

## DECEIT AND CASH-FLOW FORECASTS

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The Theft Act 1968 creates three offences of obtaining by deception and the Theft Act 1978 adds another four offences. So what is deception ?

The Theft Act 1968 section 15(4) states...”...’deception’ means any description (whether deliberate or reckless) by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or any other person”. If we take a look at cases in which the judge explains what such fraud is we find that as far back as 1889 in a case *Derry versus Peek* , Lord Herschell said “... fraud is proved when it is shown that a false representation has been made

- (1) knowingly;
- (2) without belief in its truth;
- (3) or recklessly, careless whether it be true or false...”. This was a case where damages were sought for fraudulent misrepresentations of the defendants because of which the plaintiff was induced to take shares in the company.

In 1891 in the case *Angus versus Clifford*, Lord Justice Bowen said about a fraudster...”..did he know that the statement was false , was he conscious when he made it that it was false, or if not, did he make it without knowing whether it was false and without caring?....”

Examples of deception are identity theft, corporate espionage , bank fraud and even cash-flow forecasts. A cash flow forecast is a statement of a sort and may be true or false, depending on

whether it relates to existing facts, past or present. The making of a forecast, like that of a promise, will normally lead the recipient to draw certain inferences as to existing facts. It is clearly deceptive to make a forecast knowing that it will not come true. The making of a false statement is an offence in itself under the Financial Services Act, section 200(1) and whether it is deceptive depends on how its recipient understands it and is intended or expected to understand it as the judge said in the 1994 case *Regina versus Morris* “where...the charge is one of fraudulent trading, not requiring proof that any particular person was deceived, the question in issue must be as to the interpretation which a reasonable reader would, or might, put upon a document”.

For someone to claim that they were deceived and to claim damages for the deceit, we can look for example at the case of someone, a plaintiff, who made a loan to another, the defendant, on the strength of such a statement.

The plaintiff will have to establish that the defendant made a representation to the plaintiff. The plaintiff would have to have evidence of this document, eg the cash-flow forecast or at least a witness statement as to the representation and its having been made to the plaintiff. The plaintiff would have to establish that he acted on that document. He would need the documentation or a witness statement evidencing how he made the loan as a result of the document supplied. He would have to prove that he suffered damage by acting on that document, so he would need to have evidence such as his bank statements showing his financial position before and after he acted on the misrepresentation. He would also have to establish that the representation by way of, for example, the cash-flow statement was untrue, so he would have to have that document, the cash-flow statement, for example, or a witness statement as to the circumstances in which the representation was made.

The only possible defence the defendant would have is that

the defendant did not intend to make a representation or that it was mere puff;

the defendant was not aware that it was untrue

or that the defendant believed it was true at the time.

As accounting technicians , it would be very advisable to create a sub-file in the client's file when making a cash-flow forecast. The sub-file should include all supporting documentation used to furnish figures in the forecast. Apart from the past year's financial statements, supporting figures such as the current interest rates , the current margins for that particular trade or sector, real figures as to the client's out-goings based on his mortgage statements, his car purchase details, all documentation relating to other debts he may have at the time, all current bank statements as to all bank accounts, tax liability statements, statements to show provision for VAT liabilities, should be kept in this sub-file . To protect oneself, a signed statement from the client that he has given you all relevant details and is aware of what the cash-flow statement says would be a cautious step to take.

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