

## Fraud in Scotland

**Fraud does not respect boundaries. Fraudsters use the same tactics and deceptions, and cause the same harm throughout the UK. However, the way in which the crimes are defined, investigated and prosecuted can depend on whether the fraud took place in Scotland or England and Wales. Therefore it is important for Scottish and UK-wide businesses to understand the differences that exist.**

### What is a 'Scottish fraud'?

This factsheet focuses on criminal fraud. In Scotland criminal fraud is mainly dealt with under the common law and a number of statutory offences. The main fraud offences in Scotland are:

- common law fraud
- uttering
- embezzlement
- statutory frauds.

It is important to note that the Fraud Act 2006 does *not* apply in Scotland (apart from s10(1) which increases the maximum custodial sentence for fraudulent trading to 10 years).

### Main criminal offences

#### Common law fraud

Fraud is committed when someone achieves a practical result by the means of a false pretence. In other words, where someone is caused to do something they would not otherwise have done by use of deception. Proving an intention to deceive is essential in all cases, and can often be inferred from the actions of the accused. The range of 'false pretences' observed in Scottish courts is incredibly wide, from outright lies to sinister silence, and the practical results that have been achieved are equally diverse. If the practical result is not achieved there may be a prosecution for attempted fraud.

Common law fraud is the common 'catch all' for most fraud prosecutions in Scotland.

#### Uttering

The crime of 'uttering' occurs when someone tenders 'as genuine' a forged document to the prejudice of another person. Forging a document only becomes a crime if it is shown to have been tendered (to an individual or the public at large) with an intention to defraud/cause someone prejudice.

In many cases, uttering and fraud are interchangeable offences that can equally apply to the same circumstances, but prosecutors tend to proceed with an uttering charge if a forged document is used.

#### Embezzlement

Embezzlement is the felonious appropriation of property without the consent of the owner where the appropriation is by a person who has received a limited ownership of the property, subject to restoration at a future time, or possession of property subject to liability to account for it to the owner.

There is an element of breach of trust in embezzlement making it more serious than simple theft. In most cases embezzlement involves the appropriation of money.

#### Statutory frauds

In addition there are a wide range of statutory offences which are closely related to the common law offence. The main examples can be found in the following statutes:

- Bankruptcy (Scotland) Act 1985
- Business Protection from Misleading Marketing Regulations 2008
- Companies Act 2006
- Computer Misuse Act 1990
- Consumer Protection from Unfair Trading Regulations 2008
- Criminal Justice and Licensing (Scotland) Act 2010 (articles for use in frauds)
- Financial Services and Markets Act 2000 (to protect investors)
- Food Safety Act 1990 (labelling and substandard food)
- Forgery and Counterfeiting Act 1982 (counterfeiting of bank notes and coins)
- Insolvency Act 1986
- Weights and Measures Act 1985.

#### Civil fraud

Fraud can also feature in a civil context as a delict (or tort) allowing recovery of loss, for example where a party is induced to enter into a contract through fraudulent misrepresentation. As with criminal fraud, the false statement must be made with the relevant intention; however, unlike for the crime of fraud, recklessness or negligence is sufficient for civil fraud.

### Overview of enforcement

There are many interested parties involved in the detection, investigation and prosecution of fraud in Scotland, including:

- Police Service of Scotland
- Financial Conduct Authority
- Trading Standards
- Department for Work and Pensions
- Crown Office and Procurator Fiscal Service.

### Investigating fraud

Frauds committed in Scotland are usually investigated by the Police Service of Scotland, which has regional specialist units within its Specialist Crime Division to deal with complex economic crime cases.

Serious and complex fraud and other economic crimes are investigated under the direction of the Economic Crime Unit, part of the Serious Organised Crime Division of the Crown Office and Procurator Fiscal Service (COPFS) which is Scotland's prosecution service (see 'Prosecuting fraud').

In the investigation of serious or complex fraud the Lord Advocate the ministerial head of COPFS may exercise powers under ss27 and 28 of the Criminal Law (Consolidation) (Scotland) Act 1995 to authorise a nominated investigator to compel the production of documents and to require a person to answer questions and to provide information. These powers are similar to the Serious Fraud Office's (SFO) s2 powers.

For UK-wide frauds, both the English and Scottish authorities will have concurrent jurisdiction and it will very much depend on the nature of the crime and the level of local involvement as to who leads the investigation.

## Prosecuting fraud

The sole prosecuting authority in Scotland is the Crown Office and Procurator Fiscal Service (COPFS). Most fraud prosecutions are dealt with by the local Procurator Fiscal. The Procurator Fiscal has the duty to consider the evidence available to them and make further enquiries as necessary.

In line with the government's prioritisation of serious crime, the Crown Office has established a Serious and Organised Crime Division which includes an Economic Crime Unit (launched on 17 March 2011) with primary responsibility for the investigation and prosecution of serious fraud and economic crimes of a scale and importance that require handling by that specialised unit. The local Procurator Fiscal may, therefore, choose to pass the matter to them if they consider the crime serious enough.

The SFO does not have jurisdiction to prosecute in Scotland, although its powers under s2 of the Criminal Justice Act 1987 may

be used for the purpose of investigating a serious or complex fraud which is prosecutable in England, Wales or Northern Ireland. The SFO also works with Scottish authorities in relation to UK-wide fraud.

Once a decision has been made as regards the nature of the crime and the evidence available to the prosecutors, the individual may be served with either:

- **A summary complaint:** used for less serious crime and heard by a Sheriff sitting without a jury. The maximum penalty on conviction is imprisonment for up to 12 months and/or a fine up to the 'prescribed sum'.
- **An indictment:** used for more serious crimes. The case will then proceed either with a Sheriff (lower-level judge) and jury or in the High Court. If a prosecution is successful, the maximum penalty at Sheriff and jury level is an unlimited fine and/or imprisonment of up to five years subject to any wider power granted by statute for particular offences. In addition, the Sheriff

may remit to the High Court for sentence any case where they hold that any competent sentence that they could impose would be inadequate. The maximum penalty at the High Court is an unlimited fine and/or life imprisonment subject to any restrictions imposed by statute.

On conviction the Crown may seek to use its powers under the Proceeds of Crime Act 2002 to confiscate from the accused a fixed sum of money relating to the benefit obtained from their general criminal conduct in a criminal lifestyle case and from their particular criminal conduct otherwise.

It is important to note that where insufficient evidence exists to commence a criminal prosecution, a case may be referred to the Crown Office's Civil Recovery Unit to enable legal action to be taken to recover the proceeds of crime through the civil courts instead.

## Practical differences

The steps to be taken by businesses to prevent and identify fraud on or within their organisations are the same throughout the UK. While the terminology and support structures may change, within both jurisdictions the relevant authorities seek to address the same problem. One important difference in criminal law between the two may lie in the fact that Scottish courts require 'corroboration' of evidence (ie two independent sources of evidence pointing to the crime having been committed). In most fraud cases this is unlikely to make a practical difference and in both jurisdictions businesses should seek to identify and retain as much information as they can in order to assist a successful prosecution.

*The Fraud Advisory Panel gratefully acknowledges the contribution of Tom Stocker (Pinsent Masons LLP) and Barbara Bolton (Tods Murray LLP) in the preparation of this Fraud Facts.*

## Summary of main differences

Main provisions	Scotland	England and Wales
Criminal offences	Common law fraud Uttering Embezzlement Other statutory frauds	Fraud Act 2006 Other statutory frauds
Prosecuting authorities (main)	Crown Office and Procurator Fiscal Service	Crown Prosecution Service Serious Fraud Office
Investigating authorities (main)	Police Service of Scotland	Local police forces City of London Police (national lead force for fraud) Serious Fraud Office
Sentencing:		
Summary conviction	Up to 12 months imprisonment or a fine up to the prescribed sum or both	Up to 12 months imprisonment or a fine or both
Conviction on indictment	Up to life imprisonment or unlimited fine or both	Up to 10 years imprisonment or a fine or both

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