1. White Collar Crime, aspects of the Fraud Act 2006 and trial by jury in Fraud Cases

2. White Collar Crime/Criminology:

3. The Role of the Financial Services Authority (FSA), Insider Dealing and Market Abuse

4. General Criminal Law on Fraud and Jury Trial In Fraud Cases

5. Money Laundering Offences and Regulatory Aspects, Confiscation Orders and Civil Forfeiture


7. Money Laundering, Confiscation & Civil Recovery

8. Insolvency: Delinquent Directors
Discussion and preparation

Note tasks of subgroups set out in Separate sheet:

1. Nelken

(a) Outline from Nelken’s Introduction and the Karstedt, Levi, and Godfrey, “Introduction” what the authors see as the main problems of analysis and debates on white collar crime.

(b) List Nelken’s seven types of ambiguity?

(c) Why does Nelken suggest that the concept is contested:

   (i) because of definitional problems and

   (ii) because of doubts about whether all “misbehaviours discussed under this rubric can be considered to count as crime”

(d) Why does Nelken suggest that criminologists have difficulty in explaining the causes of white collar crime using the concepts applied to other crimes

(e) How, according to Nelken, do some argue that the setting and context of white collar crime affect its nature and society’s reaction to it

(f) What, in Nelken’s view, are the main debates about the regulation or policing of white collar crimes

(g) How does Nelken argue that those problems relate to wider social factors?

(h) Do you agree with Nelken that there are severe difficulties in using the criminal law to control the groups most powerful within a given society?

2. Levi on Organised Crime

(a) How does Levi characterise the definitions of organised crime and the problems with them?

(b) How does he fit the work on drug dealing networks into his argument?

(c) What are his arguments on the links with terrorism?
Essential reading
If possible, everyone might try to read:


Further relevant reading

The following focus in more specifically in the themes which will inform the whole of this module. They will be useful reading not only for this Seminar but also for later ones. Given the amount of material this reading is optional for Seminar 1 but you should try to read some of it at some point during the Module. You can use references and bibliographies for further reading when looking to write an assessable paper on a particular area.


This examines the difficulties of collecting figures on fraud and some of the implications of that problem for the classification of crimes and whether behaviour is seen as criminal.

This is an interesting look at key issues on organised crime with some useful references in the footnotes


This is an up to date debate on “creative compliance” by professionals with regulatory rules. This is perhaps how those involved in Enron saw their own behaviour.


In particular, the following:

a. Sarah Wilson, “Law Morality and regulation: Victorian Experiences of Financial Crime” at page 1073 gives a helpful historical perspective to our concerns;

b. Ericson and Doyle on “The Institutionalization of Deceptive Sales in Life Insurance: Five Sources of Moral Risk” at page 993 provides interesting ethnographic data from Canada

c. Michael Levi “The Media Construction of White Collar Crimes” at page 1037 debates the role of the press in this area

d. D.J. Middleton, “The Legal and Regulatory Response to Solicitors Involved in serious Fraud: Is Regulatory Action More Effective than Criminal Prosecution?” at page 810 follows on one of the issues Nelken raises in the reading above.

e. V and J Braithwaite, “Democratic Sentiment and Cyclical Markets in Vice” at page 1110 deal with “aggressive” tax “planning” using the Australian example.

f. Oskar Engdahl, “The role of money in economic crime” (2008) 48 British Journal of Criminology p154 examines whether the involvement of “money” ( presumably, as opposed to goods etc.) is significant for the likelihood of economic crime

Two books worth looking at for more on organised crime are:

1. V. Ruggiero, Vincenzo, “Organized and corporate crime in Europe: offers that can’t be refused”, Aldershot : Dartmouth, 1996. and

An older source very much in our field is:

1. G. Geis and P. Jesilow (Special eds) THE ANNALS of the American Academy of Political and Social Science Vol 525, January 1993. The following papers from this excellent US collection will be of interest to read over the course of the Module. They provide excellent examples of the problems although we will be looking at more recent regulation and control methods:

   - E. Szockyj, “Insider Trading: The SEC meets Carl Karcher”
   - K. Schlegel, “Crime in the Pits: The Regulation of Futures Trading”
   - J.T. Wells, “Accountancy and White Collar Crime”

2. M. Levi and Royal Commission on Criminal Justice, The Investigation, Prosecution, and Trial of Serious Fraud, research Study No. 14 HMSO, London, 1993 (available on Short Loan) examines many of the big fraud cases of the 1980’s and early 1990’s and analyses the systems of investigation, prosecution and trial in the light of that experience. This is an invaluable resource throughout the Module.

Two older works still have helpful things to say on the problems although the legal rules have changed massively since they were written:

   
   Especially Chapters 4, 5, & 6. - the detailed rules and procedures may have changed but the key problems and issues have not.

   
   This is an entirely optional reading which, although old now, in Chapters VI to IX, gives a fine insight into the practical problems of distinguishing fraud from commercial incompetence or misfortune. Again, detailed legal provisions have changed but many of the issues remain.
Group A
Prepare a brief presentation on the key problems with the law on fraud and the Theft Act deception offences before the Fraud Act 2006

Law Reform


The 1999 Consultation Paper No 155 of 27th April 1999 “Legislating the Criminal Code: Fraud and Deception” is also available from there in summary and full forms on pdf. Fuller reasoning than the final report [http://www.lawcom.gov.uk/docs/cp155.pdf](http://www.lawcom.gov.uk/docs/cp155.pdf)

Access all these parts of the Law Commission site via “publications”, going to reports or consultations as appropriate.

Assessing those recommendations look also at:


On the problems (Group A) some of the Law Commission references below are also useful as are:


Group B

Use the above material (and Fraud Act 2006 (below)) to prepare a presentation critically assessing the Law Commission’s recommendations and the new Law
The third topic we will look at trial by jury.

Group C

Prepare a presentation critically assessing the method of trial by jury as it applies to complex fraud trials


…Should be useful as will the text of the new provision in sections 43, 44 and 48 of the Criminal Justice Act 2003 (below). These articles (all on Westlaw) will bring you up to date with these issues. Some of the earlier debates are reflected in articles under “relevant reading” below:

GENERAL DISCUSSION AND PREPARATION

We will focus on the problems confronting the Criminal Law in dealing with issues of fraud and deception and the discussion will emerge on your reports of your reading allocated above.

1. What are the difficulties highlighted by the textbooks as to the application of Theft Act deception offences?
2. Why is the meaning of “appropriation” an issue?
3. How has dishonesty been assessed up to now?
4. Why is the Conspiracy to defraud offence seen as problematic?
5. How does the Law Commission approach these problems in its 2002 Report?
6. Why is jury trial seen as problematic in this area?
7. Will the proposal in the current Criminal Justice Bill deal with the problem?
8. How do these problems compare with the concept of dishonesty applied for the purpose of constructive trust liability?
9. How do these issues relate to the arguments about “white collar” and “organised” crime that we considered in the last Seminar?

ESSENTIAL READING

Current Law

Everybody should look at one or more of the following unless their English Criminal Law is very fresh in their minds:

1. Reed, Criminal Law, 2006 Sweet & Maxwell, Chapters dealing with fraud and deception
3. J.C. Smith, Smith and Hogan Criminal Law 12th ed Oxford University Press – Chapter(s) on property offences involving fraud or deception.
If you can’t find any of these, go to any UK Criminal law Text Book published in 2006 or later and read the chapter on the Fraud Act 2006.

Best of all, on line, through Westlaw, without needing to find and borrow a book from the library or even leave the comfort of your own computer, you can read, and print out bits from, the “bible” of judges and barristers Archbold.

You find it thus:
Open Westlaw– click on Commentary – Click on “United Kingdom” – click on "crime" under “by practice area”- click on “Archbold Criminal Pleading Evidence & Practice 2009 & First Supplement” – click “table of contents” in top right hand corner of the screen - this brings you to “Archbold from Sweet and Maxwells” – Click on "Archbold" - open Chapter 21 dealing with Offences under Theft and Fraud Acts– Open XVIII – Open and read or print out all text under (5) "elements of the offence". In Archbold there are also links to relevant cases and statutory provisions. This is a hassle but well worth it for the quality of the information.

Read:
1. B. Summers, “Update on Recent Fraud Cases” (2008) 29 Company Lawyer 342
2. Otherwise, use any standard work on Criminal Law referring to the sections dealing with crimes against property involving deception or fraud.

RELEVANT READING IF YOU WANT TO FOLLOW THIS UP

The most recent and definitive analysis of the problems surrounding the prevention, investigation and prosecution of fraud (as opposed to the legal definition of the offences) is to be found in the:

1. Final Report of the Review of Fraud by the Attorney General's office published in 2006 http://www.lso.gov.uk/pdf/FraudReview.pdf . This is an excellent starting point for anyone researching these issues in greater depth,

Both:

2. M. Levi and Royal Commission on Criminal Justice, “The Investigation, Prosecution and Trial of Serious Fraud” HMSO 1993 (On Short Loan);

And:

Legal Texts


For older and more detailed material on the problems of legal definition see:

1. J. Dine, Criminal Law in the Company Context, Dartmouth, Aldershot, 1995 Chapters 2, 7 and 9.
7. See (1998) Amicus Curiae Vol 5 March R. Wright at pp 4-7; Vol 8 May, Dickson at pp 5 to 6 and Hansen at 4 to 5.

Appendix:

Fraud Act 2006 (EXTRACTS)

1 Fraud
(1) A person is guilty of fraud if he is in breach of any of the sections listed in subsection (2) (which provide for different ways of committing the offence).

(2) The sections are-

(a) section 2 (fraud by false representation),
(b) section 3 (fraud by failing to disclose information), and
(c) section 4 (fraud by abuse of position).

(3) A person who is guilty of fraud is liable-

(a) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum (or to both);
(b) on conviction on indictment, to imprisonment for a term not exceeding 10 years or to a fine (or to both).

(4) Subsection (3)(a) applies in relation to Northern Ireland as if the reference to 12 months were a reference to 6 months.

2 Fraud by false representation

(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
3 Fraud by failing to disclose information

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.

4 Fraud by abuse of position

(1) A person is in breach of this section if he-

   (a) occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person,
   (b) dishonestly abuses that position, and
   (c) intends, by means of the abuse of that position-
      (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 person may be regarded as having abused his position even though his conduct consisted of an omission rather than an act.

5 "Gain" and "loss"

(1) The references to gain and loss in sections 2 to 4 are to be read in accordance with this section.

(2) "Gain" and "loss"-

   (a) extend only to gain or loss in money or other property;
   (b) include any such gain or loss whether temporary or permanent;

and "property" means any property whether real or personal (including things in action and other intangible property).

(3) "Gain" includes a gain by keeping what one has, as well as a gain by getting what one does not have.

(4) "Loss" includes a loss by not getting what one might get, as
6 Possession etc. of articles for use in frauds

(1) A person is guilty of an offence if he has in his possession or under his control any article for use in the course of or in connection with any fraud.

(2) A person guilty of an offence under this section is liable-

(a) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum (or to both);

(b) on conviction on indictment, to imprisonment for a term not exceeding 5 years or to a fine (or to both).

(3) Subsection (2)(a) applies in relation to Northern Ireland as if the reference to 12 months were a reference to 6 months.

Criminal Justice Act 2003 (EXTRACTS)

PART 7

TRIALS ON INDICTMENT WITHOUT A JURY

43 Applications by prosecution for certain fraud cases to be conducted without a jury (NOT YET IN FORCE!)

(1) This section applies where-

(a) one or more defendants are to be tried on indictment for one or more offences, and

(b) notice has been given under section 51B of the Crime and Disorder Act 1998 (c. 37) (notices in serious or complex fraud cases) in respect of that offence or those offences.

(2) The prosecution may apply to a judge of the Crown Court for the trial to be conducted without a jury.

(3) If an application under subsection (2) is made and the judge is satisfied that the condition in subsection (5) is fulfilled, he may make an order that the
trial is to be conducted without a jury; but if he is not so satisfied he must refuse the application.

(4) The judge may not make such an order without the approval of the Lord Chief Justice or a judge nominated by him.

(5) The condition is that the complexity of the trial or the length of the trial (or both) is likely to make the trial so burdensome to the members of a jury hearing the trial that the interests of justice require that serious consideration should be given to the question of whether the trial should be conducted without a jury.

(6) In deciding whether or not he is satisfied that that condition is fulfilled, the judge must have regard to any steps which might reasonably be taken to reduce the complexity or length of the trial.

(7) But a step is not to be regarded as reasonable if it would significantly disadvantage the prosecution.

44 Application by prosecution for trial to be conducted without a jury where danger of jury tampering (IN FORCE 24th JULY 2006)

(1) This section applies where one or more defendants are to be tried on indictment for one or more offences.

(2) The prosecution may apply to a judge of the Crown Court for the trial to be conducted without a jury.

(3) If an application under subsection (2) is made and the judge is satisfied that both of the following two conditions are fulfilled, he must make an order that the trial is to be conducted without a jury; but if he is not so satisfied he must refuse the application.

(4) The first condition is that there is evidence of a real and present danger that jury tampering would take place.

(5) The second condition is that, notwithstanding any steps (including the provision of police protection) which might reasonably be taken to prevent jury tampering, the likelihood that it would take place would be so substantial as to make it necessary in the interests of justice for the trial to be conducted
without a jury.

(6) The following are examples of cases where there may be evidence of a real and present danger that jury tampering would take place-

(a) a case where the trial is a retrial and the jury in the previous trial was discharged because jury tampering had taken place,

(b) a case where jury tampering has taken place in previous criminal proceedings involving the defendant or any of the defendants,

(c) a case where there has been intimidation, or attempted intimidation, of any person who is likely to be a witness in the trial.
This Seminar focuses on the regulation of the financial services industry and the markets. The essential reading is intended to give you an outline of the key features of the regulation of the financial markets in the UK and the key issues in the areas of market manipulation and insider dealing. I have chosen these two areas to illustrate the interface between Criminal law and regulatory approaches in the context of the special features of the financial markets. Please read the required reading for your Group first so that when the groups meet in the Seminar you can develop your presentations quickly.

**DISCUSSION AND PREPARATION**

Please come prepared to discuss:

(a) The Structure of the Regulatory System

(b) The insider dealing offence under the Criminal Justice Act 1992

(c) The method proposed for dealing with market abuse under FSMA including:

(d) How “market abuse” is defined and what we really mean by the concept.

(e) Why should it be regulated?

(f) The relationship between Criminal and Civil Law/Regulatory approaches. Is the criminal law, civil law, or regulatory regime the best approach?


All members of Group A

Read the following before the Seminar and present a ten to fifteen minute talk on the structure of financial services regulation in the UK and its relevance to market abuse and insider dealing


All members of Group B
Read the following in advance of the Seminar and prepare a ten to fifteen minute presentation on the nature of insider dealing and the problems of the various methods used to deal with it

2. Jason D Haines, “FSA determined to improve the cleanliness of markets: custodial sentences continue to be a real threat” (2208) 29 Company Lawyer 370

All members of Group C
Read the following in advance of the Seminar and prepare a ten to fifteen minute presentation on the key Human Rights problems affecting the Financial Services and Markets Act 2000.


ESSENTIAL READING FOR EVERYONE

That reading will give you a basic outline of the FSA regulatory system with more detail on the human rights issues.

**Additional General Reading for a fuller understanding after the seminar or earlier if these matters are of particular interest:**


If you want to read an account of an actual example of market manipulation (in the copper commodity market) with consideration of its regulatory impact see:

This Seminar focuses on a topic of particular relevance to the financial services sector. It encompasses the Criminal Law, regulatory provisions and Civil Law issues. The reading is intended to give you an insight into the following matters which we shall discuss in the Seminar:

- The definition of money laundering
- Why it is seen as a problem
- How the International Community has developed its response to the problem by UN and Council of Europe Treaties and Conventions; FATF; the EC Directive.
- The techniques used to deal with laundering: criminal offences; confiscation orders; regulatory provisions such as the EC Directive.
- Whether provisions should extend beyond drug money and terrorism to all “serious” or ‘organised” or “financial” crime.
- The effects of developments on traditional concepts of bank secrecy.
- The interface with Civil Law - especially liability as a constructive trustee.

**READING**

Visit for access to a wealth of information on this topic. Note especially the FATF recommendations of 1990 and how they have been updated to deal with terrorism.

2. [http://www.oecd.org/pages/0,3417,en_32250379_32235720_1_1_1_1_1_00.html](http://www.oecd.org/pages/0,3417,en_32250379_32235720_1_1_1_1_1_00.html)
3. [http://www.ex.ac.uk/~RDavies/arian/scandals/launder.html](http://www.ex.ac.uk/~RDavies/arian/scandals/launder.html)
4. [http://www.hm-treasury.gov.uk/documents/financial_services/money/fin_money_index.cfm](http://www.hm-treasury.gov.uk/documents/financial_services/money/fin_money_index.cfm)

For a clear outline of the overall UK position – legislation and measures - EVERYONE should read
Group A

Members should please prepare, in advance of the Seminar, a brief outline of the FATF Recommendations as they stand now from the above website - http://www1.oecd.org/fatf/


Group B

Members should please summarise the critique of EU measures developed by Mitsilegas and Gilmore.


Some of the above are on the Law as it was before Proceeds of Crime Act 2002 consolidated the money laundering offences on an all crimes and whole UK basis but should help you understand the overall picture. The 2002 Act did not radically change the offences or the confiscation order process but introduced a new Civil Recovery Procedure and new forfeiture rules and an agency to pursue criminal proceeds (since replaced by SOCA (below)).


Group C

Members please prepare a report on the history leading up to the Proceeds of Crime Act 2002 and the Serious and Organised Crime and Police Act 2005 the from Broadbridge and Edmonds (above)


Other recent developments include the second and third EU Directives and the increased emphasis on preventing the financing of terrorism. The following articles from Westlaw are helpful on this and also raise the civil liberties issues.


There is much more material. The FSA is involved in ensuring the businesses it regulates have proper anti-laundering systems in place – See http://www.fsa.gov.uk/Pages/About/What/financial_crime/money_laundering/index.shtml and the links from there on that aspect of the regulation of laundering.

The Customs and Excise deal with Bureaux de Change in the same way and with other high value dealers e.g. in art who want to use cash above £10,000. That is part of UK implementation of the second EU Directive see

This Seminar focuses on the problem of defining and detecting behavior which has resulted in or contributed to the insolvency of a business and which can be regarded as culpable. The spectrum will range from innocent business misfortune through incompetent management to fraud. We will begin with a short “mini lecture” on the main features of the UK Corporate Insolvency system. The reading from Levi’s book “The Phantom Capitalists” explores the activity known as “long firm fraud” and so some of the problems which arise in locating a business failure within the spectrum mentioned above.

**Group A**

*Please prepare, in advance of the Seminar, a brief outline of the points made by Levi in the Phantom Capitalists Chaps VII to IX and circulate it electronically or in hard copy.*

The extracts from the Goode or Finch books illustrate the policy issues and main procedures involved in corporate insolvency while the Tolmie extracts highlight the problems of investigation and enforcement in the public interest and, in particular, the interests of public confidence in the system. This gives a modern account of the system to compare with the account in Levi of the system in the early 1980’s. However, few of the essentials have changed.

**Group B**

*Please prepare, in advance of the Seminar, a brief outline of the main policy issues and principles identified by Goode or Finch as the main features of the UK Insolvency Regime and circulate it electronically or in hard copy.*

The Milman (1997) article and (2001) editorial on curbing the phoenix syndrome and Mayer on delinquent directors and company names both highlight the way the courts have developed an Insolvency Act provision intended to prevent the much criticised “phoenix company” syndrome. Schulte on wrongful trading discusses the effectiveness of the wrongful trading remedy for incompetent directors and the problems with the use of private finance to overcome the liquidator’s risks as to costs. Brandt and Vance briefly compare equivalent US rules. Griffin updates the other material to take account of the speeded up director disqualification process allowed under the Insolvency Act 2000.

**Group C**

*Please prepare, in advance of the Seminar, a brief outline of the points made by Milman and Mayer in those three articles and circulate it electronically or in hard copy.*
Mitchell and Stockdale look at the Human Rights Act implications of the interface between the investigating powers of insolvency practitioners and DTI investigators and criminal prosecution while Vanessa Finch discusses the specialist public interest liquidation possibility conferred on regulators such as the FSA and the DTI – another device used in the borderlands between insolvency, regulation and criminal proceedings.

Think about the implications of this reading for the role of the Criminal Law on insolvency, for the special investigative and litigation techniques provided by the insolvency regime, and as to the level of commercial morality implicitly or explicitly imposed by the system.

We will review the reading in the Seminar and consider the special nature of the insolvency regimes and the divide between its remedies and the criminal law.

Should the role of the Criminal law be greater or less than it is?

READING

3. Fiona Tolmie, Corporate and Personal Insolvency Law, Sweet and Maxwell, 2003, Part IV.