FRAUD

SOME CASES

A. CASES ON THE MEANING OF '*TO DEFRAUD*' OR '*FRAUDULENTLY*'

> "*...is dishonestly to prejudice or to take the risk of prejudicing another's right knowing that you have no right to do so.''*

1. Welham v. DPP [1961]

FACTS:

Welham was charged with uttering forged documents *with intent to defraud*. He was sales manager of a car retailing company and had witnessed forged hire purchase agreements on the strength of which certain finance companies large sums of money to the car company. His defence was that he thought the agreements were brought into existence to enable the finance companies to lend money which they could not ordinarily do because of credit restrictions; he claimed that he had had not intention to defraud the finance companies, but uttered the documents to mislead the relevant authority who might inspect the records to see that the credit restrictions were being observed and whose duty it was to prevent their contravention.

PRINCIPLE

(1) "....that [the meaning of] the words 'intent to defraud' [were not confined to] depriving a person by deceit of some economic advantage or inflicting upon him some economic loss."

(2) "that an intent to defraud existed when the false document was brought into existence for no other purpose than of deceiving a person responsible for a public duty into doing something that he would not have done but for the deceit, or not doing something that but for it he would have done..."

2. R. v. SINCLAIR [1968]

FACTS:

Sinclair and others were charged with conspiring to cheat and defraud a company, its shareholders and creditors by fraudulently using its assets for purposes other than those of the company and by fraudulently concealing such use. The case for the prosecution was, in effect, that there had been an agreement between Sinclair and the others, a director of the company and other persons dishonestly to take a risk with the company's assets in a manner known not to be in the best interests of the company and to be prejudicial to minority shareholders. The judge directed the

jury that, to prove fraud, it had to be established that the conduct of Sinclair and the others was deliberately dishonest and that the test was whether there had been the taking of a risk which there was no right to take and which wuld cause detriment or prejudice another.

PRINCIPLE

"That the direction had been correct, as to cheat and defraud was to act with deliberate dishonesty to the prejudice of another person's proprietary right..."

3. WAI Yu-tsang v. R [1991]

FACTS:

WAI was the chief accountant of the Hang Lung Bank. He failed to cause to be recorded in the bank's computerised ledgers the dishonour of cheques totalling US$124m, which the bank had purchased. Instead, details were recorded in private ledgers, and entries giving a false impression were made in the bank's accounts. He was charged with conspiring the managing director, the general manager and others to defraud the bank and its existing and potential shareholders, creditors and depositors, by dishonestly concealing in the accounts of the bank the dishonouring of those cheques. He was tried alone and his defence was that he had acted on the instructions of the managing director, that the confidential system of accounting had been created to keep knowledge of the dishonour from junior staff with a view to preventing a further run on the bank, and that he believed the subsequent balancing transactions to be genuine and he was acting in the best interests of the bank. The judge directed the jury that the defendant had to have been a party to an agreement with the common intention to defraud one or more of the persons named in the indictment, and that imperilling the economic or proprietary interests of such person or persons was sufficient to constitute fraud even if no loss was suffered and the defendant did not desire that any loss should be caused. WAI was convicted and appealed. The Court of Appeal dismissed his appeal and he appealing to the Privy Council.

PRINCIPLE

"..that where a defendant had agreed with others to act dishonestly with the intention or immediate purpose of creating a situation which he realised would or might deceive the victim into so acting, or failing to act, that he would suffer ecomomic loss or his economic interests would be imperilled, the defendant was guilty of conspiring to defraud whatever his motive or underlying purpose might have been and even though he had no desire to harm the victim or potential victim and no loss was actually caused..."

4. Scott v. Metropolitan Police Commissioner [1974]

FACTS:

Scott agreed with employees of cinema owners that in return for payment those employees would, without their employers' consent, temporarily borrow films for the purpose of allowing Scott to copy and sell the copies. The copying and selling of the copies was not known to the copyright owners. Scott was charged with a number of offences, including conspiracy to defraud. He argued that the conspiracy to defraud charge should fail because he had no intention to deceive and did not agree to deceive the persons and companies allegedly defrauded. The judge rejected this submission and Scott then pleaded guilty. He appealed and the Court of Appeal dismissed that appeal. He then appealed to the House of Lords.

PRINCIPLE

(3) "...the common law offence of conspiracy to defraud was not limited to an agreement between two or more persons to deceive the intended victim and by such deceit to defraud him; and accordingly as deceit was not an essential ingredient of the offence, the count was not bad in law..."

The court went on to say that "*the object of a conspiracy must not be confused with the means by which it is intended to be carried out... 'to defraud' ordinarily means to deprive a person dishonestly of something which is his or of something to which he is or would or might, but for the perpetration of the fraud, be entitled.*"

5. Adams v. R [1994]

FACTS:

Adams was a director and deputy chairman of a holding company, and a director of some of its subsidiaries. He was convicted by the New Zealand statutory offence of conspiracy to defraud whereby it was alleged that he had conspired with one or more of his co-defendants to defraud any one or more of the holding company, its subsidiaries and others by agreeing to use dishonestly a system for disguising the source and utilisation of moneys from legitimate inquiry by means of offshore companies, bank accounts and a law firm. The Court of Appeal dismissed his appeal and he appealed to the Privy Council.

PRINCIPLE

"...that where a charge of conspiracy to defraud concerned possible economic loss, there must exist in the victim some right or interest capable of being prejudiced whether by actual loss or by being put at risk...a person could be guilty of fraud when he dishonestly concealed information from another which he was under a duty to disclose to that other or which that other was entitled to require him to disclose..."

NOTE;

Section 257 of the New Zealand Crimes Act provides (under the heading "Conspiracy to defraud"):

> *"Everyone is liable to imprisonment...who conspires with any other person by deceit or falsehood or other fraudulent means to defraud the public, or any person ascertained or unascertained..."*

6. R. v. Moses and Ansbro [1990]

FACTS:

The defendants worked for the Immigration Department. They were charged with conspiracy to defraud by facilitating applications by immigrants to get work permits, notwithstanding that they were barred from so doing by a passport stamp. The first step was obtaining a national insurance number, which required attendance with documents for checking and the completion of a form. An applicant whose passport bore a stamp prohibiting him from working would be refused a national insurance number. It was alleged that the defendants conspired to ensure that such applications were not turned down by withholding from the departmental supervisors the existence of the stamp in the applicants' passports. They obtained blank forms which Moses completed and Ansbro signed and obtained a counter signature from another member of staff, withholding the evidence that the applicant was barred from working. The completed forms were then successfully introduced into the system and the risk of the applications being turned down avoided. The defendants were convicted and appealed.

PRINCIPLE

"...in bypassing the system, they were practising a deception on the department by causing the forms to enter the system as though they had been properly processed. It was clear that they intended that the department should treat the applications as regular in form and in compliance with procedure. They recognized that he the proper procedures been followed there was at least a chance that the applications would fail. This was a conspiracy to defraud. Officers of the department who played a part in processing the applications which, on their true facts, ought not to have been processed, were acting contrary to their public duty, and where the intended victim of a conspiracy to defraud was a person performing public duties, it was sufficient if the purpose was to cause him to contravene that duty, and the intended means of achieving it were dishonest. The purpose need not involve causing economic loss to anyone...."

B. SOME HONG KONG FRAUD CASES

6. R. v. King HO Yu-sang and others [1993]

FACTS:

The School Medical Service Board, a statutory body, devised a scheme in accordance with the School Medical Service Board Incorporation Ordinance, to provide economical medical treatement to students up to form III of High School. Medical practitioners were invited to apply to join the scheme, providing details of their surgery address and hours, and their bank accounts. The doctors who registered for a particular area would be included on a list circulated to all schools in the area. The schools were invited to participate in the scheme and to indicate the number of pupils from the school who would join the scheme, and also the name or names of doctors drawn from the list, who would be that school's medical scheme doctor or doctors. Pupils wishing to join the scheme would contribute $10 and the Government would add a further $65 to that sum, and pay a total of $75 per pupil to the successful doctor, who would be expected to treat pupils from schools which had chosen him, for one year. The Board limited the number of pupils per doctor, to 3500, and prohibited doctors from paying the registration fee. [These rules, unfortunately, and probably intentionally on the part of the administrator of the scheme, were not communicated to school principals.] The Secretary of the Board, i.e. the full-time administrator of the scheme, claimed that the scheme did not work, and permitted the defendants, two doctors and the wife of the first of those doctors, to circumvent those rules, so that between them, by paying the joining fee for whole schools of children, they received payment for close of 50 percent of the pupils in Hong Kong who were joined in the scheme. Unsuspecting doctors, many of them, were enticed to join the practices of the two doctor defendants, usually for a relatively short period, during which they were asked to sign a form, usually in blank, to enable them to 'treat school children.' The defendants then inserted the surgery address of their respective surgeries and bank accounts controlled by them, into which the $75 per pupil from the Government was to be paid.

Because many pupils who were never going to use the scheme were joined, and because they used part time employees to treat those pupils who did seek treatment, they were able to cope with the students who did consult them. The pupils of some schools were deterred from using the scheme, because the actual surgery address of the doctor the school had selected was in another part of Hong Kong e.g. Aberdeen instead of Tuen Mun.

The doctor defendants could properly say that they offered a service in return for the payments they received, and it was up to the student whether or not they used it, but by dishonesty and with the connivance of the Secretary, they undoubtedly caused the School Medical Service to breach its public duty.

This is an example of a case where the defendant were convicted of a fraud whereby a public body was by the fraud caused to breach its public duty. Although the defendants obviously made money from the scheme, it is not strictly an economic loss casee

8 R. v. C. H. Low and Another [1991]

FACTS:

This is the Ka Wah Bank Case. The Low and brothers and other directors of the bank, over a period systematically 'loaned' huge amounts of the banks funds to companies in which they had an interest or in which their family members had an interest for insufficient, in some instances, no security. Details of the loans were disguised in the banks books, with funds transferred from other accounts to conceal the true nature of the transactions. Most of these funds, running into many millions, were not repaid, were never recovered and were later written off as bad debts.

This is an example of a case in which the bank was not deceived, because those in charge of the bank were a part, and in this instance, the initiators, of the scheme of fraud. The offence of conspiracy to defraud, which was one of the two charges with which the defendants were charged, could not be charged under the current proposed substantive fraud offence.

6. R. v. Lorrain Esme OSMAN, George TAN and others [1986-1997]

FACTS:

Apart from George TAN the other defendants in this, the BMFL case, were directors and shareholders of BMB Bank and of its subsidiary, BMFL. TAN of course, with the principal of the Carrian Group of companies, who was able to obtain substantial loans from BMFL on no or no sufficient security, loans which were approved by the other defendants, and false or misleading documents were provided or documents were shredded, so the full extent of BMFL's exposure was not revealed to the remainder of the directors or the shareholders or creditors of the parent bank. Although the money loaned to Carrian was ultimately lost, the case was not put on that basis, but rather on the basis that the fraud resulted in severe prejudice to the bank in that it's economic interests were put at risk.

This is another case in which deceit was not an element. The bank could not be said to have been deceived because the bank's senior management were parties to the fraud and consequently fraud under the bill as proposed, could not have been brought.

John Reading
Deputy Director of Public Prosecutions (Ag.)
11 February 1999.

17–62 (a) "To defraud" or to act "fraudulently" is dishonestly to prejudice or to take the risk of prejudicing another's right, knowing that you have no right to do so: *Welham v. DPP* [1961] A.C. 103, HL. The word "dishonestly" is inserted in deference to opinions, mostly *obiter*, expressed in several cases (*e.g. R. v. Sinclair*, 52 Cr.App.R. 618, CA; *Wai Yu Tsang v. R.* [1992] 1 A.C. 269, PC). In the leading case of *Welham*, however, there is no mention of any need to tell the jury that they must be satisfied that the accused was acting dishonestly. It is submitted that the reason for this is that their Lordships considered it beyond argument that intentionally to take the risk of prejudicing another's right, knowing that there is no right to do so, is dishonest. In *Scott v. Metropolitan Police Commr* [1975] A.C. 819, HL, Lord Diplock suggested, *obiter*, that where the intended victim of a conspiracy to defraud is a private individual, the *purpose* of the conspirators must be to cause economic loss; this view is inconsistent with *Welham* and has been rejected by the Court of Appeal (*R. v. Alsop*, 64 Cr.App.R. 29) and the Privy Council (*Wai Yu Tsang v. R.*, *ante*). In general, fraudulent conspirators neither desire nor foresee loss or injury to another; the fraud consists in taking the risk of injuring another's right which the accused know they have no right to take.

17–63 (b) It is not confined to a risk of possible injury resulting in economic loss, though most cases do involve this: *Welham v. DPP*, *ante*; *Adams v. R.* [1995] 2 Cr.App.R. 295, PC. In *Scott*, *ante*, Lord Diplock also suggested, *obiter*, that where the intended victim of a conspiracy to defraud is a private individual, the risk must be of economic loss. It is submitted, however, that this is wrong as being inconsistent with *Welham* (see *per* Lord Radcliffe at p. 124, and *per* Lord Denning at p. 131) and with the *obiter* opinion of the remainder of their Lordships in *Sc* (see *per* Viscount Dilhorne at p. 839). Where, however, an allegation conspiracy to defraud is based on economic loss, it is necessary for t prosecution to prove that the victim had a right or interest which was capable being prejudiced either by actual loss or by being put at risk: *Adams v. R.*, *an*

17–64 (c) Dishonestly to induce a person performing a public duty to act in a w which would be contrary to his duty if he had known the true position is to ri injury to the right of the state, or the public authority as the case may be, to ha that duty properly performed and amounts to an intent to defraud: *Welham DPP*, *ante*. For the practical application of this aspect of the principle, see *R. Terry* [1984] A.C. 374, HL (fraudulent use of vehicle excise licence contrary to t forerunner of the *Vehicle Excise and Registration Act* 1994 , s.45) and *R. v. Mo and Ansbro* [1991] Crim.L.R. 617, CA (conspiracy to defraud).

(d) "Deceit" is not an essential ingredient of fraud *per se*: *Scott v. Metropolit Police Commr*, *ante*.

(e) The fact that the accused put forward false evidence in order to substanti a genuine claim does not negative an intent to defraud: *R. v. de Courcy*, July 1964, CCA (unreported on this point). The court said that uttering to a court, o any person, of a false document with intent that it be acted on as if it were true extremely strong evidence of intent to defraud; the fact that it is done with t purpose of supporting a genuine claim is irrelevant.