspiracy to commit such an offence or of a conspiracy to defraud" and substituting "the offence of fraud under section 2 of the Fraud Ordinance ( of 1996)".

## **Organized and Serious Crimes Ordinance**

### **11. Other specified offences**

Schedule 2 to the Organized and Serious Crimes Ordinance (Cap. 455) is amended –

- (a) by repealing item 2;
- (b) by adding –  
"13. Fraud Ordinance  
( of 1996)  
section 2 fraud".

## **Criminal Jurisdiction Ordinance**

### **12. Offences to which this Ordinance applies**

Section 2 of the Criminal Jurisdiction Ordinance (Cap. 461) is amended –

- (a) in subsection (2), by adding –  
"(c) the offence of fraud under section 2 of the  
Fraud Ordinance ( of 1996).";
- (b) by repealing subsection (3)(b).

**13. Questions immaterial to jurisdiction in the case of certain offences**

Section 4(2) is amended by repealing "or conspiracy to defraud in Hong Kong,".

**14. Extended jurisdiction in relation to certain Conspiracies, attempts and incitements**

Section 6(1) is amended –

- (a) by repealing "or of conspiracy to defraud,";
- (b) by repealing "or fraud".

Explanatory Memorandum

The main object of this Bill is to create the offence of fraud under the laws of Hong Kong, in the light of recommendations of the Law Reform Commission of Hong Kong in its report entitled "Creation of a Substantive Offence of Fraud".

2. Clause 2 creates the offence of fraud and defines, among others, the key elements of "deceit" and "intent to defraud", as well as "benefit" and "prejudice".

3. Clause 3 provides for the abolition of the common law offence of conspiracy to defraud. With the creation of the new substantive offence of fraud, any conspiracy to commit that offence will also be an offence by virtue of section 101C of the Criminal Procedure Ordinance (Cap. 221).

4. Clauses 4 to 14 deal with consequential amendments by removing references to the common law offence of conspiracy to defraud and adding references to the new offence of fraud in appropriate legislation. (Note: The consequential amendments in Clauses 4 to 14 state the position as at 10 June 1996. Further amendments may be necessary upon enactment of this Bill after that date.)