

Exposing the liars

The Fraud Act 2006 came into force early this year and is the government's latest weapon in the fight against increasing levels of financial crime. **Alan Ma** gives an overview



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Fraud has been thriving and is costly to business, so the Fraud Act 2006 is to be welcomed. Prior to the Act, charges had to be based on a combination of eight separate offences of deception under the Theft Acts 1968 and 1978 and common law conspiracy to defraud. This caused difficulties as fraudulent conduct might not fit nicely into one of the specific offences, and the fraudster could avoid punishment on a technicality.

The Act, for the first time, makes fraud a specific offence. It repeals various offences under the Theft Acts and creates a general offence of fraud which can be committed by false representation, failure to disclose information and abuse of position. The offence carries a maximum sentence of 10 years' imprisonment and/or an unlimited fine.

The prosecution must prove that the accused had acted dishonestly, and with intention either to make a gain or to cause a loss or risk of loss. However, there is no need to show that gain or loss was suffered nor that the intended victim acted on the basis of the fraudulent act or omission or was even aware of it.

All the offences can be committed by corporate bodies as well as individuals. If an offence is committed with the consent or connivance of any director, manager or officer of a company, they will also be deemed to have committed the relevant offence. **False representation.** This covers any representation made knowingly or with awareness that it may be false or misleading.

Representation can be express or implied by words or conduct. Accordingly, inaccuracy of any warranty, representation or assertion could lead to a criminal charge if accompanied by dishonesty and guilty intention. There is no requirement that the victim of the representation need actually have relied upon it. Trade puff is a grey area. However, the situation of a seller who overstates its product's capacity should fall within the provision.

Failure to disclose information. A person will commit an offence if he dishonestly fails to disclose to another person information which he is under a legal duty to give. This covers a wide range of duties, for example import/export declarations, disclosure as specified in an agreement or under a trust or trustee relationship, tax returns. Under this clause, fraud can be committed by omission as well as positive act.

Fraud by abuse of position. The defendant must have been in what amounts to a privileged position and under an obligation to safeguard the victim's financial interests, which he dishonestly abuses with intention. The abuse may be by an act or omission. Types of relationship where this may arise include employer and employee, trustees and beneficiaries,

director and company, professional and client, agent and principal, partners and even personal relationships including carers of friends and relatives.

The new legislation moves the law to criminalise the conduct of fraudsters rather than to look at the consequence of the fraudster's activities. It simplifies the prosecution process, and extends the criminal law in respect of fraudulent and deceptive behaviour.

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COURT REPORT

[J & H Ritchie Ltd v Lloyd Ltd]

THE CASE

The buyers (Ritchie) bought a combination seed drill and power harrow from the sellers (Lloyd). The day after the equipment was first used a serious vibration was noticed on the harrow drive chain. The problem continued the next day and Ritchie contacted Lloyd about the problem. A replacement unit was delivered and Lloyd took the machinery back to their premises.

Lloyd discovered two sets of bearings that should have been fitted to the machinery were missing - a major defect which made the equipment unfit for purpose. Lloyd ordered the missing parts and fitted them to the machinery before contacting Ritchie to say that the machinery was ready for collection.

Ritchie asked Lloyd what the problem had been but Lloyd refused to provide the information or an engineer's report. Instead it pointed out that all difficulties had now been resolved and that the machinery was of "factory gate specification".

Ritchie was worried about the machinery and, without further information from Lloyd, decided to reject the equipment and ask for the

return of the purchase price. Lloyd refused to pay, arguing the machinery could not be rejected as it was now fully working and fit for purpose.

Section 35(6)(a) of the Sale of Goods Act 1979 states the sending of goods for repair does not remove the buyer's right to reject the goods. Yet it does not state what happens to the right of rejection if the repair which the buyer has asked for or has agreed to is carried out. Is he bound to accept the goods just because the seller states that the goods, after repair, are now in accordance with the contract?

The House of Lords decided that Ritchie was entitled to reject the goods despite the repair by Lloyd. They held that the return of the goods to Lloyd constituted a separate inspection and repair contract. It was an implied term of that contract that the buyer was entitled to be informed by the seller of the nature of the problem. By refusing to provide this information, the sellers were in breach of that and the House of Lords held that the buyer was not obliged to accept the repaired machinery (even though the defect had been corrected) and was justified in rejecting the goods.

WHAT THIS MEANS

The House of Lords were careful to point out this decision related to the facts of this case where the seller had refused to provide information about the fault. There will be cases where the nature of the problem is obvious to buyer and seller from the outset. In such cases, if they agree on the necessary work and the repair is properly completed, the buyer is obliged to accept the goods.

The key point is that any arrangement for the return of goods for inspection and repair will be treated as a separate contract.

Areas of uncertainty should be discussed and agreed in advance where possible. Sellers should be aware of the implied obligation to provide information about the repair to the buyer. Buyers should be aware that, where the seller complies with the terms of the inspection and repair contract and the goods are returned in suitable condition, their right to reject arising from the original defect will have been lost.

BY ALEX MCINTOSH, PARTNER, CLYDE & CO (WWW.CLYDECO.COM)

EU directive steams into shipping pollution

Shipping companies will face strict penalties if they are found to have caused or contributed to illegal pollution intentionally or by means of serious negligence, under a new EU directive.

The rules will be applicable to any party involved in the shipping process, including the master, the owner, the operator or the charterer of a ship or the classification society.

The directive, which came into effect across European states this month, covers pollution from all ships calling at EU ports in coastal waters and the high seas.

Greek government v EC

The European Commission (EC) is taking legal action against Greece regarding legislation that it argues would exclude certain companies from public procurement.

Having sent the Greek government a letter of formal notice in 2006 regarding an earlier version of the law, the EC deemed that Greece's reply in January (containing a revised draft process) was still not satisfactory.

The EC objects to the Greek law that would require suppliers "interconnected" with Greek media to submit an "official declaration" to the Greek National Council for Radio and Television certifying a clean judicial record regarding corruption charges.

It believes it would introduce grounds for exclusion from public procurement that are incompatible with EC directives.

Procurement fraud in Belgium investigated

Three arrests have been made in Belgium following an internal investigation by the European Anti-Fraud Office (OLAF) that raised suspicions of the manipulation of tender procedures.

The investigation was launched after a complaint was received by OLAF of suspicions of corruption and fraud in the leasing and procurement of EC delegation buildings and their security installations in countries outside the EU.

An EC official, an assistant of a member of European Parliament and the manager of a private company have been arrested.