

Hong Kong

The new offence of fraud

by John Reading

Hong Kong's legislature recently enacted a statutory offence of fraud by inserting a new section (16A) in the Theft Ordinance.

LAW REFORM COMMISSION

In July 1996, in response to a request from the Attorney-General to consider the creation of a statutory offence of fraud, Hong Kong's Law Reform Commission issued a comprehensive report in which it recommended the creation of a fraud offence, confined to fraud committed by deceit, and the abolition of the common law offence of conspiracy to defraud.

Had the recommendations of the Law Reform Commission been adopted they would have had a disastrous effect on the ability of Hong Kong's law enforcement agencies to combat fraud, for if the offence was confined to fraud by deceit many major fraud cases which had been prosecuted in the past could not now be prosecuted, because the manager (i.e. the 'mind') of the victimised bank or corporation is often a party to the fraud, and therefore it cannot be said in these circumstances that the bank or corporation has been deceived.

INTENT TO DEFRAUD: HONG KONG COMMON LAW

In *Scott v Metropolitan Police Commissioner* ([1975] AC 819) Lord Diplock suggested (at pp. 840–1) that there were two categories of fraud, namely fraud occasioning loss or prejudice to the victim and fraud causing a person performing public duty to act contrary to that duty. The leading case in Hong Kong is *R v Wai Yu-tsang* [1992] 1 AC 269, where their Lordships in the Privy Council were critical of the narrow definition of 'intent to defraud' advanced by Lord Diplock in *Scott*. In this regard Lord Goff of Chieveley had the following to say:

'With the greatest respect to Lord Diplock, their Lordships consider this categorisation to be too narrow. In their opinion, in agreement with the approach of Lord Radcliffe in ... Welham [Welham v DPP [1961] AC 103], the cases concerned with persons performing public duties are not to be regarded as a special category in the manner described by Lord Diplock, but rather as exemplifying the general principle that conspiracies to defraud are not restricted to cases of intention to cause the victim economic loss. On the contrary, they are to be understood in the broad sense described by Lord Radcliffe and Lord Denning in ...

Welham ... – the view which Viscount Dilhorne favoured in ... Scott ... as apparently did the other members of the Appellate Committee who agreed with him in that case (apart, it seems, from Lord Diplock).' (*Wai Yu-tsang* (supra) at p. 277F–H)

Later in the same judgment, Lord Goff quoting again from *Welham*, restated the principle that a conspiracy to defraud is 'an agreement to practice a fraud on someone'.



THEFT (AMENDMENT) BILL 1998

The Government of the Hong Kong Special Administrative Region of the People's Republic of China (HKSAR), is an executive-led government, in which most legislation is introduced by the executive into an elected legislature.

The *Theft (Amendment) Bill 1998*, was introduced with a view to creating the statutory offence of fraud. This bill extensively departed from the LRC recommendations and in effect, attempted to codify the common law concept of fraud, derived from cases such as *Welham*, *Scott* and *Wai Yu-tsang*.

However, the bill was extensively amended after consultation with legislators, and eventually emerged as the *Theft (Amendment) Ordinance 1999*.

THEFT (AMENDMENT) ORDINANCE 1999 – THE FINAL PRODUCT

The new s. 16A of the Theft Ordinance provides:

'16A 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 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.'

Subsection (3) provides a number of definitions. These include the terms 'act' and 'omission,' which are defined as including 'respectively a series of acts or a series omissions'; the term 'deceit' is also defined as:

'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.'

The terms 'benefit' and 'prejudice' are restricted respectively to financial or proprietary gain or loss, whether permanent or temporary. By subsection (4) the common law offence of conspiracy to defraud was retained.

EXCLUSIONS UNDER THE NEW SECTION

The new section only applies to fraud committed by deceit and which results in financial or proprietary gain or loss or a risk of financial or proprietary loss; it does not cover fraud where there is no deceit; nor does it cover fraud by which a person performing a public duty is caused to act in a manner which he would not have otherwise done, had he known the true position – what is sometimes referred to as breach of public duty fraud. One of the reasons why the legislators departed from the LRC recommendation regarding abolition of common law conspiracy to defraud was because the new offence would not apply to frauds of this type.

BENEFITS

(a) Misconduct which is not an offence under existing legislation

One benefit is that the offence will be available in those rare cases where the perpetrator cannot be prosecuted for any of the other offences under the Theft Ordinance (such

as deception or false accounting), or for any of the forgery offences under the Crimes Ordinance, and acts alone (i.e. does not conspire with another). However, this is a minor benefit.

(b) Acquiring property without intending permanently to deprive

The new offence also extends to fraud where the benefit or prejudice causes only a temporary gain or loss such as where a person, obtains property on a temporary basis by deceit, always intending that it would be returned. The distinction here is that whereas theft and deception offences involving the acquisition of property require proof of the element of an *intention* on the part of the defendant *permanently to deprive* the victim of his property, under s. 16A, acquiring the property or depriving the victim of the property on a temporary basis, as a consequence of the fraud, is sufficient. It is appreciated that under s. 7 of the Theft Ordinance, which is in the same terms as s. 6 of the (UK) *Theft Act* 1968, this element is given an extended meaning. However it is not necessary under the new provision to prove that the defendant treated the property as his own.

(c) Incorporating a series of acts in one fraud offence

The major benefit, however, will result from the fact that the term 'act' is defined as including 'a series of acts' and the term 'omission' is defined as including 'a series of omissions'. In a case where there is a series of (say) 100 acts of deception or false accounting committed by an individual, and where in the past the prosecution has had to proceed on a limited number of sample counts of obtaining by deception or of false accounting, so as not to overload the indictment, whilst at the same time charging sufficient offences to demonstrate the criminality involved, the prosecution can now proceed on a single count of fraud. Will this result in the average fraud trial becoming more complicated? In most cases it is considered it will not, simply because the evidence required to prove one act or omission in a series will usually be the same and involve the same witnesses, as would be required to prove all acts or omissions.

on the internet

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POSTSCRIPT

For some years now the Law Commission in England has been considering whether a fraud offence should be created there. For once Hong Kong has managed to get in first, but events in England have taken an unexpected turn. The Law Commission issued a consultative paper in April

1999 ('Legislating the Communal Code: Fraud and Deception', Consultation Paper No.155, 27 April 1999). in which it is suggested that it may be inappropriate to create a fraud offence, and querying whether or not a number of existing offences under the theft legislation, i.e. those requiring proof of the element of dishonesty, might not be in breach of proposed human rights legislation, because 'dishonesty' is not defined, and that fact might deprive defendants of the right to a fair trial! One can only imagine, how some involved in the criminal justice system, particularly those responsible for prosecuting white-collar crime, will respond to this interesting concept. Certainly, the Hong Kong legislation, as with all new legislation, has been vetted for its compliance with our human rights legislation (Bill of Rights Ordinance, Chapter 383, Laws of Hong Kong, enacted in 1991, incorporating most of the articles of the International Covenant on Civil and Political Rights) and has been given a clean bill of health.

In regard to the issue of dishonesty, our courts, like those in England, adhere to the principles derived from the well-known case of *R v Ghosh* [1982] 75 Cr App R 154 when determining whether or not an accused charged with an offence requiring proof of dishonesty, has been dishonest, applying the two-stage test derived from that case.

It will be interesting to observe how the controversy resulting from the Law Commission's Interim Report in England will ultimately be resolved.

CONCLUSION

As for the Hong Kong Special Administrative Region (HKSAR), it now has a statutory offence of fraud, but it is early days yet, and no prosecutions under the new legislation have thus far been launched. Consequently, there is no authoritative case law on the subject, and how effective the new section will be depends to a large extent on the view ultimately taken of it by the courts. 

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The views expressed in this paper are not necessarily those of the Department of Justice of the HKSAR.

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