

Answers to Exam questions

Question 1

Answer ALL parts below:

(a) Margaret applies for a mortgage and life insurance. She states on the mortgage application form that she has an income of £40,000 and she does not fill out the section relating to credit card debts held. In fact, Margaret's income is £25,000 and she owes £3,000 on various credit cards. In relation to the life insurance application, Margaret does not declare on the form that her family has a history of heart disease.

AND

(b) Geoffrey, a solicitor, receives £100,000 from Tony, a client. Instead of transferring the money into the business account, he transfers the money into his personal account.

AND

(c) Holly drives to a car wash which is operated by tokens purchased from a shop. Instead of buying a token, Holly uses a fake token which she has made herself. She places the fake token in the machine. The machine accepts it and washes Holly's car.

What offences, if any, have Margaret, Geoffrey, and Holly committed?

Bullets

- Students are expected to set out the law relating to the offence of fraud and apply it to the problem scenarios. There is a general offence of fraud under s.1 of the Fraud Act 2006.
- There are three ways in which fraud may be committed. Section 2 of the Fraud Act 2006 provides for fraud by false representation, s.3 provides for fraud by failing to disclose information, and s.4 provides for fraud by abuse of a position of financial trust.
- In part (a), Margaret could be charged with fraud under s.1(2)(a). The prosecution could be based upon s.2 – fraud by false representation. Under s.2(1) this form of the offence requires proof that Margaret made a false representation. The representation may be as to fact or law, may be made by words or conduct or in writing. Margaret made a false representation when she stated on the form that she earns £40,000 p.a.

- The *mens rea* requires proof of dishonesty. The *Ghosh* test of dishonesty applies: (i) was what the defendant did was dishonest according to the ordinary standards of reasonable and honest people? Margaret probably was objectively dishonest. If so, (ii) did the defendant realise that reasonable and honest people would regard it as dishonest? If so, she is dishonest.
- The prosecution must also prove that Margaret knew that the representation is or might be false – she must have done. Lastly, it must be proved that she intended to make a gain for herself or another or to cause loss to another or to expose another to a risk of loss.
- She does not declare her credit card debts and history of heart disease. This could amount to fraud by failing to disclose information under s.1(2)(b). Under s.3, this applies to a failure to disclose information which D has a legal duty to disclose. Margaret has a legal duty to disclose this information on a mortgage form and life insurance application form. The *mens rea* of this offence requires proof of dishonesty and an intention to make a gain (as above).
- In part (b), Geoffrey may be charged with fraud by abuse of position under s.1(2)(c). By transferring the money into his personal account, he abuses his position as solicitor and acts against the financial interests of his client, Tony. You should apply *Ghosh*. Geoffrey intends to gain money. Under s.5(2) “gain” extends only to gain in money and other property.
- Holly could be charged with fraud by false representation under s.1(2)(a). A false representation may be made to any system or device designed to receive, convey, or respond to communications (i.e., a machine). There is no need that a person be deceived. The *mens rea* of this offence requires proof of dishonesty (*Ghosh*) and an intention to make a gain (as above). She intends to gain property and is probably dishonest under *Ghosh* in light of the fact that she has made the token herself. The honest and reasonable person would regard this as dishonest and she probably realises this.

Question 2

The Fraud Act 2006 has been a great success. The general offence of fraud created by the Act is simple, accessible, and has the flexibility to deal with future developments.

To what extent do you agree with this statement? Explain your answer.

Bullets

- You should not go through the old deception offences as these are now redundant. However, in light of the question, you should offer some evaluation of the effect of the Fraud Act 2006.
- The Act came into force in 15th Jan 2007 and it created a general offence of fraud which can be committed in three ways. The Act repealed the old deception offences which were problematic for a number of reasons. In doing so the Act eliminated such problems.
- you should explain that the Act created a general offence of fraud (s.1) which can be committed in three ways: by false representation (s.2), by failing to disclose information (s.3) and by abuse of position.
- There were too many complicated offences of deception which focused heavily on the *actus reus* and were too specific and narrowly defined. This led to unjust acquittals, which were costly to the criminal justice system. The Fraud Act 2006 created one general offence of fraud, removing such complications.
- The old offences were too specific and a nightmare for both the police and prosecutors, who had to ensure that they were careful to select the correct offence with which to charge the defendant. Where the wrong offence was charged, the prosecution would fail as the case would be thrown out by the trial judge. This inefficiency was costly to the criminal justice system. The new single offence of fraud focuses on the *mens rea* instead.
- The old offences were also difficult for juries to understand, leading to unfairness to the defendant. If jurors cannot understand the charges, their integrity, and the integrity of the criminal justice system, is compromised.
- The old offence of obtaining property by deception under s.15, TA 1968 proved inadequate in situations where the defendant had obtained a money transfer by deception. The problem arose with the definition of property belonging to another under TA 1968. *Preddey* led to the creation of a new offence – obtaining a money transfer by deception under s.15A TA 1968.

- The old deception offences required proof of causation. It had to be proved that the deception *caused* the defendant to obtain the property. Sometimes prosecutions failed due to the difficulty of proving this element.
- It was unclear under the old offences whether omissions could amount to a deception: see *Firth*. This issue has now been clarified in the Fraud Act 2006 by the creation of the forms of fraud under ss.3 and 4. In light of these forms of fraud, it is thought that s.2 cannot be committed by omission.
- Under the old deception offences, it was not possible to deceive a machine. A deception could only be practised against a person: this was accepted as the general view in *Davies v Flackett*. This has become more significant in today's internet age.
- However, you might point out the criticisms which have been levelled at the Fraud Act 2006. The offence of fraud is so widely drafted that it could catch behaviour which should not really be regarded as fraud.