

UNSECURED CREDITORS AND CONSPIRACY TO DEFRAUD

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Conspiracy to defraud at common law

- Lord Denman in R v Jones (1832) 4 B & Ad 345

“an agreement to do an unlawful act or a lawful act by unlawful means”.

- “Unlawful” here extends beyond the criminal to include all types of unlawfulness.
- What does “defraud” mean at common law?

Two types

- There are two versions of the offence of conspiracy to defraud at common law:
 - (i) agreeing dishonestly to prejudice another's economic interests; or
 - (ii) agreeing to mislead a person with intent to cause him to act contrary to his duty.
- Type 2 relates to agreements to deceive public bodies and will be ignored below.

The prosecutor's darling

- “dishonesty does all the work” (Glanville Williams : *Textbook of Criminal Law*, 2nd edition, 1993, p.708).
- It is the dishonesty of the defendant that renders the agreement unlawful rather than lawful. It provides the solitary constraint on the application of the offence.

The prosecutor's darling

- The law must be clear from the elements of the offence itself – a requirement that conspiracy to defraud has always struggled to satisfy.
- The system for criminal law discourages serious legal debate with the result that, at best, unreported Crown Court judgments are delivered and no modern coherent body of case law exists.

Conspiracy to defraud at common law

- Board of Trade v Owen [1957] AC 602
- Welham v Director of Public Prosecutions [1961] AC 103
- Scott v Metropolitan Police Commissioner [1975] AC 819
- Wai Yu-Tsang v R [1991] 1 AC 269

Type 1 - Viscount Dilhorne in Scott

- “... [I]t 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 or might 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.”

Proprietary rights

- R v Sinclair [1968] 1 WLR 1246 (C.A.)

“To cheat and defraud is to act with deliberate dishonesty to the prejudice of another person’s proprietary right.”

- Can it extend to an agreement to act with deliberate dishonesty to the prejudice of another person’s unsecured enforcement rights?

Viscount Dilhorne's 6 examples

- (1) “In *R v Orbell* the indictment stated that the defendants had fraudulently and per conspiracyem, to cheat JS of his money, got him to lay a certain sum of money on a foot race and prevailed with the party to run 'booty'. No false representation was made to JS and he was not led to believe something to be true which was in fact false.”

Viscount Dilhorne's 6 examples

- (2) “In *R v Button* the defendants were charged with conspiracy to use their employers' vats and dyes to dye articles which they were not entitled to dye, to secure profits for themselves and so to defraud their employer of profit. There was no false pretence and no deceit of their employer by inducing him to believe something to be true which was false.”

Viscount Dilhorne's 6 examples

- (3) “In *R v Yates* the defendant was charged with conspiracy by false pretences and subtle means and devices to extort from TE a sovereign and to cheat and defraud him thereof. There was no evidence of any false pretence but Crompton J held that the words 'false pretences' might be rejected as surplusage and held that the defendant might be convicted of conspiracy to extort and defraud. Again, in this case, there was no deceit of TE inducing him to believe something to be true which was false.”

Viscount Dilhorne's 6 examples

- (4) “In *R v De Kromme* the defendant was indicted for soliciting a servant to conspire to cheat and defraud his master by selling his master's goods at less than their proper price. Lord Coleridge CJ (66 LT at 302) said that if the servant had sold the goods at less than their proper price, his employer would have been defrauded. The conviction was upheld. The conspiracy which the defendant was charged with inciting did not involve any deceit of the employer.”

Viscount Dilhorne's 6 examples

- (5) “In *R v Quinn* the defendants were convicted of conspiring to cheat and defraud the Great Northern Railway of Ireland of fares by abstracting return half tickets and selling them to members of the public. Again, there was no deceit of their employers.”

Viscount Dilhorne's 6 examples

- (6) “In *R v Radley* the defendants were convicted of conspiring to defraud a company inter alia by stealing the property of that company. The Court of Appeal upheld their conviction and it was never suggested that the conviction was bad on the ground that no deceit of the company was involved.”

The Rimmington principle

- “There are two guiding principles: no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; and no one should be punished for any act which was not clearly and ascertainably punishable when the act was done. If the ambit of a common law offence is to be enlarged, it ‘must be done step by step on a case by case basis and not with one large leap’” (Lord Bingham)

Partial Abolition

- Law Commission (Law Commission: Conspiracy and Criminal Law Reform (Law Com No 76) (1976))
- Criminal Law Act 1977 generally abolished common law conspiracy (section 5(1)) in favour of a new statutory offence of conspiracy, defined in terms of an agreement to commit any offence (section 1(1)). However, the common law offence of conspiracy to defraud was expressly preserved (section 5(2)).
- Law Commission: Fraud (Law Com No 276) (2002) Cm 5560 recommended abolition of conspiracy to defraud at common law

Fraud Act 2006

- 3 basic new offences – no need for a victim
- (1) "Fraud by false representation" is defined by Section 2 of the Act as a case where a person makes "any representation as to fact or law ... express or implied" which they know to be untrue or misleading.
- (2) "Fraud by failing to disclose information" is defined by Section 3 of the Act as a case where a person fails to disclose any information to a third party when they are under a legal duty to disclose such information.

Fraud Act 2006 (contd)

- (3) "Fraud by abuse of position" is defined by Section 4 of the Act as a case where a person occupies a position where they are expected to safeguard the financial interests of another person, and abuses that position; this includes cases where the abuse consisted of an omission rather than an overt.
- In all three classes of fraud, it requires that for an offence to have occurred, the person must have acted dishonestly, and that they had to have acted with the intent of making a gain for themselves or anyone else, or inflicting a loss (or a risk of loss) on another.

Common law conspiracy survives

- A-G guidelines
- June 2012 – MoJ - “Post-Legislative Assessment of the Fraud Act 2006”
- Memo submitted to Parliament’s Justice Select Committee
- Based only on the views of “key practitioners responsible for prosecuting fraud cases in England and Wales”
- Conclusion: “working perfectly satisfactorily”

Interface with debt avoidance?

- Preferences
- TUVs
- Fraudulent trading
- TDCs
- Insolvency offences
- Section 207 Insolvency Act 1986

Room for conspiracy to defraud?

- Parliament has considered the position of unsecured creditors, including the possibility that they will be adversely affected by transactions intended to defraud them; and Parliament has drawn a line in commercial and everyday life as to where such transactions should be void or voidable, and where they should be criminal.

Defrauding creditors – the Romans

- Actio Per Manu Iniecto – an enforcement instrument granting the creditor the right to sell the debtor as a slave, together with his family, or to kill him, if the debt was proved by judgment of confession

Gauis 4, 21

Seagon v Deko Marty [2009] Bus LR 1151 at [24]

A praetor named Paulus

- c150-125 BC - The Paulian action
- Discretionary remedy
- Enabling a creditor to seek revocation of any acts carried out fraudulently and to his detriment by a debtor
- Developed over centuries into core concepts of: alienation, detriment, fraud and knowledge of fraud

Statute of 1371 (50 Edw 3, c 6)

- “Fraudulent assurances of land or goods to deceive creditors, shall be void”.
- The legislative remedy afforded was to authorise creditors to levy execution against such tenements and chattels “as if no gift had been made”

The Fraudulent Conveyances Act 1571; 13 Eliz, c 5

- “For the avoiding of feigned, covinous and fraudulent feoffments, gifts, grants, alienations, bonds, suits, judgments and executions, as well of lands and in tenements, as of goods and chattels, more commonly used and practised in these days than hath been seen or heard of heretofore;

13 Eliz, c 5 cont'd

- which [feoffments etc] have been and are devised and contrived of malice, fraud, covin, collusion or guile to the end, purpose and intent to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, etc; not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining and chevisance between man and man, without the which no commonwealth or civil society can be maintained or continued.

13 Eliz, c 5 cont'd

- Be it therefore declared, ordained and enacted, that all and every [feoffment etc] or any of them, by writing or otherwise, and all and every bond, suit, judgment and execution at any time had or made to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken, only as against that person or persons, his or their heirs, successors, executors, administrators and signs of every of them, whose actions, suits, debts, etc; by such guileful, covinous or fraudulent devices and practices, as is aforesaid, are, shall or might be in anywise disturbed, hindered, delayed or defrauded, to be clearly and utterly void, frustrate, and of none effect, any pretence, color feigned consideration, expressing of use or any other matter or thing to the contrary notwithstanding.”



13 Eliz, c 5 cont'd

- Provided that this act or anything therein contained shall not extend to any estate or interest in land, tenements, hereditaments, leases, rents, commons, profits, goods or chattels, had, made, conveyed or assured, or hereafter to be had, made, conveyed or assured, which estate or interest is or shall be, upon good consideration and bona fide, lawfully conveyed or assured to any person or persons, or bodies politic or corporate, not having at the time of such conveyance or assurance to them made any manner of notice or knowledge of such covin, fraud or collusion as is aforesaid.

13 Eliz, c 5 cont'd

- It is clear from the text of the statute that it was framed in a purposive manner.
- So if someone had the intention of defrauding a creditor, unless a transaction was made *bona fide* and for good consideration, it would be “void”.

Section 172 LPA 1925

- **Voluntary conveyances to defraud creditors voidable**
- “(1) Save as provided in this section, every conveyance of property, made whether before or after the commencement of this Act, with intent to defraud creditors, shall be voidable, at the instance of any person thereby prejudiced.”

Section 172 LPA 1925 (contd)

- Sub-section 3
- “This section does not extend to any estate or interest in property conveyed for valuable consideration and in good faith or upon good consideration and in good faith to any person not having, at the time of the conveyance, notice of the intent to defraud creditors.”

Cork Report (1982) Ch.28

- Paras 1200 to 1240
- Recommended replacement provisions concentrating on undervalue
- The necessary intent was to “defeat, delay, hinder or defraud creditors or to put assets belonging to the debtor beyond their reach”

Sections 423-5

- Section 423 - not “void” or “unlawful”
- Restoration principle
- Use of word “defraud”
- “an agreement to do an unlawful act or a lawful act by unlawful means”
- Type 1 : “agreeing dishonestly to prejudice another’s economic interests”
- Rimmington has the last word?

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