LAW REFORM COMMISSION

Review Paper

« Law on Fraud »

[May 2016]

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Executive Summary

Review Paper « Law on Fraud »
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In Mauritian law, there is neither a substantive offence of fraud, nor an offence of conspiracy to defraud. There are, however, offences where an element of fraud exists, such as larceny, embezzlement or swindling.

Various Commonwealth and/or Common Law jurisdictions have statutes dealing with “Fraud”. The Commission has thus reviewed from a comparative perspective - by examining the law in the various Commonwealth and/or Common Law jurisdictions, such as UK, Australia, New Zealand, Canada, South Africa, Jersey, Singapore and Hong Kong - the substantive offence of “Fraud” (from the point of view of its different constitutive elements: Fraud by false representation, by failing to disclose information, by abuse of position, and by deception) and the offence of conspiracy to defraud.

The review would help better grasp any reform of our law relating to fraud.
LAW ON FRAUD

Introductory Remarks

1. Fraud is a broad term that refers to a variety of offences involving dishonesty or fraudulent acts. In essence, fraud is the intentional deception of a person or entity by another made for monetary or personal gain. In Mauritius, there exists neither a substantive offence of fraud nor an offence of conspiracy to defraud.

2. This paper will examine from a comparative perspective how other jurisdictions of Common law and/or Commonwealth countries deal with offences relating to Fraud (substantive offence of fraud and conspiracy to defraud). But it is first important to pinpoint the fact that fraud is often linked to other offences, indeed fraudsters can often be part of serious organised criminal gangs, who use the money to fund other crimes such as human trafficking, illegal firearms trade and terrorism.

3. We shall first consider what the notions of “fraud” and “conspiracy to defraud” encompasses (1). We shall then analyse how Common Law and/or Commonwealth jurisdictions tackle the offence of fraud (2), from the point of view of its different constitutive elements (Fraud by false representation, by failing to disclose information, by abuse of position, by deception). Finally, the offence of conspiracy to defraud shall be examined (3).
(1) DEFINITION OF “FRAUD” AND “CONSPIRACY TO DEFRAUD”

4. Fraud law covers a wide range of crimes that address situations in which a person wrongfully obtains money, property, or other benefits by deceit.

5. Fraud is generally understood as dishonesty calculated for advantage. It is a false representation of a matter of fact—whether by words or by conduct, by false or misleading allegations, or by concealment of what should have been disclosed—that deceives and is intended to deceive another so that the individual will act upon it to her or his legal injury.

6. According to Archbold, fraud is to “dishonestly prejudice or to take the risk of prejudicing another's right, knowing that you have no right to do so.”¹ Black’s law dictionary gives the following definition: “Fraud consists of some deceitful practice or wilful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional.”²

7. As to conspiracy to defraud, it implies two key elements: first, that the conspiracy involved dishonesty, and second that if the conspiracy was undertaken, the victim's property rights would be harmed. This does not necessarily require the defendants’ actions to directly result in the fraud.

¹ Archbold, Criminal pleading, evidence and practice (1992 ed, Sweet & Maxwell), at paragraph 17.89.
² http://thelawdictionary.org/fraud/
(2) “FRAUD” IN COMMON LAW AND/OR COMMONWEALTH COUNTRIES

(A) Fraud by false representation

(i) UK

8. Section 2 of the UK Fraud Act\(^3\) makes it an offence to commit fraud by \textit{false representation}. The representation must be made dishonestly. The current definition of dishonesty was established in \textit{R v Ghosh [1982] Q.B.1053}.\(^4\) That judgement sets a two-stage test. The first question is whether a defendant’s behaviour would be regarded as dishonest by the ordinary standards of reasonable and honest people. If answered positively, the second question is whether the defendant was aware that his conduct was dishonest and would be regarded as dishonest by reasonable and honest people.

9. Subsection (1)(b) requires that the person must \textbf{make the representation with the intention of making a gain or causing loss or risk of loss to another}. The gain or loss does not actually have to take place. The same requirement applies to conduct criminalised by sections 3 and 4.

10. Subsection (2) defines the meaning of “false” in this context and subsection (3) defines the meaning of “representation”. A \textbf{representation is defined as false if it is untrue or misleading and the person making it knows that it is, or might be, untrue or misleading}.

\(^3\) http://www.legislation.gov.uk/ukpga/2006/35/contents
\(^4\) http://www.bailii.org/ew/cases/EWCA/Crim/1982/2.html
11. Subsection (3) provides that a representation means any representation as to fact or law, including a representation as to a person’s state of mind.

12. Subsection (4) provides that a representation may be express or implied. It can be stated in words or communicated by conduct. There is no limitation on the way in which the representation must be expressed. So it could be written or spoken or posted on a website.

13. An example of a representation by conduct is where a person, for example, dishonestly misuses a credit card to pay for items. By tendering the card, he is falsely representing that he has the authority to use it for that transaction. It is immaterial whether the merchant accepting the card for payment is deceived by the representation.

14. This offence would also be committed by someone who engages in “phishing”\(^5\): i.e. where a person disseminates an email to large groups of people falsely representing that the email has been sent by a legitimate financial institution. The email prompts the reader to provide information such as credit card and bank account numbers so that the “phisher” can gain access to others’ assets.

15. The UK Law Commission had concluded that, although it was not clear whether a representation could be made to a machine, such a provision was unnecessary (paragraph 8.4 of their report\(^6\)). But subsection (5) is expressed in fairly general terms because it would be artificial to distinguish situations involving modern technology, where it is doubtful whether there has been a “representation”, because the only recipient of the false

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\(^5\) [http://www.theregister.co.uk/2005/05/27/fraud_law_reform/](http://www.theregister.co.uk/2005/05/27/fraud_law_reform/)

statement is a machine or a piece of software, from other situations not involving modern technology where a false statement is submitted to a system for dealing with communications but is not in fact communicated to a human being (e.g., postal or messenger systems).

16. The person must make the representation with the intention of making a gain or causing loss or risk of loss to another. The gain or loss does not actually have to take place. A representation is defined as false if it is untrue or misleading and the person making it knows that it is, or might be, untrue or misleading.

17. A representation may be regarded as being made if it (or anything implying it) is submitted in any form to any system or device designed to receive, convey or respond to communications (with or without human intervention). The main purpose of this provision is to ensure that fraud can be committed where a person makes a representation to a machine and a response can be produced without any need for human involvement (An example is where a person enters a number into a ‘CHIP and PIN’ machine).\(^7\)

18. Evidence is necessary to prove that the defendant communicated the false representation to a person or to a machine. It is not relevant whether the false representation is believed or has any effect on any other person.

(ii) CANADA

19. According to Section 380 (1) of the Criminal Code, “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 or any service,
(a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding fourteen years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars; or
(b) is guilty
(i) of an indictable offence and is liable to imprisonment for a term not exceeding two years, or
(ii) of an offence punishable on summary conviction, where the value of the subject-matter of the offence does not exceed five thousand dollars”.

20. Although the words “false representation” are not expressly used in the above Section, the term “falsehood” encompasses such notion.

21. Also, deceit means any false representation but does not include an expression of opinion not made as a statement of fact. A seller has some latitude in “puffing” his goods, but he is not authorised to misrepresent them or to assign to them benefits they do not possess. Statements made for the purpose of deceiving prospective purchasers cannot properly be characterised as mere puffing.9

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8 http://laws-lois.justice.gc.ca/eng/acts/C-46/page-83.html#h-106
9 http://www.cttj.ca/Documents/droit_contrats/puff_11B.pdf
22. Moreover, Section 52 of the *Competition Act*\(^10\) prohibits knowingly or recklessly making, or permitting the making of, a representation to the public, in any form whatever, that is false or misleading in a material respect. Under this provision, it is not necessary to demonstrate that any person was deceived or misled; that any member of the public to whom the representation was made was within Canada; or that the representation was made in a place to which the public had access. Subsection 52(4) directs that the general impression conveyed by a representation, as well as its literal meaning, be taken into account when determining whether or not the representation is false or misleading in a material respect.

23. Any person who contravenes section 52 is guilty of an offence and liable to a fine of up to $200,000 and/or imprisonment up to one year on summary conviction, or to fines in the discretion of the court and/or imprisonment up to 14 years upon indictment.

24. It is an offence to induce another party to enter into a contract by using false or misleading representations. Generally traders are not allowed to make false claims about anything that could be used to persuade a person to enter into a contract for goods or services.

25. It is an offence under the Australian Consumer Law to make false or misleading representations of goods or services (Competition and Consumer Act 2010 (Cth) Schedule 2, s29). Examples include misrepresentations as to:
- a particular standard, quality, value, grade, composition or style;
- a particular history or previous use;
- goods being new;
- that a particular person has agreed to acquire goods or services;
- the availability of facilities for the repair of goods or of spare parts for goods;
- the place of origin of goods (Part 5-3 Competition and Consumer Act 2010, Schedule 2);
- that goods or services have sponsorship, approval, performance characteristics, uses or benefits ;
- price; and
- testimonials for the good or service.

26. The maximum penalty are as follows (S. 151 Competition and Consumer Act 2010 (Cth) Schedule 2):
- Fine of up to $1,100,000 (for a body corporate) ;
- Fine of up to $220,000 (for individuals) ;

27. It is also an offence to make false or misleading representations about the sale of land (s.30). An example of a misleading representation is marketing a cordial claiming it contains fruit extracts when it does not (ACCC v Cadbury Schweppes Pty Ltd [2004] FCA 516).

28. The Misrepresentation Act 1972 (SA)\(^\text{12}\) makes it an offence to induce another party into entering a contract by misrepresentation and provides for criminal sanctions to be imposed (s.4).

29. If a business makes a false representation inducing a consumer to enter a contract, to pay money, to transfer land or personal property then the trader and/or the agent or employee making the representation are both guilty of a criminal offence.

30. According to Sec. 240 (“Obtaining by deception or causing loss by deception”) of the **Crimes Act 1961**:\(^\text{13}\):

“(1) Every one is guilty of obtaining by deception or causing loss by deception who, by any deception and without claim of right —

(a) obtains ownership or possession of, or control over, any property, or any privilege, service, pecuniary advantage, benefit, or valuable consideration, directly or indirectly; or

(b) in incurring any debt or liability, obtains credit; or

(c) induces or causes any other person to deliver over, execute, make, accept, endorse, destroy, or alter any document or thing capable of being used to derive a pecuniary advantage; or

(d) causes loss to any other person.

(1A) Every person is liable to imprisonment for a term not exceeding 3 years who, without reasonable excuse, sells, transfers, or otherwise makes available any document or thing capable of being used to derive a pecuniary advantage knowing that, by deception and without claim of right, the document or thing was, or was caused to be, delivered, executed, made, accepted, endorsed, or altered.

(2) In this section, deception means—

(a) a false representation, whether oral, documentary, or by conduct, where the person making the representation intends to deceive any other person and—

(i) knows that it is false in a material particular; or

(ii) is reckless as to whether it is false in a material particular; or

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(b) an omission to disclose a material particular, with intent to deceive any person, in circumstances where there is a duty to disclose it; or

(c) a fraudulent device, trick, or stratagem used with intent to deceive any person.”
31. In AG v Foster (1989) JLR 70, it was established that a general offence of fraud exists in Jersey with the following ingredients:

- a false representation;
- actual prejudice to someone;
- actual benefit to the accused or another; and
- a causal link between the false representation and the prejudice and benefit.

32. The Court of Appeal laid out the elements of the offence of fraud in Jersey as follows: “(…) in our judgement 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, actual prejudice to someone and actual benefit to himself or somebody else”.
(B) Fraud by failing to disclose information where there is a legal duty to disclose it

33. A person is guilty of this offence if he dishonestly fails to disclose to another person information which he is under a legal duty to disclose, and intends, by failing to disclose the information to make a gain for himself or another, or to cause loss to another or to expose another to a risk of loss.

34. “Legal duty” is any such duty that may derive from statute (such as the provisions governing company prospectuses), from the fact that the transaction in question is one of the utmost good faith (such as a contract of insurance), from the express or implied terms of a contract, from the custom of a particular trade or market, or from the existence of a fiduciary relationship between the parties (such as that of agent and principal).

35. For this purpose, there is a legal duty to disclose information not only if the defendant’s failure to disclose it gives the victim a cause of action for damages, but also if the law gives the victim a right to set aside any change in his or her legal position to which he or she may consent as a result of the non-disclosure. For example, a person in a fiduciary position has a duty to disclose material information when entering into a contract with his or her beneficiary, in the sense that a failure to make such disclosure will entitle the beneficiary to rescind the contract and to reclaim any property transferred under it.
36. Section 3 of the Fraud Act makes it an offence to commit fraud by **failing to disclose information to another person where there is a legal duty to disclose the information.** A legal duty to disclose information may include duties under oral contracts as well as written contracts.\(^{14}\) For example, the failure of a solicitor to share vital information with a client within the context of their work relationship, in order to perpetrate a fraud upon that client, would be covered by this section. Similarly, an offence could be committed under this section if a person intentionally failed to disclose information relating to his heart condition when making an application for life insurance.

37. Similarly, an offence could be committed under this section if a person intentionally failed to disclose information relating to his heart condition when making an application for life insurance.

38. Like Section 2 (and Section 4) this offence is entirely offender focused. It is complete as soon as the Defendant fails to disclose information provided he was under a legal duty to do so, and that it was done with the necessary dishonest intent. It differs from the deception offences in that it is immaterial whether or not any one is deceived or any property actually gained or lost.

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\(^{14}\) The concept of “legal duty” is explained in the UK Law Commission’s Report on Fraud, which said at paragraphs 7.28 and 7.29: “7.28 …Such a duty may derive from statute (such as the provisions governing company prospectuses), from the fact that the transaction in question is one of the utmost good faith (such as a contract of insurance), from the express or implied terms of a contract, from the custom of a particular trade or market, or from the existence of a fiduciary relationship between the parties (such as that of agent and principal). For this purpose there is a legal duty to disclose information not only if the defendant’s failure to disclose it gives the victim a cause of action for damages, but also if the law gives the victim a right to set aside any change in his or her legal position to which he or she may consent as a result of the non-disclosure. For example, a person in a fiduciary position has a duty to disclose material information when entering into a contract with his or her beneficiary, in the sense that a failure to make such disclosure will entitle the beneficiary to rescind the contract and to reclaim any property transferred under it.”
(ii) NEW ZEALAND

39. According to Section 240 (2) (b) of the Crimes Act 1961, the term “deception” include
“an omission to disclose a material particular, with intent to deceive any person, in
circumstances where there is a duty to disclose it”.15

15 Ministry of Social Development v Karen Marks [2016] NZDC 1741
40. An offence is committed if a person occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person, dishonestly abuses that position, and intends, by means of the abuse of that position to make a gain for himself or another, or to cause loss to another or to expose another to a risk of loss. A person may be regarded as having abused his position even though his conduct consisted of an omission rather than an act.

UK

41. **Section 4 of the Fraud Act** provides that the offence will be committed if a person:
   - occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person,
   - dishonestly abuses that position, and
   - intends by means of the abuse of that position –
     - to make a gain\(^\text{16}\) for himself or another, or
     - to cause loss to another or to expose another to a risk of loss.

42. Section 4 does not define “abuse” or “position”. However regarding the former concept the section states that an omission will be enough for an abuse of position to take place.

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\(^{16}\) Section 5 defines the meaning of “gain” and “loss” for the purposes of sections 2 to 4. The definitions are essentially the same as those in section 34(2) (a) of the Theft Act 1968 and section 32(2) (b) of the Theft Act (Northern Ireland) 1969. Under these definitions, “gain” and “loss” are limited to gain and loss in money or other property. The definition of “property” which applies in this context is based on section 4(1) of the Theft Act 1968 (read with section 34(1) of that Act) and section 4(1) of the Theft Act (Northern Ireland) 1969 (read with section 32(1) of that Act). The definition of “property” covers all forms of property, including intellectual property, although in practice intellectual property is rarely “gained” or “lost”.

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An example given in the Explanatory Notes is of an "employee who fails to take up a crucial contract in order that an associate or rival company can take it up instead at the expense of the employer".

43. The Law Commission's Report offers some assistance with the “position”:

“The necessary relationship will be present between trustee and beneficiary, director and company, professional person and client, agent and principal, employee and employer, or between partners. It may arise otherwise, for example within a family, or in the context of voluntary work, or in any context where the parties are not at arm's length” (para.7.38).

44. Section 4 would cover, for example, a case where an employee of a software company uses his position to clone software products with the intention of selling the products to make a profit for him, or a case where an employee copies his employer’s client database for the purpose for setting up a rival company. It would also cover a case where a person is employed to care for an elderly or disabled person has access to that person’s bank account and abuses his position by transferring funds to invest in a high-risk business venture of his own.

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17 http://www.publications.parliament.uk/pa/ld200506/ldbills/007/en/06007x--.htm
(D) Fraud by deception

(i) UK

45. The Fraud Act 2006 repeals and replaces the eight deception offences in the Theft Acts 1968-1996. It introduces a general offence of fraud, and other fraud offences which can be used in particular circumstances.\(^\text{18}\)

46. The Act repeals the following Theft Act offences:
   - Obtaining property by deception (Theft Act 1968, section);
   - Obtaining a money transfer by deception (Theft Act 1968, section 15A);
   - Obtaining pecuniary advantage by deception (Theft Act 1968, section 16);
   - Dishonestly procuring execution of a valuable security (Theft Act 1968, section 20 (2));
   - Obtaining services by deception (Theft Act 1978, section 1);
   - Securing the remission of an existing liability to make a payment (Theft Act 1978, section 2 (1) (a));
   - Dishonestly inducing a creditor to wait for payment or to forgo payment with the intention of permanently defaulting on all or part of an existing liability (Theft Act 1978, section 2 (1) (b));
   - Obtaining an exemption from or abatement of liability to make a payment (Theft Act 1978, section 2 (1) (c)).

47. Section 2 of the Fraud Act makes it an offence to commit fraud by false representation. Subsection (1) (a) makes clear that the representation must be made dishonestly.\(^\text{19}\) This

\(^{18}\) The Act is based mainly on the Law Commission’s report on fraud (Cm 5560), which concluded that the Theft Act deception offences were too specific, overlapping and outdated.
test applies also to sections 3 and 4. The current definition of dishonesty was established in *R v Ghosh*.\(^{20}\) That judgement sets a two-stage test. **The first question is whether a defendant’s behaviour would be regarded as dishonest by the ordinary standards** of reasonable and honest people. If answered positively, the second question is **whether the defendant was aware that his conduct was dishonest** and would be regarded as dishonest by reasonable and honest people.

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\(^{19}\) In the case of stolen documents the false representation may be that the defendant was lawfully in possession of the cheque/credit card/book and entitled to use it or that he was the person named on the cheque/credit card/book and entitled to use it. If the defendant is using his own credit card knowing that he has exceeded his credit limit then the false representation will be that he had authority to use the card and that the card issuer would honour the transaction (*R v Lambie* [1982] A.C. 449 HL). If the documents are forged then the false representation would be that the document was genuine and would be honoured. If the representation was made in a letter which was discovered during the search of the suspect’s property, then whether it was sent or not may be irrelevant to the fact that the representation was false, dishonest and intended to be sent.

\(^{20}\) [1982] Q.B.1053
48. As aforementioned, Section 380 (1) of the Criminal Code provides the general definition for fraud in Canada:

“380. (1) 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 or any service,
(a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding fourteen years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars; or
(b) is guilty
(i) of an indictable offence and is liable to imprisonment for a term not exceeding two years, or
(ii) of an offence punishable on summary conviction,
where the value of the subject-matter of the offence does not exceed five thousand dollars.”

49. In addition to the penalties outlined above, the court can also issue a prohibition order under s. 380.2 (preventing a person from “seeking, obtaining or continuing any employment, or becoming or being a volunteer in any capacity that involves having authority over the real property, money or valuable security of another person”). It can also make a restitution order under s. 380.3. The Canadian courts have held that the offence consists of two distinct elements:
- A prohibited act of deceit, falsehood or other fraudulent means. In the absence of deceit or falsehood, the courts will look objectively for a "dishonest act"; and
- The deprivation must be caused by the prohibited act, and deprivation must relate to property, money, valuable security, or any service.
50. The Supreme Court of Canada has held that deprivation is satisfied on proof of detriment, prejudice or risk of prejudice; it is not essential that there be an actual loss. Deprivation of confidential information, in the nature of a trade secret or copyrighted material that has commercial value, has also been held to fall within the scope of the offence.
(iii) AUSTRALIA

51. In New South Wales, according to the **Crimes Act 1900**, a person who, by any deception, dishonestly obtains property belonging to another, or obtains any financial advantage or causes any financial disadvantage, shall guilty of the offence of fraud. A person’s obtaining of property belonging to another may be dishonest even if the person is willing to pay for the property. A person may be convicted of the offence of fraud involving all or any part of a general deficiency in money or other property even though the deficiency is made up of any number of particular sums of money or items of other property that were obtained over a period of time. A conviction for the offence of fraud is an alternative verdict to a charge for the offence of larceny, or any offence that includes larceny, and a conviction for the offence of larceny, or any offence that includes larceny, is an alternative verdict to a charge for the offence of fraud.

52. Some commonly used offences in the **Commonwealth Criminal Code** are obtaining financial advantage by deception, obtaining a gain, causing a loss and causing a loss to another. The maximum penalty for an offence against section 134.2(1) of the Criminal Code is 10 years’ imprisonment. The maximum penalty for offences against sections 135.1(1), 135.1(3) and 135.1(5) of the Criminal Code is 5 years’ imprisonment.

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21 S 192E.
23 S.134.2(1) Commonwealth Criminal Code
24 S.135.1(1) Commonwealth Criminal Code
25 S.135.1(3) Commonwealth Criminal Code
26 S.135.1(5) Commonwealth Criminal Code

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(iv) SINGAPORE

53. The concept of Fraud in Singapore is to be found in the Penal Code\(^\text{27}\), under the provisions related to “\textit{cheating}”.\(^\text{28}\) Whoever, \textit{by deceiving any person, 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 intentionally induces the person so deceived to do or omit to do anything which he or she would not do or omit if he or she 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 “\textit{cheat}”.

54. There are also provisions concerning “\textit{Criminal breach of trust}”\(^\text{29}\) (the equivalent of our provisions on “embezzlement”). This offence is committed by a person who, being in any manner entrusted with property, or with any dominion over property, \textit{dishonestly misappropriates or converts to his or her 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 or she has made touching the discharge of such trust, or wilfully suffers any other person to do so.

\(^{27}\) http://statutes.agc.gov.sg/aol/download/0/0/pdf(binaryFile/pdfFile.pdf?CompId:21a9d09f-717b-47a5-a93a-5a44a8ca1a9

\(^{28}\) Chapter 224, section 417

\(^{29}\) Sections 405 to 409
(v) NEW ZEALAND

55. Section 240 of **Crimes Act 1961** is to the effect that a person shall be guilty of **obtaining by deception or causing loss by deception** who, by any deception and **without claim of right** (a) obtains ownership or possession of, or control over, **any property, or any privilege, service, pecuniary advantage, benefit, or valuable consideration, directly or indirectly**; or (b) in incurring any debt or liability, obtains credit; or (c) induces or causes any other person to deliver over, execute, make, accept, endorse, destroy, or alter any document or thing capable of being used to derive a pecuniary advantage; or (d) causes loss to any other person.
(E) The Intent to defraud

(i) UK

56. The leading authority on dishonesty is *R v Ghosh*.\textsuperscript{30} It sets out a two-stage test to be applied whenever dishonesty has to be proved as an element of an offence.

57. If the answer to either of the following questions is “no” prosecution is bound to fail. The first element is objective while the second is subjective:
   a. According to the ordinary standards of reasonable and honest people, was what was done dishonest?
   b. If it was dishonest by those standards, **did the defendant realise that reasonable and honest people would regard the conduct as dishonest?**

58. In many cases it will be clear from the evidence itself that the first stage of the test is satisfied. The court must be satisfied that the evidence is capable of providing a positive answer to both questions. There is, however, no need for a Ghosh-based direction, unless the defendant has raised the issue that he or she did not know that anybody would regard what he or she did as dishonest, in accordance with the first stage of the test.

\textsuperscript{30} [1982] EWCA Crim 2
(ii) SOUTH AFRICA

59. Fraud in South Africa is punishable as a general common-law offence. The offence involves unlawfully making, with intent to defraud, a misrepresentation that causes actual prejudice or which is potentially prejudicial to another.

60. The intent to defraud element of the offence has been interpreted to require not just an intention to deceive but also an intention to defraud in the sense that the intention is to induce the victim of the fraud to alter or abstain from altering his or her position.32

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31 RL Milton South African Criminal Law and Procedure Vol II 3rd Ed at 730
61. The Law Reform Commission of Hong Kong published a Report in 1996 where it examined the desirability of creating a substantive offence of Fraud.\(^{33}\)

62. The reform which was recommended in the Report was implemented by the Theft (Amendment) Ordinance (45 of 1999) (July 1999) amending Cap 210\(^ {34}\). The new Section 16A now reads as follows:

“(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" and "omission" include respectively a series of acts and a series of omissions; "benefit" means any financial or proprietary gain, whether temporary or permanent; "deceit" 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 relating to the past, the present or the future and a deceit as to the intentions of the person practising the deceit or of any other person; "gain" includes a gain by keeping what one has, as well as a gain by getting what one has not; "loss" includes a loss by not getting what one might get, as well as a loss by parting with what one has; "prejudice" means any financial or proprietary loss, whether temporary or permanent.

(4) This section shall not affect or modify the offence at common law of conspiracy to defraud.”
63. Fraud requires elements of “dishonesty” and “deprivation”.35

64. The actus reus for the offence is made out where36:
- there was a prohibited act of deceit, a falsehood or some other fraudulent means; and37
- there was a deprivation caused by the prohibited act. Either an actual loss or a pecuniary interest at risk.

65. The mens rea is the subjective awareness of undertaking the prohibited act and awareness of the risk of depriving another of property. The personal feelings of the “morality or honesty” of the act is not relevant. The awareness of the risk of deprivation includes recklessness. Making use of funds which the accused was wilful blindness as to it source is considered dishonest. A mistaken belief that the victim owes the accused money cannot justify collecting debt by deceit. That the accused simply “hoped the deprivation would not take place” is not a defence where the accused knew that he was undertaking a prohibited act that could cause deprivation.38 In social assistance or welfare fraud, the accused does not need to know that the regulations prohibited false applications.

66. The requirement of a deprivation “is satisfied on proof of detriment, prejudice, or risk of prejudice to economic interests of the victim. It is not essential that there be

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35 R. v. Olan, [1978] 2 S.C.R. 1175, 5 C.R. (3d) 1, 41 C.C.C. (2d) 145 at 150, per Dickson J. (“Courts, for good reason, have been loath to attempt anything in the nature of an exhaustive definition of ‘defraud’ but one may safely say, upon the authorities, that two elements are essential, ‘dishonesty’ and ‘deprivation.’ To succeed, the Crown must establish dishonest deprivation.”)
38 R v Emms 2010 ONCA 817 at para. 32
actual economic loss as the outcome of the fraud”\textsuperscript{39} It is further required in order to prove “dishonest deprivation” that the victim would not have otherwise allowed the deprivation to happen if they had known the true state of affairs. Actual loss is not necessary; it is sufficient to show a risk of loss. “Deprivation” includes the risk of deprivation. It may also include risk of prejudice to economic interests. The accused does not have to obtain any property to complete the offence. Thus, if the accused is deprived of property due to it going to someone else is enough. The Crown must also prove that the dishonest means used did in fact result in the fraud.

67. Generally, jurisdiction of the offence includes the place where a false representation was made, the false document was prepared or signed, or where deprivation took place. In order to attract the jurisdiction of the court, there needs to be a significant portion of the activities making up the offence occur within the court’s jurisdiction.\textsuperscript{40}

\textsuperscript{40} Re Libman and R., [1985] 2 S.C.R. 178
(3) “CONSPIRACY TO DEFRAUD” IN COMMON LAW AND/OR COMMONWEALTH COUNTRIES

(i) UK

68. The offence of conspiracy to defraud was preserved as a common law offence by S. 5(2) of the Criminal Law Act of 1977. According to S. 12(3) of the Criminal Justice Act of 1987\(^\text{41}\), a person who is found guilty of conspiracy to defraud is liable on conviction on indictment to imprisonment for a term not exceeding 10 years or a fine or both.

69. In *Scott v Metropolitan Police Commissioner*\(^\text{42}\), a definition of the offence was provided by Lord Dilhorne: “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 entitled and an agreement by two or more by dishonesty to injure some proprietary right of his, suffices to constitute the offence of conspiracy to defraud”.

70. In this case, the defendant confessed to having bribed 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 case was that the element of deceit was essential to establish the offence of conspiracy to defraud (i.e., 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. But it was held that to establish a conspiracy to defraud, it was not necessary to prove a deceit by the defendant of the person who would end up being defrauded.


\(^{42}\) [1975] AC 910
71. It is necessary to prove that the victim was dishonestly deceived by one or more of the parties to the agreement into running an economic risk that he or she would not otherwise have run, if the victim has not suffered any loss.  

72. Moreover, according to Lord Diplock in the Scott case, “where the intended victim of a “conspiracy to defraud” is a private individual 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”.

73. In the above-mentioned case, it was reaffirmed that dishonesty is an essential ingredient of conspiracy to defraud at common law. 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. In the context of conspiracy to defraud, this means firstly that the objectives of the parties must be dishonest according to ordinary standards of reasonable and honest people, and secondly that the parties to the agreement must themselves have realised that their objectives were by those standards dishonest.

74. Two forms of conspiracy to defraud exist: conspiracy to expose a person to loss or economic risk or disadvantage and conspiracy to deceive a person who is in a position of responsibility.

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43 Scott v Metropolitan Police Commissioner (1974) 3 All ER 1032
(a) Conspiracy to expose a person to loss or an economic risk or disadvantage

75. The first is an agreement between two or more people to dishonestly deprive someone of something that he or she is entitled to. This can also include just exposing the person to an economic risk or disadvantage. There does not have to be an intention to deceive the person.

(b) Conspiracy to deceive a person who is in a position of responsibility

76. The second variety of the offence entails two or more people to have a dishonest agreement to defraud someone by deceiving that person into acting against his or her duty. This often comprises fraud where public officials are deceived and the fraud occurs as a result, or can perhaps even include people who owe a duty to, for example, their clients or even their employers.

77. Either type of the offence is capable of overlapping with the offence of statutory conspiracy where the agreement would necessarily involve the commission of an offence and would also involve a fraud being practised on another person. In these circumstances, the prosecution has a choice as to which kind of charge to put.

78. Dishonesty is relevant in all fraud cases. Unless the defendants can be shown to have acted dishonestly, there can be no fraud. In a conspiracy, a participant in the fraud who did not know what the fraud was about, or that he or she was acting dishonestly, cannot be convicted. This may be particularly important in cases where the client is an employee or not the major organiser, and might not have known what was going on.
79. There is a two-stage test for whether someone has been dishonest: the first stage of the test is that according to the standards of reasonable and honest people what was done must have been dishonest. The second stage of the test is that the defendant himself must have realised that what he was doing was (by the standards of reasonable and honest people) dishonest.

80. Conspiracy to defraud can be heard only at the Crown Court. It is an offence at Common Law which means it is an offence created by previous decided cases. It is punishable by up to ten years’ imprisonment or a fine or both, although sentences of the maximum length are quite rare, and are usually only given in the most serious cases.
(ii) AUSTRALIA

81. Conspiracy to defraud is a crime in Australian jurisdictions, though the source of the offence differs. In New South Wales and South Australia, it is a common law offence. In Victoria, it is still a common law offence but by virtue of express statutory preservation. The Commonwealth, Australian Capital Territory and the Northern Territory have statutory offences of conspiracy to defraud. Western Australia has a general crime of fraud so that conspiracy to defraud is a species of conspiracy to commit an offence (see Section 409 of Western Australia Criminal Code).44

82. Thus, concerning the Commonwealth, in the Criminal Code Act 199545, at Section 135.4 (1), the following definition is given of conspiracy to defraud:

“A person is guilty of an offence if the person conspires with another person with the intention of dishonestly obtaining a gain from a third person (…)”.

Also, “A person is guilty of an offence if the person conspires with another person with the intention of dishonestly causing a loss to a third person (…)” (S. 135.4 (3)).

83. In the Australian Capital Territory, according to Section 334 of the Criminal Code, “a person commits an offence if the person conspires with someone else with the intention of dishonestly obtaining a gain from a third person.” Moreover, “a person commits an offence if the person conspires with someone else with the intention of dishonestly causing a loss to a third person”. A person commits an offence if the person “conspires with someone else to dishonestly cause a loss, or a risk of loss, to a third person and

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knows or believes that the loss will happen, or that there is a substantial risk of the loss happening”.

84. As for the Northern Territory, “any person who conspires with another by deception or any fraudulent conduct 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 an offence and is liable to imprisonment for 7 years” (Section 284 Criminal Code).

85. Conspiracy to defraud has been an offence for a long time. At first there had to be some prejudice to the public as in Starling’s Case.

86. In offences of conspiracy to defraud, the jury should be directed that to defraud is to deliberately use dishonest means to deprive another person of his or her property or to imperil his or her rights or interests. It involves the intentional creation of a situation by one person to use dishonest means to deprive another person of money or property, or to imperil the other person’s rights or interests, knowing that he or she has no right to deprive that other person of money or property, or imperil that other person’s rights or interests. The summing up should also identify the dishonest means relied upon by the Crown.

49 Peters v The Queen (1998) 192 CLR 431
(iii) HONG KONG

87. In Hong Kong also, the offence of “conspiracy to defraud” is a common law one and 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”.50

88. The leading authority in Hong Kong on conspiracy to defraud at common law is Wai Yu-Tsang.51 In this case, the Privy Council, on appeal from the Court of Appeal of Hong Kong, adopted the view that a conspiracy to defraud is simply « an agreement to practise a fraud on somebody », using the term « fraud » here in a broad sense, based on either dishonestly « imperiling » the economic interests of another or dishonestly « acting to the prejudice of another’s rights ». Conspiracy to defraud may be directed against both private and public victims, the latter covering, for example, public officials who are made to act contrary to their public duty, whether by deceit, forgery, bribery or such like.

51 [1992] HKCLR 29
Concluding observations

89. As we have seen, many countries have provisions in their statutes relating to Fraud and Conspiracy to defraud.

90. Concerning Conspiracy to defraud, in UK, it is a common law offence and is also governed by the Criminal Justice Act 1987 (S. 12 (3)), while in Australia it is under the Commonwealth Criminal Code 1995 (S. 135.4), and in Hong Kong, it is preserved as a common law offence.

91. As to the offence of fraud, in most countries, it is part of the general criminal legislation. Thus, in Canada, we find it under the Criminal Code, like it is the case in Australia and Singapore. In New Zealand, it is under the Crimes Act 1961. Hong Kong tackles the matter under the Theft (amendment) ordinance (July 1999) amending Cap 210, while in South Africa, it is a common law offence. UK is one of the rare countries to have adopted a Fraud Act.

92. The rationale behind the adoption of this piece of legislation is worth examining. The UK Fraud Act of 2006 replaces the laws relating to obtaining property by deception, obtaining a pecuniary advantage and other offences which were established under the Theft Act 1978. The Act provides for a general offence of fraud with three ways of committing it, which are by false representation, by failing to disclose information and by abuse of position. It crafts new offences of obtaining services dishonestly and of

52 The Act repeals the deception offences in sections 15, 15A, 16, and 20(2) of the Theft Act 1968 (c. 60), sections 15, 15A, 16 and 19(2) of the Theft Act (Northern Ireland) 1969 (c. 16 (N.I.)), sections 1 and 2 of the Theft Act 1978 (c. 31) and Articles 3 and 4 of the Theft (Northern Ireland) Order 1978 (SI 1978/1407 (N.I. 23)).
possessing, making and supplying articles for use in frauds. It also contains a new offence of fraudulent trading applicable to non-corporate traders.\textsuperscript{53}

93. The fact is that the Theft Act encompassed too many individual fraud offences, defined with reference to different types of consequences and it was not always straightforward to identify which offence to charge, and often, even less easy to secure a conviction. This in turn steered prosecutors, wherever possible, to rely heavily upon the offence of conspiracy to defraud.

94. The most important drawback which the Fraud Act 2006 was intended to cure was the focus on the mind of the victim, rather than the mind of the offender. Under the old legislation it was required to prove that the deception had acted on the victim, for example that he/she would not have parted with the goods but for the deception. This generated complications as technology advanced and the use of credit cards and payment through machines or over the internet became predominant. Other difficulties included the fact that fraud is not always committed with a clear view to gain. There was no offence of obtaining services without a deception.

95. The strengthening of our law relating to Fraud can be achieved by amending relevant provisions in our Criminal Code (such as those relating to swindling and embezzlement), and/or by adopting a statute specially designed to combat fraud, such as a Fraud Act.

\textsuperscript{53} This offence echoes the offences contained in section 458 of the Companies Act 1985 (c. 6) and Article 451 of the Companies (Northern Ireland) Order 1986 (SI 1986/1032 (N.I. 6)), which apply to companies and certain other corporate bodies.