

fraud. No gain or loss need actually occur, indeed, as noted no property of any person need actually be put in jeopardy by defendant's acts. Defendant who starts a false rumour that his competitor victim is going out of business, commits the offence if he does so with intent to lead customers away from victim and is regarded as dishonest in doing so. Although, not a result-based offence, there is a causal link that must be established: it is by the false representation that defendant must intend to make the gain or cause the loss.

Section 5 defines 'gain' or 'loss' for the purposes of ss. 2-4, in essentially the same terms as s. 34 (2) (a) of the Theft Act 1968. Thus, the offences extend only to (temporarily or permanent) gain or loss in money or other property; and 'property' means any property whether real or personal (including things in action and other intangible property)". "Gain" includes a gain by keeping what one has, as well as a gain by getting what one does not have. 'Loss' includes loss by not getting what one might get, as well as loss parting with what one has. The Government was keen to parallel those in the Theft Act 1968. Arguably, adopting this definition renders the offence unduly wide by criminalising defendant who intends, victim not to get something which victim might have gained, even though victim was not entitled to it.

Fraud by failing to disclose information

Section 3 of the Fraud Act 2006 states: A person is in breach of this section if he - (a) dishonestly fails to disclose to another person information which he is under a legal duty to disclose, and (b) intends by failing to disclose the information - (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.

This offence deals with 'deception by silence'. However, the offence is only committed when the defendant is under a legal duty to disclose the information. The key issue will be when a person is under a legal duty to disclose information. The Act offers no guidance and so the issue must be one of general law. It will be a legal question and therefore one for the judge, rather than the jury. This might require a criminal trial to delve into some complex issues in civil law. However, the alternative of having one set of rules for disclosure at civil law and another at common law seems an even less attractive option.

The government's explanatory notes 2006 to the Act state that the following passage from the Law Commission Report No. 276, Fraud explains how the legal duty should be understood: 'Such a duty may derive from statute, from the fact that the transaction in question is one of the utmost good faith (such as a contract of insurance), from the express or implied terms of a contract, from the custom of a particular trade or market, or from the existence of a fiduciary relationship between the parties (such as that of agent and principal). For this purpose there is a legal duty to disclose information such not only if the defendant's failure to disclose it gives the victim a cause of action for damages, but also if the law gives the victim a right to set aside any change in his or her legal position to which he or she may consent as a result of the non-disclosure.'

We are unpersuaded by the defendants' contentions that unlicensed gangmasters are not caught in this expectation.

The prosecution has relied on other forms of questionable financial behaviour on the part of the defendants as part of its reliance on section 4, such as the general device of charging excessive sums for rent, withholding work in order to ensure that the worker in question was indebted to the gangmaster, or lending money to workers for which claims later made for repayment (as opposed to deducting from wages). Potentially reprehensible behaviour of this kind falls outside the financial interests of a person the gangmaster could properly be expected to safeguard or not to act against. Individuals do not commit a criminal offence under section 4, if they seek rental payments in excess of the market rate and gangmasters are not under an obligation to provide employment for those seeking work. Gangmasters are entitled to ask for repayment of the moneys they have lent to workers. Although recognition that these can be difficult situations, the individual is able to look for accommodation or employment elsewhere and we are persuaded that this suggested behaviour on the part of the defendants arguably provides the basis for inclusion particularly section 4 offence. To establish abuse of position for the purposes of section 4, it is necessary for the prosecution to demonstrate a breach of fiduciary duty, or a breach of an obligation that is akin to a fiduciary duty. This can be described as a breach of trust or a breach of privilege position in relation to the financial interests of another person. Section 4 does not apply to those who simply supply accommodation, goods, services or labour, whether on favourable or unfavourable terms and whether or not they have a stronger bargaining position. Therefore, the fact that an individual is a gangmaster who offers work or accommodation on particular terms, or lawfully requests the repayments of debts incurred by workers, does not involve the abuse of a relevant position as regards the financial interests of another person.

In conclusion, section 4 should not apply in *"general commercial area where individuals and businesses complete in markets of one kind or another, including labour markets, and are entitled to and expect to look after their own interests"*. The critical factor in this case, is that there is evidence that the defendants arguably assumed control of, and responsibility for, collecting wages of the workers, or they controlled the wages at the moment that they were paid over, and the fact that they were acting as gangmasters merely provided the vital context relied on by the prosecution in which the role was assumed.

The Court of Appeal made it clear that when the jury are considering whether the defendant *'is expected to safeguard, or not act against, the financial interests of another person'* the expectations in question are not those of the defendant, nor indeed the victim, but of the reasonable person. This approach was adopted in **Pennock (2014)**, which referred to the expectations of *'the reasonable member of the public as personified by the jury'*. There may be concerns that this might disadvantage a defendant who