

INTERNATIONAL ADVANCED LEVEL

LAW

TOPIC GUIDE

Fraud, obtaining services dishonestly and making off without payment **Paper 2: Law in Action**

Pearson Edexcel International Advanced Level in Law (YLA1)

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Pearson Edexcel International Advanced Level in Law

Paper 2: Law in Action

Introduction to offence of deception

This topic booklet is designed to act as a template of good practice for all other areas of substantive law in the Pearson Edexcel International A Level in Law specification for Paper 2: Law in Action.

The topics covered are three criminal offences that students often struggle with both conceptually and in applying to legal problems. The topics are:

1. Fraud by false representation, under Section 2 of the *Fraud Act 2006*
2. Obtaining services dishonestly, under Section 11 of the *Fraud Act 2006*
3. Making off without payment, under Section 3 of the *Theft Act 1978*

Each topic covered provides:

- notes, legislation, case law and explanation of the law that is commensurate with the specification requirements
- guidance on the technique required to successfully apply each area of the law to a problem
- detailed plans of how to structure and answer on each topic.

The use of the essay technique called IDEA is covered in detail and can be used across all problem-solving questions regardless of the type of law.

Fraud by false representation (2.2.5)

Introduction

This offence is part of a suite of three offences that come under the general offence of fraud found in Section 2 of the *Fraud Act 2006*; the others are: failure to disclose information when there is a legal duty to do so (Section 3) and abuse of position (Section 4). We only need to consider **Section 2**, fraud by false representation for the Pearson Edexcel International A Level in Law specification, Paper 2, which is found in the specification, under heading *Subject content, 2.2.5*.

The new offence of Fraud by false representation was introduced as the law before this was seen as very complex and resulted in comparatively few successful prosecutions. The aim of the revised offence was to simplify its understanding and application and therefore allow for clearer evidence to aid in the prosecution of particularly large instances of fraud.

In this topic guide you will:

1. understand the meaning of the key components of the offence of Fraud by false representation
2. understand the different subsections of Section 2 of the *Fraud Act 2006* and their interpretation for the offence of Fraud by false representation
3. understand the relevant case law that helps interpret the meaning of Fraud by false representation
4. understand how to effectively apply the law on Fraud by false representation to a typical problem scenario you may be given in the exam.

Key definitions:

Fraud: criminal deception intended to result in financial or personal gain.

False representation: a factual statement/gesture which is untrue or misleading, made by one party in order to induce another party to do something.

Representation: a statement about something which is based on fact or law. Statements of opinion can be fraud but are very difficult to prove as being untrue.

Loss: can mean losing something you already have **or** missing out on a chance to get something.

Gain: can mean getting something new **or** keeping something you already have.

Key facts:

- involves a factual statement or gesture which is untrue or misleading, made to induce the other party to suffer a loss
- indictable-only offence
- maximum sentence is 10 years.

The definition of Fraud by false representation according to the *Fraud Act 2006*

The act itself helps clarify the definition under **Section 2**:

(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).

Source: <https://www.legislation.gov.uk/ukpga/2006/35/section/2>

Key point: As there is little case law to consider for this offence, you must have a very good working knowledge of the sections in the offence and be able to write these down accurately in your answer. You also need to be able to explain each key term, such as what ‘misleading’ means and then use evidence in a scenario to decide if the defendant is liable for each element of the offence.

The important elements of Fraud by false representation

There are four elements to consider when solving a problem in the exam, that may be covered by Fraud by false representation:

1. makes a false representation – *actus reus*
2. dishonestly – *mens rea*
3. knowing that the representation was or might be untrue or misleading – *mens rea*
4. with intent to make a gain for himself or another, to cause loss to another or to expose another to risk of loss – *mens rea*.

Key points:

- a) Remember it is an indictable-only offence. This corresponds with the serious nature of the offence. Therefore, all proceedings after the preliminaries take place in the Crown Court with a jury, if the defendant pleads not guilty.
- b) Note from the four elements that the offence is heavily *mens rea*-based.
- c) You must presume that in all the scenarios in the exam the defendant pleads not guilty.
- d) Also note that the offence requires the prosecution to prove the defendant was dishonest and intended to commit the fraud. Intention is the most difficult level of *mens rea* to prove from the evidence.
- e) It is important to scoring highly in your answer that you have a good understanding of 'intention' and the meaning of 'dishonesty'.
- f) Fraud adopts the same case law and interpretation as the offence of theft, in the *Theft Act 1968*, i.e. the use of the definition of 'dishonest' as laid out in the case of ***Ivey v Genting Casinos*** (2017) UKSC 67 (see below for further detail). The structure of your answer to an examination problem should have four paragraphs, covering each element of the offence and finishing with an overall conclusion as to whether, based on the evidence, the defendant is guilty of Fraud by false representation.

1. Makes a false representation (the *actus reus*)

This is explained in subsections (2) – (5) of Section 2 of the *Theft Act 1968*, set out above. Let's look at the issues one by one:

- 1.1. Firstly, fraud is a conduct crime. This means that no particular end result has to be proved. Remember, this means that as long as the prosecution can prove the defendant has made a false representation, that is enough to satisfy this part of the offence. Therefore, no one has to believe the false representation that has been made - just making the false representation is enough. The offence is complete as soon as the defendant makes the false representation,

as long as the *mens rea* elements are present at the point of making a false representation. It does not matter whether or not anyone knows of the representation, is deceived, or any property is *actually* gained or lost.

- 1.2. Secondly, the *Act*, in **Section 2(2)**, makes it clear that 'false' means 'untrue' or 'misleading', but the word 'representation' is not defined. The *Act* does, however, explain what the representation must be about. The word 'representation' is therefore taken to mean a factual statement made by one party in order to cause another party, i.e. the victim, to do something.
- 1.3. Next, **Section 2(3)** helps by defining a 'representation' which means the defendant saying or doing something as to fact or law. This means that the argument as to whether something is a statement of fact or law is irrelevant; both can be fraud. A statement of fact is straightforward. It could be something, such as the statement that a piece of jewelry is gold when it is in fact gold-plated only. A statement of law may be a statement about the effect of a legal document, such as a loan agreement for a car that is in fact a secured loan on a house.

To summarise, the meaning of a false representation is relatively clear if the defendant is saying or doing something that is misleading about a fact or the law.

1.4. Statement of opinion

However, where the representation is a statement of opinion, it is much more difficult to establish whether a false representation has been made. If the statement is not the genuine opinion of the person making it, it can amount to fraud. Proving this may be difficult and you will need to look carefully at the evidence available to the prosecution and defence as to which has the most weight.

In reality, it's likely that in this type of situation the victim may prefer to take civil action to recover their money, only resorting to criminal law when there is little prospect of succeeding. For example, if a statement that a car is in good condition is made by a car salesperson, this will only give rise to legal rights when the seller knows that is not the case or could not possibly have held that view. Of course, the salesperson is likely to dispute this so it then comes down to what evidence is available to back up the victim's suggestion of a fraudulent statement. This is much easier to prove on a balance of probabilities under the law of contract, rather than beyond reasonable doubt under the offence of Fraud by false representation.

1.5. True statements that later become false

So, what is the legal position if the defendant has made a representation that was true when made, but later becomes false? In this situation the offence can be committed by not telling the victim of the change. For example, if the defendant is selling a car which is stated to be in good condition, the potential purchaser who returns later must be told of any change that would make the car no longer in 'good condition'.

Key case

DPP v Ray (1973) UKHL 3: On, 30 September 1971, the defendant was a student. He and his friends went to a restaurant in Gainsborough, Lincolnshire, and ordered a meal. At the time he entered the restaurant, the defendant had only 10p on him but one of his friends had agreed to lend him some money to pay. He ate the meal and they then decided not to pay and to run out of the restaurant. They did so 10 minutes later. No payment was offered or made, and no money was left, for the meals served.

Precedent: The court held that there was an implied representation in the restaurant that payment would be made when the meal was ordered and that this kept on being the case until they left the restaurant. In other words, when the defendant ordered the meal, he believed his friend would pay for the shortfall in the cost of the meal and ordering the meal was regarded as a true representation. However, at the point the defendant knew his friend would not cover the shortfall, this implied statement to pay changed. He should have then informed the waiter of his dilemma and by leaving the restaurant without payment the representation changed from one that was initially true to one that was false.

(Note: this case is also one of making off without payment, which would also be the offence to cover if a similar scenario arose in the exam).

Key case

R v Rai (2000) 1 Cr App 242: Rai was the owner of a property in Birmingham. In about June 1996, he applied to the council for a grant towards providing a downstairs bathroom at his home for the use of his elderly and infirm mother. The council informed Rai that they had approved the grant in July. Two days later his mother died. He did not tell the council of the changed circumstances, and used the grant of £9,500 for the agreed modifications to his house.

Precedent: The court held the representation was true when made but became false at the point when Rai failed to inform the council that his mother had died. The court also stated that the false representation was a continuing one.

Note: As this is a conduct-only offence, Rai satisfied the *actus reus* of the offence at the point he failed to inform the council of his mother's death. It is not necessary to prove the council paid out the grant as long as the *mens rea* is also proved.

Key point: Remember, the *actus reus* is conduct only, meaning there is no need to prove a consequence has occurred due to the defendant's false representation, e.g. the victim's actual loss of money. However, for an exam problem, the key to proving a false representation will be the weight of evidence showing the defendant made a true statement that clearly became false.

1.6. A representation as to the state of mind of an individual

Section 2(3) states '...including a representation as to the state of mind of the person making the representation or any other person.'

This section means that if the defendant makes a statement about their own intentions or that of another person which are actually false, this conduct would be sufficient to be a false representation and the *actus reus* of the offence. For example, if you were to go to your father to ask for £20 to help buy a new law textbook, but you really want the £20 to go to the pub, you would be falsely representing your state of mind. Or, if you were to go to your father to ask for £20 to help your brother buy the law textbook, but you really want the £20 to go to the pub, you would be falsely representing the state of mind of 'any other person'.

Again, the proof of the state of mind of the defendant or another person will come down to the evidence you can find in the scenario.

1.7. A representation may be express or implied

Under **Section 2(4)**, a representation may be express or implied. It can be expressly made in many ways. For example, a representation can be written or texted, spoken directly or by phone or radio, posted on a website, put on a podcast or sent by e-mail.

A representation can be implied by conduct. This could occur when a person uses a credit card or purports to make a payment from their bank account, for example - by cheque or debit card. By using the card, a person represents that they have the authority to use it for that transaction. They would not do so if it was stolen or over its credit limit.

Key case

MPC v Charles (1977) AC 177: in January 1973, the defendant went to the Golden Nugget club, a gaming club, and in the course of the night he used all the cheques in his new cheque book for the purchase of chips for gaming. He used his cheque card with each cheque, which meant the bank had to legally pay out the amount on each cheque. The bank had consequently had to honour all the cheques with the result that he went hugely over his overdraft limit. This was sufficient for him to be convicted under an offence equivalent to Fraud by false representation. In the House of Lords, Viscount Dilhorne said:

'The reality is in my view that a man who gives a cheque represents that it will be met on presentment, and if a cheque is accepted by the payee, it is in the belief

that it will be met. (...) His use of a cheque card to secure acceptance of his cheque can in my opinion amount to a representation that he has the authority of the bank to use it in relation to that cheque for that purpose, and as a matter of fact will ordinarily do so. He is authorised by the bank to give its undertaking to pay... a cheque if the stipulated conditions are fulfilled. But the authority given to him is not unlimited. (...) He is not authorised to use it to secure the acceptance of a cheque which he knows would not be met by the bank if the cheque card had not been used.'

Precedent: The court held that by giving a cheque with a cheque card *implied* he had authority from the bank to pay for his gaming chips. As the defendant knew he had insufficient funds to cover the amounts, this was an implied representation that was false.

Key case

R v Lambie (1982); (1981) 2 ALL ER 776: The defendant had a credit card which was issued subject to the conditions of use. It was an express condition of its issue that it should be used only within the given credit limit. The defendant knew her credit limit was £200 but used the card for at least 24 separate transactions amounting to £533. The bank became aware of this debt and requested the card be returned. The defendant agreed to return the card on 7 December 1977, but did not do so. By 15 December 1977, the defendant had used the card for at least 43 further transactions, incurring a total debt to the bank of over £1,000. The House of Lords decided that the representation arising from the presentation of a credit card is a representation of actual authority to make the contract with the shop or to whom the payment is to be made.

Precedent: The court held that the point of presenting the card to each shop was an implied representation of authority to make a contract for the payment of goods. As the defendant knew they were not authorised to use the card, then this was a false representation.

1.8. A representation can be made through a gesture

A representation can be made through an action such as a nod of the head or by presence in a restricted area, which implies the right to be there. A gesture also includes gaining access to a secure computer system or being dressed or wearing an identification badge that implies a certain status or right to be present.

Section 15 and 16 of the Explanatory Notes to the *Fraud Act 2006* confirm such issues fall within the offence. **Section 15** confirms that the act of presenting a credit card to a shop or

service provider is a false representation even if the card is not accepted. **Section 16** states that emails or other electronic messages requesting financial information or money that falsely make out that it has been sent by a legitimate institution, such as a bank, is a false representation at the point it is sent.

Section 2(5) of the act makes it clear that the offence may be committed by making a representation to a machine, such as a cash machine.

2. Dishonestly (the *mens rea*)

As this offence is a conduct-only offence, it is critical that the mens rea is established as there could be no consequences to the crime, e.g. the presented credit card may be spotted as a fraud without gaining any goods. As with theft, 'dishonestly' is interpreted using the case of Ghosh, which has been impliedly overruled by the case of *Ivey v Genting Casinos* (2017) UKSC 67.

The revised test for dishonesty from the case of *Ivey v Genting Casinos* is a two-part test. The test you should apply to a scenario is:

1. Did the defendant genuinely believe their behaviour was dishonest?

(If the answer is 'no', the defendant is not guilty of fraud as they have not been dishonest. You need to review the evidence in the problem to see if there is a reasonably held belief or not. If the evidence shows the belief was unreasonable, then it is unlikely to be genuine and the answer is 'yes'.)

If the answer is 'yes' the second question is:

2. Would the defendant's behaviour be regarded as dishonest by the standards of reasonable and honest people?

The defendant does not need to appreciate that their behaviour was deemed dishonest by the standards of reasonable and honest people. The defendant's behaviour will be judged by the jury, who are regarded as reasonable and honest members of society.

It should be noted that the examples of actions that are not dishonest in Section 2 of the *Theft Act* 1968 do *not* apply to fraud offences.

3. Knowing that the representation was or might be untrue or misleading (the *mens rea*)

The person making the false representation must know that it is, or might be, untrue or misleading, but makes a decision to make it anyway. The defendant cannot be convicted if the statement is, in fact, true.

The words 'might be' do not mean recklessness. There must be actual knowledge that the representation might be untrue rather than just an awareness of a risk that it might be untrue. If it is the case that the statement is untrue or misleading, then the defendant must know that it is the case.

4. **With intent to make a gain for himself or another, to cause loss to another or to expose another to risk of loss (the *mens rea*)**

The words 'with intent to' mean that there is no need for anyone to have suffered any actual loss or be exposed to any loss or even that the defendant makes a gain. This is all about what the defendant intends by carrying out their act.

Key case

R v Parkes (1973) Crim LR 358: The defendant was using threats to get money that was lawfully owing to him.

Precedent: The court held that Parkes was making a gain as he was attempting to get the money now, rather than waiting to make his legal claim for the money through the court process.

Applying Fraud by false representation to an exam scenario

- **Explain the law first** - never start with a conclusion and then try and explain the law. Make sure you know the elements of each area of law – create a revision card for each area of law with the basic elements, then test yourself or get tested on these – the aim is for you to be able to reach a point where you can just recite them. Once you know these, you have a structure for your answer.
- Ensure you have a balance of **AO1** (knowledge and understanding), **AO2** (application), **AO3** (analysis) and **AO4** (evaluation) – you need to be able to explain the law, and then demonstrate that you can apply, analyse and evaluate.
- **Use of cases** – cases are needed as they are the source of the legal principle. Criminal law example: '*Fraud by false representation can be implied when the defendant presents a credit card knowing they are not able to use it as they have gone over their contractual limit with the bank (R v Lambie (1982) 2 ALL ER 776).*' How many cases? This will depend on the area of law – your teacher will advise. Pearson advises that you only need one case per point. With the offence of Fraud by false representation, there are few cases. Therefore, you are expected to know the meaning of different sections of the *Fraud Act 2006*, though not word for word. You cannot be expected to learn multiple cases on every aspect of the law. Make sure your

revision sheet has a minimum number for each area of law – 5 or 6 (10 maximum). There are only 5 cases in these notes on the offence of Fraud by false representation, though your teacher may use other cases or more cases.

Want a high grade? You will need more cases but you are better learning the core cases to begin with until you are confident you have the basics before you devote time to learning cases on the less central areas of a topic. Look at some of the sample answers provided as a guide. If you cannot learn that many – then cut down.

- **Do you need to explain all the law?** Pearson advises that you only need to focus on what is relevant. This means that if you are explaining the *actus reus* of Fraud by false representation, you do not need to waste time outlining the detailed rules on a representation made by a gesture if this is not raised in the scenario. Obviously, you need to outline the key elements of the law and you need to use your judgement in deciding what is relevant and pertinent to the question and what is not needed.
- **End with a conclusion** – to get the highest score, Pearson advises that you need to reach a conclusion. There will be a mini-conclusion for each element of the *actus reus* and *mens rea* of the Fraud by false representation – only a sentence saying why the evidence for that element proves the defendant's guilt or not. The purpose of a scenario is to get you to analyse and discuss the law – it is deliberately written so that there are areas open to argument ('grey areas') and possible 'red herrings', i.e. points to test your ability to distinguish important legal issues from issues of no significance. Your challenge is to identify the key issues and discuss these before reaching a conclusion. The easiest way to do this is to have a few sentences beginning: 'In conclusion, ... it appears ...'.

Vertical or horizontal approaches to writing your answer

1. **The vertical approach** – this has been the traditional approach to answering legal questions – to look at each aspect of the law in turn and explain and apply the law to the problem and reach a conclusion.

Advantage – it is logical and helps you focus on the ingredients in the area of law you are analysing. You can focus on one area at a time and go through the issues in sequence. For example, if a question was looking at Fraud by false representation, you could build your answer around the four elements: i) there must be a false representation; ii) it must be made dishonestly; iii) the defendant must have known the representation was or might be untrue or misleading; iv) the defendant had the intent to make a gain or loss or a risk of loss to another. After explaining the first element, you can identify whether there has been a false representation (the *actus reus* of the offence) and then link to the facts of the scenario picking up AO1, AO2, AO3 and AO4 marks.

Structuring your paragraphs

Structuring the paragraphs while answering the problem question is critical to ensuring you practise all the skills needed to score the highest marks. The best approach is to use the

structure called 'IDEA'. Each of your paragraphs should split into four elements or sentences. Each paragraph must explain the relevant law: I. It must then define the relevant law; D. The law must then be explained using a case and/or the relevant part of an Act of Parliament; E. This will make up about half of each paragraph; A. the other half of the paragraph should then apply the law to the specific evidence in the scenario and reach a brief conclusion.

IDEA – identify, define, explain, apply:

- **Identify the area of law or legal issue** (AO2): 'In this case, Javid may be liable for Fraud by false representation because... '.
- **Define and explain the law** (AO1): 'A false representation is defined in the *Fraud Act 2006*, Section 2, asThe first thing that must be established is ... '.
- **Apply to the facts:** 'Here, Javid's actions in presenting a stolen credit card to the shop for purchase of toffees may be considered an implied representation because' (AO2, AO3) 'However, Javid may argue it is not an implied representation because' (AO2, AO3) 'Weighing up the evidence, it is clear that presenting the card is an implied representation due to the strength of the prosecution's evidence that' (AO2, AO3, AO4).

2. The horizontal approach – to explain all the **relevant** law first and then do the analysis and application and reach a conclusion.

This alternative approach is to outline all the law that is relevant to solving the problem. Some students will find this more direct approach quicker and less complicated.

For example: i) there must a false representation; ii) it must be made dishonestly; iii) the defendant must have known the representation was or might be untrue or misleading; iv) the defendant had the intent to make a gain or loss or a risk of loss to another (AO1).

'Here, Javid's actions in presenting a stolen credit card to the shop for purchase of toffees may be considered an implied representation because' (AO2, AO3) 'However, Javid may argue it is not an implied representation because' (AO2, AO3) 'Weighing up the evidence, it is clear that presenting the card is an implied representation due to the strength of the prosecution's evidence that' (AO2, AO3, AO4)

Pearson will accept either approach. It enables you to separate the explanation of the law from the discussion and argument. Having explained the law, you will know that you simply need to relate what you have said to the facts of the scenario and the precedents/sections of acts in a series of distinct paragraphs.

Planning an answer to a scenario on Fraud by false representation

Before writing an answer to a scenario regarding this offence, consider the following points:

1. If the question specifically asks for this offence, do not cover anything else that is not in the question.
2. If the question requires you to decide which offence may be relevant, ask yourself these questions to make sure it is Fraud by false representation:
 - Has the defendant used a card without authority, made a representation about facts or given an opinion that is at least misleading? If so, this points to this offence.
 - Has the defendant made a gesture or sent an electronic message or attempted to use a cash machine that is misleading or untrue as defined under Section 2? If so, this points to this offence.
 - Has the defendant actually made a gain or caused a loss? If so, it may be this is Obtaining services dishonestly rather than fraud.
3. If the situation is focused on not paying a bill such as a restaurant meal, then it is more likely the offence they will be charged with is Making off without payment.
4. If the situation is focused around a statement or gesture used to receive a service, such as an entry to a football ground, then it is likely the offence the defendant is likely to be charged with is Obtaining services dishonestly.

Follow this basic structure to write your answer to a scenario on Fraud by false representation:

1. Briefly define the offence in one sentence.
2. Identify, define, explain and apply the relevant law on the *actus reus* of the offence, making a false representation.
3. Write a short paragraph using IDEA, considering only the relevant issues:
 - Section 2(2), Section 2(3) (the 2006 Act)
 - statement of opinion
 - true statements that later become false
 - a representation as to the state of mind of an individual
 - a representation may be express or implied
 a representation can be made through a gesture – watch out for representations made electronically or to a machine.
4. Identify, define and apply the relevant law on the *mens rea* of the offence, making a false representation:
 - dishonestly – you must apply each element of the *Ivey v Genting Casinos* (2017) UKSC 67 test to the scenario

- knowing the representation might be untrue or misleading
- with intent to make a gain or cause another to risk a loss.

5. Write a conclusion weighing up whether or not the defendant is liable for the offence.

Obtaining services dishonestly 2.2.6

Key definitions:

Obtains: receives a service which would otherwise incur a cost.

Services: made available by the vendor or service provider on the basis that payment has been, is being or will be made for or in respect of them.

By deception: no act of deception is needed, and there is no need to prove that the service provider has been deceived as long as it is done dishonestly to avoid payment for the defendant or another.

Avoids payment in full or part: this means that the defendant must intend to avoid payment for the service provided in full or in part.

The offence of Obtaining services dishonestly is a direct replacement for the offence under the Theft Act 1978, Section 1, of obtaining services by deception (the *Fraud Act 2006*). Examples include: someone who climbs over the wall of a football ground to watch the match without paying, or someone who seeks free medical treatment to which they are not entitled.

Key facts:

- involves intending to avoid full/part payment for a service that would have incurred a cost.
- triable either way offence
- maximum sentence is 5 years.

The definition of obtaining services by deception

Section 11 of the *Act* itself helps clarify the definition:

- (1) A person is guilty of an offence under this section if he obtains services for himself or another –
- (a) by a dishonest act, and
 - (b) in breach of subsection (2).
- (2) A person obtains services in breach of this subsection if –
- (a) they are made available on the basis that payment has been, is being or will be made for or in respect of them,
 - (b) he obtains them without any payment having been made for or in respect of them or without payment having been made in full, and
 - (c) when he obtains them, he knows –
- (i) that they are being made available on the basis described in paragraph (a),
 - or

- (ii) that they might be, but intends that payment will not be made, or will not be made in full.

Source: <https://www.legislation.gov.uk/ukpga/2006/35/section/11>

In many cases, the defendant will also have committed an offence under s2 of fraud by making a false representation, the false representation being that payment will be made or, where only part payment has been made, will be made in full.

1. Obtains for himself or another (the *actus reus*)

This offence, Section 11(1) is a result crime, unlike the offence under Section 11(2) below, as there must be proof that the services have actually been obtained. Therefore, there must be the conduct that causes the consequence of obtaining a service. No act of deception is needed, and there is no need to prove that the service provider has been deceived. This is why, for example, climbing the wall to see the cricket match can form the offence. The fan is accessing a service (the cricket match) that is normally provided only on payment of a fee (the ticket price).

The offence can be committed where the person performing the act does not do so for their own benefit. This could, therefore, possibly include lifting someone over a fence to get into a music festival.

2. Services (the *actus reus*)

The offence applies to services that are 'made available on the basis that payment has been, is being or will be made for or in respect of them' (s11(2)(a) of the 2006 Act). This means that where a service is being provided without a charge, there cannot be an offence under this section. The word 'services' is not defined within the act so I have given a number of examples of services that would fall within this section:

- obtains chargeable data or software over the internet without paying
- orders a meal in a restaurant knowing they have no means to pay
- attaches a decoder to their TV to enable them to access chargeable satellite services without paying
- uses the services of a members' club, such as a golf club, without paying and without being a member.

Watch out for these types of situation in the exam scenario as they are a big clue that this is the correct offence to apply.

Chargeable data would include music or video downloads. Ordering the meal without the means to pay would also suggest an offence under subsection (2). Accessing the chargeable satellite services would mean there was a separate offence each time a service was accessed.

There is one case that helps with respect to banking services and identity theft.

Key case

R v Sofroniou (2004) EWCA Crim 3681: The defendant falsely pretended to be three people to deceive or attempt to deceive banks into providing him with banking services, credit card companies into providing him with credit cards, and retailers into providing him with goods.

Precedent: The court held that for there to be a service within the meaning, there had to be 'an agreement or sufficient understanding that an identifiable payment or payments have been or will be made by or on behalf of the person receiving the services to the person providing them'. This understanding would not automatically exist between a bank and its account holders. On analysing the facts, the court found that there was a sufficient understanding as to payment, as interest would be payable on the loans and credit card balances that went beyond any interest-free period.

Note: If the banking services obtained are free, Section 11 cannot be the appropriate offence. However, the same restriction does not apply to subsection (2).

3. Dishonestly (the *mens rea*)

This is exactly the same use of the *Ivey v Genting Casinos* test (2017) UKSC 67 as there was for Section 2.

4. Knowing the services are made available on the basis that payment ... (the *mens rea*)

In most cases, this will not be a problem as most people will know that the service is one for which payment is normally made either in advance of the service, at the time of the service or afterwards. The defendant must get the service either by not paying for it or not paying in full if there is to be a conviction under Section 11 (of the 2006 Act).

5. Avoids or intends to avoid payment in full or in part (the *mens rea*)

The key point here is that whilst avoiding payment is the key to the offence, it is sufficient that the defendant intends to avoid payment. This means that the defendant must intend to avoid payment for the service provided in full or in part and have that intention at the time that the service is obtained. With banking services, this is a continuing act and so a later intention, whilst the service continues, will be sufficient.

The intent must be never to pay the sum involved. This means that an honest belief that credit is being given will mean the offence is not committed.

Key case

R v Allen (1985) 2 ALL ER 889: The defendant booked a room at a hotel and finally left stating he was in financial difficulties because of some business transactions. He left his passport as security for the debt stating he would return to settle the bill. He was arrested on his return and said that he genuinely hoped to be able to pay the bill and denied he was acting dishonestly. He said he had acted honestly and had genuinely expected to pay the bill from the proceeds of various business ventures.

Precedent: The court held that anyone who knows that payment on the spot is expected or required of them and who then dishonestly makes off without paying as required or expected must have at least the intention to delay or defer payment.

It follows, therefore, that the phrase 'and with intent to avoid payment of the amount due' adds a further ingredient – an intention to do more than delay or defer – an intention to evade payment altogether.'

Note: This issue is more explicitly linked to the revised test for dishonesty in the case of *Ivey v Genting Casinos* (2017) UKSC 67, i.e. if the evidence shows the defendant had a genuine belief they were not acting dishonestly, they are more likely to be also seen as not having an intention to evade payment altogether.

Applying Obtaining services dishonestly to an exam scenario

The structure and rules already discussed on the general application of the law to a scenario, with the offence of Fraud by false representation equally apply to Obtaining service dishonestly, e.g. structuring your paragraphs using the mnemonic IDEA.

Planning an answer to a scenario on Obtaining service dishonestly

This is an offence which is often confused and used incorrectly in scenarios. Before writing an answer to a scenario regarding this offence, consider the following points:

1. If the question specifically asks for this offence, do not cover anything else that is not in the question.
2. If the question requires you to decide which offence may be relevant, ask yourself these questions to make sure it is Obtaining service's dishonestly:
 - Has the defendant received a service without payment/reduced payment, such as entry to a cricket ground by their actions? If so, this points to this offence.

- Has the defendant made a gesture or sent an electronic message or attempted to use a cash machine that is misleading or untrue but has received no service? If so, this points to the offence Fraud by false representation.
 - Has the defendant actually made a gain or caused a loss? If so, it may be this is Obtaining services dishonestly rather than fraud.
3. If the situation is focused on not paying a bill, such as a restaurant meal, then it is more likely the offence they will be charged with is Making off without payment.
 4. If the situation is focused around a statement or gesture used to receive a service, such as an entry to a football ground, then it is likely the offence the defendant is likely to be charged with is Obtaining services dishonestly.

Follow this basic structure to write your answer to a scenario on Obtaining services dishonestly:

1. Briefly define the offence in one sentence.
2. Identify, define, explain and apply the relevant law on the *actus reus* of the offence, Obtaining services dishonestly.
3. Write a short paragraph using IDEA considering only the relevant issues:
 - obtains a service – identify the service
 - services.
4. Identify, define, explain and apply the relevant law on the *mens rea* of the offence, Obtaining services dishonestly:
 - dishonestly – you must apply each element of the *Ivey v Genting Casinos* (2017) UKSC 67 test to the scenario
 - knowing the services are made available on the basis that payment...
 - avoids or intends to avoid payment in full or in part.
5. Write a conclusion weighing up whether or not the defendant is liable for the offence.

Making off without payment

Key definitions:

Making off without payment: an offence where the defendant knows payment should be made but dishonestly decides not to pay at the time custom requires.

Payment on the spot: when it is custom and practice to pay for goods/services and the defendant fails to do this.

Making off: departing suddenly, disappearing, leaving in a way that makes it difficult to be traced.

This offence occurs in situations such as where the defendant fills up their car with petrol and drives off without paying or has a meal in a restaurant and walks out without paying. It is a crime that commonly takes place at petrol stations and has been the focus of police targets.

Key facts:

- an offence where the defendant knows payment should be made but dishonestly decides not to pay at the time custom requires
- triable either way offence
- maximum sentence is 2 years.

The definition of Making off Without payment (MOP)

The offence is defined in the *Theft Act 1978*, Section 3 as:

- (1) Subject to subsection (3) below, a person who, knowing that payment on the spot for any goods supplied or service done is required or expected from him, dishonestly makes off without having paid as required or expected and with intent to avoid payment of the amount due shall be guilty of an offence.
- (2) For purposes of this section 'payment on the spot' includes payment at the time of collecting goods on which work has been done or in respect of which service has been provided.
- (3) Subsection (1) above shall not apply where the supply of the goods or the doing of the service is contrary to law, or where the service done is such that payment is not legally enforceable.

Source: <https://www.legislation.gov.uk/ukpga/1978/31/section/3>

The offence of Making off without payment has the following elements:

- goods supplied or services done – *actus reus*

- makes off from the spot – *actus reus*
- fails to pay on the spot as required or expected – *actus reus*
- dishonesty – *mens rea*
- knows that payment on the spot is required or expected – *mens rea*
- intention to avoid payment permanently – *mens rea*.

Let us look at each element of the offence in turn.

1. Goods supplied or services done (the *actus reus*)

The goods must be supplied. This requires the goods to be delivered to the defendant or the defendant being allowed to take the goods, for example: at a petrol filling station or from a self-service shop. If that is not the case, the offence is theft. Where the goods are taken from the self-service shop, both theft and Making off without payment are committed.

Where services are involved, the services must be done. This includes examples such as repairing a bicycle, supplying a meal or renting a car.

Key case

R v Allen (1985) 2 ALL ER 889: See the case facts as above on page 18.

Precedent: The court held that anyone who knows that payment on the spot is expected or required of them, such as for staying in a hotel bedroom, falls within the meaning of ‘services done’.

The offence is not, however, committed where ‘the supply of the goods or the doing of the service is contrary to law, or where the service done is such that payment is not legally enforceable’.

This is **Section 3(3)** of the *Act*. This refers to illegal transactions, such as supplying alcohol to the under-18s, and also to transactions that are not legally enforceable. This refers to contract law where contracts with minors (under-18s) for goods that are not ‘necessaries’ are unenforceable. If that was the case, there would be no offence of Making off without payment, but there would be an offence of theft.

2. Makes off from the spot (the *actus reus*)

The idea of making off is just one of departing. There is no need to be seen to be running away or surreptitiously leaving when no one is looking, even though that behaviour often occurs. The important point is that the departure is dishonest.

Key case

R v Brooks and Brooks (1983) 76 Crim App Rep 66: The defendants had a meal in the upstairs room of a restaurant. The first defendant left the restaurant in a hurry. The second defendant also tried to leave but was caught by the manager. The second defendant alleged that she believed the first defendant had paid for the meal.

Precedent: The court held that the actions of leaving in a hurry or not, constituted making off from the spot.

Key case

R v McDavitt (1981) Crim LR 843: The defendant and his friends had a meal at a restaurant. The friends left, but the defendant stayed at the table. The bill was presented by a waiter, an argument started and the defendant refused to pay. He went to the door to try and leave, but the exit was blocked and he was kept in the restaurant until the police arrived.

Precedent: The court held that 'making off' refers to 'a departure from the spot where payment is required or expected'. Where that spot is, is a matter for the jury to decide, depending on the circumstances. Here, the defendant did not actually leave the spot, but merely attempted to do so.

Note: This is why shoplifters are usually arrested outside the shop as the offence of Making off without payment (and theft) will definitely be complete then, rather than being an attempt to commit the crime.

It is therefore clear that 'the spot' covers a wide range of places, but usually means the area controlled by the person to whom payment should be made.

3. Fails to pay on the spot as required or expected (the *actus reus*)

Normally, this is at the end of a meal in a restaurant or before leaving a shop with goods. The key point is that the departure is made without paying as required or expected. This, therefore, depends on the normal relationship between the defendant and the person(s) providing the service.

Key case

R v McDavitt (1981) Crim LR 843: See the details of this case above on page 22.

Key case

R v Vincent (2001) EWCA Crim 295: The defendant stayed for a week at a guest house in Windsor and shortly afterwards for a month at a pub with rooms in Windsor. He left both hotels without paying his bill in full. In the course of his stay, he had made a part-payment at one of the hotels. The expectation normally is that hotels will be paid before the customer leaves the premises. In this case, there were discussions between the defendant and the hotels as to when payment would be made.

Precedent: The court held that there were discussions between the defendant and the hotels as to when payment would be made, including more time for payment. An agreement is capable of defeating the expectation of payment on the spot and so no offence of Making off without payment is committed.

Note: If the defendant makes a false representation to get the victim to agree to payment later, this is **no longer making off without payment but fraud** by false representation under Section 2 of the *Fraud Act 2006*. Watch out for this issue in exam scenarios.

4. Dishonesty (the *mens rea*)

This is exactly the same use of the *Ivey v Genting Casinos* (2017) UKSC 67 test as there was for Section 2 and 11 of the *Fraud Act 2006* previously discussed.

5. Knows that payment on the spot is required or expected (the *mens rea*)

We have seen in the previous element that dishonesty relates to the making off. The idea that credit is not available is something that the defendant must know and, as in Section 2 of the *Fraud*

Act 2006, is usually clear from the evidence. Dishonesty is not part of the method of payment element. If payment is no longer expected (however, that may have been achieved) the suspect is not dishonestly making off when they leave as we have seen in the case of *R v Vincent* (2001) EWCA Crim 295.

Exam tip: Watch out for the size of payment that is agreed for deferral. In *R v Vincent* (2001) EWCA Crim 295, the bill presented a reasonably substantial amount for hotels. It would be much more difficult to show an agreement had been reached to defer payment of a taxi fare, petrol at a filling station or for a meal in a restaurant. It could happen as, perfectly innocently, people get caught out by not having enough money with them, or realising they have lost their wallet. They then have to make an agreement to pay the next day.

6. Intention to avoid payment permanently (the *mens rea*)

Here the intent must be never to pay the sum involved. This means that an honest belief that credit is being given will mean the offence is not being committed. This has already been seen in the case of *R v Allen* (1985) 2 ALL ER 889.

Applying Making off without payment to an exam scenario

The structure and rules already discussed on the general application of the law to a scenario, with the offence of Fraud by false representation equally apply to Making off without payment, e.g. structuring your paragraphs using the mnemonic IDEA.

Planning an answer to a scenario on Making off without payment

This is an offence which is often confused and used incorrectly in scenarios. Before writing an answer to a scenario regarding this offence, consider the following points:

1. If the question specifically asks for this offence, do not cover anything else that is not in the question.
2. If the question requires you to decide which offence may be relevant, ask yourself these questions to make sure it is Making off without payment:
 - Has the defendant decided to leave the premises/place without paying for a good or service? If so, this points to this offence.
 - Has the defendant made a gesture or sent an electronic message or attempted to use a cash machine that is misleading or untrue but has received no service? If so, this points to the offence Fraud by false representation.

- Has the defendant decided they will never pay for the goods or service? If so, it is likely to be Making off without payment.
 - Has the defendant received a service without payment/reduced payment by 'deception'? If so, this points to the offence of Obtaining services dishonestly.
3. If the situation is focused on not paying a bill, such as a restaurant meal, then it is more likely the offence they will be charged with is Making off without payment.
 4. If the situation is focused around a statement or gesture used to receive a service, such as an entry to a football ground, then it is likely the defendant is likely to be charged with Obtaining services dishonestly.

Follow this basic structure to write your answer to a scenario on Making off without payment:

1. Briefly define the offence in one sentence including the act and section.
2. Identify, define, explain and apply the relevant law on the *actus reus* of the offence, Making off without payment.
3. Write a short paragraph using IDEA, considering only the relevant issues:
 - goods supplied or services done – identify the service or good
 - makes off from the spot – define the concept and apply relevant case law and evidence
 - fails to pay as expected - define the concept and apply relevant case law and evidence.
4. Identify, define and apply the relevant law on the *mens rea* of the offence, Making off without payment:
 - dishonestly – you must apply each element of the *Ivey v Genting Casinos* (2017) UKSC 67 test to the scenario knowing that payment on the spot is expected – consider whether any deferral can negate this element as in the case of *R v Vincent* (2001) EWCA Crim 295.
 - intention to avoid payment permanently.
5. Write a conclusion weighing up whether or not the defendant is liable for the offence.

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