

FRAUD ACT 2006

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Section 4: Fraud by abuse of position

20. **Section 4** makes it an offence to commit a fraud by dishonestly abusing one's position. It applies in situations where the defendant has been put in a privileged position, and by virtue of this position is expected to safeguard another's financial interests or not act against those interests. The Law Commission explain the meaning of "position" at paragraph 7.38:
- "7.38** The necessary relationship will be present between trustee and beneficiary, director and company, professional person and client, agent and principal, employee and employer, or between partners. It may arise otherwise, for example within a family, or in the context of voluntary work, or in any context where the parties are not at arm's length. In nearly all cases where it arises, it will be recognised by the civil law as importing fiduciary duties, and any relationship that is so recognised will suffice. We see no reason, however, why the existence of such duties should be essential. This does not of course mean that it would be entirely a matter for the fact-finders whether the necessary relationship exists. The question whether the particular facts alleged can properly be described as giving rise to that relationship will be an issue capable of being ruled upon by the judge and, if the case goes to the jury, of being the subject of directions.
21. The term "abuse" is not limited by a definition, because it is intended to cover a wide range of conduct. Moreover *subsection (2)* makes clear that the offence can be committed by omission as well as by positive action. For example, an employee who fails to take up the chance of a crucial contract in order that an associate or rival company can take it up instead at the expense of the employer, commits an offence under this section.
22. An employee of a software company who uses his position to clone software products with the intention of selling the products on would commit an offence under this section.
23. Another example covered by this section is where a person who is employed to care for an elderly or disabled person has access to that person's bank account and abuses his position by transferring funds to invest in a high-risk business venture of his own.