

Status:  Law In Force

## **Fraud Act 2006 c. 35**

### **Fraud**

This version in force from: **January 15, 2007 to present**

(version 1 of 1)

## **2 Fraud by false representation**

(1) A person is in breach of this section if he—

(a) dishonestly makes a false representation, and

(b) intends, by making the representation—

(i) to make a gain for himself or another, or

(ii) to cause loss to another or to expose another to a risk of loss.

(2) A representation is false if—

(a) it is untrue or misleading, and

(b) the person making it knows that it is, or might be, untrue or misleading.

(3) “*Representation*” means any representation as to fact or law, including a representation as to the state of mind of—

(a) the person making the representation, or

(b) any other person.

(4) A representation may be express or implied.

(5) For the purposes of this section a representation may be regarded as 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).

**Subject:** Criminal law

**Keywords:** Fraud by false representation; Statutory definition

## Annotation

### Section 2

#### Introduction

The Government's Explanatory Notes to this Act (see Key Legal Concept: [Explanatory Notes](#)) say as follows:

"10. Section 2 makes it an offence to commit fraud by false representation. Subsection (1)(a) makes clear that the representation must be made dishonestly. This test applies also to [sections 3 and 4](#). The current definition of dishonesty was established in [R v Ghosh \[1982\] Q.B.1053](#). That judgment 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.

"11. Subsection (1)(b) requires that 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. The same requirement applies to conduct criminalised by [sections 3 and 4](#).

"12. Subsection (2) defines the meaning of 'false' in this context and subsection (3) defines the meaning of 'representation'. 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.

"13. 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.

"14. 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.

"15. A representation may also be implied by conduct. An example of a representation by conduct is where a person 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.

"16. This offence would also be committed by someone who engages in 'phishing': 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.

"17. Subsection (5) provides that 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.) The Law Commission had concluded that, although it was not clear whether a representation could be made to a machine, such a provision was unnecessary (see paragraph 8.4 of their report). 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 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)."

**Navigation Note (General):**

For offences committed by body corporate see [s.12](#); for provision about evidence (including self-incrimination) see [s.13](#); for consequential amendments see [s.14](#); for commencement see [s.15](#); for extent see [s.15](#).

**Definitions Note (General):**

The following expressions are defined: “article” — [s.8](#); “fraud” — [s.1](#); “gain” — [s.5](#); loss — [s.5](#).

**Post-Legislative Scrutiny Note:**

See the Government’s [Post-legislative assessment of the Fraud Act 2006](#) published on 27 June 2012 by the Ministry of Justice for submission to the Justice Select Committee.

**Background Note:**

For information about the background to this Act see the annotations to the [preamble](#).

**Background Note (Law Commission Report):**

The Report on which this Act is expressly based is the [Law Commission report \(Law Com No.276\) on Fraud](#) published in July 2002 as Cm 5560.

**Relevant Key Legal Concepts:**

[Person](#).

Knows — [Levels of Certainty](#).

**Pepper v Hart Note** (see Key Legal Concept: [Pepper v Hart](#)): In the Standing Committee on the Bill for this Act in the House of Commons the Minister said as follows:

“The clause makes it an offence to commit fraud by false representation. The offence was recommended by the Law Commission and widely welcomed in responses to the Government’s consultation paper. A representation is defined as false if it is ‘untrue or misleading’, and if ‘the person making it knows that it is, or might be, untrue or misleading.’

“The types of representation covered by the clause may be of fact or law, including a representation as to a person’s state of mind. They can be stated in written or spoken words, or in non-verbal communication.

“Clause 2 goes wider than the existing [Theft Act 1968](#) offences, which rely on the deception of a victim. Under clause 2, it will be immaterial whether the person subject to the false representation believes it to be true. The fact that the representation was made will be sufficient evidence to prove the crime. ... I have one point to make to the hon. Member for Somerton and Frome (Mr. Heath): the current definition of dishonesty was established, as the explanatory notes say, in the case of Ghosh in 1982. The judgment sets out a two-stage test. To respond to the hon. Gentleman’s point about dishonesty, the first question is whether the defendant’s behaviour would be regarded as dishonest by the ordinary standards of reasonable and honest people. If the answer is positive, 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. That is the approach to dishonesty that we want to see the Bill take.” ([Hansard, June 20, 2006](#).)

**Pepper v Hart Note** (see Key Legal Concept: [Pepper v Hart](#)): At the Second Reading of the Bill for this Act in the House of Lords the Attorney-General said as follows:

“The three ways in which fraud can be committed are set out in Clauses 2 to 4. A basic requirement of all of them is that the behaviour of the defendant must be dishonest. There is

a further requirement that the defendant's intention must be to make a gain or cause a loss to another. But there will no longer be any need to prove in what form he intended that gain to be realised, that a gain or loss had actually been realised, or that any victim was deceived by the defendant's behaviour. The offence carries a maximum of 10 years' imprisonment.

"The general offence can be committed in three ways: first, by false representation in any form; secondly, by failing to disclose information to another person where there is a legal duty to disclose the information; and, thirdly and lastly, by the abuse of position — that is, by taking advantage of a position where one is expected to safeguard another's financial interests." ([Hansard, June 22, 2005.](#))

#### Case Note:

"Fourthly, in all the circumstances, I am satisfied that there was a reasonable basis for PC Ahmed suspecting the Appellant of committing an offence under s.2 of the 2006 Act. As underlined in the judgment (at [38]), there was a background of dishonest people holding themselves out as collecting for charities to solicit donations. Further, while the Appellant's confrontational stance towards both the LEOs and, to begin with, towards PC Ahmed, could not of itself have furnished reasonable grounds for PC Ahmed's suspicion — civil liberties are not confined to those who behave cooperatively - it cannot be gainsaid that the Appellant's conduct formed part of the overall picture presented to PC Ahmed. The Judge observed, not at all unfairly (at [24]), that even 'a basic level of cooperation' on the Appellant's part could have dispelled the LEOs' initial suspicion. As it was, PC Ahmed was faced with a situation where such cooperation had been lacking. Still further and to my mind of the first importance, there was PC Ahmed's overall impression of the stall, reiterated throughout his evidence. In that regard, entirely reasonably in my judgment, the collection box stood out. Notwithstanding the writing on it (see above as to the difficulty in practice of drawing a clear dividing line between charities and campaigns), the collection box closely resembled a charity collection box. It certainly struck me with force as such, both when first seeing the photographs and, thereafter, when revisiting them on a number of occasions." ([Proctor v Chief Constable of Cleveland \[2017\] EWCA Civ 1531.](#))

#### Case Note:

"51. The suggestion that the drafter of clause 2 of the Fraud Act intended by substituting 'state of mind' for 'present intentions' to obliterate the distinction between representations and future promises recognised in *Gilmartin*, and more generally in the law, does not stand up to serious analysis. This conclusion is further strengthened by reference to the report of the Law Commission on Fraud, 2002, Law Com 276, which led to the Act being passed. In its report the Commission said at para 7.17:

'The concept of fraudulent misrepresentation is well established in both the civil and criminal law. It may be defined as an assertion of a proposition which is untrue or misleading, either in the knowledge that it is untrue or misleading or being aware of the possibility that it might be. The assertion may be expressed, implicit in written or spoken words, or implicit in non-verbal conduct. The proposition asserted may be one of fact or of law. It may be as to the current intentions, or other state of mind, of the defendant or any other person: for example, a person who orders a meal in a restaurant thereby impliedly claims to have not only the means of payment but also the intention to pay. An assertion as to future events will not suffice; but this is academic, since such an assertion would be dishonest only if the maker of the assertion knew that it was likely to prove untrue — in which case the maker would be making a false assertion about a present fact, namely the maker's own state of mind'.

"(Original emphasis) 52 In a footnote the Commission added:

'The pre-1968 concept of 'false pretence' did not include a misrepresentation as to the defendant's state of mind: Dent [1955] 2 QB 590. Such a misrepresentation is sufficient for the tort of deceit, however ([Edgington v Fitzmaurice \(1885\) 29 Ch D 459](#)), and [section 15\(4\) of the Theft Act 1968](#) expressly provides that 'deception' includes a deception as to the present intentions of the person using the deception or any other person. Clause 2(3) of our draft Bill similarly provides, for the avoidance of doubt, that, for the purpose of the new fraud offence, 'representation' includes a representation as to the intentions of (a) the person making the representation or (b) any other person.'

"53. The wording of clause 2(3) of the draft Bill attached to the report was identical to the wording of s2(3) of the Act. The Commission plainly did not intend to introduce the radical change which Mr Summers submitted is the effect of its choice of words." ([United Arab Emirates v Allen \[2012\] EWHC 1712 \(Admin\)](#).)

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