

# **FRAUD AND THE VULNERABLE CONSUMER**

Thesis submitted by

**GILBERT ATO ARKO CRENTSIL**

In Partial Fulfilment of the Requirements

for the Degree of

Doctor of Philosophy

**INSTITUTE OF ADVANCED LEGAL STUDIES  
SCHOOL OF ADVANCED STUDY  
UNIVERSITY OF LONDON  
LONDON  
UNITED KINGDOM**

2018

(Submitted September 2018)

Supervisor: Professor Barry A. K. Rider OBE

Candidate Number: 1341103

## SIGNED DECLARATION

I declare that this thesis represents my own work. Where other sources of information have been used they have been acknowledged.

Name: Gilbert Ato Arko Crentsil

Signature: 

## ABSTRACT

*'Fraud and the Vulnerable Consumer'* is a thesis that explores the measures for protecting the consumer from fraud in English law. It is expected that the consumer would be identified in English law from earlier times to the present. Having identified the consumer, the concept of fraud is examined. Fraud has a long history and is not a simple concept to define in English law. It has many dimensions including moral and ethical perspectives and these are discussed.

Crucially, protection from fraud is in essence consumer protection. Therefore, consumer protection is discussed including its philosophy and rationales. The influence of the European Union on the United Kingdom is also noted. Whilst the consumer can be described as vulnerable the concept of the average consumer is advocated in European law, these two concepts are discussed. Fraud is explored in the financial services, consumer credit and conveyancing sectors. While the idea of a consumer fits neatly into consumer credit because it is consistent with consumption, it is not so in respect of financial services where the individual does not necessarily consume but invests.

There must be means of redress when a consumer becomes a victim of fraud. It is acknowledged that this can be discussed under the criminal law and the civil law. Under both jurisdictions the mechanisms for pursuing redress are examined from earlier times to the present. How these jurisdictions have helped advance consumer protection are critically considered. Beyond the traditional civil and criminal jurisdictions, there is regulatory law which often precedes the traditional jurisdictions. In the end, the relationships amongst these three complementary areas of law are critically examined and recommendations made for philosophical, transactional and regulatory reforms.

## TABLE OF CONTENTS

Title Page	1
Signed Declaration	2
Abstract	3
Table of Contents	4-6
Preface	7-16
Acknowledgments	17
<b>Chapter One - Protecting the Consumer - Historical Overview</b>	<b>18-53</b>
Introduction	18-19
Origin of consumer protection in England	19-25
System for the protection of the consumer in earlier times	25-26
The 'Imperfect Garden' and the consumer	26-28
The Consumer and the 'Perfect Market'	28-29
Freedom of Contract	30-31
Caveat Emptor	31-33
Philosophy and consumer protection	33-34
Rationales for consumer protection	34-37
The impact of law of tort	37-38
The emergence of consumer protection legislations	38-40
Who is the consumer?	40-42
The European Dimension	42-45
Competition law and the consumer	45-46
What is vulnerability?	46-48
Significance of the Thesis	48-49
Sectors which are the focus of the research	49-50
Conclusion	50-52
<b>Chapter Two - What is Fraud</b>	<b>53-94</b>
Introduction	53-55
Fraud and Morality	55-61
General History of Fraud	61
History of fraud under English law	61-62
Fraud at Equity	62-65
Fraud at Common law	65-70
Fraud in Equity and the Common law	70-72
Fraud under the criminal law	72-80
What is consumer fraud?	80-83
Transaction as the setting for consumer fraud	83
The role of the Common Law Courts in protecting the consumer	83-85
The role of the Court of Chancery in protecting the consumer	85-88
The role of the early Criminal Courts in protecting the consumer	88-92
Standard of proof for fraud – has consistency finally arrived?	92-93
Conclusion	94
<b>Chapter Three - Financial Services Fraud</b>	<b>95-133</b>
Introduction	95-96
Origin of financial services	96-98
The relationship between financial services and fraud	98-100

Regulating the markets in England under the criminal law - statutory	100-113
Regulating the market in England under criminal law - the common law	113-120
Regulating the market in England under the civil law - statutory	120-128
Regulating the market in England under the civil law - the common law	129
Regulating the market in England - regulatory and administrative measures	130-131
Financial services and consumer protection	131-133
Conclusion	133
<b>Chapter Four - Consumer Credit Fraud</b>	<b>134-170</b>
Introduction	134-136
History of Consumer Credit	137-141
Protecting the consumer against fraud in the consumer credit industry	141-142
Regulating consumer credit under the civil law - statutory	142-153
Regulating consumer credit - the criminal law	154-170
Conclusion	170
<b>Chapter Five - Conveyancing Fraud</b>	<b>171-205</b>
Introduction	171-172
History of commercial market in land in England	172-178
Protection against fraud abuse under common law	178-182
Protection against fraud in Equity	182-188
Protection against conveyancing fraud under civil law - statutory	188-193
Measures for regulating conveyancing fraud under criminal law	193-200
Conveyancing fraud - regulatory law	200-204
Conclusion	204-205
<b>Chapter Six - Enforcing Consumer Rights-the Criminal Law</b>	<b>206-231</b>
Introduction	206-207
Direct actions by the consumer victim of criminal fraud	207-216
Representative criminal actions...under specific fraud laws	216-217
Representative criminal actions...under non-consumer specific fraud laws	218-223
The consumer and the Corporation	223-227
Challenges with prosecuting fraud	227-231
Conclusion	231
<b>Chapter Seven-Enforcing Consumer Rights-Civil and Regulatory Processes</b>	<b>232-270</b>
Introduction	232-233
Direct Actions by the Consumer	233-246
The Role of consumer specific agencies'	246-249
Role of organisations and institutions with broad consumer mandates	249-269
Conclusion	269-270
<b>Chapter Eight-Assessment of the Mechanisms for Protecting the Consumer</b>	<b>271-332</b>
Introduction	271-272
Consumer protection and consumer fraud	273-278
Same legal standards for different businesses?	278-279
The average consumer and consumer vulnerability	279-282
Defining Consumer vulnerability	282-283
Vulnerability, Financial services and consumer credit	283-284
The conveyancing sector and consumer vulnerability	285

Candidate Number: 1341103

Vulnerability and standards... different classes of consumers/persons?	285-286
The role of the criminal law in consumer protection	286-292
The role of private law in consumer protection	292-295
The extent of legislative protection	295-296
The role of regulatory or administrative law	296-303
The role of the civil law in consumer protection	303-308
The choice of law	308-309
The limitations of the law in combatting fraud in the conveyancing sector	309-313
The limitations of the law...in financial and consumer credit transactions	313-317
Recommendations for combatting consumer fraud-multi-disciplinary approach	317-328
Potential impact of Brexit	329-330
Summary	330-333
<b>Bibliography</b>	<b>334-394</b>

## PREFACE

It is trite that a proper appreciation of history aids understanding of the present. This proposition is true in many disciplines of human endeavour. For there is a sense in which history can guide society to chart the future. A critical study of consumer protection may thus require a journey into the past to understand how the individual was protected in earlier times and to enquire whether there are any signposts that point to the future. It is this approach that has broadly driven how the present author examines, with a focus on English law, the subject of fraud and the vulnerable consumer, essentially consumer protection. This preface seeks to highlight how certain socio-economic and political touchstones impacted consumer protection in England.

A historical account of consumer protection in England can be gleaned from a consideration of the history and activities of English guilds and livery companies. Among other windows to the origin of consumer protection, the livery companies are significant because their activities present a fitting historical setting for the cultural, social, political, legal and regulatory backdrop.<sup>1</sup> Briefly, Englishmen with similar skills and crafts historically united to establish what was then known as '*guilds*' or '*misteries*' to advance their common interests.<sup>2</sup> The word '*misteries*' is said to have originated from the Latin '*misterium*' which means 'professional skill'.<sup>3</sup> '*Guild*' on the other hand originated from the Saxon word '*gilder*' which means to pay, referring to the payment of fees which was a condition of membership of various companies. The word '*livery*' originally referred to the various items including clothing, food and drinks, supplied to employees who lived

---

<sup>1</sup> See generally David Palfreyman, *London Livery Companies* (Oracle Publishing UK Ltd 2010) a book to which the present author owes deserving credit, the story of livery companies is here greatly summarised.

<sup>2</sup> *ibid* 43.

<sup>3</sup> *ibid*.

Candidate Number: 1341103

in rich households or official residence. It evolved to refer solely to the distinctive clothing worn by members of guilds, thus leading to the name 'livery' companies.<sup>4</sup>

Importantly, guilds were in reality scattered all over Europe and are believed to have existed before the official recording of time. The uncertainty of the actual early beginnings is concisely noted in Blackham's statement that '*the origin of the Livery Companies of London is lost in the twilight of tradition and smothered in the fog of controversy*'.<sup>5</sup> Indeed a certain 'gild' was said to have been in existence in Canterbury in the ninth century while a peace guild was in existence during the reign of Athelstan who lived from 924-939.<sup>6</sup> When guilds flourished they were incorporated by Royal Charters as companies although they were in reality chartered corporations.<sup>7</sup> The first of these were the Weavers Company which was incorporated in 1155.<sup>8</sup> Today livery companies cover various occupations and are still predominantly in London and include the Worshipful Company of Pattenmakers in the City of London,<sup>9</sup> the Worshipful Company of Educators<sup>10</sup> and the Worshipful Company of International Bankers.<sup>11</sup>

Important as the historical account is, it is in the actual examination of the activities of the livery companies that its relevance to the subject of consumer protection becomes evident. Having membership producing all manner of products, livery companies set quality standards for their products. Although it could be argued that the primary motive

---

<sup>4</sup> Barry One-off, 'The Livery Companies of the Square Mile' <<http://www.barryoneoff.co.uk/livery.html>> accessed 23 September 2018.

<sup>5</sup> Palfreyman (n 1) 46.

<sup>6</sup> *ibid* 44.

<sup>7</sup> *ibid* 208. The Oxford and Cambridge colleges also are chartered corporations.

<sup>8</sup> *ibid* 44.

<sup>9</sup> Worshipful Company of Pattenmakers in the City of London, 'Worshipful Company of Pattenmakers in the City of London' <<http://www.pattenmakers.co.uk/>> accessed 23 September 2018.

<sup>10</sup> Worshipful Company of Educators, 'Worshipful Company of Educators' <<https://educatorscompany.org/>> accessed 23 September 2018.

<sup>11</sup> Worshipful Company of International Bankers, 'Worshipful Company of International Bankers' <<http://internationalbankers.org.uk/>> accessed 23 September 2018.



was commercial, regulating product standards arguably served to protect consumers. It is said that twelfth-century town charters “recognized ‘an active and virile trade organization’ functioning within town as a ‘merchant gild’, regulating trade and commerce within the local market ...”.<sup>12</sup> Today consumer protection involves setting standards for products and services.<sup>13</sup> Similarly recognised as a lens to the origin of consumer protection, the regulation of products and services by local authorities’ weights and measures departments across England was consistent with the activities of the livery companies.<sup>14</sup>

The regulation of the skills and standards of its members is another window to assessing the contribution of livery companies to consumer protection. It is recognised that consumer protection involves setting standards and regulating the conducts of professionals, used here in a broad sense. Indeed this is the essence of the licensing of professionals such as lawyers and traders in financial services firms. Livery companies in England did same by preventing those who were unskilled and untrained from operating in the industry. It is said that they kept ‘a tight rein on recruitment to the trade and also to ensure the maintenance of craft standards’.<sup>15</sup> They created ‘a stable trading environment for investment in human capital through training the apprenticeship system, as co-ordinating complicated production processes, and as protecting consumers’. By regulating products, services and human capital livery companies essentially protected consumers.

Nevertheless, some deride the contribution of livery companies to the English economy as a whole and certainly to consumer protection. It is acknowledged that consumer

---

<sup>12</sup> Palfreyman (n 1) 47.

<sup>13</sup> See generally Consumer Rights Act 2015.

<sup>14</sup> John A O’Keefe, *On the Law of Weights and Measures* (Butterworths & Co (Publishers) Ltd 1966).

<sup>15</sup> Palfreyman (n 1) 50.

protection involves prevention of monopolies and generally anti-competitive practices. It is generally recorded and indeed acknowledged that livery companies advanced their interests by becoming monopolies. It is in this regard that they received sharp condemnation from Adam Smith calling them '*a conspiracy against the public*'.<sup>16</sup> It is not unexpected that livery companies themselves would argue that they did so for noble reasons including protecting the consumer by ensuring only quality products were sold to the public. Without denying that they created monopolies, it is arguable that standards were maintained by livery companies which made them ignore the competition of the trader next door with inferior products. Although monopolies impact prices of goods and thus inimical to the interest of the consumer, to the extent that quality standards were maintained on products and services it is arguable that livery companies protected the consumer.

Another aspect to consumer protection to which livery companies had influence is in dispute resolution and seeking redress. Critical to consumer protection is the existence of mechanisms for seeking redress including among others the role of the courts. It is recognised that livery companies in the City of London had courts which sat on cases. They bought a charter from the Crown to incorporate the guild and the City's Court of Aldermen.<sup>17</sup> This court had been involved in regulating the City's licence for brokers.<sup>18</sup> Indeed earlier courts such as court leets handled many cases including those brought by local trading standards weights and measures departments.<sup>19</sup> Today English courts

---

<sup>16</sup> Cited in *ibid* 69.

<sup>17</sup> *ibid* 66.

<sup>18</sup> See Barry Rider, Charles Abrams and Michael Ashe, *Guide to Financial Services Regulation* (3rd Edition, CCH Editions Ltd 1997).

<sup>19</sup> Theodore Frank Thomas Plucknett, *A Concise History of the Common Law* (Liberty Fund Inc 1956) 89–90; Alcester Court, 'Alcester Court Leet-History' <[www.alcestercourtleet.co.uk/history/court-leet-history/](http://www.alcestercourtleet.co.uk/history/court-leet-history/)> accessed 8 August 2017.

Candidate Number: 1341103

continue this crucial function with the small claims courts established specifically to help consumer claimants with low value claims.

For bodies accused of effectively operating as monopolies to have the right to establish courts raises fundamental questions about the political power it wielded. Livery companies were indeed not excluded from influence in the politics of the United Kingdom. British politics is heavily influenced by the City of London. For '*at certain crucial points in English history those who run the City and command its resources in effect decide what happens at the level of national government*'.<sup>20</sup> It is this influence that regrettably made the City seemingly impervious to legislative efforts to rein in corruption in the financial services sector. The main setting of the livery companies was coincidentally the City of London. Reference has been made about its purchase of the Charter for the City's Court of Aldermen.<sup>21</sup> It is further noted that they were an elite that controlled the government of the City.<sup>22</sup> The power of guilds was so strong that even Machiavelli was reported to have attended their meetings to advance his reputation among his subjects.<sup>23</sup>

This political dimension is vitally important to consumer protection and requires brief consideration.<sup>24</sup> Legislative provisions are essentially policies of political parties in power.<sup>25</sup> Thus where political leadership value consumer protection, it would influence its legislative agenda and this is particularly so in the United States whose history of

---

<sup>20</sup> Palfreyman (n 1) 49.

<sup>21</sup> *ibid* 66.

<sup>22</sup> *ibid* 49.

<sup>23</sup> *ibid* 1.

<sup>24</sup> See generally Stephen Brobeck, *Encyclopaedia of the Consumer Movement* (ABC-CLIO 1997).

<sup>25</sup> See generally Mark Nadel, 'Congress and Consumer Protection', *Encyclopedia of the Consumer Movement* (ABC-CLIO 1997) 127.

consumerism and regulation has poignant global influence.<sup>26</sup> Highlighting a few to advance this proposition, President Franklin D Roosevelt, considered consumer protection vital to his New Deal agenda and consequently passed two important acts: the Meat Inspection Act 1906 and the Pure Food and Drug Act 1906 as well as establishing consumer agencies. The general philosophy of disclosure, central to fraud and consumer protection, is captured by President Roosevelt when he stated that: 'there is ... an obligation upon us to insist that every issue of new securities ... shall be accompanied by full publicity and information, and that no essentially important element attending the issue shall be concealed from the buying public. The proposal as to the ancient rule of caveat emptor, the further doctrine, "let the seller also beware". It puts the burden of telling the whole truth on the seller. It should give impetus to honest dealing in securities and thereby bring back public confidence'.<sup>27</sup>

Subsequent presidents, principally Democratic, made strides in promoting consumer protection including John F Kennedy, Lyndon Johnson, Jimmy Carter, Bill Clinton and Barack Obama. President Obama for instance initiated and ensured the passage of the Credit Card Accountability Responsibility and Disclosure (CARD) Act (2009) and the Dodd-Frank Wall Street Reform and Consumer Protection Act (2010). The former Act addressed disclosure issues in the consumer credit industry while the latter created notable agencies such as the Consumer Financial Protection Bureau. Many political leaders have thus made significant strides in advancing the story of consumer protection. Regrettably, the signals are that President Donald Trump's tenure would mark a reverse in the progress made by President Obama as he seeks to undo the progress his predecessor made.

---

<sup>26</sup> Richard W Waterman and E Thomas Garman, 'Presidents and the Consumer Movement', *Encyclopedia of the Consumer Movement* (ABC-CLIO 1997) 433.

<sup>27</sup> Cited in Robert R Pennington, *The Investor and the Law* (Macgibbon & Kee Ltd 1968).

Candidate Number: 1341103

Crucial to the extent to which political leadership takes consumer protection seriously is among others the level of pressure which is brought to bear on them by many factors including by civil society groups. It is noted that despite the landmark strides President Roosevelt made, political pressure had been brought to bear on him. In this regard one cannot discount the role played by ordinary political figures such as Ralph Nader.<sup>28</sup> A graduate of both Princeton and Harvard Law School, he influenced consumer protection in the United States through his many campaign activities and notable work *Unsafe at Any Speed* published in 1965. Unlike his bid to become president of the United States, Nader successfully influenced consumer protection across many sectors in the United States and has been described as the one who 'transformed "consumerism" into a movement that could effectively counter the power yielded by business in the market place and by government policymakers'.<sup>29</sup>

Significantly, crisis with fraud as its provenance has a direct consequential bearing on how political leadership responds to consumer protection. Thus consistent with history the post 2008 global financial crisis was greeted by consumer protection legislations.<sup>30</sup> The major economies had prior to this event experienced periods of sustained economic growth leading the former British Prime Minister Gordon Brown, then Chancellor of Exchequer to suggest that the periods of boom and bust were over.

Some of the sectors where the growth became evident were the housing, financial services and consumer credit. Mortgage had become widely available for which reason many bought houses. What many had not realised was that the availability of mortgage for property purchases in residential properties was based on what is termed sub-prime

---

<sup>28</sup> 'Nader, Ralph', , *Encyclopedia of the Consumer Movement* (ABC-CLIO 1997).

<sup>29</sup> See also Nadel (n 25).

<sup>30</sup> See Dalvinder Singh, 'Northern Rock, Depositors and Deposit Insurance Coverage: Some Critical Reflections' (2010) 2 *Journal of Business Law* 55.

lending. This is high interest lending to people considered high risk due to bad credit record. The mortgagors who were on the client lists of the financial institutions were then packaged as mortgage backed securities and sold on the exchanges. The availability of credit equally meant that consumerism and irresponsible lending rose, and many supported hitherto unsustainable lifestyles with credit cards and other forms of loans including payday loans. Consequently, the crisis hit all sectors of the economy including low income unemployed persons on welfare benefits as governments began austerity programmes. Many wondered why some of the vulnerable in society had to bear the brunt of the misconducts of the few who were indeed quite rich.

The post crisis inquisition brought many issues to light. Mortgage fraud had been rampant. Organised professionals had falsified documents to enable unqualified persons to obtain mortgage to purchase properties. Some designed schemes to fraudulently sell other persons' properties. Moreover, credit had been widely available and there had been irresponsible lending to consumers. The crisis consequently raised significant cultural, legal, regulatory, socio economic as well as moral issues. People questioned the culture in financial services and consumer credit. The sectors which had direct relevance to these issues became the financial services, consumer credit and real estate. Consumers were wallowing in debt due to irresponsible lending including on credit cards and pay day loans.

The need to focus on consumer protection became urgent. The US and UK responses to the crisis with respect to consumer protection and consumer credit regulation are confirmed in a report by the Financial Stability Board titled '*Consumer Finance Protection with Particular Focus on Credit*' (2011).<sup>31</sup> President Obama passed two Acts.

---

<sup>31</sup> See source material in Iain Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (3rd edn, Hart Publishing 2012) 382–385.

Candidate Number: 1341103

Both the CARD Act (2009) and the Dodd-Frank Wall Street Reform and Consumer Protection Act (2010), and Title XIV of the latter the Mortgage Reform Anti-Predatory Lending Act focused on dealing with mortgage malpractices. In the United Kingdom it is arguable that former Prime Minister David Cameron's ground-breaking legislations in 2010 and 2012 of the Financial Services Act and the Consumer Rights Act 2015 were in response to the 2008 financial crisis and neither necessarily as a result of his Big Society agenda nor his British Bill of Rights, the latter which may have been influenced by President Clinton's Consumer Bill of Rights.<sup>32</sup>

The present author has been intrigued by the influence of the history on the concept of consumer protection in England. This fascination has influenced the author's approach to this work. The present author has thus been highly selective in the content of this thesis by emphasizing on the historical. Therefore while current issues are highlighted in this work, the author has always approached the study by asking how the consumer was protected then and how the protection is effected today. The sense of history which has pervaded this work is similarly true when it comes to financial frauds which has a long history.

The thesis therefore examines consumer protection from fraud. It commences by setting the backdrop of consumer protection generally and the various themes in the subject are explored. The concept of fraud is examined generally. The specific frauds in financial services, conveyancing and consumer credit are then discussed. The redress schemes available are then considered. In addition to regulatory law most of the issues are looked at from the standpoints of the civil and criminal law and explored historically. Finally,

---

<sup>32</sup> HM Treasury, 'A New Approach to Financial Regulation: Building a Stronger System' (HM Treasury 2011) Cm 8012 <<https://www.gov.uk/government/consultations/a-new-approach-to-financial-regulation-building-a-stronger-system>> accessed 11 July 2018.

Candidate Number: 1341103

the thesis makes recommendations for designing a just and fair architecture for regulating the financial services, consumer credit and the real estate sectors.

Finally, it has been submitted that livery companies have historically protected the consumer, a claim they boldly posit.<sup>33</sup> Yet Palfreyman has in a stinging diatribe questioned the role the Worshipful Company of International Bankers played in ensuring the 2008 financial crisis did not occur. He states that *'one hopes the Worshipful Company of Internal Bankers has its pillory readily to hand and a plentiful supply of smouldering and suitably smelly 'sub-prime lending' documents or 'asset-backed commercial paper', 'collateralised debt obligations' and 'credit default swops' (or even some exotic 'CDOs of ABS' debt documentation-collateralised debt obligations composed of asset-backed securities ...)* to burn, as the *'toxic-waste' of the financial services industry, under the noses of reckless colleagues who through their dabbling with financial alchemy have so brought disrepute upon their fellow bankers and so discredited the ancient and honourable profession of banking'*.<sup>34</sup> In contrast to Former Prime Minister Brown's above noted optimism, an elder banking statesman and a senior Partner at a family-run bank stated that *'roughly speaking, the banking world makes the same mistake every 15 years or 20 years. It always, and I suspect it always will. It looks a little different each time, but it's the same'*.<sup>35</sup> Is this the culture within financial services? If so, can a 'culture' can be created to combat fraud and prove this statement wrong?

The Law is as stated on September 2018

Gilbert Crentsil

---

<sup>33</sup> Barry One-off (n 4).

<sup>34</sup> Palfreyman (n 1) 74–75.

<sup>35</sup> Cited by *ibid* 75.



## ACKNOWLEDGMENTS

Inherently daunting is the prospect of embarking on a PhD. Many have assisted me on this arduous journey including my supervisors Professor Barry Rider OBE and Professor Chizu Nakajima. I am incredibly appreciative to my main supervisor, Professor Rider OBE for his genuine commitment to my thesis and his immense intellectual support.

The pursuit of a PhD impacts close family and friends. I am immensely grateful to my wife Lydia whose role in the successful completion of this thesis is immeasurable. Thank you for the energy you give me as my greatest cheerleader. Thank you Lovera, Wilma and Ed. Daddy's never-ending excuse is now ended and the bar is set high. Many thanks to my family including sisters Joyce and Bernice, my brother Richmond and my nieces Sharon and Eleanor. Further thanks to Charles, Esther, her husband John and Mina.

Thank you, Mrs Wilma Evans, for ensuring I did not quit. Sincere thanks to Mr and Mrs Appah for keeping me awake at night through your numerous calls from the US. To you Esenam Agubretu for your all-round support. If you can identify a capable person, then certainly you are one. Similar appreciation to you Linda for the sincere sacrifice. To you Aunts Solace, Janet, Nana and Naana, and Mrs Ify Siwoniku; I thank you for your genuine encouragement.

Finally, I am grateful to all my work colleagues at Hodders Law for your understanding, William Brown and Cherry Campbell for your encouragement. I thank you Dido Asantewa Ofei-Kwatia (Barrister-at-Law) for being a friend that sticks closer than a brother.

To all whose names have not featured here I hope you understand that you are included amongst those to whom I am grateful.

# CHAPTER ONE (1)

## PROTECTING THE CONSUMER-HISTORICAL OVERVIEW

### Introduction

It is a paradox when society<sup>1</sup> makes laws that seem an affront on an individual's freedom to contract.<sup>2</sup> Even more unusual is when individuals, after exercising their right to contract, contend an entitlement to relief from the outcome of their own decisions. This seeming conflict between the rights of individuals and that of society is at the heart of this thesis which examines the circumstances under which individuals are entitled under English law to relief from acts of fraud and abuse resulting from commercial relations and how robust such measures are in protecting the consumer.

Opening his scholarly account of the history of the criminal law of England, Sir James Fitzjames Stephen stated that '*a complete account of any branch of the law ought to consist of three parts, corresponding to its past, present, and future condition respectively. These three parts are-(1) Its history (2) A statement of it as an existing system (3) A critical discussion of its component parts with a view to its improvement*'.<sup>3</sup> The present author, essentially employing black letter methodology, adopts the same approach in examining the issues in this thesis; put aptly consumer protection.<sup>4</sup> In 1962, the Monoly Committee in defining consumer protection stated that 'consumer protection is an amorphous conception that cannot be defined. It consists of those instances where the law intervenes to impose safeguards in favour of purchasers and hire-purchasers, together with activities of a number of organisations, variously inspired, the

---

<sup>1</sup> C-415/93 *Union Royale Belge des Societes de Football Association and others v Bosman and Others* [1995] ECR I-4921. See also *Case 175/73 Union Syndicale Massa and Kortner v Council* [1974] ECR 917.

<sup>2</sup> See generally Patrick Selim Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press 1979).

<sup>3</sup> Sir James Fitzjames Stephen, *A History of the Criminal Law of England*, vol 1 (MacMillan and Co 1883) p 8.

<sup>4</sup> See generally Mike McConville and Wing Hong Chui, *Research Methods for Law* (Edinburgh University Press Ltd 2007).

object or effect of which is to procure fair and satisfying treatment for the domestic buyer. From another viewpoint “consumer protection” may be regarded as those measures which contribute, directly or indirectly, to the consumer assurance that he will buy goods of suitable quality appropriate to his purpose; that they will give him reasonable use, and that if he has just complaint there will be a means of redress.<sup>5</sup> Consumer protection is broad and the discussions cut across various disciplines. It embraces, among others, protection of the consumer from unsafe products, edible and inedible alike. This thesis however focuses on analysing the measures under English law for protecting the consumer against direct and indirect fraudulent and abusive practices in specific transactional sectors, namely the markets, consumer credit and conveyancing sectors.

This introductory chapter is however dedicated to introducing the main themes to be discussed in the thesis. It commences with a discussion of the origin of consumer protection in England and essentially traces the substantive protection of the individual until the express recognition in law of the ‘consumer’ as a distinct entity worthy of protection. It also takes a brief look at the broad subject of consumer protection and the influence that varied fields of knowledge have had on both Parliamentary and judiciary responses and approaches. It is logical to define the word ‘consumer’ as a preliminary task, but this question is properly addressed when a historical overview is taken of the developments that preceded the term consumer in English law.

### **Origin of consumer protection in England**

There is no definite date to which one can delineate as the origin of consumer protection in England. It suffices to state that the individual has always had recourse to some form of formal and informal remedies. Some of those remedies, if viewed through modern legal lens, appear

---

<sup>5</sup>The Molony Committee, ‘Final Report of the Committee on Consumer Protection’ (Her Majesty’s Stationery Office 1962) Cmnd 1781 8 paragraph 21.

crude. Generally speaking, the origin of consumer protection involves identification of earlier laws and practices that essentially protected the 'individual person' or the public regarding markets, products and services and certain industries.<sup>6</sup>The Preface to this work highlights the emergence of the guilds or livery companies across Europe before the official recording of time and what role they played in consumer protection in earlier times.<sup>7</sup>

The development of the law of weights and measures is another aspect to examining the origin of consumer in England. <sup>8</sup> Writing in his annals of England, Rogers of Hoveden wrote that '*... weights and measures also, great and small shall be of the same amount in the whole realm, according to the diversity of wares ... it is established that woollen cloths, wherever they may be made, be made of the same width, to wit of two ells within the lists (ie the selvedges) and of the same good quality in the middle and at the sides ... It is forbidden to all merchants throughout the whole of the realm that any merchant set in front of his shop red or black cloths or shields or any other thing whereby the buyers*'.<sup>9</sup>The overriding reason being the prevention of fraud, weights and measures laws were historically customary around the country before they evolved into statutes.<sup>10</sup>

There are various laws of uncertain dates that regulated weights and measures. The laws had been designed for the standardization of weights and measures, control over accuracy of equipment used for weighing and measuring by traders, and the protection of the consumer

---

<sup>6</sup>See generally John A O'Keefe, *On the Law of Weights and Measures* (Butterworths & Co (Publishers) Ltd 1966). See generally The Molony Committee (n 5). See also Atiyah (n 2) pp 544-561. See also chapter one of Brian W Harvey and Deborah L Parry, *The Law of Consumer Protection and Fair Trading* (6th edn, Butterworths & Co (Publishers) Ltd 2000).

<sup>7</sup> See generally also David Palfreyman, *London Livery Companies* (Oracle Publishing UK Ltd 2010).

<sup>8</sup>See Atiyah (n 2) pp 545, 547-548. See also

<sup>9</sup>Cited in The Molony Committee (n 5) 293 para 892.

<sup>10</sup>Atiyah (n 2) p 545.

against short weights or measures. The earliest statute in this regard is the Magna Carta in 1215, which was confirmed in 1224 provided that:

*“there shall be but one measure of wine throughout the realm, and one measure of ale, and one measure of corn, that is to say, the quarter of London; and one breadth of dyed cloth, russets, and haberjects, that is to say, two yards within the lists. And it shall be of weights as of measures.”<sup>11</sup>*

Furthermore, in advancing that weighing was to be equal, an Act of Edward III confirmed in 1353<sup>12</sup> that ‘since great the damage and deceit was done to the people because many merchants bought and sold ... merchandise auncel’, it was ordered that it ‘be wholly put out’.<sup>13</sup>The regulations were abolished by an Act of 1824 called an Act for Ascertaining and Establishing Uniformity of Weights and Measures (which also established imperial units and Weights and Measures of 1835.<sup>14</sup>Several laws were enacted under weights and measures in the eighteenth and nineteenth centuries<sup>15</sup> including the Weights and Measures Act of 1985.<sup>16</sup>

Harvey rightly recognises that consumer protection conceptually meant protection from excessive pricing levied on primary commodities and protection from short measures<sup>17</sup> including the laws on regulating the description of goods.<sup>18</sup>The regulation of the adulteration of food is another aspect to exploring the origin of consumer protection.<sup>19</sup>Some of the products about which regulations were provided included bread, beer, meat and fuel and the Crown and its agencies of justices and local courts regulated both in terms of quality and quantity.<sup>20</sup>The

---

<sup>11</sup>Henry 3, c. 25.

<sup>12</sup>27 Edw. 3, c. 9.

<sup>13</sup>O’Keefe (n 6) 41.

<sup>14</sup>ibid 51.

<sup>15</sup>Atiyah (n 2) pp 547-548.

<sup>16</sup>Weights and Measures Act 1985.

<sup>17</sup>Harvey and Parry (n 6) 2.

<sup>18</sup>See generally The Molony Committee (n 5) chapters 5-18.

<sup>19</sup>See generally Barry Atwood, Katherine Thompson and Chris Willett, *Food Law* (3rd edn, Bloomsbury Publishing 2009).

<sup>20</sup>See also Atiyah (n 2) pp 546-547.

Assize of Bread and Ale of 1266<sup>21</sup>(*Assisa Panis et Cervisie*) is considered the earliest legislation on adulteration of food, which act confirmed statutes regulating the same by 'progenitors, sometime Kings of England',<sup>22</sup>and Bread Act 1836.<sup>23</sup>Laws against adulteration of food and drink products were old and references could be made to laws in the medieval era.<sup>24</sup>

Fraudulent commercial practices in adulteration worsened as a result of urbanisation in the nineteenth century and measures were largely ineffective due to lack of scientific evidence.<sup>25</sup> Some of these included laws enacted against the adulteration of tea,<sup>26</sup>laws passed in 1758, 1822 and 1836 against the use of alum in bread, laws against the adulteration of beer passed in 1761, and in 1819 to prevent adulteration of beer.<sup>27</sup>Scientist Frederick Carl Accum who wrote '*Treatise on Adulterations of Food and Culinary Poisons*' in 1820 and Arthur Hill Hassall exposed frauds in the food industry. Scientific advancement by way of microscopic analyses led to a Parliamentary Select Committee report of 1855 which among others rejected '*that the best course will be to leave the buyer to take care of himself. But there are many adulterations which it is impossible for the buyer to detect ... it is said there are too many frauds which legislation cannot reach or punish. But on the other hand, it would be difficult to tell the numberless frauds which legislation may prevent. The great difficulty of legislating on this subject lies in putting an end to the liberty of fraud without affecting the freedom of commerce*'.<sup>28</sup>

Parliament in response to the Committee's report enacted the significant Adulteration of Food and Drink Act 1860. This is considered the first major horizontal legislation which affected the

---

<sup>21</sup>51 Hen 3 Stat 1.

<sup>22</sup>O'Keefe (n 6) 38.

<sup>23</sup>6 & 7 Will. 4, c. 37.O'Keefe (n 6) 39.

<sup>24</sup>See generally O'Keefe (n 6) 1-72.

<sup>25</sup>Atiyah (n 2) pp 546-547.

<sup>26</sup>ibid.

<sup>27</sup>ibid.

<sup>28</sup>cited by ibid pp 547.

manufacture and production of food generally. A review by a Select Committee on adulteration indicated that the statutory provisions must address deception of consumers. From a legal standpoint, the vagueness of the legislation did not assist in the effectiveness of the legislation. For instance, the 1860 Act provided that substances must not be mixed with food, however, it was later that subsequent legislation brought clarity and added that the act became an offence if it was injurious to health. Further to *R v Treeve*,<sup>29</sup> *Shillito v Thompson*<sup>30</sup> and *R v Kempson*,<sup>31</sup> the common law also regulated food and ensured that wholesome food was sold to prevent malice or self-seeking and it was public nuisance to sell, diseased or unwholesome food.

The public was also protected by laws regulating inedible products by way of laws to maintain the purity of gold and metals known as hallmarking and assaying even as early as the 13<sup>th</sup> century and 14<sup>th</sup> century.<sup>32</sup> A statute of Edward I in 1300 provided that '*no goldsmith ... shall henceforth make or cause to be made any manner of vessel, jewel or any other thing of gold or silver except it be of the true alloy and that no manner of vessel of silver depart out of the hands of the workers, until further, that it be marked with the leopard's head*'.<sup>33</sup> Other earlier statutes included those of Edward III–37, Edw. III c.7<sup>34</sup> and 17 Edw.IV c.1<sup>35</sup> all of which provide further standards for goldsmiths. Hallmarking regulation is old having begun in middle ages,<sup>36</sup> parliamentary involvement occurred in 1856 and a Select Committee began working on it in 1879. The object was the prevention of fraud and the 1856 Committee indicated that the

---

<sup>29</sup>*R v Treeve* 1796 2 East PC 821.

<sup>30</sup>*Shillito v Thompson* 1875 1 QBD 12.

<sup>31</sup>*R v Kempson* 1893 28 L Jo 477.

<sup>32</sup>See also Atiyah (n 2) pp 548-549.

<sup>33</sup>28 Edw. I c.20.

<sup>34</sup>37 Edw. III c.7.

<sup>35</sup>17 Edw. IV c. 1.

<sup>36</sup>Atiyah (n 2) p 548.

*'the practice of assaying is calculated to afford protection to the public against fraud, and ought to be maintained'*<sup>37</sup>.

The regulation of markets in England is ancient and the protection against restrictive or anti-competitive practices is one dimension.<sup>38</sup> It is universally acknowledged that there were the ancient offences of forestalling, Bowen L J noted in *Mulcahy v Regina*<sup>39</sup> that *'the ancient common law of this country and the statutes with reference to the acts known as badgering, forestalling, regrating and engrossing, indicated the mind of the legislature and of the judges that certain large operations in goods which interfered with the more ordinary course of trade were injurious to the public; they were held criminal accordingly'*.<sup>40</sup> Further historical aspects of consumer protection are the usury acts which are dealt with in detail in other areas of this thesis.<sup>41</sup> These usury laws put ceilings on borrowing for a long time. Bentham's Defence of Usury of 1790 was to have had an impact on the appointment of a select Committee in 1818 but the laws were repealed in 1854.<sup>42</sup>

A major identifiable aspect of protecting the public is in the privileges accorded professionals. The legal profession for instance was regulated as far as back the reign of Edward I and by 1275 the 'sergeant countor' was threatened with imprisonment when found guilty of collusive or deceitful practice.<sup>43</sup> In the 18<sup>th</sup> century there were laws regulating the licensing of

---

<sup>37</sup> cited by *ibid.*

<sup>38</sup> See generally Geraint Howells and Stephen Weatherill, *Consumer Protection Law* (2nd edn, Ashgate Publishing Limited 2005) pp 517-572. See chapter one Barry Rider, Charles Abrams and Michael Ashe, *Guide to Financial Services Regulation* (3rd Edition, CCH Editions Ltd 1997).

<sup>39</sup> *Mulcahy v Regina* 1868 LR HL 306.

<sup>40</sup> *ibid.*

<sup>41</sup> Atiyah (n 2) pp 550-551. See Warren Swain and Karen Faiweather, 'Usury and the Judicial Regulation of Financial Transactions in Seventeenth-and Eighteenth-Century England', *Unconscionability in European Private Financial Transactions-Protecting the Vulnerable* (Cambridge University Press 2010).

<sup>42</sup> Atiyah (n 2) pp 550-551.

<sup>43</sup> Sir Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I*, vol 1 (2nd edn, Cambridge University Press 1898) 229-229.



professionals such as doctors.<sup>44</sup>The sector by sector approach to protecting the public in the 18<sup>th</sup> century included legislation enacted to regulate industries.<sup>45</sup>

Protecting the public included protecting them from dishonest acts such as thefts. Generic criminal law in this era included the law on simple larceny<sup>46</sup> which protected people from stealing.<sup>47</sup> Another aspect of the origin of consumer protection is the development of the doctrine of contract and its evolution into the doctrine of deceit and generally the concept of fraud.<sup>48</sup>The action of deceit evolved from the doctrines such as covenant and debt, assumpsit, which then evolved in a complex legal journey to deceit or fraud. The judicial debate on exemption clauses is another modern dimension to the evolution of consumer protection in English law. The initial absence under the common law of the law of negligence and the ground-breaking decision in *Donoghue v Stevenson*<sup>49</sup> are all aspects of consumer protection law.

### **The system for the protection of the consumer in earlier times**

Beyond consideration of the substantive laws that protected the consumer, similarly relevant is the practical mechanism for the protection of the consumer, what the Monoly Committee describes as the 'system of consumer protection'.<sup>50</sup> The broad machinery for the enforcement of consumer protection laws were private enforcement under the common law and public enforcement.<sup>51</sup> Local government in this era was particularly relevant in the enforcement of

---

<sup>44</sup>Atiyah (n 2) pp 552-553.

<sup>45</sup>Atiyah (n 2) for carriages pp 552-553, carriers pp 553-555 and railways pp 556-560.

<sup>46</sup>Larceny Act 1916.

<sup>47</sup>Melanie Tebbutt, *Making Ends Meet: Pawnbroking and Working Class Credit* (Leicester University Press 1983) p 70.

<sup>48</sup>John Christian Bunbury, 'A History of the Action of Deceit on the Case and Related Developments in Contract Law' (Doctorate Thesis, The University of Auckland 2005).

<sup>49</sup>*Donoghue v Stevenson* 1932 UKHL 100.

<sup>50</sup>Howells and Weatherill (n 38) pp 39-62.

<sup>51</sup>See generally Harvey and Parry (n 6) 1-6.

laws on products and safety standards.<sup>52</sup> In relation to the prosecution and enforcement of criminal offences local courts in the relevant Anglo-Saxon era, medieval and modern eras have been instrumental.<sup>53</sup> Court Leet<sup>54</sup> and manorial criminal courts established by grant or presumed grant were instrumental in this regard.<sup>55</sup> As noted in the Preface the livery companies played major role in consumer protection as well as the court of Aldermen.

The justices of peace and mayors of boroughs were responsible for this regulation further to an act of 1709.<sup>56</sup> They were responsible for setting the 'assize of bread, prices, weight, prices, and bakers had to check size and quality and also criminal enforcement until abolished in 1836 through adoption of Adam Smith's principle that competition was the best regulator.<sup>57</sup> Regulation of ale by the court ensured that vessels would be made and sized and stamped or marked as a quart or pint.<sup>58</sup> Regulation was done through court leet appointed persons including an aleconner who checked quality by tasting.<sup>59</sup> A 1975 Act provided the appointment by Justices of local inspectors whose power included entering shops to examine weights and measures.

### **The imperfect garden and the consumer**

Universally acknowledged in the development of the English legal system is the influence of Judeo Christianity, particularly its doctrine and teachings. This influence extends to consumer

---

<sup>52</sup>ibid 2. See generally Josef Redlich and Francis W Hirst, *The History of Local Government in England* (2nd edn, Augustus M Kelley Publishers 1970).

<sup>53</sup>See generally O'Keefe (n 6) 37–72.

<sup>54</sup> Alcester Court, 'Alcester Court Leet-History' <[www.alcestercourtleet.co.uk/history/court-leet-history/](http://www.alcestercourtleet.co.uk/history/court-leet-history/)> accessed 8 August 2017.

<sup>55</sup>Theodore Frank Thomas Plucknett, *A Concise History of the Common Law* (5th edn, The Law Book Exchange Ltd 2001) 89–90. WS Holdsworth, *A History of English Law*, vol 1 (3rd edn, Methuen & Co Ltd 1922) 134–138. Harvey and Parry (n 6) 1–6.

<sup>56</sup> Brian W Harvey, *The Law of Consumer Protection and Fair Trading* (2nd edn, Butterworths & Co (Publishers) Ltd 1982) 2.

<sup>57</sup>Harvey and Parry (n 6) 2–3.

<sup>58</sup>ibid 3.

<sup>59</sup>ibid.

protection. The famed Judeo-Christian account of the creation of the universe superficially connotes a world impeccable at its inception.<sup>60</sup> Although the credibility of this account is discounted,<sup>61</sup> littered in the Garden of Eden are symbols that have particular relevance to the subject of consumer protection. First, nothing ‘created’ in the Garden of Eden was said to be perfect. The elements of heaven and earth were ultimately denotatively described as ‘very good’.<sup>62</sup> It is trite that ‘very good’ is inferior to ‘perfect’. Second, the account presents the image of man deceived in his quest for knowledge.<sup>63</sup> The two propositions are pointers to major themes in the development of consumer protection. Man is presented as limited in knowledge, morally weak and vulnerable in an imperfect world where he is susceptible to fraud and abuse. Therefore the Bible cautions traders against using ‘false balances’,<sup>64</sup> the essence being the protection of the vulnerable consumer from fraud. The Jewish Talmud similarly speaks against taking advantage of the blind, similarly implying the protection of the vulnerable in society.<sup>65</sup>

In discussing the influence of the Ecclesiastical Courts in England, Sir David Parry states that ‘where a promisor had pledged his faith to perform his promise—that is to say, had made a promise or entered into an agreement ratified by an oath—and then failed to fulfil that promise or agreement, his failure constituted an ecclesiastical offence for which he was answerable in the Church courts as a sinner in need of correction’.<sup>66</sup> It is noteworthy that the Ecclesiastical Courts took this view even against the opposition by Constitutions of Clarendon and the failure by the King’s courts to deal with breach of contract or what was termed sin, or crime.<sup>67</sup> The

---

<sup>60</sup>See Genesis Chapter 1 of *The Amplified Bible* (The Lockman Foundation 1954) <[www.Lockman.org](http://www.Lockman.org)>.

<sup>61</sup> See Charles R Darwin, *The Descent of Man, and Selection in Relation to Sex* (Murray and New York: Hill 1871).

<sup>62</sup>See Genesis Chapter 1:31 of *The Amplified Bible* (n 60).

<sup>63</sup>*ibid* Chapter 3.

<sup>64</sup>See Proverbs 11:31 of *The Amplified Bible* (n 60). See also Hershey H Friedman, ‘Placing a Stumbling before the Blind Person: An in-Depth Analysis’ (2002) <<http://www.jlaw.com/Articles/placingstumbling.html>> accessed 3 April 2018.

<sup>65</sup>See Leviticus 19:14 *The Amplified Bible* (n 60).

<sup>66</sup>Sir David Hughes Parry, *The Sanctity of Contracts in English Law* (Stevens & Sons Limited 1959) pp 5-6.

<sup>67</sup>Theodore Frank Thomas Plucknett, *A Concise History of the Common Law* (Liberty Fund Inc 1956) p 17.

position of the Ecclesiastical Court is best summed up by Professor Plucknett when he states that 'The Church very early took a strong view of the sanctity of contractual relationships, insisting that in conscience the obligation of a contract was completely independent of writings, forms and ceremonies, and tried so far as she could to translate this moral theory into terms of law'.<sup>68</sup> When one takes account of the battle by the church against usury, among many other initiatives, it is not in doubt the consistency in both theory and practice of Judeo-Christian influence on consumer protection in England.<sup>69</sup>

### **The consumer and 'the perfect market'**

In indirect contrast with this Judeo-Christian image of the world is the economic concept of the perfect market. For a theory emphasising perfection, it is ironic that its origin is uncertain with different economists such as Adam Smith, Leon Malras, Kenneth Arrow, Gerard Debreu, among others, suggested to have influenced its emergence. The concept itself paints a picture of the world where all parties to a transaction including individuals have perfect information. According to Ramsay the perfect market has the following characteristics.

*"There are numerous buyers and sellers in the market, such that the activities of any one economic actor will have only a minimal impact on the output or price of the market; there is free entry into and exit from the market; the commodity sold in the market is homogenous; that is, essentially the same product is sold by each seller in the particular market; all economic actors in the market have perfect information about the nature and value of the commodities traded; all the costs of producing the commodity are borne by the producer and all the benefits of a commodity accrue to the consumer-that is, there are no externalities".<sup>70</sup>*

---

<sup>68</sup>Plucknett (n 55) 627.

<sup>69</sup>See generally Norman Jones, *God and the Moneylenders; Usury and Law in Early Modern England* (Basil Blackwell Ltd 1989).

<sup>70</sup>Iain Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (3rd edn, Hart Publishing 2012) 42.

Professors Howells and Weatherill also present another simplified image of the perfect market in the opening paragraph to their work on consumer protection.<sup>71</sup> This perfect image of commerce however resides only in the abstract. First it is even acknowledged within economics that there exists no such perfect market.<sup>72</sup> Moreover, historical economic reality is a foil to the picture painted in the perfect market.<sup>73</sup> As a result of this rational and historical economic reality, civilisations have established varied forms of controlling markets and protecting the vulnerable in society.

The acknowledgment within economics of the illusion of the perfect market theory might incline one to believe that economists would resoundingly advocate for the protection of consumers. This does not seem the case when viewed from an analysis of the works of classical economists by Professor Atiyah.<sup>74</sup> He sums up<sup>75</sup> the views of the classical economists, suggesting that they were *'vigorous propagators of laissez faire in every corner of the economy'*. Unsurprisingly, they were *'all agreed on the utter failure of the state's regulatory efforts ... in the usury laws'*, among others. Excepting Herbert Spencer<sup>76</sup> who despite accepting that there were *'plenty of trickeries, plenty of difficulties in the detection of fraud, plenty of instances showing the inability of purchasers, to protect themselves ...'* nevertheless advocated for *'the choice of the commodity may be safely left to the discretion of the buyers'*,<sup>77</sup> most of the classical economists including Adam Smith accepted some form of state protection for the consumer.

---

<sup>71</sup>Howells and Weatherill (n 38) 1.

<sup>72</sup>ibid 2 para 1.1.2. See also Scottish Enterprise, 'The Rationale for Intervention'.

<sup>73</sup>Howells and Weatherill (n 38) 2 para 1.1.2.

<sup>74</sup>See generally Atiyah (n 2) pp 294-310.

<sup>75</sup>ibid 322-323.

<sup>76</sup>ibid 321.

<sup>77</sup>ibid 322.

## Freedom of contract

Fundamental a doctrine as it is, the concept of freedom of contract is certainly not an absolute inalienable right. Indeed in the law of obligations, that power of the individual, without external influence or with minimal state intervention, to enter into a contract, determining the terms, is vitally important. Suggested to have originated in the 19<sup>th</sup> century, the observation of Sir George Jessel MR in 1885 on the notion of judicial laissez-faire is often considered a high watermark. He stated that “if there is one thing which more than any other public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contract entered into freely and voluntarily shall be held sacred and it shall be enforced by Courts of Justice”.<sup>78</sup> The concept is thoroughly and scholarly discussed by Professor Atiyah.<sup>79</sup>

Though a simple concept, there are different aspects to freedom of contract.<sup>80</sup> First is the concept of procedural freedom of contract. This sense of the freedom suggests that freedom of contract is valid only if the procedures for the contract are fair.<sup>81</sup> The second option of freedom of contract submits that a contract is fair if there is substantive fairness. Also known as instrumental understanding of contractual freedom including equal bargaining power.<sup>82</sup> This implies the terms and conditions forming the substance of the contract must be fair.<sup>83</sup> The third option suggests that contractual freedom permits only fair contracts. Where the contract is not fair contractual fairness does not apply. It is then opined that ‘there is no tension between

---

<sup>78</sup> *Smith v Hughes* [1960] 1 WLR 830.

<sup>79</sup> see generally Atiyah (n 2).

<sup>80</sup> Florian Rodl, ‘Contractual Freedom, Contractual Justice and Contract Law’ (2013) 76 *Law and Contemporary Problems* 57.

<sup>81</sup> *ibid.*

<sup>82</sup> *ibid.*

<sup>83</sup> *ibid.*

contractual freedom and contractual justice because contractual freedom can only be exercised in voluntary agreements with fair terms.<sup>84</sup>

### Caveat emptor

It is arguable that an unreasoned advocacy for the concept of freedom of contract might seem a perfect justification for the doctrine of caveat emptor which means 'buyer beware'.<sup>85</sup> Largely influenced by the classical model of contract law the doctrine is said to be 'the apotheosis of nineteenth century individualism'.<sup>86</sup> The doctrine in essence means 'that each party to a contract was left (to rely on his own judgement and not that of the other party). Neither party owes duties to the other to volunteer information or even to undecieve him when he plainly laboured under some misapprehension. Further there was no presumption that the terms of the contract bore any particular relationship to the price agreed upon'. The express terms determined the existence of warranty in the contract of sale. The courts' attitude to contract was formal and normative which means its enquiry into dispute focuses solely on express terms of the contract and whether the aggrieved party ought to have relied on any representations made by the other party and what expectations he was entitled to under the terms of the contract.<sup>87</sup>

It might seem that the judiciary embraced the doctrine of caveat emptor, if viewed from the observation in *Smith v Hughes*<sup>88</sup> that

*"Now in this case, there was plainly no legal obligation in the plaintiff in the first instance to state whether the oats were new or old. He offered them for sale according to the sample, as he had a perfect right to do, and gave the buyer the fullest opportunity of inspecting the sample, which, practically was equivalent to an inspection of the oats themselves. ....If, indeed, the buyer, instead of acting on his own*

---

<sup>84</sup> *ibid.*

<sup>85</sup> See *Chandler v Lopus* [1603] Cro Jac 4 viewed as the first case on caveat emptor. See discussion in Atiyah (n 2) 178–180 and 464–479.

<sup>86</sup> Atiyah (n 2) 464.

<sup>87</sup> *ibid* 465.

<sup>88</sup> *Smith v Hughes* [1960] 1 WLR 830 (n 78).

*opinion, had asked the question, whether the oats were old or new, if he had said anything which intimated his understanding that the seller was selling the oats as old oats, the case would have been wholly different...Here, however, nothing of the sort occurs. The buyer in no way refers to the seller but acts entirely on his own judgement.*"<sup>89</sup>

Certainly from the perspective of the common law, the irony of consumer protection in English law is that this nineteenth century doctrine emerged to create a regrettable friction with earlier existing protections for the public. In this regard, the influence of the political economists as highlighted above appears to have been critical in this downward trend.

The generic proposition for the adherents of caveat emptor was that the expressed terms in the contract made it indefeasible even if material information has been withheld from the individual.<sup>90</sup> Nevertheless, it is arguable that the doctrine did not have universal application under the common law, and rightly so. A survey of cases shows that the doctrine was not accepted by the judiciary as was propagated. Moreover the consumer was protected where there was express warranty and as where pursuant to *Pasley v Freeman*<sup>91</sup> there had been actual fraud.<sup>92</sup> However, any such protection in cases of fraud was undermined by its non-applicability to opinions expressed by the defendant and the defendant's non-disclosure. The proposal of Lord Kenyon in *Mellish v Motteaux*<sup>93</sup> of the doctrine of 'good faith' is evidence that the doctrine was not universally accepted.<sup>94</sup>

Nevertheless, this position must be viewed against the backdrop of the English Courts' historical reluctance, due to reasons of ensuring contractual certainty, to promote a doctrine of good faith. Recent cases in this regard include *Thompson v London Midland*<sup>95</sup> and *Scottish*

---

<sup>89</sup> *ibid.*

<sup>90</sup> Atiyah (n 2) 464-479.

<sup>91</sup> *Pasley v Freeman* 3 TR 51.

<sup>92</sup> JH Baker, *An Introduction to English Law* (4th edn, Butterworths Lexis Nexis 2002) 332.

<sup>93</sup> *Mellish v Motteaux* (1792) 170 ER 113 per Lord Kenyon at 157.

<sup>94</sup> See *Carter v Boehm* (1766) 97 ER 1162 at 1910 where a similar statement had been made.

<sup>95</sup> *Thompson v London Midland* [1930] 1 KB 41.



*Railway Co, Thornton v Shoe Lane Parking*,<sup>96</sup> all of which cases are relevant to the negotiation or bargain stages of fairness.<sup>97</sup> Statutes were enacted which did not encourage caveat emptor such as the Unfair Contract Terms Act (UCTA) 1977. It was generally not applied to land transactions. Although it is suggested that it did not apply to investments,<sup>98</sup> the government White Paper on the Gower Review seems to have endorsed caveat emptor.<sup>99</sup>

### **Philosophy and consumer protection**

While it may be disappointing for lawyers and economists to make the pursuit of justice subservient to commercial considerations, it is regrettable when such an approach is adopted by philosophers. For philosophy as a discipline dwells on 'first principles' often so strongly that it diminishes its practical utility. Thus while it is uncommon for Thomas Hobbes to make an incursion into the subject of contract law, more startling is his definition of contract as tantamount to the submission to the rule of law as a result of fear.<sup>100</sup> He noted that 'covenants entered into by fear in the condition of Meer Nature, are obligatory. For example, if I Covenant to pay a ransome, or service for my life, to an enemy; I am bound by it. For it is a contract, wherein one receiveth the benefit of life; the other is to receive money, or service for it; and consequently, where no other Law (as in the condition of mere Nature) forbiddeth the performance, the Covenant is valid'.<sup>101</sup> It is unusual that this view is not held in high esteem and was criticised by later philosophers such as Hume and Locke, the latter of whose views on protection of the individual by the state was ambivalent.<sup>102</sup> The present author submits that the

---

<sup>96</sup>*Scottish Railway Co, Thornton v Shoe Lane Parking* [1971] 2 QB 163. See also *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1988] 2 WLR 615, [1988] 1 All ER 348.

<sup>97</sup>As exemplified in *A Schroeder Music Publishing Co Ltd v Macauley* [1974] 3 All ER 616.

<sup>98</sup>See discussion on disclosure in Robert R Pennington, *The Investor and the Law* (Macgibbon & Kee Ltd 1968).

<sup>99</sup>'Financial Services in the United Kingdom-A New Framework for Investor Protection' (Department of Trade and Industry 1985) White Paper Cmnd. 9432.

<sup>100</sup>See Atiyah (n 2).

<sup>101</sup>*ibid.*

<sup>102</sup>*ibid.*

concept of justice and fairness are fundamental to the protection of the consumer and this is pursued in this thesis.<sup>103</sup>

## Rationales for Consumer Protection

Law is inherently anti discriminatory. Yet to advocate that the state should make laws that protect one party to a transaction, effectively overriding terms of the contract is to suggest potentially that the state must intervene to redefine the terms of the original contract against the other party. The question then arises whether there can be any rationale, to justify the state taking such actions?

The rationales for state intervention in consumer protection can be viewed from different lenses. From an economic perspective, 'the failure of one of the conditions for the optimal operation of a competitive market', market failure, is opined as a rationale for state intervention in consumer protection.<sup>104</sup> Market failure affects prices and quality, in effect the consumer experience. So it is necessary to address it by examining the potential failures. Two significant failures often talked about are first information failures which includes the lack of adequate information on price, quality and terms. Secondly, regard must be had to the institutional framework and its efficiency since it determines the performance of market exchanges. The provision of all relevant information is necessary for a fair market exchange particularly the case in consumer and business transactions. When Lord Denning stated that there are certain clauses that '*in order to give sufficient notice, it would need to be printed in red ink with a red hand pointing to it-or something equally startling*', he was stressing the importance of information to a party in a contract.<sup>105</sup> The recognition of information failures clearly are acknowledged in measures such as truth in lending, controls on misleading advertising and

---

<sup>103</sup>See John Rawls, *Justice as Fairness: A Restatement* (Harvard University Press 2003).

<sup>104</sup>See generally Ramsay (n 70) 42-56.

<sup>105</sup>*Scottish Railway Co, Thornton v Shoe Lane Parking [1971] 2 QB 163* (n 96).

implied warranties which seek to 'address imperfections either in the provision of market information or in a consumer's ability to process complex information'.<sup>106</sup>

The growth in behavioural economics is considered a rationale for consumer protection. Behavioural economics challenges traditional neoclassical economic theory founded on the premise of rational thinking humans.<sup>107</sup> Humans respond differently to situations based on how they are framed,<sup>108</sup> information overload negatively affects consumer decisions,<sup>109</sup> fairness,<sup>110</sup> and humans caring for others' emotions.<sup>111</sup> Such being the case, state intervention is necessary to address.

Behavioural economics complicates competition which is another rationale for protecting consumers.<sup>112</sup> Among others, Ramsey suggests that the traditional sense of competition which focused on supplier side is said to be shifting and<sup>113</sup> the large literature on switching costs, the literature on behavioural economics among others has a bearing on costs and affects consumers.<sup>114</sup> It has thus been argued that control of terms of contract is a factor that may help in resolving the issue. The impact of behavioural economics undermines the traditional thinking by rationalists that consumers make rational decisions when in reality they make irrational decisions. Further, consumer interests influence competition policy in ensuring that laws made protect consumers from the less obvious activities of cartels.

---

<sup>106</sup>See Ramsay (n 70) 54–56.

<sup>107</sup>See generally *ibid* 56–67. See also Iain Ramsay, 'Regulation and the Constitution of the EU Single Market: The Contribution of Consumer Law' (2010) 50 *Canadian Business Law Journal* 322.

<sup>108</sup>Ramsay (n 70) 58–59.

<sup>109</sup>*ibid* 59–60.

<sup>110</sup>*ibid* 60.

<sup>111</sup>*ibid* 60–61.

<sup>112</sup>See generally *ibid* 67–70.

<sup>113</sup>*ibid* 67–68.

<sup>114</sup>*ibid* 68.

Another rationale for consumer protection is the issue of positive welfare or a redistribution of power and resources, since the average consumer is poor and has to rely on the protection of others.<sup>115</sup> This is discussed by Ramsey under equity.<sup>116</sup> Another term linked to poverty is social exchanges which is a generic term regarding low income related to employment situations, lack of access to services such as education and residence in poor environment.<sup>117</sup> Paternalism is universally acknowledged as a factor in protecting consumers<sup>118</sup> and this refers to measures adopted by the government to protect the consumer because they cannot protect themselves.<sup>119</sup> Paternalism has both positive and negative connotations which brings the question of consumer sovereignty.<sup>120</sup> A final rationale to consumer protection is sustainable consumption.<sup>121</sup> Emanating from the UN consumer protection guidelines, this takes account of consumers interest in the environment and enable businesses to approach issues with that objective.<sup>122</sup>

A highly instructive observation made in Australia is that

*“In consumer transactions, unfair practices are widespread. The existing law is still founded on the principle known as caveat emptor – meaning “let the buyer beware”. That principle may have been appropriate for transactions conducted in village markets. It has ceased to be appropriate as a general rule. Now the marketing of goods and services, is conducted on an organised basis and by trained business executives. The untrained consumer is no match for the business man who attempts to persuade the consumer to buy goods or services on terms and conditions suitable to the vendor. The consumer*

---

<sup>115</sup> Peter Cartwright, *Consumer Protection in Financial Services* (Kluwer Law International 1999) 28.

<sup>116</sup> See generally *ibid* 70–80.

<sup>117</sup> cited in *ibid* 73–74.

<sup>118</sup> See generally *ibid* 81–82.

<sup>119</sup> *ibid* 81.

<sup>120</sup> *ibid*.

<sup>121</sup> *ibid*.

<sup>122</sup> *ibid* 82–83.

*needs protection by the law and this Bill will provide such protection.*  
123

Considered against the backdrop of the deficiencies in the common law, it is understandable that legislative intervention became necessary in protecting the consumer.

### **The impact of the law of tort**

Developments in the law of tort are similarly crucial in the examination of consumer protection law. Indeed the law of tort is the origin of the criminal law.<sup>124</sup> The examination may be undertaken through *Donoghue v Stevenson*.<sup>125</sup> The material facts well known, the question that was before the court was whether a consumer of a product had a cause of action in negligence against a manufacturer with whom it had no contract. Lord Buckmaster, dissenting argued that "the principle of tort lies completely outside the region whose such considerations apply, and the duty; if it exists, must extend to every person who, in lawful circumstances, uses the article made. There can be no special duty attaching to the manufacture of food apart from that implied by contract or imposed by Statute" 'except where the article was dangerous in itself and where by reason of some defect or some other reason known to the manufacturer'. This was the general common law position at the time as gleaned from the case law.<sup>126</sup>

Lord Atkins disagreed referring among others to Kelly C.B's statement in *George v Skivington*<sup>127</sup> that if there was liability in an action on the case for unskillfulness and negligence in the manufacture then he argued, rightly that such a duty existed towards the purchaser, extending to the person for whose use the vendor knew the compound was purchased" He cited

---

<sup>123</sup> Cited in Harvey (n 56) where Senator Murphy, then Australian Attorney-General, was introducing the Trade Practices Bill of the Commonwealth of Australia in the Senate—who was equally quoting John Goldring' Consumer Protection and the Trade Practices Act 1974-5' 6 Federal L Rev at 288.

<sup>124</sup> Plucknett (n 55) 422-423.

<sup>125</sup> *Donoghue v Stevenson* 1932 UKHL 100 (n 49).

<sup>126</sup> *Langridge v Levy* 2 M & W 519; 4 M & w 337. See *Longmeid v Holliday* 6 EX 761. See also *Winterbottom v Wright* 10 M & W 109. See particularly *Blacker v Lake and Elliot* Ld 106 LT 533.

<sup>127</sup> *George v Skivington* LR 5 Ex 1.

both English and US authorities such as *Hawkins v Smith*<sup>128</sup> and *Elliot v Hall*<sup>129</sup> and in respect of the latter he noted that '*the mouse had emerged from the ginger-beer bottle in the United States before it appeared in Scotland, but there it brought liability upon the manufacturer*'.<sup>130</sup>

He concludes by noting the ratio that

*'a manufacturer of products, which he sells in such a form as to as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take reasonable care'*.

This decision marked a significant shift not only in the development of the law of tort and negligence in particular, but for our purposes it marked a major development in the protection of the consumer against acts by businesses. The case itself reaffirmed developments which had taken place in the courts approach as clearly manifested in notable property cases and railways cases such as *Francis v Cokrell*.<sup>131</sup>

### **The emergence of consumer specific legislations**

The history of the common law and in particular contract law, demonstrates the invaluable role it has played in the protection of the individual in society.<sup>132</sup> Nevertheless it is arguable that it was not an easy means for individuals to contend for their rights. One cannot deny the technicality of the common law, even for legal persons. The doctrines of covenant, debt, assumpsit and deceit are clearly hard, a situation compounded by uncertain legal interpretations.<sup>133</sup> These factors including cost of bringing court proceedings, necessitated

---

<sup>128</sup>*Hawkins v Smith* 12 Times LR 532.

<sup>129</sup>*Elliot v Hall* [1885] 15 QB D 315.

<sup>130</sup>*ibid.*

<sup>131</sup>*Francis v Cokrell* LR 5 QB 505.

<sup>132</sup>See generally SFC Milsom, *Historical Foundations of the Common Law* (2nd edn, Butterworths & Co (Publishers) Ltd 1981).

<sup>133</sup>See generally Alfred William Brian Simpson Simpson

Parliamentary involvement in protecting the individual. Modern Parliamentary recognition of the need to protect the individual found expression in the enactment of a succession of generic statutes each of which dealt with a particular theme.<sup>134</sup> Word count restrictions affect detailed review of the background leading to Parliamentary enactments of these statutes which unsurprisingly relate principally to goods and services.

Briefly, the 1893 Sales of Goods Act<sup>135</sup> essentially codified the protections available under the common law to the purchaser in sales of goods transactions.<sup>136</sup> These protections were scattered across different cases thus it made sense to codify them. The Trade Descriptions Act 1968 was enacted by parliament to replace the Merchandise Marks Act 1887 to 1953 by providing new prohibitions regarding misdescriptions of goods, services, accommodation and facilities provided in the course of trade. The Sales of Goods Act 1979<sup>137</sup> and the Sales of Goods and Services Act 1982<sup>138</sup> strengthened the protections for the consumer, with the latter adding services. The Sale of Goods Act 1979 contained provisions on implied warranties and obligations. There are equally laws which protect the consumer in respect of torts, negligence, misrepresentation and or defects. The Misrepresentation Act 1967 is an instance of such protection for the vulnerable consumer. The Unfair Contract Terms Act 1977<sup>139</sup> protects the consumer in respect of negligence claims where the business entity has striven to protect itself with exemption clauses in transactions based on the business' standard contract.<sup>140</sup> A key concept introduced in UCTA is the requirement of reasonableness in exemption clauses. The

---

, *A History of the Common Law of Contract The Rise of the Action of Assumpit* (Oxford University Press 1975). See also WT Barbour, *The History of Contract in Early English Equity*.

<sup>134</sup> See Sir Gordon Borrie, *The Development of Consumer Law and Policy-Bold Spirits and Timorous Souls* (Stevens & Sons Limited 1984).

<sup>135</sup> Sale of Goods Acts 1893.

<sup>136</sup> David J Ibbetson, 'Sale of Goods in the Fourteenth Century' (1991) 107 *Law Quarterly Review* 480.

<sup>137</sup> Sales of Goods Act 1979.

<sup>138</sup> Sales of Goods and Services Act 1982.

<sup>139</sup> Unfair Contract Terms Act 1977.

<sup>140</sup> Consumers International (CI), 'A Guide to Developing Consumer Protection Law' <[www.consumersinternational.org](http://www.consumersinternational.org)>.

Unfair Terms Contracts in Consumer Contracts Regulations 1999 focuses on unfair terms which have not been individually negotiated, introducing the concept of good faith and a list of indicative terms considered unfair.<sup>141</sup>

Another UK enactment which protects consumer transactions is the Consumer Protection (Distance Selling) Regulations 2000. This Regulation came into force on 31 October 2000 and the purpose of the Regulation was to generally protect the consumer regarding distance selling transactions. It required that in online contracts there must be guarantee of a 'cooling off' period for the consumer'. The Consumer Contracts (Information, cancellation and Additional Charges) Regulations 2013 have since 13 June 2014 replaced the 2000 Act extending the cooling off period to fourteen days. In respect of pre-contract disclosure, the Consumer Protection from Unfair Trading Regulations 2008 prohibits unfair trading, misleading and aggressive trading practices and thirty one unfair practices which is applicable in advertising. The Act introduces the concept of the average consumer.<sup>142</sup>The offences in this provision are criminal in nature. The Consumer Rights Act 2015 have now consolidated the above acts.<sup>143</sup>

### **Who is the consumer?**

Now addressed is the assumption made above as to the meaning of the word consumer. The use of the word 'consumer' in consumer protection regulation is of recent origin. 'Consumer' is the nominal form of the verb 'consume', which according to the Oxford Dictionary means to 'eat, drink, or ingest (food or drink)'. Another definition given is 'buy (goods or services)'. The Dictionary defines the consumer as 'one who purchases goods and services for personal use' and 'a person or thing that eats or uses something'. Synonyms from the Oxford Dictionary

---

<sup>141</sup>Unfair Terms in Consumer Contracts Regulations (UTCCR) 1999.

<sup>142</sup>Criminal Enforcement of the Consumer Protection from Unfair Trading Regulations 2008-OFT Policy OFT1273'.

<sup>143</sup>Consumer Rights Act 2015.



are 'shopper, buyer, customer and purchaser'. The Monoly Committee on the other hand defined the consumer as '... one who purchases (or hire-purchases) goods for private use or consumption'.<sup>144</sup> It is obvious that the definition provided by the Monoly Committee is narrow and does not capture the spectrum of who is recognised as a consumer. The dictionary embraces services which are excluded from the above definition of the Committee.

Legislative use of the word consumer emerged under section 12 of the Unfair Contracts Terms Act 1977 states that a party to a contract deals as a consumer if "*a) he neither makes the contract in the course of the business nor holds himself out as doing so; b) the other party does make the contract in the course of the business*".<sup>145</sup> This definition is broad and suggests that where a business entity purchases goods for its staff, it is a consumer. The question then arises this connotation is consistent with the intention of the statute. The Consumer Protection Act 1987 defines a consumer as 'a) in relation to any goods , means any person who might wish to be supplied with the goods for his own private use or consumption; b) In relation to any services or facilities, means any person who might wish to be provided with the services or facilities otherwise than for the purposes of any business of his; and c) In relation to any accommodation, means any person who might wish to occupy the accommodation otherwise than for the purposes of any business of his'.<sup>146</sup> The use of the word person, without qualification also embraces businesses. This issue is nevertheless addressed in Regulation 2 of the Unfair Terms in Consumer Contracts Regulations 1999 which describes a consumer "a natural person who, in making a contract to which these regulations apply, is asking for purchases which are outside his business".<sup>147</sup> Some may however question whether where a business entity purchasing for its staff should be treated as a consumer. Most recently, the Consumer Rights Act 2015 has

---

<sup>144</sup>The Molony Committee (n 5) p 1 para 2.

<sup>145</sup>S.12 Unfair Contract Terms Act 1977 (n 139).

<sup>146</sup>S. 20(6) Consumer Protection Act 1987.

<sup>147</sup>Reg 2 Unfair Terms in Consumer Contracts Regulations (UTCCR) (n 141).

defined the consumer as ‘an individual acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession’.<sup>148</sup>

Professor Cartwright has cautioned<sup>149</sup> that “it is important not to limit the term consumer to contracting parties, as that might exclude the ultimate user of goods and services such as the plaintiff in *Donoghue v Stevenson*.”<sup>150</sup> It has also been suggested that when the citizens charter was being drafted, it was considered whether it was appropriate to describe it as a consumer’s charter but as Professor Cartwright have suggested, “the legacy of the Citizens Charter is that citizens have increasingly been treated as consumers, rather than consumers as citizens.”<sup>151</sup> The Molony Committee itself stated that the consumer is “everybody all of the time”.<sup>152</sup> It is agreed that Consumerism is just as concerned with the supply of services as with goods. The consumer merely becomes the client or patient, or whatever rather than the shopper.<sup>153</sup> The present author adopts a broad conception of the consumer because even though earlier laws did not use the word consumer, the individual afforded protections was arguably a consumer.

### **The European dimension**

While multiplicity of reasons may account for the loss of a consumer’s sovereignty, it is often not expected that a country may voluntarily cede its sovereignty for any purpose. Indeed in the UK, the principle of parliamentary sovereignty, that principle that Parliament only can make and unmake any law, is a cornerstone of its constitutional order. Nevertheless the formation of and subsequently, the United Kingdom’s joining of the European Union is another significant decision which impacted not only Parliament’s sovereignty but also elevated the rights of the

---

<sup>148</sup>sections 2, 3 and 4 Consumer Rights Act 2015 (n 143).

<sup>149</sup>Peter Cartwright, *Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK* (Cambridge University Press 2001) p 3.

<sup>150</sup>*Donoghue v Stevenson* 1932 UKHL 100 (n 49).

<sup>151</sup>Cartwright, *Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK* (n 149) p 4.

<sup>152</sup>The Molony Committee (n 5) para. 16.

<sup>153</sup>Cartwright, *Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK* (n 149) p 4.

consumer beyond the borders of the United Kingdom.<sup>154</sup> A detailed history of the European Union is beyond the scope of this work<sup>155</sup> but it is important to stress that there are many institutions that form the EU and the sources of law is variable. The legal relationship between the EC and the UK is highly significant to understanding developments in consumer legislation. First, EU law including decisions of the European Court have supremacy over UK laws, so long as the UK is part of the European Union.<sup>156</sup>

Yet it is in the area of directives that the rights of the consumer become significant. According to Article 249 (Ex 189) EC, a directive “ shall be binding, as to the results to be achieved, upon each member state to which it is addressed, but shall leave to the national authorities, the choice of form and method”.<sup>157</sup> In order to ensure that member states implement directives into national law, there are three fundamental jurisprudence developed by the European Courts. First, in the absence of proper implementation, a directive couched in sufficiently clear terms is capable of being applied by national courts against the state.<sup>158</sup> Second, in the absence of implementation, national courts are expected to fulfil an obligation to interpret existing national law in order to conform to Community law.<sup>159</sup> Third, significantly and somewhat ironically, the rights of the individual have been elevated above the state, failure to implement a directive may result in the liability of the state, not private persons, to compensate individuals who have suffered loss caused by such non-implementation.<sup>160</sup> The courts declared in *Francovitch* that “the full effectiveness of community provisions would be affected and the protection of the right to be recognised undermined if individuals were not able to recover damages when their

---

<sup>154</sup> See generally Ramsay (n 107).

<sup>155</sup> See generally Howells and Weatherill (n 38) 99–144.

<sup>156</sup> Section 2 (1) European Communities Act 1972.

<sup>157</sup> Treaty establishing the European C 325, 24/12/2002 P. 0033-0184 Community (Consolidated version 2002)n Article 249 (Ex 189).

<sup>158</sup> *ibid* Article 10 (Ex 5).

<sup>159</sup> *ibid* Article 226 (169). *Marleasing SA v La Comercial Internacional de Alimentacion SA C-106/89*.

<sup>160</sup> *Francovitch, Bonifaci & Others v Italy ECJ 19 Nov 1991*.

rights were infringed by a breach of community law attributable to a member state.<sup>161</sup> Since there are many EU Directives on protection of the consumer, it must be stressed that this has serious implications for the protection of the consumer under UK law.<sup>162</sup>

In relation to financial services, in 1973 when the European Economic Community was established, not much by way of regulation existed at the time.<sup>163</sup> The focus at the time was more about product regulation under UCITS and the Third Life Directive which related to passporting within the EEC and prudential regulation.<sup>164</sup> Subsequently, the UK enacted the Financial Services Act 1986 (FSA) further to the Gower Review and recommendations. However the pendulum swung to the EU in 1999 with the development of and adoption of a Financial Services Action Plan with the aim of single market and harmonisation of financial sectors.<sup>165</sup> In 2005 the Financial Services Policy was introduced to explore best ways of consolidating progress on the FSAP. In 2007 a Green Paper on Financial Services was developed and in 2008 more emphasis was placed on consumer protection regulation through the Consumer Protection Aspects of Financial Services. The Second Green Paper on Financial Services and a Joint Discussion on Automated Financial Advice developed by the EU are similarly significant to consumer protection but in the end the United Kingdom's contribution to consumer protection in financial services is recognised and the EU's approach considered ambiguous.<sup>166</sup> Significantly Parliament has voted to take back its full sovereignty by voting to implement the decision of the UK voters to leave the European Union<sup>167</sup> in a complex political

---

<sup>161</sup> *ibid.*

<sup>162</sup> See generally Jana Valant, 'Consumer Protection in the EU-Policy Overview' [2015] European Parliamentary Research Service. See also Anna Morner, 'The European Union, Financial Services and the Consumer', *Consumer Protection in Financial Services* (Kluwer Law International 1999).

<sup>163</sup> David Severn, 'The Implications of Brexit for UK Consumers of Financial Services: A Think-Piece' <[https://www.fs-cp.org.uk/sites/default/files/consumer\\_panel\\_brexit\\_research\\_october\\_2016.pdf](https://www.fs-cp.org.uk/sites/default/files/consumer_panel_brexit_research_october_2016.pdf)> accessed 7 July 2018 The present author owes this section of the work and a major of the Brexit discussion to this document.

<sup>164</sup> *ibid* see paragraph 6.1.

<sup>165</sup> *ibid* see paragraph 6.2.

<sup>166</sup> *ibid* see paragraph 6.11.

<sup>167</sup> European Union (Notification of Withdrawal) Act 2017.

process informally titled Brexit. This would impact UK consumer protection and the discussion is pursued in the final part of Chapter.

### **Competition law and the consumer**

A notable feature of responsible societies is the recognition that businesses cannot be granted unfettered power to compete in a manner that ultimately hurts the consumer. The Preface has pointed out the negative view of the livery companies as monopolies.<sup>168</sup> It is also noteworthy that narrow financial interest has driven both the application by business for monopolies and issuance of monopolies by the Royal Family. Queen Elizabeth I in exercise of royal prerogative and further to the financial incentive that came with it, had granted monopolies to new businesses by way of patents.<sup>169</sup> Even then the Queen's narrow financial motive did not prevent her from fulfilling her 1601 promise to enact in 1602 law revoking grants inconsistent in law and holding a patent was unlawful as it is no new invention and did not further commerce.<sup>170</sup> Expressing a consistent theme, the 1999 white paper 'Modern Markets: Confident Consumers'<sup>171</sup> indicated the need to avoid placing impediments to proper competition, the object being improving the efficiency of the market.

There are basically three dimensions to the question of anti-competitive developments in United Kingdom. This involves the creation of cartels, monopolies and mergers.<sup>172</sup> Cartels refer to businesses colluding to hurt consumer interest through fixing of prices. Contracts enabling restraint of trade were under the common law unenforceable. Further legislative changes have since taken place including the Statute of Monopolies enacted by James I, Patent Acts

---

<sup>168</sup> See discussion in Palfreyman (n 7) 63–71.

<sup>169</sup> cited in Harvey (n 56) 287.

<sup>170</sup> *ibid.*

<sup>171</sup> 'Modern Markets: Confident Consumers-The Government's Consumer White Paper (Command Paper)' (Department of Trade and Industry 1999).

<sup>172</sup> Harvey (n 56) 286–308.

1977.<sup>173</sup> Significant regulation came in the form of EC regulation Articles 81 and 82 and in the UK Competition Act 1998 which is largely consistent EU law and the Enterprise Act 2002. Monopolies are inconsistent structurally with the operation of markets as it prevents the invisible hand to operate in the consumer's interest. Significant regulation came in the form of EC regulation Articles 82 EC Article 86 EC regulates state monopolies and was transposed into the Competition Act 1980.<sup>174</sup> Mergers include section 73 of Fair Trading Act 1973 where political discretion was exercised. Further to the White Paper in 2001 Productivity and Enterprise: A World Class Competition Regime, Part 3 of the Enterprise Act 2002 was enacted to regulate mergers. The Competition Act 1998 and The Enterprise Act 2002 are current UK legislation dealing with the question of competition.

### **What is vulnerability?**

The consumer is the entity who is considered vulnerable in relation to this thesis. Consumers are heterogeneous, and vulnerability is relative.<sup>175</sup> By the vulnerable consumer reference is made to the consumer as a class or a group and secondly, the consumer as an individual.<sup>176</sup> Meanwhile the concept of vulnerability has varied definitions. Smith and Cooper-Martin have defined vulnerability as those 'more susceptible to economic, physical, or psychological harm in or as a result of economic transactions because of characteristics that limit their ability to maximize their utility and well-being'.<sup>177</sup> It is suggested that the focus on personal characteristics is narrow.<sup>178</sup> An arguably strong definition is that provided by the Victoria Papers that vulnerability is '*the exposure to the risk of detriment in consumption due*

---

<sup>173</sup>See Patent Acts 1977 and Monopolies and Restrictive Practices Act (Inquiry and Control) Act 1948, Restrictive Trade Practices Act 1956, Restrictive Trade Practices Act 1976 and Fair Trading Act 1973.

<sup>174</sup>Competition Act 1980.

<sup>175</sup>Peter Cartwright, 'The Vulnerable Consumer of Financial Services: Law, Policy and Regulation'.

<sup>176</sup>ibid.

<sup>177</sup>cited in ibid.

<sup>178</sup>ibid.

*to the interaction of market, product, and supply characteristics and personal attributes and circumstances*'.<sup>179</sup> Professor Cartwright has noted that this definition reveals the broad context and consistent with the Thoresen Review of Generic Financial Advice who identify what it calls 'drivers of vulnerability'.<sup>180</sup>

In distinguishing the general consumer from the vulnerable, Burden states that consumer vulnerability results from two factors including the need to obtain or to deal with information needed to make appropriate purchasing decisions, and second, because they may suffer greater loss than other consumers by making inappropriate purchase decisions.<sup>181</sup> He identifies seven vulnerable groups including the elderly, the young, the unemployed, those with a limiting longstanding illness, those in low-income households, members of ethnic minorities and those with no formal educational qualifications. This definition is however criticised because other elements contribute to vulnerability.<sup>182</sup> The Legal Services Consumer Panel adopted the British Standard which broadly looks at vulnerability from the characteristics of the individual and the market and the interaction of both.<sup>183</sup> The individual risk factors are age, inexperience, learning disabilities, physical disabilities, English as a second language, among others. It introduces dynamism into the approach by introducing concepts such as fluctuating vulnerabilities and short term vulnerabilities. In respect of market vulnerability, the British standard focuses on timely, affordable and accessible access by consumers to the market, the receipt of right of advice, the availability of choices of suppliers, the provision of right information, the avoidance of discrimination and access to redress in respect of a problem.<sup>184</sup> It is agreed with Professor

---

<sup>179</sup> Consumer Affairs Victoria, 'What Do We Mean by "vulnerable" and "Disadvantaged" Consumers?- Discussion Paper' <[www.consumer.vic.gov.au](http://www.consumer.vic.gov.au)> accessed 11 July 2018.

<sup>180</sup> Cartwright, 'The Vulnerable Consumer of Financial Services: Law, Policy and Regulation' (n 175).

<sup>181</sup> Noted in *ibid*.

<sup>182</sup> *ibid*.

<sup>183</sup> 'Recognising and Responding to Consumer Vulnerability-A Guide for Legal Services Regulators' [2014] Legal Services Consumer Panel.

<sup>184</sup> *ibid*.

Cartwright is a helpful shorthand term to describe those consumers who are particularly susceptible to loss or harm'.<sup>185</sup> He identifies taxonomy of vulnerability information, pressure, supply, redress and impact vulnerability.<sup>186</sup>

### **Significance of the thesis**

Although essentially a legal thesis this study examines profound issues of serious socio economic and political importance. As indicated in the Preface, consumer protection issues have had a long history with consequential implications on almost every aspect of life in England. Moreover it is evident that crisis in fraud can have grave global impacts and that no country is insulated from the potential consequences of fraud crises. Significantly, various domestic and transnational studies show that fraud in general is a major problem, but consumer fraud is of more critical importance. For instance, in a study conducted to examine the nature, extent and economic impacts of fraud in the United Kingdom, Professor Levi's team concluded that the cost of fraud to private individuals exceeded that of businesses.<sup>187</sup> While the cost of fraud to corporate financial services institutions exceeded 1 billion in 2005, the cost to private individuals exceeded 2.75 billion.<sup>188</sup>

A recent 2018 study of the economic and social costs of crime puts the cost to individuals in 2015/2016 to be 50 billion and for businesses at 9 billion.<sup>189</sup> An EU study on the economic and social impacts of organised crime in the European Union puts the cost of fraud against

---

<sup>185</sup>Cartwright, 'The Vulnerable Consumer of Financial Services: Law, Policy and Regulation' (n 175).

<sup>186</sup>ibid.

<sup>187</sup> Michael Levi, John Burrows and Matthew Hopkins, 'The Nature, Extent and Economic Impact of Fraud in the UK' (Association of Chief Police Officers' Economic Crime Portfolio 2007) 4 <<http://orca.cf.ac.uk/48242/>> accessed 20 September 2018.

<sup>188</sup> ibid.

<sup>189</sup> Matthew Heeks and others, 'The Economic and Social Costs of Crime Second Edition' (Home Office 2018) 99 6 <[https://www.gov.uk/government/publications/the-economic-and-social-costs-of-crime?utm\\_source=f750e4fd-a260-434a-a2d9-05181bd7d838&utm\\_medium=email&utm\\_campaign=govuk-notifications&utm\\_content=immediate](https://www.gov.uk/government/publications/the-economic-and-social-costs-of-crime?utm_source=f750e4fd-a260-434a-a2d9-05181bd7d838&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate)> accessed 20 September 2018.



individuals at 79 billion Euros.<sup>190</sup> This is a huge amount considering the fact that the cost to the individual includes negative emotional impact and the cost of recovery which may never be realised if the individual is aged. The significance of this study is made more essential by the fact that the Office of National Statistics 2018 crime figures show that individuals are more likely to be victims of fraud and cybercrime than any other crime.<sup>191</sup> Indeed the estimate of 3.34 million fraud offences and 1.23 million cybercrime offences means the two crimes together account for half of all crimes.<sup>192</sup> Despite all these startling statistics, all of which put the estimate at conservative levels, it is acknowledged by all the studies that consumer fraud has not been given the needed attention. It is in this regard that this study is significant, particularly as since FSMA 2000 regulators have recognised the need to place emphasis on consumer protection.

### **Sectors which are the focus of this research**

This work focuses on the markets, consumer credit and conveyancing transactions. First it is acknowledged that consumer activities belonging to these sectors are complex transactions. Within the markets for instance, it is acknowledged that among others there is information asymmetry and complexity of transactions. In regard to complexity, the Sandler Report states 'retail products are inherently more complex than almost all consumer goods'<sup>193</sup> Professor Cartwright has stated that it can be brought down to the simple truth that many financial products are hard for consumers to understand. The purchase of a property with mortgage

---

<sup>190</sup> Michael Levi and others, 'The Economic, Financial and Social Impacts of Organised Crime in the European Union' (European Parliament's Special Committee on Organised Crime, Corruption and Money Laundering (CRIM) 2013) 37 <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493018/IPOL-JOIN\\_ET%282013%29493018\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493018/IPOL-JOIN_ET%282013%29493018_EN.pdf)> accessed 20 September 2018.

<sup>191</sup> Office of National Statistics (ONS), 'Overview of Fraud Statistics: Year Ending Mar 2016' (Office of National Statistics (ONS)) <<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/overviewoffraudstatistics/yearendingmarch2016#which-groups-in-society-are-most-likely-to-be-victims-of-fraud>> accessed 20 September 2018.

<sup>192</sup> *ibid.*

<sup>193</sup> Cited in Cartwright, 'The Vulnerable Consumer of Financial Services: Law, Policy and Regulation' (n 175).

funding would certainly involve interactions with various professionals partly due to the complexity and the rules governing the nature of the transaction. Secondly, as stated in the Preface relationships exist among the financial services, consumer credit and the conveyancing sector. The relationship between the markets and the consumer credit market is confirmed by the fact that in the United Kingdom both are regulated by the Financial Conduct Authority (FCA).<sup>194</sup> Thirdly and rightly identified by Professor Cartwright is the propensity for consumers to be 'mislead' in such transactions.<sup>195</sup> In short consumers are more likely to become victims of fraud in the financial and consumer credit services industries in general and the conveyancing sector. Indeed many consumers became victim of fraud during the recession which affected both the conveyancing sector and those who have traded on the markets as their investors. Further conveyancing involves access to legal services and it has rightly been recognised that consumers may be vulnerable in accessing legal services and any such defect affects rule of law and access to justice.<sup>196</sup> To the present author's knowledge, no major work has focused on the relationship between the three pronged areas with specific reference to fraud. It is therefore anticipated this work would contribute to understanding of the relationship that exists between these inherently linked sectors.

## Conclusion

There are various dimensions to a study on consumer protection and fraud in particular. What Chapter One has sought to do is introduce the reader to the broad subject area, including its history, the earlier forms of protection available to the individual, the economic and philosophical movements that influenced legal development both under the common law and statute. It also gives a sneak preview into the present era including the architecture for

---

<sup>194</sup> Financial Services Act 2012.

<sup>195</sup> Cartwright, 'The Vulnerable Consumer of Financial Services: Law, Policy and Regulation' (n 175).

<sup>196</sup> 'Recognising and Responding to Consumer Vulnerability-A Guide for Legal Services Regulators' (n 183).

protection of the vulnerable consumer. The foundation is thus laid for the discussions that follow in the rest of the work. Chapter Two looks at the concept of fraud including examining its history, relationship to morality, and perspectives under the common law, equity and under the criminal law in England. The Chapter ends by providing a generic definition of the concept of consumer fraud. The exploration is given specific relevance in Chapters Three, Four and Five where frauds within financial services, consumer credit and conveyancing frauds are discussed respectively. Chapters Six and Seven deal with the issue of legal and regulatory measures the consumer can adopt to enforce his rights. The challenges associated with a strictly legal framework have led to the introduction of other modes of protection such as administrative or regulatory law provided by trade associations or professional bodies.

Chapter Eight examines the key question as to how effective the current system of consumer protection protects the vulnerable against fraud in England while at the same time addressing several other issues raised by the discussions in the thesis. For instance, drawing inspiration from the terminology used in United States the thesis attempts to provide a working definition of consumer fraud in the UK. The present author also finds that although there are varied definitions and approaches to the concept of vulnerability in the UK, they are not all embracing. The author attempts to respond to this situation by similarly providing a universal definition of vulnerability. Furthermore, varied rationales have been provided for the need to protect the consumer including the need to deal with consumer information vulnerability. These rationales have nevertheless not been anchored on generic first principles of philosophy. The author proposes that the doctrines of the 'veil of ignorance' and 'original position' as employed in Professor John Rawls' 'Theory of Justice' can act as the basis for such first principles.<sup>197</sup>

---

<sup>197</sup> See generally Rawls (n 103).

The present author focuses on the concept of fraud and explores the issue from an earlier period with the protection of the individual driving the discussion. The author would in the end submit that early English law did protect the consumer in both direct and indirect ways and developments of consumer protection legislations in the twentieth century only served to advance and refocus protections that existed in earlier times. The present author also submits that while works have been undertaken that deal with consumer protection in consumer credit and conveyancing fraud and in a limited sense financial services with the markets as the focus, this work is unique in delineating the relationships that exist among these three areas.<sup>198</sup> A question explored by the essay is whether the same standards should apply for the protection of all types of consumers.

In the end the author submits that this essay, although exploratory in nature, brings to the fore important theoretical debates in consumer protection in the area of fraud that makes an important contribution to the ever expanding scope of consumer protection. The author also takes the opportunity to explore briefly what the state of consumer protection would be after the UK departs from the European Union. The present author adopts a multidisciplinary inspiration for the philosophical and practical proposals it makes for the protection of the consumer in the markets, consumer credit and the real estate sectors. It is genuinely anticipated that the measures proposed in this work can drive prospective legislative and administrative policy directions. The author asks whether we are possibly missing something vital in protecting vulnerable consumers by the narrow approach to the discussion. The author acknowledges that it is illusory to promise to adequately protect the consumer when there are clear weaknesses in the system. The work serves as a platform from where others can pick up inspiration for further investigations.

---

<sup>198</sup>See George Walker, Robert Purves and Michael Blair, *Financial Services Law* (4th edn, Oxford University Press 2018) which deals with all 3 areas but not specifically from the perspective of fraud.

## CHAPTER TWO (2)

### WHAT IS FRAUD?

#### Introduction

The pursuit of a generic definition for the concept of fraud may appear to be a futile quest.<sup>1</sup> For this reason, the proposition that fraud is difficult to define is ubiquitous in many literature.<sup>2</sup> One reason is that fraud has tentacles in both civil and criminal jurisdictions in English law. As a natural consequence, it would be difficult to couch an all-embrasive definition. Furthermore, the evolution of the concept has been coarse. For instance, in England, it was a concept applied principally in the courts of equity and not so much under the common or criminal law. Again, though essentially a criminal concept, prior to the passing of the Fraud Act 2006 ‘fraud’ was not an offence in England.<sup>3</sup> Therefore there was no categorical statutory or judicial definition of fraud in neither the criminal nor the civil jurisdictions. The preponderance of synonyms in describing fraud is further evidence of the difficulty in defining the concept. Fraud has, among others, been described as ‘white collar crime’,<sup>4</sup> ‘financial crime’,<sup>5</sup> ‘economic crime’,<sup>6</sup> ‘deceit’,<sup>7</sup>

---

<sup>1</sup> A more comparative version of this chapter is published in Gilbert Crentsil, ‘Fraud-A Comparative Analysis’, *Research Handbook on International Financial Crime* (Edward Elgar Publishing 2015). Moreover detailed religious element has been removed from this chapter due to word count.

<sup>2</sup> See William Williamson Kerr, *A Treatise on the Law of Fraud and Mistake as Administered in Courts of Equity* (Bradbury, Evans, and Co 1923).

<sup>3</sup> Anthony Arlidge QC, Alexander Milne QC and Jacques Parry, *Arlidge and Parry on Fraud* (4th edn, Sweet and Maxwell 2013).

<sup>4</sup> Edwin H Sutherland, ‘White-Collar Criminality’, *White-collar Criminal-The Offender in Business and the Professions* (First Edition, Atherton Press 1968) 40.

<sup>5</sup> See the Journal of Financial Crime on [www.emeraldinsight.com](http://www.emeraldinsight.com)

<sup>6</sup> Professor Barry Rider uses this term in The Cambridge International Symposium on Economic Crime which takes place annually at Jesus College, Cambridge University.

<sup>7</sup> Sir James Fitzjames Stephen, *A History of the Criminal Law of England*, vol II (MacMillan and Co 1883) 121–122.

'forgery',<sup>8</sup> 'dishonesty',<sup>9</sup> among others. Although 'financial' and 'economic' may be considered synonyms, 'white collar' is an entirely different metaphor which complicates the meaning of the concept.

Perhaps judicial pronouncements discouraging efforts at defining fraud may not have helped. Lord Macnagten has stated thus: "... fraud is infinite in variety; sometimes it is audacious and unblushing; sometimes it pays a sort of homage to virtue, and then it is modest and retiring; it would be honesty itself if it could only afford it. But fraud is fraud all the same; and it is the fraud, not the manner of it, which calls for interposition of the Court".<sup>10</sup> Lamm, J., also stated that "Fraud is kaleidoscopic, infinite. Fraud being infinite and taking on protean form at will, were courts to cramp themselves by defining it with a hard and fast definition, their jurisdiction would be cunningly circumvented at once by new schemes beyond definition. Messieurs, the fraud-feasors, would like nothing half so well as for courts to say they would go thus far, and no further in its pursuit. Accordingly, definitions of fraud are of set purpose left general and flexible, and thereto courts match their astuteness against the versatile inventions of fraud-feasors".<sup>11</sup>

Meanwhile it is not suggested that the challenge in defining the concept caused serious practical difficulties in application by the courts. This situation is summed up in the expression that fraud<sup>12</sup> '... is the elephant easy to recognise, but difficult to define, and a jury is well able to recognise it, even though they could not define it'.<sup>13</sup> Stephen has

---

<sup>8</sup>Michael Gale, Sarah Gale and Gary Scanlan, *Fraud and the Plc* (LexisNexis UK 1999) 2.

<sup>9</sup>*R v Ghosh* [1982] QB 1053. See also Gale, Gale and Scanlan (n 8) 1–25, and 'Fraud: Report on a Reference under Section 3(1)(e) of the Law Commissions Act 1965' (2002) LAW COM No 276, Cm 5560 <<http://www.lawcom.gov.uk>>.

<sup>10</sup>*Reddaway v Banham* [1896] AC 199 221.

<sup>11</sup>*Stonemets v Head* [1913] Mo Supreme Court Rep 243 Southwest Report 108 114. This case is cited by Sheridan in LA Sheridan, *Fraud in Equity-A Study in English and Irish Law* (1st Edition, Sir Isaac Pitman and Sons Ltd 1957) who in turn cited it from Green, Judge and Jury, pp. 311-12.

<sup>12</sup>In the sense of dishonesty

<sup>13</sup>Gale, Gale and Scanlan (n 8) 5.

indicated in relation to fraud that he “shall not attempt to construct a definition which will meet every case in which might be suggested ... .”<sup>14</sup>

The approach adopted in this chapter is that fraud is ‘a relative and an amorphous concept’.<sup>15</sup> This means fraudulent conducts would be defined in context. The chapter therefore presents a brief general overview of the concept of fraud. First, the relationship between fraud and morality is examined. This chapter also gives brief historical accounts of the development and administration of fraud under the civil and criminal jurisdictions in English jurisdictions. It concludes by examining the connection between the concept of fraud and the protection of the vulnerable consumer in England. Adherence to word count restrictions imply that the chapter takes a general overview of the issues raised and the reader is referred to more standard texts for detailed discussions.<sup>16</sup>

## **Fraud and Morality**

Fraud is not a hard concept. Consequently, an enquiry into the phenomenon of fraud is an intellectual journey that can lead to varied conceptual paths. Among others, fraud can be viewed in terms of its relationship to morality.<sup>17</sup> Morality, in this sense, is a supra legal ethical concept to which a person subscribes. Morality as defined has a strong connection to fraud.

Professor Rider has expressed surprise at the extent to which governments and international organisations are “influenced, subverted and penetrated” by those for whom he describes as “having different values to those” he hoped most people espouse.<sup>18</sup> In a

---

<sup>14</sup>Stephen (n 7) 121–122.

<sup>15</sup>Gale, Gale and Scanlan (n 8) 2.

<sup>16</sup>The present author further explores aspects of English fraud and the two major religions: Judeo/Christian and Islamic religions and Roman law in a version of this work published in Crentsil (n 1).

<sup>17</sup>Sheridan (n 11) 184–205.

<sup>18</sup>Barry Rider, ‘The Enemy Within’ [2010] *Quantum Finance in Perspective* 25, 28–29.

well-reasoned philosophical essay, morality is opined as the singular virtue, the lack of which accounts for political corruption.<sup>19</sup> It is however clear that fraud is connected to morality. It has been observed that the law in action is greatly influenced and determined by custom or public opinion.<sup>20</sup> Indeed the relationship between morality and fraud is summed in the expression “a nation is born stoic but dies epicurean”,<sup>21</sup> rendered in fraud terms “that self-indulgent, exploitative, and unprincipled behaviour ultimately dooms a society.”<sup>22</sup> If the lack of morality has a direct bearing on fraud, then it would be expected that the greater the sense of a person’s morality, the less likely the person would commit fraud. It has been observed that people with a stronger sense of morality were unlikely to commit fraud.<sup>23</sup> Morality arguably has a strong bearing on crime generally and fraud in particular. Commenting on the recent global financial crisis and LIBOR scandals, Gordon Brown, the then UK Chancellor of the Exchequer stated that “*but the events of the past months bear witness, more than anything in my lifetime, to one simple truth: markets need morals*”.<sup>24</sup> Religious laws as sources of morality may help to regulate conduct within markets.<sup>25</sup>

Since fraud is regulated by law, an examination of the relationship between morality and fraud forms part of the broad subject of morality and the criminal law. At a general basic level, there are certain distinguishing features between morality and law. First, both serve

---

<sup>19</sup>Kwame Gyekye, *Tradition and Modernity: Philosophical Reflections on the African Experience* (Oxford University Press 1997) 192.

<sup>20</sup>Richard C Fuller, ‘Morals and the Criminal Law’ (1941) 32 *Journal of Criminal Law and Criminology* 624, 624 citing Roscoe Pound in *Criminal Justice in America*, New York, 1930.

<sup>21</sup>Gilbert Geis, *White-Collar Criminal-The Offender in Business and the Professions* (Atherton Press 1968) 11 citing Will Durant, ‘Our Oriental Heritage’ (New York: Simon and Schuster, 1954), p. 259.

<sup>22</sup>*ibid* 11–12.

<sup>23</sup>Sidney C Suffrin, ‘How Moral Can a Business Be?’ 246–249 <<http://www.religion-online.org/showarticle.asp?title=1688>> accessed 25 February 2014.

<sup>24</sup> As quoted in Steve Tombs and David Whyte, ‘Reappraising Regulation: The Politics of “Regulatory Retreat” in the United Kingdom’, *How They Got Away With It: White Collar Criminals and the Financial Meltdown* (Columbia University Press 2013) page 211.

<sup>25</sup> Steven Shavell, ‘Law versus Morality as Regulators of Conduct’ (2002) 4 *American Law and Economics Association* 227.



to regulate peoples conduct as highlighted above. Secondly, it is more expensive to establish moral rules than it is to establish legal rules.<sup>26</sup> Furthermore, legal rules, since they relate to particular situations and can easily be changed, are specific and flexible than moral rules.<sup>27</sup> In respect of sanctions, legal rules have a greater magnitude of sanctions than moral rules, the latter's sanctions being weaker.<sup>28</sup> The probability of sanctions in law is comparatively difficult to impose than on morality where the person subscribes deeply to his moral code.<sup>29</sup> Furthermore, it is more challenging to find information for the application of moral rules than it is to find information for the application of legal rules.<sup>30</sup> In respect of the cost of enforcement, it is more expensive to enforce legal rules than it is to enforce moral rules. The same hold true for the cost of imposition of sanctions. Morality can also be distinguished from law in the sense that it is not obligatory.<sup>31</sup>

There are several moral issues that pervade the fraud discussions. Firstly, it is argued that there is discrimination and bias at the heart of criminal law and the administration of criminal law; that the whole institution has been set up to favour the rich and powerful as against the poor and low in society.<sup>32</sup> The second related contention is that there should be no bias in the stigmatisation of criminals, that is those convicted in the criminal courts as well as those exposed by non-criminal courts or bodies.<sup>33</sup> A further related argument is propounded by Green who suggests that certain conducts should be criminalised because they are essentially immoral.<sup>34</sup> Critics of such positions hold that such moral

---

<sup>26</sup>ibid.

<sup>27</sup>ibid.

<sup>28</sup>ibid.

<sup>29</sup>ibid.

<sup>30</sup>ibid.

<sup>31</sup>John Gardner, 'Law and Morality' <users.ox.ac.uk/~lawf0081/pdfs/lawandmoralityedited.pdf>.

<sup>32</sup>Robert G Caldwell, 'A Re-Examination of the Concept of White-Collar Crime', *White-collar Criminal-The Offender in Business and the Professions* (First Edition, Therton Press Incorporated 1968) 378.

<sup>33</sup>ibid.

<sup>34</sup>Stuart P Green, 'Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements' (2001) 53 *Hastings Law Journal* 157. See also Stuart P Green, 'Moral

issues are not crimes or criminal in nature.<sup>35</sup> A crime is conduct which the criminal law of the state forbids while criminal is the 'body of rules regarding human conduct which are prescribed, interpreted and administered by the elected and appointed representatives and enforced by the government authority'.<sup>36</sup> To this extent, it is argued that crime must be defined by the criminal law and morality and ethics are not necessarily the same as crime.<sup>37</sup> Ironically speaking, is not the criminal statute "simply the formal embodiment of someone's moral values in an official edict, reinforced with an official penal sanction?"<sup>38</sup> However, both morality and law have a cutting influence on each other. The law can change people's morality. On the other hand, morality can influence change in the law.<sup>39</sup>

The question is asked the degree to which the sphere of an immoral conduct coincides with the sphere of conduct defined as criminal. It has been suggested that this degree is dependent on the 'relative homogeneity of moral values within the society represented in any political jurisdiction'.<sup>40</sup> Fuller suggests that the more complex a society the less there would be of relative homogeneity of moral values and vice versa. In other words, Fuller, citing research conducted by Sutherland and Ghelke, argues that conducts are made criminal even though there is no cohesive opinion among the public in advanced society.<sup>41</sup>

---

Ambiguity in White Collar Criminal Law' (2004) 18 Notre Dame Journal of Law, Ethics & Public Policy 501. See also Mitchell N Berman, 'On the Moral Structure of White Collar Crime' (2007) 5 Ohio State Journal of criminal law 301.

<sup>35</sup>Berman (n 34).

<sup>36</sup>Caldwell (n 32) 378-379.

<sup>37</sup>Caldwell (n 32). See also Fuller (n 20).

<sup>38</sup>Fuller (n 20).

<sup>39</sup>Shavell (n 25).

<sup>40</sup>Fuller (n 20) 626.

<sup>41</sup>Edwin H Sutherland and CE Ghelke, 'Crime and Punishment', *Recent Social Trends in the United States* (1933) as cited by Fuller (n 20) 627.

Another major dimension in the law and morality debate is the extent to which each or both must be used to regulate human conduct. A highly persuasive response has been provided by Steven Shavell by establishing what he terms the optimal domains of law and morality. Shavell states that:

*As a general matter, one may conceive of the determination of optimal domains of law and morality as follows. For any given type of conduct that society seeks to control through morality or law, three possibilities exist: the conduct is placed in the domain of control of morality alone; it is put in the domain of control of both morality and law; or it is entered into the domain of control of law alone each of these possible regimes is associated with a level of social welfare, which reflects the costs the means of control, its effectiveness in altering conduct, and the social benefit from so doing. One of the possible regimes will be best for each type of conduct, and this determines the optimal domains of law and of morality.<sup>42</sup>*

It is the second option which is relevant to fraud. Shavell contends that morality and law are optimal where the cost of doing so is justified by the extra social benefit.<sup>43</sup> This would apply when two conditions apply, the expected private gains from undesirable conduct are often large and the expected harm to such conduct are often large. Into this category Shavell puts offences such as fraud, murder, rape among others. He contends that if the expected gains from bad conduct are great, then moral sanctions would not suffice in dealing with it. On the other hand, if expected harm from such conduct is substantial, then it would be prudent to prevent it as failure to do so would be socially serious. Thus, it is necessary for the legal system to support efforts at regulating such conduct. Shavell contends that the presence of firms where the force of moral sanctions is diluted is necessary to control such conduct. In this regard, the threat of monetary sanctions for example, is necessary to regulate such conduct. The combination of the two is important

---

<sup>42</sup>Shavell (n 25).

<sup>43</sup>ibid.

because the law is imperfect, secondly law may lack vital information which morality can help. Thirdly, moral rules may be inexpensive.

Morality is fuzzy. For instance, the origin of morality is a subject of much controversy. It is arguable that religion affects morality, either at the personal level or even at a broad sociological level.<sup>44</sup> Judeo-Christian religion has undeniably affected Western morality in a significant way.<sup>45</sup> It is similarly arguable Islamic religion has direct impact, not only on the nature of economic transactions, but forms the moral structure of the business transactions Muslims undertake.<sup>46</sup> Some deny that religion is the foundation of morality, arguing that morality is some objective standard to which one could ascribe.<sup>47</sup> The principles of contract law as taught in common law jurisdictions is considered to be a source of morality.<sup>48</sup> Darwin argued that morality results from the natural selection but resides only in humans.<sup>49</sup> This contention is opposed by those who argue that other animals have morality.<sup>50</sup> It is submitted that this contention is difficult to sustain. Perhaps it is more appropriate to state that culture, which is dynamic and evolutionary, has a role to play in people's acquisition of morality.<sup>51</sup>

---

<sup>44</sup>John Inge, 'Theological Reflections on the Place of the Sacred in Society' (2004) 7 Ecclesiastical Law Journal 380. See Also Hershey H Friedman and William D Adler, 'Moral Capitalism: A Biblical Perspective' (2011) 70 American Journal of Economics and Sociology 1014 where the authors argue how four basic principles of the Hebrew Bible and Talmud could be used to create a more moral economic system.

<sup>45</sup>WS Holdsworth, *A History of English Law*, vol 1 (3rd edn, Methuen & Co Ltd 1922).

<sup>46</sup>Abd El-Rehim Mohamed Al-Kashif, 'Shari'ah's Normative Framework as to Financial and Abuse' (2009) 86 Journal of Financial Crime <Westlaw> accessed 18 December 2013.

<sup>47</sup>Michael J Perry, 'The Morality of Human Rights: A Nonreligious Ground?' (2005) 27 Dublin University Law Journal 28.

<sup>48</sup>M Cathleen Kaveny, 'Between Example and Doctrine: Contract Law and Common Morality' (2005) 33 The Journal of Religious Ethics 669.

<sup>49</sup>Charles R Darwin, *The Descent of Man, and Selection in Relation to Sex* (Murray and New York: Hill 1871). As cited in Geoffrey M Hodgson, 'The Evolution of Morality and the Economic Man' [2011] Journal of Evolutionary Economics 1.

<sup>50</sup>Hodgson (n 49).

<sup>51</sup>Gyekye (n 19) In this article, Gyekye critiques the expression 'culture of corruption'.

## General History of Fraud

The history of fraud dates back into Biblical times as well as in Greek and Roman times. Generally, fraud has been abounding through the centuries. The story is told of Hegestratos, a ship owner and his accomplice, Xenothemis persuading the purchaser of corn to make advance payment but subsequently making the shift to sail empty.<sup>52</sup> The story is also told of a prominent Greek family who employed inferior materials in the building of temple.<sup>53</sup> Early Roman regulation of fraudlike cases concerned forgery or falsum.<sup>54</sup> This did not recognise any specific concept of fraud. The Visigothic *Lex Visigothorum* regulated, from a criminal perspective, *dolus malus* or *fraus* as a criminal offence.<sup>55</sup> Later classifications were maintained in the Canon and ancient Italian doctrines. Roman law, apart from preceding English law, similarly had a major impact on the latter's development of the law.<sup>56</sup> As early as 1195, the University of Oxford had an established law programme.<sup>57</sup> It is however not clear the extent to which it had an impact on English law of fraud.

## History of Fraud under English law

An enquiry into the history of fraud in England is linked to the history of the English people. English history began from about 449 when the Angles, Saxons and Jutes settled in bands in the country.<sup>58</sup> Obnoxious conduct is inevitable when human beings live

---

<sup>52</sup>Cited by M Clarke, *Business Crime. Its Nature and Control* (St Martin's Press 1990). As cited in Peter Johnstone, 'Serious White Collar Fraud: Historical and Contemporary Perspectives' (1999) 30 *Crime, Law and Social Change* 107, 107.

<sup>53</sup>Geis (n 21) 11. See also Johnstone (n 52).

<sup>54</sup>Stanley N Katz, *The Oxford International Encyclopaedia of Legal History*, vol III (VI, Oxford University Press 2009) 102.

<sup>55</sup>*ibid.*

<sup>56</sup>Holdsworth (n 45) 3–14.

<sup>57</sup>*ibid* 148.

<sup>58</sup>*ibid* 14–15.

together in society. Law is thus indispensable in ensuring order in England in the early times. However, if the establishment of the English state did not emerge in a formalised fashion then so are its laws regulating human conduct. The regulation of unacceptable behaviour commenced by self-help before the state intervened to regulate, at different times in English history, conducts considered obnoxious.<sup>59</sup> This section is chronologically divided into fraud at equity, fraud under the common law and fraud under the criminal law.

### Fraud at Equity

The exact date when regulation of fraud began is not known. It is suggested that it may have begun during the reign of Edward II or earlier.<sup>60</sup> What is generally not in doubt is that fraud was mainly regulated under equity even though some form equity existed under the common law.<sup>61</sup> Indeed it was the deficiencies associated with the common law that gave birth to equity.<sup>62</sup> It is stated that ‘through a strange quirk in history, the evolution of the law of fraud began about five hundred years ago in the English common law, about the same time as double entry book keeping came into vogue in Italy, through the efforts of Pacioli, an Italian mathematician and Franciscan friar’.<sup>63</sup>

The overwhelming evidence nevertheless points to the fact that equitable jurisdiction of fraud long predated the common law’s approach to regulating fraudulent conduct.<sup>64</sup> It is

---

<sup>59</sup> Holdsworth (n 45). See Also John Hostettler, *A History of Criminal Justice in England and Wales* (Waterside Press 2009).

<sup>60</sup> ‘Equity’, , *Halsbury’s Law of England* (2nd edn, Butterworths Lexis Nexis).

<sup>61</sup> Sir WS Holdsworth, ‘The Relation of the Equity Administered by the Common Law Judges to the Equity Administered by the Chancellor’ (1916) XXVI *Yale Law Journal* <Heinonline> accessed 2 May 2014.

<sup>62</sup> ‘Equity’, , *Halsbury’s Law of England* (2nd edn, Butterworths Lexis Nexis).

<sup>63</sup> J Bologna, *Corporate Fraud. The Basics of Prevention and Detection* (Butterworths 1984). As cited by Johnstone (n 52).

<sup>64</sup> Holdsworth (n 45) 292–293. See also ‘Equity’ (n 62). Similarly in Flora Page, ‘Defining Fraud: An Argument in Favour of a General Offence of Fraud’ (1997) 4 *Journal of Financial Crime* 287.

thus impossible to fully appreciate the history of fraud in England without first looking at the jurisdiction in equity. Indeed, it was not until the development of the doctrine of deceit in the late eighteenth century that the common law began regulating fraudulent conduct in England.<sup>65</sup> On the other hand equitable relief against fraud existed as far back as Henry V onwards.<sup>66</sup> It is recorded that this is where the earliest recorded case emerges.<sup>67</sup>

The Courts of Equity, Requests and the Star Chamber had jurisdiction over cases of fraud in England.<sup>68</sup> Coke, writing to the Chancery stated that “For this Court of Equity the ancient rule is good. Three things are to be judged in the Court of Conscience, Covin, Accident, and breach of confidence. All covins, frauds, and deceits, for the which there is no remedy by the ordinary course of law.”<sup>69</sup> Coke it is said actually ascribes this statement to Sir Thomas More, “Three things are to be held in Conscience; Fraud, accident, and things of Conscience”.<sup>70</sup> Indeed, it was only after 1875 that English law administered law and equity together.<sup>71</sup> In this light the history of the equitable jurisdiction of fraud, however brief, is indispensable to the appreciation of the regulation of fraud in England.

The most significant case dealing with the equitable jurisdiction of fraud is (1751) *Earl of Chesterfield v. Janssen*.<sup>72</sup> The Chancellor Lord Hardwicke emphasised the fact that the Court of Conscience had jurisdiction to deal with all cases of fraud where it is fraud on

---

<sup>65</sup> Holdsworth (n 45) vol 5, pp. 292–3. See also Page (n 64).

<sup>66</sup> HW Seton, *Early Records in Equity* (Unpublished) 69. As cited by Sheridan (n 11) 5.

<sup>67</sup> Seton (n 66) 67. As cited by Sheridan (n 11) 5.

<sup>68</sup> Sheridan (n 11) 5.

<sup>69</sup> *ibid.*

<sup>70</sup> *ibid.*

<sup>71</sup> Stephen Waddams, ‘Protection of Weaker Parties in English Law’, *Unconscionability in European Private Financial Transactions—Protecting the Vulnerable* (Cambridge University Press) 27 <<http://ebooks.cambridge.org/>> accessed 25 January 2014.

<sup>72</sup> *Chesterfield (Earl of) v Janssen* [1751] 2 Ves Sen 125.

the public. Fraud on the public has been clarified as fraud contrary to public policy.<sup>73</sup> Lord Hardwicke further classified equitable fraud into about five different categories. However, some of Lord Harwicke's classification has been rejected by Sheridan who clarifies that 'the transaction being an imposition and deceit on persons not parties to the fraudulent agreement' in his view, encompasses 'fraud on a specific third person and ... frauds on the public.'<sup>74</sup> Several other cases followed the Earl of Janssen case including the *Carpenter v Heriot*<sup>75</sup> and *Earl of Aylesford v Morris*<sup>76</sup> cases.

Subsequently, the width of the equitable fraud extended to intellectual property cases. In *Singleton v Bolton*,<sup>77</sup> it was held where a manufacturer has protected his intellectual property being a trade mark, in a product, it was fraud if another adopted the same trademark and markets it as if it was his own. This case was similarly confirmed in the case of *Sykes and Sykes*. Furthermore, in case *Scroggs v Scroggs*,<sup>78</sup> equity was applied to prevent the fraudulent execution of a power. The material facts were that a father had employed misrepresentation and imposition to cause a trustee to appoint his younger son to manage the family estate, contrary to the terms of settlement. Lord Harwicke refused to allow the father's evidence to be read in court suggesting that the claimant was extravagant and undutiful. He then held that the power was to be 'considered' as a trust to be executed with discretion and the father was in breach of trust.

Post eighteenth century equity predominantly concerned contractual disputes.<sup>79</sup> The examination of contracts is reflected in the way equity dealt with cases involving the

---

<sup>73</sup>Sheridan (n 11) 5.

<sup>74</sup>ibid 7-9, 167-183.

<sup>75</sup>*Carpenter v Heriot* (1759) 1 Ed. 338.

<sup>76</sup>*Aylesford (Earl of) v Morris* (1873) L. R. 8 Ch. App. 484.

<sup>77</sup>*Singleton v Bolton* [1783] 3 Douglas 293.

<sup>78</sup>*Scroggs v Scroggs* [1755] Ambler 272 (Court of Chancery).

<sup>79</sup>Michael Lobban, 'Contractual Fraud in Law and Equity, C1750-C1850' (1997) 17 Oxford Journal of Legal Studies 441.



statute of frauds. This investigation went beyond the normal to exploring the intentions behind contracts.<sup>80</sup> This reflected mainly in undue influence cases and misrepresentation.<sup>81</sup> However the detailed treatment of these is presently beyond the scope of this work.

In summary therefore, the Court of Equity dealt with all cases of fraud before the common law began to exercise jurisdiction on matters of fraud. Since 1875 however, the court of equity and the common law exercised concurrent jurisdiction.<sup>82</sup> A very brief note on the relationship between how both courts dealt with fraud would be considered after a short look into how the common law exercised jurisdictions in matters of fraud. Since the early days of dealing with matters of breach of trust and fraudulent misrepresentation to induce a contract, equitable frauds today include among others knowing receipt, unconscionable dealing as a vitiating factor, equitable undue influence, conspiracy, and dishonest assistance.<sup>83</sup>

## Fraud at Common Law

The history of regulation of fraud under the common law is linked to the history of the action in deceit. Fraudulent activities however had been going on from the eleventh century till about the fourteenth century.<sup>84</sup>

The common law up to the late eighteenth century had three causes of action for fraud, all related to deceit. These were actionable when they came to the notice of the court

---

<sup>80</sup>ibid.

<sup>81</sup>ibid.

<sup>82</sup>ibid.

<sup>83</sup>See Janet Ulph, Sir Michael Tugendhat and James Glistler, *Commercial Fraud: Civil Liability, Human Rights and Money Laundering* (Oxford University Press 2006). See also Paul McGrath, *Commercial Fraud in Civil Practice* (Oxford University Press 2014). See similarly Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (Sweet and Maxwell 2006).

<sup>84</sup>Holdsworth (n 45) 30.

during litigation.<sup>85</sup> The first is deceitful acts litigation as reflected in writs of deceit and *audita querela* which was remedied by an action on the case.<sup>86</sup> This is now relatively unimportant because there is less opportunity for perpetuating fraud in litigation. Two, breach of an express warranty which was remedied by an action on the case.<sup>87</sup> The 1802 *Williamson v. Allison*<sup>88</sup> case shows how long this action for breach of warranty survived. This subsequently became action for breach of contract. It ceased to be recognized as connected with deceit or perhaps with tort at all. Its scope has since widened to cover implied warranties. Three, knowingly false representation inducing a person to contract with a utterer.<sup>89</sup> All the three frauds were related to deceit, meaning the relief was available if the fraud came to light in the conduct of a case.<sup>90</sup> Forgery was similarly at the time punishable as was reliance on a false document in a court of law.<sup>91</sup>

The opportunity for committing fraud during litigation was great because there were intricate procedures involved in litigation.<sup>92</sup> The complexities of these procedures are discussed by Holdsworth.<sup>93</sup> An example is the case where a knight used the name of another who had been offered protection by the King in Scotland. The court advised the injured person that the circumstances fit a writ for deceit. This form of actionable deceit is now relatively unimportant because opportunities for fraud in litigation are limited. Modern civil procedures are clearly entailed in the Civil Procedure Rules and related documents. Nevertheless, it is still the case that fraud vitiates judgment in English law.

---

<sup>85</sup> Sheridan (n 11) 6–7.

<sup>86</sup> *ibid.*

<sup>87</sup> *ibid.*

<sup>88</sup> *Williamson v Allison* [1802] 2 East 446.

<sup>89</sup> Sheridan (n 11) 6–7.

<sup>90</sup> Holdsworth (n 45) 366. See also *ibid* 407.

<sup>91</sup> Holdsworth (n 45) 366.

<sup>92</sup> *ibid* 407.

<sup>93</sup> *ibid* 623–626.

The doctrine of deceit was extended to substantive actions in the contracts of sale where there had been inducements by a deliberate misleading.<sup>94</sup> The action on the case was 'akin in its early stages to the modern notion of an action for breach of warranty than to one in tort for fraudulent misrepresentation'.<sup>95</sup> The application of the action applied in cases where the vendor had no title or to the sale of an article with unsound quality. These cases further extended to the assumpsit and not the action of deceit today.<sup>96</sup> It is suggested that it 'the confusion of a false representation and broken promise ... tied the common law conception of fraud as a cause of redress to that which affected a contractual relation'.<sup>97</sup>

Holdsworth describes few of those cases where a person sold bad meat or one who has warranted the soundness of unsound article. In 1367, a plaintiff had bought cattle from a defendant and paid the price, but the defendant was not entitled to the cattle. Similarly, this person was advised that he could recover damages for fraud by writ of deceit.<sup>98</sup> Persons who sold food were liable in deceit if they sold unwholesome food, 'whether or not they had made representations as to the quality of the food'.<sup>99</sup> Significant developments along the same vein took place under Henry VI reign.<sup>100</sup>

Notwithstanding the civil liability for deceit, the law had not considered the nature of deceit. For it ignored the intentions of the defendant but rather focused on the acts and damage caused to the claimant. To this extent it was considered similar to breach of warranty. The 1433 *Somerton's*<sup>101</sup> case emphasizes the point that the consequences of action rather than the intent was mattered in cases of fraud. Similarly the breach of an

---

<sup>94</sup> *ibid* 407.

<sup>95</sup> Sheridan (n 11) 5.

<sup>96</sup> *ibid*.

<sup>97</sup> *ibid*.

<sup>98</sup> As cited in Holdsworth (n 45) 407.

<sup>99</sup> *ibid* 386.

<sup>100</sup> *ibid* 407.

<sup>101</sup> *Somerton's case* [1433] B 11 Hen 6 Hil Pl 1.

express undertaking was considered equal to breach of a warranty. In the 1442 the *Doige's*<sup>102</sup> case, a buyer accepted the purchase price but refused to convey the land. The writ stated he was 'craftily scheming to defraud the plaintiff' and thus 'false and fraudulent'. Thus the law of actionable promise or assumpsit took off. Fermor's case 1602 reflects the established doctrine that false representation was actionable, not only when the defendant made an express warranty as to the truth of the statement, but also when the plaintiff could prove that defendant had been intentionally deceitful. Finally breach of warranty was distinguished from an action for false representation. By 1889 *Derry v Peek*<sup>103</sup> had established that intention to defraud must form a component of the deceit.<sup>104</sup>

The 1603 *Chandler v Lopus*<sup>105</sup> is case that long represented the attitude towards fraud. A man paid £100 for objects which the seller represented with some degree of scepticism that it was bezoar stones. The buyer sued for refund of the £100 he paid upon subsequently realizing it was not bezoar stones. How the Court of Exchequer, denying the buyer's right to refund held that 'the bare affirmation that it was a bezoar stone, without warranting it to be so, is no cause of action'. This reasoning was pursued in *Roswell v Vaughan*.<sup>106</sup> It was until eighteenth century that fraud became a cause of action in contract of sale, thus a contract of sale induced by knowingly false representation could trigger an action in fraud.

Knowingly false representation inducing a person to contract with an utterer had by the eighteenth century lost its peculiarity to contract of sale and became a general principle: where a person was induced by a knowingly false representation to enter into any contract,

---

<sup>102</sup>*Doige's Case* B Hill 9 Hy VI.

<sup>103</sup>*Derry and others v Peek* (1886) 1 ER Rep 1 (House of Lords).

<sup>104</sup>Holdsworth (n 45) 408.

<sup>105</sup>*Chandler v Lopus* [1603] Cro Jac 4.

<sup>106</sup>*Roswell v Vaughan* [1607] Cro Jac 196.

he was entitled to damages in respect of any loss that caused him.<sup>107</sup> Similarly, the defrauded person had a defence to an action on the contract. The first reported case under the common law where a claimant who was induced to do anything other than contract with the defendant was allowed to recover damages is the 1789 case of *Pasley v Freeman*.<sup>108</sup> The common law now developed its own modern rules on rescission of contracts on the ground of fraud.<sup>109</sup>

Fraud under the common law in the eighteenth century gave relatively little scope for the exercise of discretion outside the strict terms of the agreement by juries.<sup>110</sup> Regarding the pleading in contract cases, there were generally two broad approaches, plaintiffs had to use a special count here the contract was executory, requiring the setting out of the details of the contract.<sup>111</sup> However where the contract was executed, the plaintiff did not have to specify the details of the contract.<sup>112</sup> This was called a general indebitatus count.<sup>113</sup> The details are beyond the scope of this work. Meanwhile any seeming simplicity of the pleading in indebitatus assumpsit was minimised by the strict laws on evidence which juries had to apply.<sup>114</sup> A retrial could in the middle of the century be ordered where laws on evidence are properly applied.<sup>115</sup> Furthermore, the range of remedies available to a party who suffered from pre-contractual misrepresentation was narrow.

Juries principally focused on terms of agreement made of the parties and it was crucial that the evidence shows an agreement between the parties.<sup>116</sup> In executed contracts, the

---

<sup>107</sup>Sheridan (n 11) 5–6.

<sup>108</sup>*Pasley v Freeman* 3 TR 51.

<sup>109</sup>Sheridan (n 11) 5–6.

<sup>110</sup>Lobban (n 79).

<sup>111</sup>ibid.

<sup>112</sup>ibid.

<sup>113</sup>ibid.

<sup>114</sup>ibid.

<sup>115</sup>ibid.

<sup>116</sup>ibid.

juries relied on the strict terms of the agreement whereas where was done without prior agreement, the juries would examine the evidence to check the constitution of the agreement. However in contrast to the seeming strict control exhibited by juries at nisi prius, juries who assessed parties' damages before sherrifs on writs of enquiry after judgment by default apparently had greater scope for 'fair' judgments. While the sherrifs's jury was a good place for plaintiffs, it was not so defendants. To this end there were safeguards to protect the defendants.<sup>117</sup>

In the nineteenth century, the trend moved away from liberalism towards a more complete examination of the contract to ensure fairness.<sup>118</sup> This was achieved through interpreting contracts to achieve fairness and public expectation. Judges achieved through construing contracts to reflect the intentions of parties, implying warranties into contract in a balanced way. Another major way judges took care of fraud was putting forward doctrines to prevent fraud. Cases in point are the development of the doctrine of estoppel and extension of the doctrine in deceit in *Pasley v Freeman*. The extension of the doctrine of deceit in *Pasley v Freeman* has however not been without controversy.

Today common law fraud conducts include misrepresentation, mistake, undue influence, duress, deceit, unjust enrichment and conversion.<sup>119</sup>

## Fraud in Equity and the Common Law

Post *Pasley v. Freeman*,<sup>120</sup> the significant debate arose between the courts of equity and the common law. The concerns with *Pasley* were on two fronts.<sup>121</sup> First it was considered

---

<sup>117</sup> *ibid.*

<sup>118</sup> *ibid.*

<sup>119</sup> McGrath (n 83). See also Ulph, Tugendhat and Glister (n 83). See Similarly Enonchong (n 83).

<sup>120</sup> *Pasley v Freeman* (n 108).

<sup>121</sup> James Edelman, 'Nocton v. Lord Ashburton (1914)', *Landmark Cases in Equity* (Hart Publishing 2012) 473-498.

that the decision was broad, thus circumventing the statute of frauds, making a person a guarantor of the other without a written documentation. This position was reversed by Lord Tenterden's Act, thus making misrepresentations about credit unactionable unless they were in writing.

The second objection to Pasley was that the doctrine was too narrow.<sup>122</sup> There had been a prevalent view that misrepresentation ought to be actionable even if it had been made carelessly, not fraudulently. Even though it was the minority view it prevailed. However *Derry v Peek*<sup>123</sup> reinstated the requirement of fraud in misrepresentation.<sup>124</sup>

A concurrent argument was taking place in equity on the same lines where Lord Eldon stated that the test for fraud in equity was 'either distinct fraud, or that gross degree of negligence, which this court looks at as fraud regarding the consequences attaching to it'. The controversy raged in both jurisdictions in *Borrowes v Lock*<sup>125</sup> and *Slim v Croucher*.<sup>126</sup> In *Croucher*,<sup>127</sup> the defendant's misrepresentation to a lender, to which he stated that he had forgotten the true facts, was held to be fraudulent and that both equity and common law had concurrent jurisdiction in such cases. *Croucher*<sup>128</sup> was consistent with existing authority.

The apparent discontent about the seeming gap between equity and the common law position brought concerns. The House of Lords seemed to have resolved the matter in *Derry v Peek*<sup>129</sup> when it held that the defendant duty was to make statements he 'honestly

---

<sup>122</sup>ibid 478–479.

<sup>123</sup>*Derry and others v Peek* (n 103).

<sup>124</sup>Edelman (n 121).

<sup>125</sup>*Burrowes v Lock* [1805] 10 Ves 470 32 ER 473.

<sup>126</sup>*Slim v Croucher* [1860] 1 G F J 518 45 ER 462.

<sup>127</sup>ibid.

<sup>128</sup>ibid.

<sup>129</sup>*Derry and others v Peek* (n 103).

believed ... to be a true and fair representation of the facts'. The position crystallised after *Derry v Peek*.<sup>130</sup> However the case of *Nocton v Lord Ashburton*<sup>131</sup> where negligent misstatement was held to be actionable on the basis of fiduciary was subsequently answered in *Bristol & West Building Society v Mothew*.<sup>132</sup> Liability was further extended in Misrepresentation Act 1967 in section 2(1). For this reason, equitable fraud is no longer necessary.

### Fraud under the Criminal Law

English society had always considered theft inexorable and made it a capital crime.<sup>133</sup> By Edward I's time the distinction between grand and petty larceny (theft) had been established and continued till 1827.<sup>134</sup> However breach of warranty of title was the norm in cases where individuals sought remedies for acts of fraud, and different reasons have been given to explain this situation.<sup>135</sup>

Meanwhile early signals of regulating criminal fraud began around 13<sup>th</sup> Century when laws were enacted to deal with forestalling.<sup>136</sup> Forestalling as a criminal offence was a general term for regrating, engrossing. Forestalling emanated from the Anglo-Saxon word *foresteal*.<sup>137</sup> *Foresteal* had Biblical origins.<sup>138</sup> It is understood that there are surviving records in Norwich in 1278 and in Bury St Edmunds 'reporting court leet fines against local citizens for obstructing and polluting streets and ditches, selling defective

---

<sup>130</sup>*ibid.*

<sup>131</sup>*Nocton v Lord Ashburton* [1914] AC 932 (HL).

<sup>132</sup> See earlier *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575, HL.

<sup>133</sup> Sir James Fitzjames Stephen, *A History of the Criminal Law of England*, vol III (MacMillan and Co 1883) 129. See also Hostettler (n 59).

<sup>134</sup> Stephen (n 133) 129. See also Gilbert Geis, 'From Deuteronomy to Deniability: A Historical Perilustration on White-Collar Crime' (1988) 5 *Justice Quarterly* 7.

<sup>135</sup> Page (n 64).

<sup>136</sup> Stephen (n 133) 199–202.

<sup>137</sup> Geis (n 134).

<sup>138</sup>*ibid.*



merchandise and charging excessive prices.<sup>139</sup> Among such laws were 27 Edward III c. 11 (1360) and 5 and 6 Edward VI, c. 14 (1552) (The Lawes of the Market [1595] 1974).<sup>140</sup> The laws on forestalling, were repealed in 12 Geo. III, c. 7 in 1777.<sup>141</sup>

In 1474, the Carriers case<sup>142</sup> presented the first opportunity for both the Court of Star Chamber and the Exchequer Chamber to examine, in the criminal context, fraud effected by the abuse of trust. A stranger merchant carrier had carried to a completely different location goods entrusted to him, in the process breaking the bales and carrying off the contents. In response to the question whether he was guilty of felony, the court ruled in the affirmative, laying the principle that “though a man cannot steal goods bailed to him ... yet, if the bailee does an act which determines the bailment, he may steal the goods”.<sup>143</sup> In 1483, a statute making bale breaking a felonious act was enacted followed in 1529 by one statute making it offence for servants to take their master’s property.<sup>144</sup>

Between 1542 to around 1543, reference is made to ‘... divers and sundry persons, craftily obtaining into their hands great substance of other men’s goods. ...’<sup>145</sup> It is also reported that where metal dealers used ‘uncorrected weighted balances, they were excommunicated while the sale of underweight foods resulted in a fine and banishment. Sir Edward Coke stated in 1602 that ‘fraud and deceit abound these days more than in former times’.<sup>146</sup> The general attitude towards fraud at the time is perhaps reflected in the case of *Chandler v Lopus*.<sup>147</sup>

---

<sup>139</sup> *ibid.*

<sup>140</sup> *ibid.*

<sup>141</sup> *ibid.*

<sup>142</sup> *The Carrier’s case* [1474] 13 Edwa 4 P9 No 5. As reported in Stephen (n 133) 139.

<sup>143</sup> Stephen (n 133) 139.

<sup>144</sup> Page (n 64).

<sup>145</sup> (34,35 Henry VIII c. 4. Coke. Fourth Institute. 2777, 278 Vol. i). As cited by Johnstone (n 52).

<sup>146</sup> Johnstone (n 52).

<sup>147</sup> *Chandler v Lopus* (n 105).

By 1757, the statute for the offense of obtaining by false pretenses had been enacted with the object of dealing with intent to cheat or defraud. This legislation was however used sparingly because the doctrine of constructive taking<sup>148</sup> was developed in 1779, in the case of the *R v Pear*.<sup>149</sup> The defendant had been indicted for stealing a black horse which he allegedly hired from the prosecutor. The question before the jury was whether the defendant had hired a horse with fraudulent intent after it emerged that he sold the horse the same day and had not travelled with the horse on the journey he had stated he would. The jury found that the defendant had fraudulent intent and was thus guilty of felony. This case was similar to a 1729 case at the Old Bailey in which the defendant was found guilty of felony for stealing a brown mare. The case of *Bazzeley*<sup>150</sup> followed the trend of *Pear*. It was not until the case of *Young*<sup>151</sup> that the 1757 Act was applied. In this case, Asthurst J stated that ‘all men were not equally prudent, and this statute was passed to the weaker part of mankind’.<sup>152</sup>

In the Victorian era, the legislature took a determined attempt at dealing with fraud from the criminal perspective.<sup>153</sup> In this regard, a plethora of legislations were enacted.<sup>154</sup> However these provisions did not effectively deal with fraud as it ought to be confronted. For this reason, in 1861, an Act sought to consolidate these various provisions. However, this attempt has been considered ‘haphazard’.<sup>155</sup> For instance it has been agreed that the consolidation lacked any underlying principle and thus leading to the

---

<sup>148</sup>Page (n 64).

<sup>149</sup>*The King v Pear* [1779] 1779 1 Leach 212 (Old Bailey).

<sup>150</sup>*R v Bazzeley* [1799] 2 Leach 835.

<sup>151</sup>*R v Young* [1789] 3 Term Rep 98.

<sup>152</sup>*ibid*.

<sup>153</sup>Page (n 64).

<sup>154</sup>Holdsworth (n 45) 151–152.

<sup>155</sup>Page (n 64).

perpetuations of 'useless distinctions'.<sup>156</sup> It is also the case that identical provisions were placed side by side.<sup>157</sup> Unsurprisingly, the Stephen and law commissioners of 1878 proposed a new simplified code.<sup>158</sup> The practical response to these proposals came in the 1916 Larceny Act.

The Larceny Act 1916 sought to codify the provisions in place at the time; to define the law on larceny and related offences including stealing. The Act was the first to provide a statutory definition for larceny by combining both the Larceny Act 1861 and common law offences including false pretenses, conversion, embezzlement robbery sacrilege among others. It defined larceny as the situation 'a person steals without consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner...'<sup>159</sup> The word 'takes' is defined as any trick, intimidation, mistake, among others.<sup>160</sup>

Although initially welcomed,<sup>161</sup> the Act<sup>162</sup> was not appropriate in dealing with fraud. For instance, under the provisions on larceny, certain cases of dishonesty went unpunished.<sup>163</sup> The present author believes that some of the mode of punishment under the Act could not have withstood human rights considerations. For instance the Act provided that a minor who committed larceny was to be whipped by strokes. The law was also considered to be

---

<sup>156</sup>ibid.

<sup>157</sup>ibid.

<sup>158</sup>ibid.

<sup>159</sup>Larceny Act 1916 1(1).

<sup>160</sup>ibid 2(i).

<sup>161</sup>Page (n 64).

<sup>162</sup>Larceny Act (n 159).

<sup>163</sup>Roy Stuart, 'Law Reform and the Reform of the Law of Theft' (1967) 30 *The Modern Law Review* 609, 612.

complex and displayed uncertainty.<sup>164</sup> Certain expressions such as 'trick', were not properly defined. The law also did not focus on ownership but on possession rights.

It was against the backdrop of the above difficulties associated with the 1916 Act that the Law Commission advocated for the repeal of the Larceny Act and the introduction of the Theft Act 1968, aimed at addressing the issues identified with the 1916 Larceny Act. However, the Theft Act did not lack its own critics.

Page has argued that further to the definition of theft under the Act, one could contend that fraud was 'theft by other means'.<sup>165</sup> Yet Page offers two reasons why this is not the case in practice. First it is opined that theft as defined was not reflective of fraud as it ought to be defined in that the former excluded serious offences which it is agreed ought to be the focus of the definition of fraud. The means adopted by serious criminals may not easily fit into the s.1 the requirements of 'appropriation' and 'property'. The Guinness cases<sup>166</sup> are cited as cases in point. Secondly the restrictive interpretation of 'property' under the Theft Act means it excludes the intangible incorporeal assets of which are the often the subject of frauds.<sup>167</sup> A case in point is that of *R v Clowes*<sup>168</sup> and *R v Hallam*,<sup>169</sup> where Beldam LJ stated that 'the law of theft is in urgent need of simplification so that ... scarce public resources of time and money are not devoted to hours of semantic arguments divorced from the true merits of the case'. This is further confirmed in the wide ambit of theft as reflected in the *R v. Gomez*<sup>170</sup> decision by the House of Lords.

---

<sup>164</sup>Stuart (n 163).

<sup>165</sup>Page (n 64).

<sup>166</sup>*R v Suanders, Ronson & Parnes* [1991] The Independent.

<sup>167</sup>Page (n 64).

<sup>168</sup>*R v Clowes* [1992] 3 ER 440.

<sup>169</sup>*R v Hallam* [1994] The Times.

<sup>170</sup>*R v Gomez* 1 ER 1.

The Theft Act 1968 and the related fraud combating laws did not provide satisfactory solution to regulating frauds in the United Kingdom. The Law Commissions report<sup>171</sup> on fraud highlighted some of these problems. The Commission raised the issue of multiplicity of charges in serious fraud trials even though none of them adequately encapsulated the meaning of fraud.<sup>172</sup> The Commission raised questions about the narrowness of the statutory offences and the wideness of the common law conspiracy to defraud offence.<sup>173</sup> This situation caused confusion for juries who do not know what fraud was.<sup>174</sup> Further consequence of the situation is that specific offences were sometimes wrongly charged in inappropriate circumstances.<sup>175</sup> A further issue raised by the commission is that the law on fraud had not caught up with the pace of technological advancements.<sup>176</sup>

Meanwhile the offence of conspiracy to defraud, which is crucial in fighting multiparty fraud, was given a statutory footing. It had originated in 1304 in the Third Ordinance of Conspirators as conspiracy to thwart justice, being agreement to commit perjury or agreement to bring a false suit before the court.<sup>177</sup> As a general criminal offence it emerged in 1611 in the Poulterer's case, tried in the Star Chamber in 1611, which turned it into a general offence.<sup>178</sup> The offence was finally clarified by Hawkins in Pleas of the Crown.<sup>179</sup> On conspiracy to defraud, there is a debate to abolish the offence. The Common

---

<sup>171</sup> 'Fraud: Report on a Reference under Section 3(1)(e) of the Law Commissions Act 1965' (n 9).

<sup>172</sup> *ibid* 2.

<sup>173</sup> *ibid* 2-3.

<sup>174</sup> *ibid* 3.

<sup>175</sup> *ibid*.

<sup>176</sup> *ibid* 57.

<sup>177</sup> Robert Spicer, *Conspiracy: Law, Class and Society*, vol 23 (1981). As cited by Tom Stenson, 'Inchoate Crimes and Criminal Responsibility under International Law' (2006) V *Journal of International Law* <[HTTP://www.law.upenn.edu/journals/jil/jilp/](http://www.law.upenn.edu/journals/jil/jilp/)> accessed 16 February 2014.

<sup>178</sup> Francis Sayre, 'Criminal Conspiracy' (1922) 393 *Harvard Law Review*. As cited by Stenson (n 177).

<sup>179</sup> Theodor Mommsen and Paul Krueger, 'The Digest of the Justinian' (1985) IV. As cited by Stenson (n 177).

Law Conspiracy to Defraud was restated in 1975 in *Scott v Metropolitan Police Commissioner*.<sup>180</sup> It is basically an agreement to do that which is proscribed by law. The 1977 Criminal Law Act s.1 brings statutory offence of conspiracy to defraud while s 5 abolished all conspiracy related offences. Another major step in tackling fraud from a criminal perspective is the establishment of the Serious Fraud Office pursuant to the 1987 Criminal Justice Act.

The Commission indicated that to continue to plug the gaps in the law on fraud on ad hoc basis is a 'technique that is 'bound to be always lagging behind developments in technology and commerce',<sup>181</sup> To this end the Commission stated the need to address these issues by devising a 'general fraud' which, without relying too heavily on the concept of dishonesty, would nevertheless be sufficiently broad and flexible to catch nearly every case that would today be likely to be charged as a conspiracy to defraud'.<sup>182</sup> This, the Commission believed, would address all the problems highlighted about fraud and prosecutions on fraud. Thus the Fraud Act 2006 was born.

Fraud under the criminal law is defined in Section 1 (1) of the Fraud Act 2006 which provides that a person is guilty of fraud if he is in breach of any sections listed in subsection (2).<sup>183</sup> The section provides that: "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" The sections listed in s.1(2) are: s.2 (fraud by false representation), s.3 (fraud by failing to disclose information) and s.4 (fraud by abuse of position) .

---

<sup>180</sup>*Scott v Metropolitan Police Commissioner* [1975] AC 819.

<sup>181</sup>'Fraud: Report on a Reference under Section 3(1)(e) of the Law Commissions Act 1965' (n 9) 57.

<sup>182</sup>*ibid.*

<sup>183</sup>See also Simon Farrell QC, Nicholas Yeo and Guy Ladenberg, *Blackstone's Guide to The Fraud Act 2006* (Oxford University Press 2007).

This means that there are three ways of committing fraud. There are a number of issues highlighted by the fraud Act 2006. Professor Rider has stated that it can be used in “limited circumstances”. It has equally been observed that there is overlap between deception and fraud by false representation.<sup>184</sup> In respect of making off without payment and s.2 (1), if an intent to gain includes intent to keep one’s own property. It is also opined that there is overlap between s.2 (1) and s.11 of the FA 2006.<sup>185</sup> This overlap it is said then has bearing on the Law Commission’s view that it did not want a defendant to face several charges. On the point of interpretation, whether a false representation comes within the definition of a dishonest act under s.11.false representation it is said has mental element which appears to be the same meaning as the former meaning of deception.<sup>186</sup>

There is also the criticism that fact finders may experience difficulties in finding defendants have acted dishonestly.<sup>187</sup> Another important issue raised is that of certainty. The government has been accused of failing to appreciate that the principle of dishonesty fails to measure up to the principle of legal certainty.<sup>188</sup> Whiles dishonesty is considered flexible; it is inconsistent with principles as reflected by Article 7 and the principle of legality and respect for individual autonomy and as central values. It is further suggested that the Fraud Act 2006, like the definitions under the Theft Act, are broad as its main offences are phrased in inchoate mode.<sup>189</sup> The effect is that lower and outer boundaries of the law are shifting as the contours of criminalization become uncertain and shifting. It is argued that fraud relies on dishonesty which relies on variable social judgments and

---

<sup>184</sup>Carol Withey, ‘The Fraud Act 2006-Some Early Observations and Comparisons with the Former Law’ *Journal of Criminal Law* 220.

<sup>185</sup>*ibid.*

<sup>186</sup>*ibid.*

<sup>187</sup>Andrew Ashworth, *Principles of Criminal Law* (6th Edition, Oxford University Press 2009) 398–402.

<sup>188</sup>*ibid.*

<sup>189</sup>*ibid* 399.

it is insufficient to guide conduct. There is also the question of fairness and social ambiguity and hypocrisy.<sup>190</sup>

Regarding conspiracy to defraud, the Law Commission's position is that it is 'too wide that it offers little guidance on the difference between fraudulent and lawful conduct'.<sup>191</sup> This is strongly opposed by the CPS on the basis that '... where facts are complex and reveal a multiplicity of offences, it makes sense to encapsulate all of these in one simple statement of offence'. The House of Lords waded into the debate in *Norris v United States of America*<sup>192</sup> when it emphasised the certainty requirements under human rights law. It held that there is no authority for regarding price fixing as amounting to conspiracy to defraud.

### **What is Consumer Fraud?**

The history of the regulation of fraud is linked to the fight to protect the vulnerable in society. The exhortation in Judeo Christian religion is connected with the protection of the poor.<sup>193</sup> Similarly, the Roman law on fraud was also aimed at the protection of the vulnerable in society.<sup>194</sup> This work is about consumer-oriented fraud, in simple terms, consumer fraud. What then is 'consumer fraud'? The phrase 'consumer fraud' as a corollary of commercial fraud, can be ambiguous. The traditional noun 'consumer' functions in this context as a modifier of 'fraud' and may be expanded as fraudulent acts 'by' or 'against' consumers, either preposition creating a different meaning. For instance, in a thesis submitted to the London School of Economics, Claudia Lopes uses the phrase

---

<sup>190</sup> *ibid.*

<sup>191</sup> 'Fraud: Report on a Reference under Section 3(1)(e) of the Law Commissions Act 1965' (n 9). See also Farrell QC, Yeo and Ladenberg (n 183).

<sup>192</sup> *Norris v Government of USA* 2008 UKHL 16.

<sup>193</sup> Ben-Zion Rosenfield and Joseph Menirav, 'Fraud: From the Biblical Basis to General Commercial Law in Roman Palestine' (2006) XXXVII *Journal for the Study of Judaism* 594.

<sup>194</sup> Johnstone (n 52).



in the sense of fraud committed by consumers.<sup>195</sup> Lopes however admits that the literature use the phrase in the converse but prefers to call this sense of the phrase ‘consumer victimisation’.<sup>196</sup> ‘Consumer victimisation’ is too general and conveys little meaning. A proper way of resolving this ambiguity is to use the mildly wordy expression ‘consumer-oriented fraud’. Even though ‘consumer fraud’ is potentially ambiguous, it is however adopted in this context to mean fraud as it affects vulnerable consumers. It is submitted that it is a convenient shorthand. Besides, it is the more generalised understanding of the phrase. In this context therefore, the consumer is the victim and not the perpetrator.

The present author submits that consumer fraud occurs when a consumer becomes the victim of conduct described as fraud and prohibited by the criminal or civil fraud laws in any society. This generic definition covers both the criminal and civil understandings of fraud. For instance, not all types of frauds directly affect the consumer. A case in point is bribery. Rothschild and Throne define criminal consumer fraud as ‘an intentional act of lying to, cheating or stealing from a consumer (or attempting to do so), which is punishable as a crime in any jurisdiction’.<sup>197</sup> The problem with this definition is that it assumes that fraud in any jurisdiction means “an intentional act of lying to, cheating or stealing from a consumer (or attempting to do so), which is punishable as a crime”. The definition of fraud in the Fraud Act 2006 demonstrates that this may not necessarily be the case.

The question may be asked regarding how to distinguish between frauds which affect consumers and businesses. A number of elements could be used to assess whether a

---

<sup>195</sup>Claudia Isabel Marues de Abreu Lopes, ‘From Description to Explanation in Cross-National Research The Case of Economic Morality’ (PhD Dissertation, London School of Economics 2011).

<sup>196</sup>ibid.

<sup>197</sup>Donald P Rothschild and Bruce C Throne, ‘Criminal Consumer Fraud: A Victim-Oriented Analysis’ (1976) 74 Michigan Law Review 661. The authors use chapters 1 and 2 of the book of Micah as the Biblical origin of consumer fraud but this is unclear.

conduct can be classed as consumer fraud. For instance, do the applicable laws of the jurisdiction make that distinction?<sup>198</sup> To the present author, the fundamental question is whether the conduct complained of is one for which a consumer or his lawful representative can use as a cause of action to bring a claim against the defendant. Such conduct may have certain characteristics. For instance, the conduct may be considered dishonest both within the civil and criminal senses. This could be the basis of a dishonest assistance claim or fraud claim pursuant to the Fraud Act 2006. Furthermore, the conduct may be unconscionable?<sup>199</sup> Further queries could be whether the conduct complained of is considered unfair and unjust or simply unlawful within the criminal and civil law senses within the particular jurisdictions. This is not an exhaustive list.

Consumer fraud is also distinguished from commercial fraud in the sense that the ambit of protection offered to the consumer is often broader.<sup>200</sup> Indeed the law has often taken account of these in often considering the bargaining power of the parties.<sup>201</sup> Further, administrative bodies are often established to protect the consumer whereas this may not necessarily be the case for businesses.<sup>202</sup>

Secondly, while in commercial setting, the basis of liability is principally contractual and legal action is normally between the parties in the transaction, protecting the vulnerable consumer against fraud may involve the state bringing criminal proceedings against the

---

<sup>198</sup> Compare the Unfair Contract Terms Act 1977 and the Consumer Protection from Unfair Trading Regulations.

<sup>199</sup> Waddams (n 71). Sarah Nield, 'Borrowers as Consumers: New Notions of Unconscionability for Domestic Borrowers', *Unconscionability in European Private Financial Transactions-Protecting the Vulnerable* (Cambridge University Press 2010).

<sup>200</sup> Consumers International (CI), 'A Guide to Developing Consumer Protection Law' <[www.consumersinternational.org](http://www.consumersinternational.org)>.

<sup>201</sup> Section 12 of Unfair Contract Terms Act 1977 (n 199).

<sup>202</sup> Competition and Markets Authority (CMA), 'How the CMA Investigates Competition and Consumer Issues' (25 September 2014) <<https://www.gov.uk/government/collections/how-the-cma-investigates-competition-and-consumer-issues>>.

defendant.<sup>203</sup> For instance commercial torts such as where a manufacturer produces inherently dangerous products such as exploding ovens, defective automobiles and harmful pharmaceutical products.

### **Transaction as the principal setting for consumer fraud**

If the stage is the setting for a theatrical play, then the transaction is the pivot for the commercial interaction between the consumers and businesses. Generally, the transaction between the seller and the consumer commences by means of a contract. Fraud may take place in the contract process. The consumer principally becomes a victim of fraud in a purchase transaction with the seller. Transactions fall into two broad phases: pre-contract and post contract.<sup>204</sup> A useful taxonomy has been provided by Professor Cartwright in the context of protecting vulnerable consumers.<sup>205</sup> These are information vulnerability, impact vulnerability, pressure vulnerability, supply vulnerability and redress vulnerability. This taxonomy can be incorporated into the pre-contract and post contract phases of a transaction.

### **The Role of the Common Law in protecting the consumer in fraud cases**

The common law provided the victim an avenue to seek redress through various actions. It is an irony when procedures instituted to achieve justice results in the contrary. Yet the common law's emphasis on procedures became a fertile ground for fraud. A combination of factors such as staff fraud by 'extremely fraudulent' officials, geographical location of courts and procedural uncertainties enhanced fraud in early common law, particularly in

---

<sup>203</sup> Consumers International (CI) (n 201).

<sup>204</sup> *ibid.*

<sup>205</sup> Peter Cartwright, 'The Vulnerable Consumer of Financial Services: Law, Policy and Regulation'.

the countryside. Paradoxically the slowness and cautious nature of early common law procedures was a check on fraud.<sup>206</sup>

It has been noted that redress for fraud was available through the action on the case in earlier times when formal proceedings have begun.<sup>207</sup> Difficulties with assumpsit subsequently led to remedies being sought in the 17<sup>th</sup> century in money had and received claims under the common law.<sup>208</sup> In real actions the claimant, could where there was a deed bring a case in covenant against a vendor's failure to convey land. No action existed in the common law until assumpsit was recognised in 1504 where the payment of the purchase price was a condition precedent to bringing the action.<sup>209</sup> The Claimant also needed to demonstrate that the vendor had expressly undertaken to convey land. Parties could by writ of deceit <sup>210</sup>bring claims against attorneys and legal officials for any fraudulent action or inaction and under the old writ of deceit for fraudulently acting in someone's name<sup>211</sup> or trespass on the case for deceit for dishonest disclosure of information to the other side.<sup>212</sup> Deceit in contract was prominent in land purchasing.<sup>213</sup>

One of the means by which the Chancery and the Common law courts protected the debtor against fraud is through the *audita querela*.<sup>214</sup> This writ issued of Chancery and directed the judges of the Kings Bench or Common Pleas '*ordering them to do speedy justice to*

---

<sup>206</sup>Plucknett (n 12) 380.

<sup>207</sup>Sir Frederick Sir Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I*, vol 2 (Cambridge University Press 1923) 560. See also JH Baker, *An Introduction to English Law* (4th edn, Butterworths Lexis Nexis 2002) 331.

<sup>208</sup>John Christian Bunbury, 'A History of the Action of Deceit on the Case and Related Developments in Contract Law' (Doctorate Thesis, The University of Auckland 2005). See also Alfred William Brian Simpson Simpson, *A History of the Common Law of Contract The Rise of the Action of Assumpsit* (Oxford University Press 1975).

<sup>209</sup>WT Barbour, *The History of Contract in Early English Equity*, pp 51–52.

<sup>210</sup>*ibid* 51.

<sup>211</sup>Baker (n 222) 336.

<sup>212</sup>*ibid*.

<sup>213</sup>*Somerton's case* [1433] B 11 Hen 6 Hil Pl 1. See also *Doige's Case* B Hill 9 Hy VI. Baker (n 222) 336.

<sup>214</sup>Plucknett (n 12) 393–394.

*the debtor, after having heard his complaint (audita querela) and reasons of the parties'.* It is said that *'it replaced the action of deceit and the writ of error to a large extent in matters arising under the states of merchants and staple, and later in the middle ages was used as a general remedy for those who had been the victims of the forgery or fraudulent manipulation of any type of procedure and records'.*<sup>215</sup> However its equitable nature was questioned. The common law relating to fraud was extremely meagre.<sup>216</sup> It is obvious that the role played by the common law courts was superior to the inferior one played by the private and ecclesiastical courts in protecting the consumer against fraud. The common law continues to play an important role in the protection of the vulnerable consumer.<sup>217</sup>

### **The role of the Court of Chancery in protecting the consumer in fraud cases**

The Court of Chancery had jurisdiction in many matters among which fraud is key component.<sup>218</sup> Fraud in the Court of Chancery related to the conscience and relief of the poor and vulnerable although it ceased to be available to the poor due to growth in procedural technicalities.<sup>219</sup> The court held that *'it is no conscience to be a partaker of fraud'* and extended the notion of fraud and included jurisdiction in matters of penalties and forfeitures. These reflected in relief for those debtors who could not pay it, even though Lord Norburie later hardened his stance against it. The Court even extended its jurisdiction to include mistake, negligence and extortion.<sup>220</sup>

---

<sup>215</sup>Plucknett (n 1) 394.

<sup>216</sup>ibid 689.

<sup>217</sup>David Capper, 'Protection of the Vulnerable in Financial Transactions-What the Common Law Vitiating Factors Can Do for You', *Unconscionability in European Private Financial Transactions-Protecting the Vulnerable* (Cambridge University Press) <<http://ebooks.cambridge.org/>> accessed 25 January 2014.

<sup>218</sup>Jones (n 15) 422.

<sup>219</sup>Plucknett (n 1) 689.

<sup>220</sup>Jones (n 15).

There are several aspects of fraud cases which the Court of Chancery stepped in to relieve.<sup>221</sup> These include situations where a condition has been fraudulently omitted from a bond, instruments obtained by fraud, circumvention, practising on the weakness of others, were invalidated and were sometimes cancelled in open court. A mere assertion of fraud was adequate in the bill of complaint, a decision compelled a vendor to repay money received for a reversion of which he could not give the purchaser the stipulated enjoyment.<sup>222</sup> The decline caused parallel developments in law.

It is said many cases in Chancery were concerned with leases and taking advantage of the weakness of others was abhorred.<sup>223</sup> The basis of the Court's intervention was grounds of public policy and the penalties included forfeitures, assessment of mistake, accidents and ignorance.<sup>224</sup> Jones said that 'unless the creditor was out to take deliberate advantage of the another's misfortune or trifling default, there was little to be complained'.<sup>225</sup> The Chancery had unique means of enforcing the law and these were discovery, recovery, restraint and the common injunction.<sup>226</sup>

The individual's claim's in the courts are not without challenges some of which were procedural. It is not anomalous if a proposition asserts the importance of procedure in legal proceedings. Indeed, the procedure is sometimes intertwined with the 'law'. Nevertheless, it seems unusual when it is asserted that procedure is more significant than substantive law. Yet this is true of early English law as reflected in the forms of action.<sup>227</sup> The forms of action refer to written document which instructed the defendant to appear

---

<sup>221</sup> *ibid* 429.

<sup>222</sup> *ibid* 430.

<sup>223</sup> *ibid* 431–432.

<sup>224</sup> *ibid* 437–448.

<sup>225</sup> *ibid* 447.

<sup>226</sup> *ibid* 449–498.

<sup>227</sup> See generally Plucknett (n 1) 353–418.

in the relevant court to answer to a complaint. The Kings writ system set the tone for the commencement of proceedings under the civil law in England.<sup>228</sup> Real actions referred to situations where the demandant, claims title to real property including lands. Personal actions involved situations where a man claims among others a debt, a personal duty, or satisfaction in damages for some injury done to his person or property. Mixed actions however applied where suits involved real and personal damages.<sup>229</sup>The universal place of the forms of action are best captured in Maitland's oft quoted statement that *'the forms of action we have buried, but they still rule us from the graves'*.<sup>230</sup> Indeed Sir Maine has stated *'so great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure'*.<sup>231</sup>

The procedural challenges were also evident in the relationship between the common law courts and the courts of chancery. This was important because a legal system cannot be upheld as standing to scrutiny if it cannot be seen to stem abuses in the processes for achieving justice. This was the state of the English civil system before the merger of common law courts and the Court of Chancery. Several milestones led to this development. The process began in the 15th century with the abolishing of the process whereby the defendant could be imprisoned where the cause of action for such arrest has not been particularly expressed, a situation aided by the overhauling of bankruptcy laws

---

<sup>228</sup>ibid 353.

<sup>229</sup>See FW Maitland, 'Forms of Action at Common Law, 1909' <<https://sourcebooks.fordham.edu/basis/maitland-formsofaction.asp>> accessed 1 July 2018 for a detailed discussion of the three important types. See Baker (n 222) 70 for a broader picture of original.

<sup>230</sup>Maitland (n 244).

<sup>231</sup>Sir Henry Sumner Maine, *Early Law and Custom* (John Murray 1890) 389 <<https://archive.org/stream/onearlylawandcu00maingooq#page/n8/mode/2up>> accessed 1 July 2018.

in the 19th century.<sup>232</sup>The introduction of the English language to the courts also enhanced this development.<sup>233</sup>

Significant statutory developments enhanced the merger of the courts. The uniformity of process Act provided that unless in exceptional circumstances all cases in the common law courts and courts of Chancery must follow *mutatis mutandis*, the same initial steps in the least.<sup>234</sup>The overlapping of various causes of actions at different courts, was riddled with traps such that Jenks suggested that *'the most successful practitioner in the Common Law Courts was not the man with the greatest grasp of principle, or the strongest sense of justice, but the man with the memory of irrelevant details, and the least scruple in making use of them'*.<sup>235</sup>The parallel jurisdictions of the courts were finally ended by the Judicature Act of 1873 which was amended in 1875. This had among others been preceded by reforms to forms of action, reorganisation of court staff, introduction of Chancery processes into Common law courts and vice versa. The courts had thus merged by 1873.<sup>236</sup>

### **The role of the early criminal courts in protecting the consumer**

The criminal law also plays quite an early role in protecting the individual through the early courts. It is acknowledged that understanding English law of earlier times requires an understanding of the system of the judiciary at the time. For *'the rules which govern the jurisdiction and procedure of the courts are the substantive part of early bodies of law'*.<sup>237</sup> The early history of the criminal law can be viewed from the communal society

---

<sup>232</sup>Edward Jenks, *A Short History of English Law from the Earliest Times to End of the Year 1911* (Little, Brown and Company 1913) 346–348.

<sup>233</sup>*ibid* 348–349.

<sup>234</sup>*ibid* 348–350.

<sup>235</sup>*ibid* 350.

<sup>236</sup>*ibid* 356–371.

<sup>237</sup>Holdsworth (n 38) 1–2.



in earlier times.<sup>238</sup> There were in the early era, two basic types of courts: local courts<sup>239</sup> and royal courts.<sup>240</sup> These included the national system of communal courts vis-a-vis private courts such as the ecclesiastical and lay courts of larger land owners.<sup>241</sup> The Royal Court had wide criminal and civil jurisdiction and powers over the local courts and officials.<sup>242</sup>

By the end of 13th century the sheriff's tourn and the court leet<sup>243</sup> exercised jurisdiction over petty crimes including regulating bread and beer as noted in Chapter One of this thesis. The Boroughs and Lord Manors<sup>244</sup> with right to exercise criminal charters and to hold court leet did so in the 17th century.<sup>245</sup> They were to disappear occasioned by the rise of the justice of peace who were appointed in the Borough in the middle of the 16th century made of among others mayors and aldermen as noted in the Preface to this thesis.<sup>246</sup> These charters gave right to hold quarter sessions and this led to the court of quarter sessions which superseded the court leet or was amalgamated.<sup>247</sup>

The ecclesiastical court also had a criminal jurisdiction over offences against religion where a clerk was accused, and a wide corrective jurisdiction over clergy and laity alike.<sup>248</sup> They also had jurisdiction over offences against morals and exercised disciplinary control over the moral life of the church. The offences included usury, adultery, incontinency, incest, misbehaviour in church, neglect to attend church,

---

<sup>238</sup>See generally Baker (n 52) 1–11.

<sup>239</sup>Holdsworth (n 38) 3.

<sup>240</sup>ibid 32.

<sup>241</sup>ibid 4.

<sup>242</sup>ibid 40,47.

<sup>243</sup>ibid 87–94. See also ibid 133–135.

<sup>244</sup>Holdsworth (n 38) 142.

<sup>245</sup>ibid 143.

<sup>246</sup>ibid 142–143.

<sup>247</sup>ibid 143.

<sup>248</sup>ibid See generally 580–621.

swearing, profaning the Sabbath, blasphemy, and drunkenness. The Ecclesiastical court used inquisition as its trial procedure.

First mentioned in 1264, the Office of Justice of the Peace is the genesis of the Magistrate's Court which today handle consumer claims under the criminal law.<sup>249</sup>The Magistrates courts have jurisdictions in summary trials and the crown courts are appellate and first instance courts. The Crown Courts deal with indictable offences and is the venue for serious fraud trials.

Another important court of criminal jurisdiction was the Court of Star Chamber. Its origin is unclear. Some suggest it existed by the Act of 1487, others suggest it existed before this Act and was named after the ceiling called the Camera Stella<sup>250</sup> and others suggest that the Act of 1487 merely enlarged the Court's jurisdiction.<sup>251</sup> The court which met at Westminster was established by 1641.<sup>252</sup> The Star Chamber handled crimes committed contrary to the common law or statute even though the statute of 1487 criminalise among others imbracery, bribing jurors, untrue demeanours of sheriffs in false returns and panels.<sup>253</sup>

Indeed like its counterpart High Court of Chancery, it corrected deficiencies in the common law.<sup>254</sup> For our purposes according to Hudson, the court dealt with forgery of deeds,<sup>255</sup> seized corruption of officers, fraud,<sup>256</sup> conspiracy and libel, including attempts

---

<sup>249</sup>Justices of the Peace Act 1361.

<sup>250</sup>Susan Agee, 'The Court of Star Chamber, 1593-1603' (Student Honors Theses, University of Richmond 1969) 1-4 <<http://scholarship.richmond.edu/honors-theses>>. See Michael Stuckey, *The High Court of Star Chamber* (Gaunt Inc 1998) 25-30 It is a difficult read but contains good primary references. For a short lighter read by the same author see Michael Stuckey, 'A Consideration of the Emergence and Exercise of Judicial Authority in the Star Chamber' (1993) 19 Monash University Law Review.

<sup>251</sup>Agee (n 82) 2-3.

<sup>252</sup>Stuckey, *The High Court of Star Chamber* (n 82) 9.

<sup>253</sup>ibid 46-54. Agee (n 82).

<sup>254</sup>Agee (n 82) 1.

<sup>255</sup>Edward P Cheyney, 'The Court of Star Chamber' (1913) 18 *The American Historical Review* 727.

<sup>256</sup>Stuckey, *The High Court of Star Chamber* (n 82) 47.

to coin money, burglary forgery at first instance only as second was a felony.<sup>257</sup> For purposes of consumers, private persons or the attorney general<sup>258</sup> could begin proceedings and corporations could be sued.<sup>259</sup> The Court of Star Chamber protected members of the public by bringing prosecutions against even lawyers. The role of the Court in prosecuting fraud and in the development of the English judiciary was immense.<sup>260</sup> The judges pronounced sentence at the end of the case.<sup>261</sup> Forestalling and related offences were held criminal in the Star Chamber.<sup>262</sup>

Early criminal trial developed certain procedures which have a bearing on fraud trials. One such concept is the burden of proof during trials. Generally, the plaintiff's statement of claim <sup>263</sup> supported by a Secta or trust worthy witnesses according to Magna Carta<sup>264</sup> called a jury, 'raised a slight presumption in the plaintiff's favour which the defendant could meet by compurgation'.<sup>265</sup> A prima facie case having been established orally, the defendant made his defence similarly.<sup>266</sup> The burden of proof, which meant going through prescribed form to establish innocence, lay on the defendant<sup>267</sup> and the court rationally considered each parties' contentions.<sup>268</sup> Roman law influenced in the 13<sup>th</sup> century the idea of placing the burden on the plaintiff<sup>269</sup> which method gradually developed into a serious trial by jury.<sup>270</sup> Sir Holdsworth aptly captures the downside when

---

<sup>257</sup>ibid 46–54. Theodore Frank Thomas Plucknett, *A Concise History of the Common Law* (5th edn, The Law Book Exchange Ltd 2001) 459.

<sup>258</sup>Stuckey, *The High Court of Star Chamber* (n 82) 48.

<sup>259</sup>See ibid 38–40.

<sup>260</sup>Holdsworth (n 38) 507–508.

<sup>261</sup>Stuckey, *The High Court of Star Chamber* (n 82) 64–65.

<sup>262</sup>Cheyney (n 87).

<sup>263</sup>Holdsworth (n 38) 299–300.

<sup>264</sup>ibid 300.

<sup>265</sup>ibid.

<sup>266</sup>ibid 301.

<sup>267</sup>ibid.

<sup>268</sup>ibid 301–302.

<sup>269</sup>ibid 302.

<sup>270</sup>ibid 304.

he states 'thus in early law to begin a law suit, or to be a witness in a law suit when the other side was skilled in warlike weapons was a perilous process'. It had practically come to an end by the fifteenth century, but it was in 1819 that it was abolished.<sup>271</sup>

## **The standard of proof for fraud - has consistency finally arrived?**

It is trite that liability for a wrong is subject to the standard of proof for the conduct been adjudged to have been satisfied by a court of competent jurisdiction. In criminal fraud cases, it has been stated that the test in England is dishonesty which according to Ghosh<sup>272</sup> must be satisfied in both subjective and objective senses in criminal cases. While in civil cases the standard of proof according to *Barlow Clowes International Ltd v Eurotrust International Ltd*<sup>273</sup> is assessed only in the objective sense, Ghosh expects the jury to be satisfied that the defendant was dishonest in both subjective and objective senses.<sup>274</sup> Simply, the defendant might himself or herself 'believed that what he or she is 'alleged to have done was in accordance with the ordinary person's idea of dishonesty'.<sup>275</sup>

The court ruled in *Barlow* that 'although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards'.<sup>276</sup> The differing approaches have been the subject of concern to the courts. In *Kirschner v General Dental Council*<sup>277</sup>

---

<sup>271</sup> *ibid* 310.

<sup>272</sup> *R v Ghosh* [1982] QB 1053.

<sup>273</sup> *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37.

<sup>274</sup> *R v Ghosh* (n 22).

<sup>275</sup> *R v Ronald Price* (1990) 90 Crim App R.

<sup>276</sup> *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37 (n 6).

<sup>277</sup> *Kirschner v General Dental Council* [2015] EWHC 1377 (Admin).

Mr Justice Mostyn observed that ‘the position needs to be conclusively clarified by the higher appellate courts or by legislation’.<sup>278</sup> Equally, Lord Justice Leveson had similarly raised that concern observing that ‘at some stage the opportunity to revisit this issue should be taken by the Court of Appeal (Criminal Division)’, a clear suggestion that it is the criminal court that must align with the civil courts.

The Supreme Court ruling in the case of *Ivey v Genting Casinos (UK) Ltd t/a Crockfords*<sup>279</sup> appears to resolve the inconsistency between the application of the concept of dishonesty in criminal and civil senses. The Supreme Court has ruled that the subjective limb of the test of dishonesty in criminal cases cannot be justified in that ‘there can be no logical or principled basis for the meaning of dishonesty (as distinct from the standards of proof by which it must be established) to differ according to whether it arises in a civil action or criminal prosecution’. The Court clarified that it was important to do so in civil case because ‘such an opportunity is unlikely to occur in a criminal case whilst *Ghosh* remains binding on trial judges throughout the country ... and there is some doubt about the freedom of [the Court of Appeal (Criminal Division)] to depart from *Ghosh*<sup>280</sup> in the absence of a decision from this court’. While it is clear that the Supreme Court expects its observations to have far reaching effect in cases in the lower courts and Tribunals across the country, it must be noted that it was obiter. To the present author the reason the court gave in clarifying this issue in a civil case shows that lower courts can be bold in its application to cases where the standard of proof required subjective dishonesty including theft, cases under the Fraud Act 2006 and criminal offences in financial services transactions.

---

<sup>278</sup> *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37 (n 6).

<sup>279</sup> *Ivey v Genting Casinos (UK) Ltd t/a Crockfords* [2017] UKSC 67.

<sup>280</sup> *R v Ghosh* (n 5).

## **Conclusion**

As a generic introduction to fraud, this chapter has been largely exploratory. Statutory offences such as those under the Insolvency Act 1986 have not been discussed. Subsequent chapters would explore some of the issues raised in this chapter in greater detail and where appropriate raise others. The next chapter contextualises fraud by examining it within the field of financial services.

## CHAPTER THREE (3)

### FINANCIAL SERVICES FRAUD

#### Introduction

‘Financial services’ covers the broad spectrum of business activities in financially intensive sub-sectors of an economy such as banking, financial markets or securities, pensions and insurance.<sup>1</sup> It is a broad area and this thesis could well have been titled financial services fraud and the vulnerable consumer.<sup>2</sup> A retrospective journey into financial services regulation in England thus involves carving a sense of a loose marriage of varied areas of human endeavours. Gilligan has stated that ‘*financial services regulation and law in general are a product of, and subsequently respond to, social, political and economic phenomena*’.<sup>3</sup> This proposition is true. Indeed, it is doubtful whether one can undertake a credible focused enquiry into any of these areas absolutely divorced from the impacts of other sectors.

This Chapter presents a short overview of the financial services industry in England with specific reference to legal and regulatory developments which directly or indirectly protects individual investors against fraud. It commences with an attempt at tracing the origin of financial services followed by a discussion of how regulation has historically been pursued under the civil, criminal and regulatory ‘laws’ in England.<sup>4</sup> There are many authorities on this subject. Yet the distinguishing feature of this discussion is the emphasis

---

<sup>1</sup> Peter Cartwright, ‘Consumers, Investors and Citizens’, *Consumer Protection in Financial Services* (Kluwer Law International 1999) pages 6 and 7. See also ‘Office of Fair Trading Press Release 60/97 16.12.97’.

<sup>2</sup> See generally George Walker, Robert Purves and Michael Blair, *Financial Services Law* (4th edn, Oxford University Press 2018) where the authors treat both consumer credit and land transactions.

<sup>3</sup> George P Gilligan, ‘Historical Touchstones in the Regulation of the Financial Services Sector’ <<http://ssrn.com/abstract=2213254>>.

<sup>4</sup> See ‘Background to Financial Services Legislation’, , *Encyclopaedia of Financial Services Law* (Sweet and Maxwell 2018).

on the protection of the consumer. The latter part of the chapter therefore introduces how the main financial services regulator in the UK, the Financial Conduct Authority (the FCA) undertakes its function under FSMA 2000 for protecting the consumer. It must be noted however that the present author sees the individual member of the public, the individual investor and the consumer as one and the same entity.

### **Origin of Financial Services**

The origin of financial services is temporally indefinite<sup>5</sup> and conceptual controversies partly account for this situation. The concept is young,<sup>6</sup> if it is viewed within the prism of modern definition and requirements.<sup>7</sup> In the United Kingdom, even the Financial Services Act 1986 used the term investments.<sup>8</sup> Nevertheless, where the enquiry focuses on activities deemed of a substantive financial nature, it is arguable that it began in antiquity. Redfield comments on how the Greeks in the eighth century sought a regulatory structure for the markets in respects of its relationship with the social political structure called polis.<sup>9</sup> He notes that "... The Greeks looked upon the market as a threat to the political order. The function of the state, to a large extent, was to correct the effects of the market-not by regulation, but by creating a superordinate structure of social regulations".<sup>10</sup> There is evidence of derivatives in the 48<sup>th</sup> law of the Code of Hammurabi who it is believed reigned from 1792 to 1750 BC as well as among the Ancient Mesopotamians.<sup>11</sup> There is also evidence of derivative contracts in cuneiform script in the Babylonian language used

---

<sup>5</sup> Barry Rider, Charles Abrams and Michael Ashe, *Guide to Financial Services Regulation* (3rd Edition, CCH Editions Ltd 1997) page 102.

<sup>6</sup> Cartwright (n 1) pages 6 and 7.

<sup>7</sup> E Victor Morgan and WA Thomas, *The Stock Exchange: Its History and Functions* (ELEK Books Ltd 1962) page 11.

<sup>8</sup> Financial Services Act 1986 Schedule 1 (Part 1).

<sup>9</sup> Noted in Gilligan (n 3).

<sup>10</sup> Cited in *ibid*.

<sup>11</sup> Steve Kummer and Christian Pauletto, 'The History of Derivatives: A Few Milestones' (EFTA Seminar on Regulation of Derivatives Markets 2012).



in Egypt to record transactions with many nations in the region.<sup>12</sup> The Roman and Byzantine states encountered regulatory challenges regarding forgery and counterfeiting.<sup>13</sup> In 16<sup>th</sup> century England, joint stock companies were established for trading in various countries including Russia, Africa and India.<sup>14</sup> Records further show that by the 17<sup>th</sup> Century all the conditions for a regular stock exchange had been fulfilled in England.<sup>15</sup> Financial services is thus in substantive terms arguably old.

Recent developments in the UK financial services landscape includes religious financial service providers particularly Christian and Islamic. Indeed, in relation to Christianity, involvement in financial activities dates to Biblical times.<sup>16</sup> There is historical evidence of financial activities within Israel and reference is made to legal knowledge manifested by scribes who drafted legal documents such as interest bearing loan contracts.<sup>17</sup> Crucially the first recorded stock exchange in the world, the Avignon Exchange, is of Christian origin.<sup>18</sup> In present times, there are funds by the Methodist Church,<sup>19</sup> the Church of England<sup>20</sup> and the financial activities of the Salvation Army's Reliance Bank which has received critical acclaim. Of Reliance it is said that *'it has never sold payment protection insurance. It has never had a customer complain to the financial ombudsman. It has never been fined by regulators-and it was certainly not mixed up in the Libor*

---

<sup>12</sup> *ibid.*

<sup>13</sup> Gilligan (n 3).

<sup>14</sup> Morgan and Thomas (n 7) pages 11-13.

<sup>15</sup> *ibid* page 11.

<sup>16</sup> Morris Silver, *Prophets and Markets The Political Economy of Ancient Israel* (Kluwer-Nijhoff Publishing 1983) pages 65-68.

<sup>17</sup> *ibid* page 68.

<sup>18</sup> Paul Einzig, *A Dynamic Theory of Forward Exchange* (Macmillan 1961) page 1.

<sup>19</sup> Niklas Kreander, Ken McPhail and David Molyneaux, 'God's Fund Managers: A Critical Study of Stock Market Investment Practices of the Church of England and UK Methodists' (2004) 17 *Accounting, Auditing & Accountability Journal* 408.

<sup>20</sup> *ibid.*

*scandal*'.<sup>21</sup> Indeed the UK government has embraced Islamic finance including investments.

### **The relationship between financial services and fraud**

From whatever standpoint it is examined, fraud has a strong pecuniary connection. It is almost impossible to examine fraud in the context of law without appreciating its monetary connection. The English Law Commission in its Report on Fraud 2002<sup>22</sup> stated that 'fraud is essentially an economic crime, and we do not think the new offence should extend to conduct which has no financial dimension'. Indeed, when the Fraud Act 2006 uses the expression 'gain or loss' in the mens rea of the fraud offences, the reference is clearly directed to a pecuniary consequence.<sup>23</sup> A historical study of crisis emanating partly or wholly from fraud also demonstrates its relationship with money.<sup>24</sup> Furthermore, it is arguable to opine that almost every industry susceptible to fraud has some connection to money.<sup>25</sup> It is this direct relationship that explains why fraud is referred to as financial or economic crime. Invariably, the magnitude of money stolen must be great for it to fall under serious fraud. The Financial Services and Markets Act (FSMA) 2000 in regulating financial activities in the United Kingdom, distinguishes mainstream and non-mainstream.<sup>26</sup> It is therefore true to propose that the susceptibility of an industry to

---

<sup>21</sup> Patrick Collinson and Rupert Jones, 'The Ethical Bank That Offers Salvation?' *The Guardian News and Media Limited* (London, 26 October 2013) <[www.theguardian.com/money/2013/oct/26/ethical-bank-reliance-coop-salvation-army](http://www.theguardian.com/money/2013/oct/26/ethical-bank-reliance-coop-salvation-army)> accessed 23 May 2016.

<sup>22</sup> 'Fraud: Report on a Reference under Section 3(1)(e) of the Law Commissions Act 1965' (2002) LAW COM No 276, Cm 5560 <<http://www.lawcom.gov.uk>>.

<sup>23</sup> See sections 2, 3 and 4 of Fraud Act 2006.

<sup>24</sup> George Robb, *White Collar Crime in Modern England: Financial Fraud and Business Morality, 1845-1929* (Cambridge University Press 1992).

<sup>25</sup> See generally introductory section of Michael Clarke, *Regulating the City Competition Scandal and Reform* (Open University Press 1986).

<sup>26</sup> See Financial Services and Markets Act 2000 which under the FSA mainstream transactions came under the full weight of the COBS and non-mainstream activities required firms to only comply with some sections of COBS.

financial crime is determined among others by the magnitude of money within that industry.

The financial services industry is the natural habitat for fraud. It is obvious that financial activities within an economy cut across various industries but at varying degrees of scale. The financial services industry deals with large amounts of money, making it the heart of fraud activities in any economy. This peculiarity is confirmed when the Right Honourable Lord Justice Bingham states that "*the failure of any substantial company is likely to cause loss, and often hardship, to creditors, employees and shareholders. But when the company is a bank these results are magnified, because banks deal in other people's money ...*".<sup>27</sup> It is generally accepted that integrity is indispensable for the efficient functioning of the industry.<sup>28</sup> Yet fraud seriously affects the integrity of not only the financial services industry, but the entire economy. It is logical therefore when a general study into fraud enquires into fraud within the financial services industry. This is the object of this essay.

The present author has stated that fraud generally occurs when a person becomes the victim of conduct described as fraud and prohibited by the criminal or civil fraud laws in any society. Governments thus have the obligation to protect the victims of fraud. More importantly, it is agreed with Professor Rider that protecting victims of financial fraud '*... involves giving attention to matters which are not always legal and unlawful in the black and white sense of the criminal law*'.<sup>29</sup> This truism informs the discussion in this essay. This essay deals with regulation of fraud within financial services but focuses only on the markets. Under English law, the discussion focuses on the criminal and civil

---

<sup>27</sup> 'Banking Supervision and Regulation' (House of Lords Select Committee on Economic Affairs 2009) 2nd Report of Session 2008-09.

<sup>28</sup> Section 1B (3) (b) of Financial Services Act 2012. Rider, Abrams and Ashe (n 5) page 101.

<sup>29</sup> Rider, Abrams and Ashe (n 5) page 703.

regulation of market frauds. However, the examination of the laws and principles under each category is inextricably linked to historical developments and the major ones are discussed. The aim is to ensure a balanced approach to the subject of fraud within financial markets.

The primary aim of the discussion is to address how the measures have and still protect the consumer. This is in accordance with the regulatory objectives of the Financial Services Act 2012.<sup>30</sup> Unlike the broad approach adopted by Professor Cartwright where he explored general areas such as banking and pensions,<sup>31</sup> the present author focuses on the markets. Further, the present author examines non-pure consumer protection legislations since it is arguable that regulations on offences such as insider dealing serve to protect the consumer though not directly mentioning the consumer. The public, the investor and the consumer are the same<sup>32</sup> an approach acknowledged by even writers who usually focus on pure consumer statutes.

## **Regulation of the markets in England under the criminal law- statutory**

### **Engrossing, Forestalling and Regrating**

The public were protected in earlier times under the criminal law through the prohibition of offences on the markets. Indeed Sir Blackstone discusses the offences under the subject of 'offences Against Public Trade'.<sup>33</sup> The criminal regulation of markets in early England

---

<sup>30</sup> Section 1B (3) (a) of Financial Services Act 2012 (n 30).

<sup>31</sup> Peter Cartwright, *Consumer Protection in Financial Services* (Kluwer Law International 1999).

<sup>32</sup> See Robert R Pennington, *The Investor and the Law* (Macgibbon & Kee Ltd 1968). See also Adam Samuel, *A Practitioner's Guide to Consumer Financial Services Complaints and Compensation* (2nd edn, Sweet and Maxwell 2017). See also Jonathan Russen, *Financial Services: Authorisation, Supervision, and Enforcement: A Litigator's Guide* (Oxford University Press 2006) 117–179. Dimity Kingsford Smith, 'Financial Services Regulation and the Investor as Consumer', *Handbook of Research on International Consumer Law* (Edward Elgar Publishing 2010).

<sup>33</sup> William Sir Blackstone, *Commentaries on the Laws of England (1765-1769)*, p Book 4, Chapter 12 <Accessed from the Lonang Institute> accessed 11 April 2018.

was in one sense statutory and took the form of the ancient common law offences of engrossing, forestalling and regrating which were classified as offences in London in 12<sup>th</sup> Century and early 1321 around various cities under King Edward the Confessor.<sup>34</sup> Although forestalling sometimes was used to embrace all three offences, they indeed referred to varied forms of market abuse which distort prices and made them dearer or enhanced prices.<sup>35</sup> As this was injurious to the public, under King Henry I forestalling was considered a crime, an offence against the King's Peace. It subsequently acquired the meaning of a marketing offence when the Marshalseas appointed under Edward I to regulate trade in the shires distributed the law.

Sir Blackstone defines the offences as follows: forestalling as “... *the buying or contracting for any merchandise or victual coming in the way to market; or dissuading persons from bringing their goods or provisions there; or persuading them to enhance the price, when there: any of which practices make the market dearer to the fair trader*”.<sup>36</sup> This was a statutory offence.<sup>37</sup> Regrating was on the other hand defined to be ‘*the buying of corn, or other dead victual, in any market, and selling them again in the same market, or within four miles of the place*’.<sup>38</sup> Considered from a modern view point, it is logical to query why this was considered an offence. However it was not noted that as regrating enhanced the price of the provisions because the successive seller had to make profit, it was considered an offence.<sup>39</sup> Finally, Engrossing was defined as ‘*getting into one's possession, or buying up, of corn or other dead victuals, with intent to sell them again*’.<sup>40</sup>

---

<sup>34</sup> Sir James Fitzjames Stephen, *A History of the Criminal Law of England*, vol III (MacMillan and Co 1883).

<sup>35</sup> *ibid.*

<sup>36</sup> Sir Blackstone (n 35) Book 4, Chapter 12.

<sup>37</sup> 5 & 6 Edw. VI. c. 14.

<sup>38</sup> Sir Blackstone (n 35) Book 4, Chapter 12.

<sup>39</sup> 5 & 6 Edw. VI. c. 14 (n 39).

<sup>40</sup> Sir Blackstone (n 35).

Similarly this was considered injurious to the public as it placed the provisions in the hands of few rich men who inflated the price at their discretion. This made it an offence.<sup>41</sup>

The quest for transparency and the inadequacy of previous law resulted in Edward IV's parliament passing an amending act in 1552 called the Act against Regrators, Forestallers and Ingrossers<sup>42</sup> (5 & 6 Edward VI c.12) iii, arguing, among others, that market should take place in 'open Fair or Market' that had license from 3 justices of peace in the relevant county. To address the perceived inadequacies of previous law, in 1562, Parliament passed an Act<sup>43</sup> (5 Elizabeth I, c 12) iv that regulated the licensing of people to trade, coming up with strict conditions and the penalty for breaching the law. The licensing was necessary because it was said that '*such a great number of Persons seeking only to live easily, and to leave their honest Labour, have and do daily seek to be allowed and licensed ... being most unfit and unmet for those Purposes... diminishing the number of goods and husbandmen*'. The death knell finally came in 1844 with the enactment of an Act for Abolishing the Offences of Forestalling, Regrating and Engrossing, and for Repealing certain statutes passed in restraint of Trade. This Act repealed all the 19 other Acts passed in the reigns of Henry III and Edward VI.

The nascent regulation of ancient non-financial markets has important implications for modern markets. In principle and in practice, they introduced the idea that markets need to be regulated to ensure integrity, transparency and fairness to vulnerable participants.<sup>44</sup> Significantly, they elevated the seriousness of market offence to a crime.<sup>45</sup> Additionally, they established a licensing regime, which feature is important in both criminal and civil

---

<sup>41</sup> 5 & 6 Edw. VI. c. 14 (n 39).

<sup>42</sup> 5 & 6 Edward VI c.12.

<sup>43</sup> 5 Elizabeth I, c 12.

<sup>44</sup> See generally Laurence Cecil Bartlett Gower, 'Review of Investor Protection' (Her Majesty's Stationery Office 1982) Discussion Document and associated reports.

<sup>45</sup> *R v McQuoid* [2009] EWCA Crim 1301 where insider dealing was held to be a crime.

regulation of modern financial markets.<sup>46</sup> It is arguable that these are some core features of the regulation of modern markets.

### **The Bubble Act 1720**

The trigger for the Bubble Act 1720 is a historically important backdrop to fraud on the market in England and protecting the investing public. Established in 1711, the embryonic cashless joint-stock South Sea Company<sup>47</sup> engaged in sustained speculative trade and manipulating of prices, leaving in its wake many a victim from all works of life. Relying on the patronage of its stocks by Royalty and public officials, the directors managed, in the face of concerns about frauds, to persuade the House of Commons to stifle competition by passing the Bubble Act in 1720.<sup>48</sup> In reality a set of clauses in a statute confirming the privileges of chartered status on two insurance companies, it provided that a company was illegal if it was formed without a Royal Charter or under a charter for another purpose.<sup>49</sup> Furthermore, transactions in shares in such companies were void and the penalties could be forfeiture and life imprisonment. It is therefore doubtful whether this legislation was enacted to deal with abuse.<sup>50</sup> Unsurprisingly, its impact in dealing with abuse and scandal was minimal<sup>51</sup> and all restrictions on joint stock companies imposed in the Bubble Act were abolished in 1825. While the Bubble Act was successfully used to prosecute the defendant in the *R v Cawood*<sup>52</sup> for setting up a bubble company North Sea, the court declined to find against the defendant in *R v Dodd*.<sup>53</sup>

---

<sup>46</sup> See Financial Services Act 1986 (n 8) which introduced the authorisation regime and subsequent legislations.

<sup>47</sup> See generally Morgan and Thomas (n 7) pages 29-41.

<sup>48</sup> *ibid* page 37.

<sup>49</sup> *ibid* pages 37-38.

<sup>50</sup> *ibid* page 37.

<sup>51</sup> *ibid* page 40.

<sup>52</sup> *R v Cawood* 92 ER 386.

<sup>53</sup> *R v Dodd* 93 ER 136.

### **Prevention of Fraud (Investments) Act 1939**

The journey that began with forestalling and related offences, found modern expression with the enactment of the Prevention of Fraud (Investments) Act 1939, an act passed with specific reference to financial services.<sup>54</sup> The principal object was to prevent the proliferation of new companies which resulted from the 1930s boom and to prohibit frauds involving sale of shares in worthless companies. It had a requirement that anyone dealing with shares must hold principal licence, but it was deficient in that it 'prescribed no requirements for the licensed dealer to follow to acquire shares.'<sup>55</sup>

### **Prevention of Fraud (Investments) Act 1958**

Consequently, Parliament passed the Prevention of Fraud (Investments) Act 1958 which introduced the requirement that a person could, except exempted by recognised body, only deal in investments or securities if licensed by the DTI. Pursuant to the section 7 power, the DTI introduced the Licensed Dealers (Conduct of Business) Rules 1983 (SI/1983/585).<sup>56</sup> This introduced the concept of Chinese walls, the obligation to know your client, restriction on cold calling and holding dealers to certain acceptable standards of practice. Section 13 regulated investment by criminalising an attempt to induce a person to enter investment advice by misleading, false or deceptive statement, promise forecast or by dishonest concealment of material fact.<sup>57</sup>

---

<sup>54</sup> Section 13 Prevention of Fraud (Investments) Act 1939.

<sup>55</sup> Eilis Ferran, 'The Break-up of the Financial Services Authority' (2011) 31 *Oxford Journal of Legal Studies* 455. George P Gilligan, 'The Origins of UK Financial Services Regulation' [1997] *Company Lawyer*.

<sup>56</sup> Section 7 Prevention of Fraud (Investments) Act 1958.

<sup>57</sup> Section 13 of the *ibid*.



Candidate Number: 1341103

However, the PFA 1958 had inherent weaknesses.<sup>58</sup> First, it did not regulate all professions, who required licensing; regulated dealers but investment advisers.<sup>59</sup> Secondly it led to growth in the exempted dealers which included those who traded in securities, which situation Gower indicated became a status symbol.<sup>60</sup> There was confusion in the regulation of unit trusts by the DTI, as its rules were unpublished.<sup>61</sup> The PFA also failed to define a circular, so it was unclear whether newspaper advertisements were circulars.<sup>62</sup> Moreover, it had no provision for civil liability for making a false or reckless statement, also the DTI could not suspend licence or re-new them, rather they had to revoke them entirely.<sup>63</sup> Due to the narrow scope of the PFI and the trend of courts' reluctance to be involved in business regulation it has been suggested that it has been 'emasculated by restrictive interpretation.'<sup>64</sup>

### **Financial Services Act 1986**

The resultant enactment in 1986 of the Financial Services Act<sup>65</sup> was anticipated as the panacea to regulation of the industry.<sup>66</sup> The Gower Review which preceded the Act's birth was triggered among others by the fact that the scandals in that era spoke louder.<sup>67</sup> Furthermore, the self-regulation culture in the City could not withstand the international

---

<sup>58</sup> See also Graham F Pimlott, 'Reform of Investor Protection in the U.K.-an Examination of the Proposals of the Gower Report and the U.K.'s Government's White Paper of January 1985' (1985) 7 *Journal of Comparative Business and Capital Market Law* 141. See also 'Financial Services in the United Kingdom- A New Framework for Investor Protection' (Department of Trade and Industry 1985) White Paper Cmnd. 9432.

<sup>59</sup> Pimlott (n 96).

<sup>60</sup> *ibid.*

<sup>61</sup> *ibid.*

<sup>62</sup> *ibid.*

<sup>63</sup> *ibid.*

<sup>64</sup> See also Rider, Abrams and Ashe (n 5) 6-8.

<sup>65</sup> Financial Services Act 1986 (n 8).

<sup>66</sup> Rider, Abrams and Ashe (n 5) 101-127.

<sup>67</sup> See Gower, 'Review of Investor Protection' (n 46) and the two reports. Laurence Cecil Bartlett Gower, 'Review of Investor Protection' (Her Majesty's Stationery Office 1984) Part 1. Laurence Cecil Bartlett Gower, 'Review of Investor Protection': (Her Majesty's Stationery Office 1985) Part 2.

pressures that had been brought to bear in the UK financial industry.<sup>68</sup> A key aspect to the FSA 1986 is the section 47 offence<sup>69</sup> for manipulating the market by making a false statement, either dishonestly or recklessly or by dishonestly concealing a material fact. The emphasis on criminal prosecution under 1986 Act meant some market abuse conducts went unpunished.<sup>70</sup> The criminal process was considered slow in light of modern technological developments and few prosecutions were achieved.<sup>71</sup> The resultant enactment in 1986 of the Financial Services Act also had civil sanctions<sup>72</sup> and regulatory enforcement<sup>73</sup> provisions.<sup>74</sup>

### **Financial Services and Markets Act 2000**

Financial Services and Markets Act 2000 FSMA was enacted to expand the options available in the enforcement of market manipulation and market abuse, particularly by adding a civil option.<sup>75</sup> Essentially, the civil element had the speed lacking in criminal dimension.<sup>76</sup> Section 397 of FSMA, which is essentially a redrafting s. 47,<sup>77</sup> established two criminal offences namely making false or misleading statements in relation to market activity and the creation of false or misleading impressions in relation to the value of investments.<sup>78</sup> Misleading statements could be made by making a misleading statement

---

<sup>68</sup> Rider, Abrams and Ashe (n 5).

<sup>69</sup> Section 47 of the Financial Services Act 1986 (n 8).

<sup>70</sup> Rosalind Wright, 'Market Abuse and Market Manipulation: The Criminal, Civil and Regulatory Interface' (2001) 3 *Journal of International Financial Markets* 19.

<sup>71</sup> *ibid.*

<sup>72</sup> See Financial Services Act 1986 (n 8) Sections 5 (agreements made by or through unauthorised persons unenforceable), 6 and 61 relating to injunctions and restitution orders further to breach of section 3.

<sup>73</sup> *ibid* Schedule 2 Paragraph 4.

<sup>74</sup> See Jonathan Fisher and Jane Bewsey, *The Law of Investor Protection* (Sweet and Maxwell 1997) 44–62 paragraphs 4-006-4-069.

<sup>75</sup> For general background see Jonathan Fisher and others, *The Law of Investor Protection* (2nd edn, Sweet and Maxwell 2003) 17–26 paragraphs 2-008-2034. See also 'Background to Financial Services Legislation' (n 4) and Part 2A of same. . See generally Financial Services and Markets Act 2000 (n 28).

<sup>76</sup> Wright (n 108).

<sup>77</sup> Financial Services Act 1986 (n 8) Section 47.

<sup>78</sup> Section 397 of the Financial Services and Markets Act 2000 (n 28).

whiles knowing that it is false, concealing facts about such statements with dishonest intent or recklessly making a misleading statement.<sup>79</sup>

Among others, FSMA 2000 was also intended to address weaknesses in the enforcement of the civil regulatory framework and the criminal law by creating a civil offence of market abuse.<sup>80</sup> The market abuse regime applies to all persons, whether or not authorised or approved under the FSMA.<sup>81</sup> However market abuse offences attract civil liability and can take the form of limited fines or public censure by the FCA or a court order for restitution to compensate investors who have suffered losses as a result of market abuse.<sup>82</sup> The market abuse regime supplemented the existing provisions of the criminal law of insider dealing s 52 (Part V CJA 1993) and the prohibition on misleading statements and practices under FSMA section 397.<sup>83</sup> It created criminal offences for using information not generally available to the market, creating false or misleading impression intended to manipulate prescribed financial markets and distorting the market.<sup>84</sup> The section 397 provision was the basis of the conviction in the *R v Rigby and Bailey v Rowley* cases. The FCA's has power to impose sanctions for market abuse.<sup>85</sup>

### **Financial Services Act 2012**

In 2012, Parliament enacted the Financial Services Act (FSA) 2012,<sup>86</sup> which broadened the scope of the market abuse regime by replacing section 397 with three separate

---

<sup>79</sup> Section 397 of the *ibid.*

<sup>80</sup> *ibid* Part VIII (Sections 118-131. See also Barry Rider and others, *Market Abuse and Insider Dealing* (Bloomsbury Professional Ltd 2016). See also Fisher and others (n 113) 297–32114-001-14-069.

<sup>81</sup> Fisher and others (n 113) 297.

<sup>82</sup> Financial Services and Markets Act 2000 (n 28) Section 123.

<sup>83</sup> Part V of the Criminal Justice Act 1993.

<sup>84</sup> Financial Services and Markets Act 2000 (n 28) See section 118.

<sup>85</sup> *ibid* Section 123.

<sup>86</sup> For background see Walker, Purves and Blair (n 2) 11–12 Paragraphs 1.22-1.26.

offences, namely; misleading statements,<sup>87</sup> misleading impressions<sup>88</sup> and misleading statements among others in relation to benchmarks.<sup>89</sup> These changes became significant in view of the London Interbank Offered Rate (LIBOR) scandal.<sup>90</sup> The FSA 2012 among others, eliminated the Financial Services Authority and replaced it with a Prudential Regulation Authority (PRA) responsible for regulating banks, certain investment and insurance firms and a Financial Conduct Authority (FCA) responsible for regulating conduct and market practice issues.<sup>91</sup> The scope of the market abuse offence is much broader and prohibits among others, behaviour by persons who create false or misleading impressions among others on prescribed markets.

The two offence frameworks of section 397 had been replaced by three separate offences in sections 89, 90, 91 FSA 2012. Pursuant to section 89 (1) misleading statement is to be identified in the conduct of the person who makes the statement which the person knows to be false or misleading in a material respect, makes a statement which is false or misleading in the material respect being reckless as to whether it is, or dishonestly conceals any material facts, whether in connection with a statement by the person or otherwise. It must be noted that section 90 strengthened the scope of the offence originally set out in section 397(3) by punishing those who create impressions to induce another person to make investments or refrain from dealing so as well as outlawing impressions created with the view to making gain for oneself or causing loss to another person.<sup>92</sup> The former offence under section 91, is committed when a false or misleading statement is

---

<sup>87</sup> Financial Services Act 2012 (n 30) Section 89.

<sup>88</sup> *ibid* Section 90.

<sup>89</sup> *ibid* Section 91.

<sup>90</sup> See discussion in Barry Rider and others, *Market Abuse and Insider Dealing* (2nd edn, Tottel Publishing 2009) 113–115.

<sup>91</sup> For background see Timothy Edmonds, 'Financial Markets: Supervisory and Structural Reform-the Draft Financial Services Bill-SN/BT/5934'.

<sup>92</sup> Financial Services Act 2012 (n 30) Section 90.

made during the arrangement for the setting of a relevant benchmark, the statement will influence the setting of the benchmark or the person who makes the statement knows or is reckless as to whether this is false or misleading. On the other hand, the latter offence arises in relation to a misleading impression as to the price of any investment or interest rate of any transaction.<sup>93</sup>

Market abuse equally covers market distortion and market manipulation, price positioning and abusive squeezes. If the behaviour engaged in, interferes with the proper operation of the market forces, with the purpose of positioning prices at a distorted level, then such behaviour could attract criminal liability for market manipulation. Under sections 380 and 382 of FSMA, the FCA may seek court action for market abuse and market manipulation.<sup>94</sup> The FCA enforces the market manipulation offence based on misleading statements as in *R v Rigby, Bailey v Rowley*. Section 91 was introduced to address, the seeming jurisdictional limitations that existed between the FSA and the FCA during the Libor scandal regarding its powers to bring criminal proceedings.<sup>95</sup> This is a summary of the criminal provisions in the financial services sector.<sup>96</sup>

### **Insider Dealing**

Insider dealing<sup>97</sup> which involves misuse of information to gain commercial advantage in trading is prohibited under the criminal law. Insider dealing is fraud on the investor because it affects the integrity of the market. Moreover, it is dishonest use of information for economic gain. The criminal regulation of insider dealing is provided in the CJA

---

<sup>93</sup> See 'Former RBS LIBOR Submitter Banned for False Rate Setting' (2016) 8 *Company Lawyer*.

<sup>94</sup> Financial Services and Markets Act 2000 (n 28) Sections 380 and 382.

<sup>95</sup> Financial Services Act 2012 (n 30) Section 91. Rider and others (n 80).

<sup>96</sup> Detailed reference can be made to the materials mentioned including Walker, Purves and Blair (n 2) for a modern broad scope analysis. See however Rider and others (n 90) and his other works referred for detailed treatment.

<sup>97</sup> See generally Barry A. Rider, 'The Regulation of Insider Trading in Corporate Securities' (PhD Dissertation, University of London, Queen Mary 1977). See also Barry Rider and Michael Ashe, *The Fiduciary, the Insider and the Conflict* (Brehon and Sweet & Maxwell 1995).

1993.<sup>98</sup> While it is generally accepted, that the CJA 1993 adopts a broad based approach to the definition of inside information, it was deficient, in that it excluded from the definition, information which relates to securities generally or to issuers of securities.<sup>99</sup> The CJA 1993 thus appears to be less strict than Article 1(1) of the European Directive on insider dealing. FSMA 2000 seeks to address that discrepancy.

Insider abuse can be regulated under the civil law on the basis of the principle of conflict of interest<sup>100</sup> as well as the rule that those acting in a fiduciary relationship must not derive from their position or by virtue of their relationship a secret profit.<sup>101</sup> Insider dealing can also be regulated under the rule on illegality and public policy.<sup>102</sup> The remedies available under the civil regulation of insider dealings are usually equitable. These include the imposition of constructive trust on property or money. Under the doctrine of secret profit, the fiduciary may be ordered to account for profit and in respect of misrepresentation, the remedy of rescission.<sup>103</sup>

The statutory civil market abuse regime has been influenced by EU directives. Under FSMA, seven offences were introduced to support regulatory enforcement. These were subsequently replaced under the Market Abuse Directive (MAD). The seven offences were revised under MAD including insider dealing and the legacy offence misleading behaviour and market distortion.<sup>104</sup> Meanwhile the EU Market Abuse Regulation (EU MAR) which came into effect on 3 July 2016 replaced MAD and introduced criminal sanctions further to the Criminal Sanctions for Market Abuse (CSMAD). It must be noted

---

<sup>98</sup> Criminal Justice Act 1993 (n 83).

<sup>99</sup> Rider and others (n 80).

<sup>100</sup> See discussion in Rider and others (n 90) 18–20 paragraphs 2.3-2.7.

<sup>101</sup> *ibid* 20–42 paragraphs 2.8-2.50.

<sup>102</sup> *ibid* 42–43 paragraph 2.51.

<sup>103</sup> *ibid* 43–46 paragraphs 2.52-2.57.

<sup>104</sup> Financial Services and Markets Act 2000 (n 28) Sections 118 (2)-(8).

that the UK did not opt in to the CSMAD. The defendant had a defence section 123(1) under MAD. Full consideration of the market abuse would similarly require look at the Markets in Financial Instruments Directive (MiFID),<sup>105</sup> Markets in Financial Instruments Directive (MiFID 2),<sup>106</sup> and Markets in Financial Instruments Regulations (MiFIR).<sup>107</sup> A critical issue raised by blending of these issues is the interaction between the criminal and civil regimes.<sup>108</sup>

### **Anti-money Laundering**

Vitally important aspects to criminal regulation of financial fraud are the anti-money laundering and drug trafficking regulations. Basically meaning an attempt to disguise illegal money, it broadly covers benefitting from such conducts, a reason for the sanctions imposed by regulators on banks such as HSBC and Barclays. It is in this regard that it is dishonest and fraudulent. Money laundering began to be regulated under the Criminal Justice Act 1988, the same year that a supra-national body the Financial Action Task Force (FATF) was established by member jurisdictions to deal with the issue of combating money laundering, terrorist financing and related threats.<sup>109</sup> The now expanded plethora of statutes and regulations deal with the unlawfulness in retention or use of the proceeds of criminal conduct, and these make it a criminal offence for concealing, or being involvement arrangements, or acquiring proceeds of crime.

The current statutory provision is the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 but it has been preceded

---

<sup>105</sup> Markets in Financial Instruments ('MiFID') Directive 2004/39/EC.

<sup>106</sup> Markets in Financial Instruments (MiFID II) - Directive 2014/65/EU.

<sup>107</sup> Markets in Financial Instruments (MiFIR) - Regulation (EU) No 600/2014.

<sup>108</sup> See discussion on market abuse in Walker, Purves and Blair (n 2) 12.01-12.304.

<sup>109</sup> Financial Action Task Force, 'Who We Are' <[www.fatf-gafi.org.uk/about/historyofthefatf/](http://www.fatf-gafi.org.uk/about/historyofthefatf/)> accessed 24 March 2017.

by several statutes.<sup>110</sup>Detailed obligations placed on financial institutions include obligation to make suspicious activity reports, establishing internal controls across the firm obligation to undertake customer due diligence, among others. For the financial services sector a key document for guidance is the Prevention of money laundering/combating terrorist financing document by the Joint Money Laundering Steering Group.<sup>111</sup>The FCA is responsible for anti-money laundering enforcement against financial services with enforcement actions by way of financial notices having sent to various firms including Coutts, Standard Bank Plc, Deutsche Bank, among others.<sup>112</sup>

### **Fraud finally defined?**

A most significant step towards fighting fraud came in 2006 when the Fraud Act was enacted defining fraud generally in sections 1 (1) and (2) as fraud by false representation, failure to disclose information and abuse of position.<sup>113</sup> The *R v Adoboli* case involving fraud of over two billion pounds was prosecuted under this legislation and he was convicted for abuse of position.<sup>114</sup> Furthermore, the theft laws,<sup>115</sup> including forgery laws, banking laws, tax laws, false accounting, companies acts offences among others continue

---

<sup>110</sup> Terrorism Act 2000 Money Laundering Regulations 2003, the Anti-Terrorism, Crime and Security Act 2001, the Proceeds of Crime Act 2002, the Serious Organised Crime and Police Act 2005 and Money Laundering (Amendment) Regulations 2012 and Money Laundering (Amendment) Regulations 2015.

<sup>111</sup> Joint Money Laundering Steering Group, 'Prevention of Money Laundering/Combating Terrorist Financing' <<http://www.jmlsg.org.uk/>> accessed 7 September 2018 for all three part guidance.

<sup>112</sup> Financial Conduct Authority, 'Money Laundering and Terrorist Financing' (16 February 2018) <<https://www.fca.org.uk/firms/financial-crime/money-laundering-terrorist-financing>> accessed 9 July 2018 for the FCA final notices.

<sup>113</sup> Fraud Act (n 23) sections 1 (1) and (2) .

<sup>114</sup> 'Sentencing Remarks of Mr Justice Keith R V Kweku Adoboli' <<https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Judgments/kweku-adoboli-sentencing-remarks-20112012.pdf>> accessed 6 July 2018.

<sup>115</sup> See Larceny Act 1916 Section 84. See *R v Kyslant [1932] 1 KB 442*. See also Companies Act 1948 Section 44.



to remain as part of the armoury under the criminal law for regulating of financial services in England.<sup>116</sup>

## **Regulating the markets in England under the criminal law-the Common Law**

### **Manipulating the market and conspiracy**

It is arguable that the investing public suffered directly from the negative impact of the manipulation of the market. The common law was particularly poignant in the regulation of the abuse on the markets in England in the 19<sup>th</sup> century shortly before and after the repealing of the early statutes on forestalling and related offences.<sup>117</sup> A significant case in this regard is *Rex v de Berenger*.<sup>118</sup> The defendants had been accused of unlawfully alleging that peace would be made between the United Kingdom and, thereby causing ‘without any just or true cause a great increase and rise’<sup>119</sup> of governments securities. The defendant had been motivated by ‘... a wicked intention thereby to injure ... all the subjects of the King who should, on the 21 February, purchase or buy any part or parts, share or shares of and in said public Government funds and other Government securities’.<sup>120</sup> The issue before the Court was an application by the defendant to arrest judgment on three grounds including among others that the suggestion that no purchasers were injured had been particularised.

---

<sup>116</sup> See generally Anthony Arlidge and Jacques Parry, *Arlidge and Parry on Fraud* (5th edn, Sweet and Maxwell 2016).

<sup>117</sup> See generally Pennington (n 32) 289–296.

<sup>118</sup> *R v de Berenger* [1814] 105 Eng Rep 536 (KB).

<sup>119</sup> *ibid.*

<sup>120</sup> *ibid.*

All four judges overwhelmingly rejected the defendant's application. Lord Ellenborough thus stated, quite emphatically in response to the defendant's contention that the act engaged in was no criminal conspiracy:

*“ A public mischief is stated as the object of this conspiracy; the conspiracy is false rumours to raise the price of the public funds and securities; and the crime lies in the act of conspiracy and combination to effect that purpose, and would have been complete although it had not been pursued to its consequences, or the parties had not been able to carry it into effect. The purpose itself is mischievous, it strikes at the price of a vendible commodity in the market, and it gives a fictitious price, by means of false rumours, it is a fraud levelled against all such as may possibly have anything to do with the funds on that particular day. The excuse is, that multitude would be an excuse in point of law. But the statement is wholly unnecessary, the conspiracy being complete independently of any persons being purchasers. I have no doubt it must be so considered in law according to the cases”<sup>121</sup>*

Responding to the suggestion that the defendant's conduct was not a crime, Le Blanc J indicated that *‘it may be admitted therefore that the raising or lowering the price of the public funds is not per se a crime... but if a number of persons conspire by false rumours to raise the funds on a particular day, that is offence;’*<sup>122</sup> On the question of particularisation of the victims, Le Blanc J further stated the *‘the offence being to raise the funds on a future day, its object was to injure all those who should become purchasers on that day, and not some individuals in particular.’*<sup>123</sup>

Bayley J stated that *‘here then is a conspiracy to effect an illegal end, and not only so, but to effect it by illegal means, because to raise the funds by false rumours, is by illegal means. And the end is illegal, for it is to create a temporary rise in the funds without any foundation, ...’* Finally, Dampier J noted that *‘... I cannot raise a doubt but that this is a*

---

<sup>121</sup> *ibid.*

<sup>122</sup> *ibid.*

<sup>123</sup> *ibid.*

*complete crime of conspiracy according to any definition of it*.<sup>124</sup> The overwhelming positions the justices took on this issue demonstrates the strength of reprehension against manipulating the market.

The court's attitude to manipulative conduct on the markets in the 19<sup>th</sup> century is further revealed in *Rubery v Grant*<sup>125</sup>. This is a case in equity where the court was considering whether the *introduction of a statement by the plaintiff that the defendant was involved in a 'syndicate, in order to deal with ... shares, and contrive operations on the Stock Exchange (popularly called 'rigging the market') for the purpose of bringing the ... shares up to a fictitious value in the market'* was scandalous.<sup>126</sup> Although the court held that it was scandalous of the plaintiff, and did not grant the reliefs of specific performance and injunction to restrain disposal of the shares, Sir Robert Malins VC condemned as dishonest a person's membership of a share rigging syndicate. He was unequivocal when he stated that "*going into the market pretending to buy shares by a person whom you put forward to buy them, who is not really buying them, but only pretending to buy them, in order that they may be quoted in the public papers as bearing a premium, which premium is never paid, is one of the most dishonest practices to which men can possibly resort*"<sup>127</sup> He added that: "*there is a class of people who think it is a legitimate mode of making money, but if they would only examine it for a moment they would see that a more abominable fraud, and one more difficult of detection, cannot be found*"<sup>128</sup>. The reach of

---

<sup>124</sup> *ibid.*

<sup>125</sup> *Rubery v Grant* [1872] XIII LR 443.

<sup>126</sup> *ibid* at 8.

<sup>127</sup> *ibid* at 9.

<sup>128</sup> *ibid* at 9.

the case has extended beyond the United Kingdom into cases places such as South Africa.<sup>129</sup>

Sir Mallins VC's call for a deeper contemplative behaviour from market manipulators, was as true then as it is today. The court's posture in *R v Hayes*,<sup>130</sup> the recent LIBOR case, demonstrates its reluctance to entertain manipulative conduct. First Cooke J indicated the court's willingness to impose deterrent sentences on those who conspire to defraud the market. Lord Thomas LCJ, sounding a similar tone, stated that:

*"this court must make it clear to all in the financial and other markets in the City of London that conduct of this type, involving fraudulent manipulation of the markets, will result in severe sentences of considerable length, which depending on the circumstances, may be significantly greater than the present total sentence",<sup>131</sup> which in this case was eleven years.*

Since *de Berenger* did directly address the question of false rumours, the question has been asked whether it was an indictable conspiracy to interfere with the markets through a course of dealing. One of the judges had stated that

*"... the raising or lowering the price of the public funds is not per se crime. A man may have occasion to sell out a large sum, which may have the effect of depressing the price of stocks, or may buy in a large sum, and thereby raise the price on a particular day, and yet he will be guilty of no offence. But if a number of persons conspire by false rumours to raise the funds on a particular day, that is an offence; and the offence is, not in raising the funds simply, but in conspiring by false rumours to raise them on that particular day"*

---

<sup>129</sup> JJ Henning and S Du Toit, 'South Africa: High Pressure Selling of Securities: From Rigging the Market to False Trading, Market Manipulation and Insider Dealing' (2000) 21 *Company Lawyer* 257.

<sup>130</sup> *R v Hayes* [2015] EWCA Crim 1944.

<sup>131</sup> *ibid.*

Pursuant to the market abuse regime, it is quite clear that any type of manipulative behaviour is likely to be considered as unlawful conspiracy. Moreover, the court's stance in *Scott v Brown, Doering, McNab & Co*<sup>132</sup> where it was held, albeit in a civil context, that it amounted to criminal conspiracy to defraud the public where one enters into an agreement, the sole purpose of which is to create the impression of a thriving market to induce investors to purchase. Lord Lopes sums up the debate when he indicates no substantial distinction exists between 'false rumours and false and fictitious acts'. However, as Professor Rider has pointed out, the key issue is whether the conduct amounts to manipulation or stabilisation *Levi v British Westralian Mine and Share Corporation*<sup>133</sup> and *London v Beiorley*.<sup>134</sup>

One of the fundamental elements of the offence of conspiracy is agreement among the conspirators to effect the actus reus. Yet consensus had been lacking among many on the nature of the offence.<sup>135</sup> There has been prolonged historical debate regarding whether it amounts to conspiracy for people to agree to do a substantive act which is lawful, in other words an agreement to undertake an act which is not itself an offence under the criminal law. This continued to the late 20<sup>th</sup> century and the Law Commission's Working Party confirmed this dispute when it stated that 'before 1977, an agreement to do an "unlawful" act, though not criminal, act could amount to criminal conspiracy, as could an agreement to a lawful act by unlawful means'.<sup>136</sup> The situation was nevertheless resolved in section 1 of the Criminal Law Act 1977 (Conspiracy) when the common law offence of

---

<sup>132</sup> *Scott v Brown, Doering, McNab & Co* [1892] 2 QB 724.

<sup>133</sup> *Levi v British Westralian Mine and Share Corporation* [1898] 43 Sol Jo 45.

<sup>134</sup> *London v Beiorley* [1848] 10 LT 505 EX.

<sup>135</sup> See Simon Farrell QC, Nicholas Yeo and Guy Ladenberg, *Blackstone's Guide to The Fraud Act 2006* (Oxford University Press 2007).

<sup>136</sup> 'Criminal Law: Conspiracy to Defraud' (1965) 228 Item 5 of the 4th Programme of Law Reform Criminal Law <[www.lawcom.gov.uk/wp\\_content/uploads/2015/lc228.pdf](http://www.lawcom.gov.uk/wp_content/uploads/2015/lc228.pdf)>.

conspiracy was given statutory footing, providing that substantive conduct by the alleged must be an offence under the criminal law.<sup>137</sup>

There also has been a related discussion whether common law offence conspiracy to defraud should be retained outside the statutory regime. In the end, further to both the Law Commission and the Crown Prosecutions Service view that it is among others, an efficacious tool against combating fraud, conspiracy to defraud was maintained.<sup>138</sup> This position is perhaps exonerated in the *Queens v Adams*.<sup>139</sup>

It is noteworthy that when applied to the markets, conspiracy has criminal and civil senses for which the judiciary apply inconsistently. The general rule however appears to be that it would be conspiracy at criminal law where in a series of transactions, one makes false statements or engages in purposeful conduct with the intention of misleading the market.<sup>140</sup> In light of the existence of statutory provisions such as sections 89 and 90 of the Financial Services Act 2012,<sup>141</sup> this position is enhanced when viewed with the lens of Lord Roger's comments that 'where parliament ... Lord Roger's comments were subsequent to the holding in *R v Cooke*<sup>142</sup> which modified *R v Ayres*<sup>143</sup> a crime of conspiracy to defraud could not be charged where a substantive is available. However, *R v Remington*<sup>144</sup> must be examined in the light of observations in *Norris v Government of the USA*<sup>145</sup> and *R v Goldshield Plc.*<sup>146</sup> In the former case it was held that where aggravating factors such as 'fraud, misrepresentation, violence, intimidation or

---

<sup>137</sup> Section 1 of the Criminal Law Act 1977.

<sup>138</sup> See Farrell QC, Yeo and Ladenberg (n 135).

<sup>139</sup> *Queens v Adams* [1995] 1 WLR 52.

<sup>140</sup> Rider and others (n 80) page 131.

<sup>141</sup> Sections 89 and 90 of the Financial Services Act 2012 (n 30).

<sup>142</sup> *R v Cooke* 1986 AC 909.

<sup>143</sup> *R v Ayres* 1984 AC 447.

<sup>144</sup> *R v Rimmington* 2005 UKHL 63.

<sup>145</sup> *Norris v Government of USA* 2008 UKHL 16.

<sup>146</sup> *R v Goldshield* 2008 UKHL 16.

inducement of breach of contract' are absent, a cartel agreement would not amount to conspiracy to defraud. In *Goldshied*<sup>147</sup> the Lords were concerned, in light of Article 7 of the ECHR, that the law is not extended into uncertain areas.

A number of issues arise however when conspiracy to defraud is applied to circumstances on the market.<sup>148</sup> First, although the conspiracy would amount to defrauding, the agreement between the parties to the conspiracy would generally be unenforceable before the civil courts on the basis that it is contrary to public policy.<sup>149</sup> Moreover the courts are unlikely to allow an innocent party to suffer loss by declining to enforce the agreement in favour of the wrongdoer. Another issue is whether an innocent party claiming to have been harmed by the manipulation can pursue a civil claim against those responsible.<sup>150</sup> It appears the response might require a distinction to be made between representations to the market and to the market authorities. Where the representations were made direct to the authorities, then it appears a cause of action might not result. The corollary however might not lead to a cause of action. Another issue worthy of note is whether an investor is entitled to assume that the price represented to the market is a representation of compliance with all the rules and procedures which contribute to the availability of the market and price. Although the US courts provide that such a cause of action might exist, it is doubted that a UK court would on the basis of the common law so conclude particularly in the light of reliance and causation.<sup>151</sup> The question whether conspiracy to defraud in principle extends to price fixing has been answered in the affirmative but mens rea would have to be proven.<sup>152</sup> In this case the indictment was wrong, and the defendant

---

<sup>147</sup> *ibid.*

<sup>148</sup> *Rider and others* (n 80) page 132-134.

<sup>149</sup> *Scott v Brown, Doering, McNab & Co* (n 132).

<sup>150</sup> *Bedford v Bagshaw* 1859 4 Hurl Normans 538 157 ER 951.

<sup>151</sup> *Rider and others* (n 80).

<sup>152</sup> *Norris v Government of USA* (n 145).

crisis which dovetailed the economic boom in last decade of the 17th century, a period considered the height of when specialised dealers became necessary as it had 'a highly developed market'.<sup>156</sup> In 1694 Sir Henry Furnese participated in a number of schemes for artificially lowering the price of funds and then purchasing as much as possible at reduced price. Economic growth between 1693 and 1695 led to a crisis which triggered an enquiry appointed to 'look after the trade of England'.<sup>157</sup> In November 1696 Parliament found numerous stockbrokers committing fraud including among others, fraudulent endorsement of securities, exchequer bills, bills of exchange and bank drafts. The Committee reported that

*"The pernicious Art of Stockjobbing hath, of late, so wholly perverted the End and Design of Companies and Corporations, erected for the introducing, or carrying on, of Manufactures, to the private Profit of the first Projectors, that the Privileges granted to them, have commonly, been made no other Use of, by the First Procurers and Suscribers, but to see again with Advantage, to ignorant Men, ..."*<sup>158</sup>

The 1697 Act thus effectively restrained anyone from trading in shares unless the person was "admitted, licensed, approved and allowed by the Lord Mayor and Court of Aldermen".<sup>159</sup> The penalties for acting contrary to its provisions included imprisonment, £500 fine, quite onerous for the time, disqualification as a broker and the pillory. The Act was unique in its blend of criminal, civil and administrative justice procedures' Brokers were further to swear the oath to undertake their tasks, among others, without 'Fraud or Collusion'.<sup>160</sup>

---

<sup>156</sup> *ibid* pages 20-21.

<sup>157</sup> *ibid* pages 22-23.

<sup>158</sup> *ibid*.

<sup>159</sup> *ibid* 23-24.

<sup>160</sup> *ibid* pages 23-24.



Candidate Number: 1341103

Another relevance of the 1697 Act is that it was ‘the first reference point of a regulatory cycle that has been a recurring feature of the financial services sector. A depressingly repetitive pattern of economic boom accompanied by deregulation, followed by recession and attendant social regulation, has been materializing over the last three hundred years. It must be noted that the Act was only to regulate the securities industry and was, apart from clauses dealing with stocks and shares, a reaffirmation of previous acts. Strangely, the act was criticised for leaving the loophole of not preventing unlicensed persons from dealing in the stocks and shares of unincorporated companies. There was no separation between broker and jobber.<sup>161</sup> The 1697 Act by which the City regulated brokers expired in 1707.<sup>162</sup> It did even though a committee having advised that it be continued.

The judicial applications of these earlier statutes are reflected in a few cases. In *Clarke v Powell*<sup>163</sup> the question for the court was whether a person acting as a stockbroker, described as a person who on various occasions buys shares in the Government securities, transferable at the Bank of England for other persons for reward within the City of London or its liberties was a broker as required by statute of 6 Anne, c 16, to be admitted the office by the court of the mayor and aldermen of the City of London.

The court, applying most of the earlier cognate statutes held in the affirmative.<sup>164</sup> On the contrary the court declined to accept that a ship broker is a broker in *Gibbons v Rule*.<sup>165</sup> In *Janssen, Bart. Chamberlain of London v Green*,<sup>166</sup> the claimant brought an action for forfeiture for the penalty of £25 to be recovered by an action of debt against the Defendant

---

<sup>161</sup> *ibid* page 21.

<sup>162</sup> *ibid* page 26.

<sup>163</sup> *Clarke v Powell* 1833 4 Barnewall Adolphus 846 110 ER 674.

<sup>164</sup> See also *Clarke v Powell* 4 Bk & Ad 846 ( 24 ECLR) cited in . Sir John Barnard Byles, *A Treatise of the Law of Bills of Exchange, Promissory Notes, Bank-Notes and Checks* (5th American, T & J W Johnson & Company 1867).

<sup>165</sup> *Gibbons v Rule* 1827 4 Bingham 301 130 ER 783.

<sup>166</sup> *Janssen, Bart Chamberlain of London v Green* 1767 4 Burrow 2103 98 ER 97.

for acting as a broker without being admitted so to do by the Court of Mayor and Aldermen. The court, applying among others St Barnards Act, held unanimously in favour of the Claimant. Similarly, in *Scott v North*,<sup>167</sup> the court gave a favourable ruling to the claimant against the defendant for acting as a broker without a licence.

### **Licensing of brokers**

The examination of the civil regulatory regime in financial services in England further demands drawing distinction between jobber and broker created by statutory regulation. A jobber dealt in shares generally but was a term of opprobrium. The term jobber meant 'to turn a public service or trust to private gain or party advantage'.<sup>168</sup> In relation to dealing, a jobber meant 'share practice or rigging of the market'.<sup>169</sup> Indeed the Brokers on the other hand had to be licensed by the Lord Mayor and Aldermen, to take an oath and a bond of good behaviour; carry a silver to show they were licensed.<sup>170</sup> Conspicuously lacking however was their job description. Indeed, a balanced view of the crisis in that era showed that other factors, apart from just fraudulent brokers and stockjobbers accounted for the situation.<sup>171</sup>

### **The St Barnard's Act-1734 'Act to Prevent the Infamous Practice of Stock-Jobbing**

An arguably significant piece of legislation in the civil regulation of the market in England was the 1734 'Act to Prevent the Infamous Practice of Stock-Jobbing', known as the St Barnard's Act, after its sponsor Sir John Barnard. The purpose of the Act was to essentially prevent speculative trading although it is suggested that it did not prevent time bargains where the seller had the stock at the time of the sale and actually transferred it

---

<sup>167</sup> *Scott v North* 1866-67 LR 2 CP 270.

<sup>168</sup> Morgan and Thomas (n 7) pages 21-22.

<sup>169</sup> *ibid.*

<sup>170</sup> See generally David Palfreyman, *London Livery Companies* (Oracle Publishing UK Ltd 2010) and the Preface.

<sup>171</sup> *ibid* page 25-26.

on settling day.<sup>172</sup> It appears that had they been enforced it would have prevented both speculative time bargains and option dealings.<sup>173</sup> The Act reaffirmed obligation of brokers to record all transactions and imposed additional risk on broker who undertook speculative bargains for his clients.<sup>174</sup> its effectiveness was in ensuring alternative means of dispute resolution as well treating each principals. The Act ran for three years but made perpetual in 1736. There were failed reinforcements in 1745, 1756, 1771 and 1773 but the last one rejected by the Lords.

The courts applied St Barnards Act in *Faikney v Reynous*<sup>175</sup> and *Petrie v Hannay*<sup>176</sup> in what was quite regrettable decisions. In *Faikney v Renous*,<sup>177</sup> the issue was whether the St Barnard Act was applicable to prevent the claimant to recover from the defendant agreements which had been corruptly entered for transferring sundry parcels of stock on the joint of himself and the defendant. The court held that the St Barnard's Act was not applicable, arguing among others, that while it recognised in law that no court of Justice would allow to recover for what is made unlawful to be done, the case was not within the Act of Parliament. Lord Mansfield stated that the 'bond is money lent to another to fulfil a prohibited contract'. In contrast, several other cases including *Sullivan v Greaves*<sup>178</sup> overruled *Faikney v Reynous*.<sup>179</sup> In *Cannan v Bryce*<sup>180</sup> the court held that money lent and applied by the borrower for the express purpose of settling losses on illegal stock-jobbing transactions, to which lender was no party was not recoverable.

---

<sup>172</sup> See generally Morgan and Thomas (n 7) but specifically page 63.

<sup>173</sup> *ibid* pages 63-64.

<sup>174</sup> *ibid* pages 62-64.

<sup>175</sup> *Faikney v Renous* 98 ER 79.

<sup>176</sup> *Petrie and Another, Executors of Page Keeble v Hannay, Baronet* 1789 3 Term Rep 418 100 ER 652.

<sup>177</sup> *Faikney v Renous* (n 175).

<sup>178</sup> *Sullivan v Greaves Park Insur* 8.

<sup>179</sup> *Faikney v Renous* (n 175).

<sup>180</sup> *Cannan and Another v Bryce* 1819 106 ER 628 3 Barnewall Alderson 179.

### **Leeman's Act 1867**

Little mention must be made of the Leeman's Act 1867 which received little notice when it was enacted to prevent speculation in bank shares.<sup>181</sup> The Act had been enacted with the aim of introducing the need to individually record transactions thereby stopping group or house recording of transactions and to stop speculative dealing in the City. In an embrasive fashion the Chairman of the London Stock Exchange at the time told a parliamentary committee that

*"Sirs, we disregard for years Sir John Barnard's Act and we are now disregarding in the same measure Mr Leeman's Act".*

This response characteristically reminds one of the former head of Barclays Bank's evidence to Parliament where he stated that *'there was a period of remorse and apology and I think that period needs to be over'*,<sup>182</sup> Subsequently, Lord Penzance was appointed in 1877 to inquire into the Administration of the London Stock Exchange following a series of promotional scandals. Disappointingly, Lord Penzance report recommending that a public body be vested with the responsibility of enforcing fraud on the markets, repeating that all transactions on the Stock Exchange be individually recorded and the statutory regulation of the Stock Exchange received passive response from the City and the government. History exonerated Lord Penzance when his recommendations were re-echoed in the Financial Services Act 1986 and the establishment of the Serious Fraud Office further to sections 1-3 of Criminal Justice Act 1987.<sup>183</sup>

---

<sup>181</sup> Morgan and Thomas (n 7) page 147.

<sup>182</sup> Treanor Jill, 'Bob Diamond Stands Firm against MPs' Calls to Forgo His Bonus' *The Guardian News and Media Limited* (London, 11 January 2011) <<https://www.theguardian.com/business/2011/jan/11/bob-diamond-stands-firm-mp-bonus>> accessed 7 July 2018.

<sup>183</sup> See Gilligan (n 3).

### **The corporate structure and fraud**

The legal restraints on the corporate structure are crucial in examining and protecting vulnerable persons.<sup>184</sup> It is acknowledged that the concepts of separate legal personality and limited liability, despite serving valid purposes, are employed in committing fraud.<sup>185</sup> Limited liability has been variously described as ‘a mischievous delusion to ensnare the unwary public’, ‘a rogues charter’ and ‘were Parliament to set about devising means for the encouragement of speculation, over trading and swindling, what better could it do’. This explains why Parliament passed in 1825 legislation maintaining unlimited liability.<sup>186</sup> This restriction however finally came to an end in 1856 through the Joint Stock Companies Act<sup>187</sup> and consolidated in 1862 by the Limited Liability Act. Limited liability led to increase in company promotions some of which were for fraudulent purpose.<sup>188</sup>

There are however circumstances when senior managers and compliance officers of businesses can be liable personally.<sup>189</sup> These can be where there has been a breach of the duty of fidelity, the tort of inducing or procuring breach of contract by another person, and under the law of restitution in equity where it is considered unconscionable to retain assets. Under the criminal law, personal liability arises in cases of insider dealing further to section 52 of the CJA 1993, market abuse under section 89-91 FSA 2012, making false statements by directors under section 19 of the Theft Act 1968, the Fraud 2006 and the

---

<sup>184</sup> See also Hans Tjio, ‘The Misuse and Abuse of the Corporate Form’, *Research Handbook on International Financial Crime* (Edward Elgar Publishing Ltd 2015).

<sup>185</sup> Morgan and Thomas (n 7) page 138.

<sup>186</sup> 1825 6 Geo IV c.91.

<sup>187</sup> Joint Stock Companies Act 1856 (19 & 20 Vict. c. 47).

<sup>188</sup> Morgan and Thomas (n 7) page 136.

<sup>189</sup> See discussion in Rider and others (n 90) 339–364.

Bribery Act 2010. Under regulatory law, breach of the Supervision sourcebook further to section 59 and 64 of FSMA could also lead to personal liability.

### **Insolvency and fraud**

It has long been recognised that fraudsters, both individual and businesses can use the bankruptcy and insolvency to commit fraud against vulnerable persons.<sup>190</sup> Identified as one of the offences against public trade it was called fraudulent bankruptcy.<sup>191</sup> The Insolvency Act 1986 prohibits practices such as fraudulent trading,<sup>192</sup> wrongful trading<sup>193</sup> and certain transactions were prohibited. The statute also gave a petitioner the power to present a petition to wind up a company on just and equitable grounds. A case illustrating this point is *Ebrahimi v Westbourne Galleries Ltd.*<sup>194</sup> An initial response to *Salomon*<sup>195</sup> came by way of Preferential Payments in Bankruptcy Amendments Act 1897 which set in place a fair prioritised system of payments in insolvency situations to prevent the situation where Salomon could pay himself.

Criminal armoury that flows from civil procedures is, among others, the criminality of breaching an order made for disqualification. Under s.13 a person is to be in contempt of court if he breaches an order disqualifying him from involvement in the activities of a company.<sup>196</sup> This is similarly the case under s.11 and s.15 of the Company Directors Disqualification Act 1986.<sup>197</sup>

---

<sup>190</sup> Sir Blackstone (n 35) Book 4, Chapter 12.

<sup>191</sup> *ibid* Book 4 Chapter 12.

<sup>192</sup> Insolvency Act 1986 Section 213. See *Re Patrick & Lyon Ltd [1933] Ch 786*. See also *Bernasconi and Another v Nicholas Bennett & Co (a firm) and Another [1999] All ER (D) 1199*.

<sup>193</sup> Insolvency Act 1986 Section 214.

<sup>194</sup> *Ebrahimi v Westbourne Galleries Ltd* 1973 AC 360.

<sup>195</sup> *Salomon v A Salomon & Co Ltd [1897] AC 22*.

<sup>196</sup> Company Directors Disqualifications Act 1986 Section 13.

<sup>197</sup> *ibid* Sections 11 and 15.

### **Company directors and fraud**

In the same vein, the Company Directors Disqualifications provides that where a disqualified director continues to act as a director, he becomes personally liable. Equally important are the statutory powers of investigation under the Company Directors Disqualifications 1986, In this regard the Company Directors Disqualification Act is relevant.<sup>198</sup> This gives the Court power to make an order preventing a director from directly or indirectly getting involved in the management of a company.<sup>199</sup> Section is most important and cases in this regard includes<sup>200</sup> director misappropriated funds.<sup>201</sup> The ambit has of this power is broad and further to *Re Seagull* can extend beyond geographical boundaries. Directors may be removed although the directors could prevent it, or it may be expensive to do so. The Company's Act 2006 provides further grounds for the removal of directors including competition infringements,<sup>202</sup>wrongful trading<sup>203</sup> among others. The directors are similarly subject to FSMA market abuse and insider dealing regulations. It extends to auditors in tort under statutes.<sup>204</sup>For senior managers there are other circumstances that they are liable.

---

<sup>198</sup> *ibid* Section 1 generally.

<sup>199</sup> *ibid* Section 6.

<sup>200</sup> *Re Sevenoaks Stationers (Retail) Ltd* [1991] Ch 164 [1991] Ch.

<sup>201</sup> *Secretary of State for Trade and Industry v McTighe (no 2)* [1996] 2 BCLC 477.

<sup>202</sup> Companies Act 2006 Section 9A-9E.

<sup>203</sup> *ibid* Section 10.

<sup>204</sup> *ibid* Section 532 but note section 1157. See Insolvency Act 1986 Section 212. *Caparo Industries Plc v Dickman* [1990] 2 AC 605. See also *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575, HL.

## Regulating the markets in England under the civil law-the common law

### Separate legal personality and fraud

The courts can make exceptions to the separate legal personality principle in *Salomon v Salomon*<sup>205</sup> and the rule in *Foss v Harbottle*<sup>206</sup> on the basis of fraud.<sup>207</sup> Further context where they may do so are in the context of agency,<sup>208</sup> group status to avoid obligations<sup>209</sup> and employing trust.<sup>210</sup> The common law also protects shareholders where it considers that the company has acted ultra vires among others.

A typical case in point is *Edgington v Fitzmaurice*<sup>211</sup> where the Court of Appeal held that the claimant could claim misrepresentation if him for his course of action was based on half-truths and his own failure to read the information contained in the prospectus. Deceit in respect of action on the case of *Derry v Peek*<sup>212</sup> is significant particularly in light of the requirement for dishonesty. Furthermore, where the investor relies a false statement in a prospectus which was made negligently then further to *Hedley Byrne and Co, Ltd v Heller Partners Ltd*,<sup>213</sup> the investor could bring a claim for negligence particularly if the investor had relied on that statement.

---

<sup>205</sup> *Salomon v A Salomon & Co Ltd* [1897] AC 22 (n 195).

<sup>206</sup> *Foss v Harbottle* (1843) 2 Hare 461.

<sup>207</sup> For a detailed discussion of this rule see Barry A. Rider, 'Amiable Lunatics and the Rule in *Foss v Harbottle*' (1978) 37 Cambridge Law Journal 270.

<sup>208</sup> *Smith, Stone and Knight Ltd v Birmingham* [1939] 4 All ER 116. See also *Re FG Firms Ltd* [1953] 1 WLR 483. See also *Salomon v A Salomon & Co Ltd* [1897] AC 22 (n 195).

<sup>209</sup> *DHN Foods Distributors Ltd v Tower Hamlets London Borough Council* [1976] 1 WLR 852.

<sup>210</sup> *Trebanog Working Men's Club and Institute Ltd v MacDonald* [1940] 1 KB 576.

<sup>211</sup> *Edgington v Fitzmaurice* (1885) 29 Ch D 459.

<sup>212</sup> *Derry and others v Peek* (1886) 1 ER Rep 1 (House of Lords).

<sup>213</sup> *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575, HL (n 204).



## **Regulating the markets in England-Regulatory and administrative measures**

### **The City and self-regulation**

Regulatory enforcement by bodies and institutions is another aspect of investor protection in financial services. The City has always sought to regulate itself. The City jurisdiction over brokers was affected when the Brokers Relief Act abolished the bonds for brokers who were being admitted and the jurisdiction of the court of aldermen ended completely in 1886.<sup>214</sup> Brokers guilty of fraud were now disqualified from so acting. Indeed, when the then Chairman of the Foreign Loans Committee stated that “*we disregarded for years and years Sir John Barnard’s Act, and we are now disregarding Mr Leeman’s Act*”, Morgan has suggested that this attitude was as a result of the fact that ‘*it had its own sanctions with which to enforce its own code of conduct*’. Professor Rider has on the other hand suggested that it was symptomatic of the scant regard that the City had of external regulators. Nevertheless, even Professor Rider acknowledges that City self-regulation had for several reasons being successful. He has said that ‘self-regulation in the financial services industry has worked reasonably effectively in the past, and in a significantly modified form may be expected to do so in the future, largely because of the nature and character of the City of London’ including its ‘village atmosphere’.<sup>215</sup> Self-regulation has its advantages.<sup>216</sup> The Panel on Take-overs and Mergers,<sup>217</sup> the London Stock Exchange<sup>218</sup> and the Council for the Securities Industry are particular in the discussion on self-regulation. Whilst it is acknowledged that a detailed discussion is crucial to

---

<sup>214</sup> Morgan and Thomas (n 7) page 144-147.

<sup>215</sup> Rider, Abrams and Ashe (n 5) 49 para 11.

<sup>216</sup> Barry A. Rider, ‘Self Regulation: The British Approach to Policing Conduct in the Securities Business, with Particular Reference to the Role of the City Panel on Take-Over and Mergers in the Regulation of Insider Trading’ (1978) 1 Journal of Comparative Law and Securities Regulation 319.

<sup>217</sup> The Panel on Takeovers and Mergers, ‘About the Panel’ <[www.thetakeoverpanel.org.uk](http://www.thetakeoverpanel.org.uk)>.

<sup>218</sup> Morgan and Thomas (n 7).

consumer protection, this is discussed in Chapter 7 which discusses civil and regulatory approaches to consumer protection and redress.

### **Financial Services and Consumer Protection**

A principal express introduction into both the objectives and the lexicon of financial services regulation of fraud in England in the twenty first century is the protection of the consumer. This objective is first made evident in FSMA 2000 and provided that: *'the protection of consumers objective is: securing the appropriate degree of protection for consumers'*.<sup>219</sup> By the consumer it was meant persons '(a) who are consumers for the purposes of section 138; or (b) who, in relation to regulated activities carried on otherwise than by authorised persons, would be consumers for those purposes if the activities were carried on by authorised persons'.<sup>220</sup> Simply, the consumer is not the business entity or the institutional investor. The consumer is also the small investor.<sup>221</sup>

The significance of the express introduction of the protection of the consumer objective subsists mainly in its emphasis on the individual person. The reason is obvious in that virtually all the activities undertaken in the regulation of the financial services is in substance a protection of the consumer, directly or indirectly. It is fair to suggest that the FSA seemed not to have approached this objective with the anticipated seriousness and devotion and perhaps did not make a success of it.<sup>222</sup>

The consumer protection function of the FSA, further to the Financial Services Act 2012 became the work of the FCA.<sup>223</sup> Consumers refer to persons who use, have used or may

---

<sup>219</sup> Financial Services and Markets Act 2000 (n 26) Section 5 (1).

<sup>220</sup> *ibid* Section 5 (3).

<sup>221</sup> JUSTICE, 'The Protection of the Small Investor' (JUSTICE Educational and Research Trust 1992).

<sup>222</sup> Ferran (n 55).

<sup>223</sup> 1A (1) Financial Services Act 2012 (n 30).

use, among others financial services or have interest in it'.<sup>224</sup> The FSA 2012 provides that the FCA would have the operational objectives of consumer protection, integrity and competition.<sup>225</sup> Perhaps due to the work undertaken by the FSA in its twilight, the FCA appears to have a comparatively defined strategy to consumer protection.

What is the FCA's approach to consumer protection? The FCA's remit is to secure for consumers an appropriate degree of protection, protect and enhance the integrity of the UK financial system and promote effective competition in the interests of consumers. In this regard, its general work on regulating the sector is part of its consumer protection functions. The FCA approach to consumer protection thus considers the three other objectives including deterring the commission of financial crime as part of its functions. In short, all three objectives are mutually inclusive.<sup>226</sup> The FCA remit also is drawn from the CRA 2015 and the Unfair Terms in Consumer Contracts Regulations 1999. The FCA is also committed to ensuring that firms act consistent with the Equality Act 2010. The operationalising of these is noted in the FCA Handbook.<sup>227</sup>

The FCA approach to consumer protection requires firms first to act fairly and in accordance with consumer protection redress schemes.<sup>228</sup> Second, it requires firms to take account of vulnerable consumers.<sup>229</sup> Third, firms need to promote access to financial services for consumers.<sup>230</sup> Fourth, the FCA is committed to ensuring that a compensation scheme exists to protect consumers.<sup>231</sup> Finally the FCA aims to promote consumer

---

<sup>224</sup> *ibid* Section 1 (G) (1).

<sup>225</sup> 1B(3) *ibid*.

<sup>226</sup> Financial Conduct Authority, 'FCA Mission: Our Future Approach to Consumers' 4 <<https://www.fca.org.uk/publication/corporate/our-future-approach-consumers.pdf>> accessed 26 June 2018.

<sup>227</sup> Financial Conduct Authority, *FCA Handbook* (Financial Conduct Authority) <[www.fca.org.uk](http://www.fca.org.uk)>.

<sup>228</sup> Financial Conduct Authority, 'FCA Mission: Our Future Approach to Consumers' (n 226) 9.

<sup>229</sup> *ibid*.

<sup>230</sup> *ibid*.

<sup>231</sup> See JUSTICE (n 221).

responsibility, which objective is particularly relevant to consumer credit.<sup>232</sup> The FCA has produced papers on these areas including vulnerability<sup>233</sup> and access to financial services to guide its approach to protecting consumers.<sup>234</sup> The United Kingdom's possible exit from the EU would have implications for consumers, particularly if the financial services sector is excluded from a possible trade agreement.<sup>235</sup>

## Conclusion

This has been a brief introduction to fraud and consumer protection within financial services. Although earlier laws on regulating financial services had the object of protecting the public, it is arguable that the public included the consumer. The shift in emphasis from a generic word such as the public to the consumer is not only a semantic development. Substantively, the consumer is protected in financial services in the civil, criminal and regulatory senses. Importantly, the protection covers both common law and statute, given the consumer the opportunity to be able to take advantage of the option that best fits the circumstances. Later chapters expand on the issues raised in this chapter.

---

<sup>232</sup> Financial Conduct Authority, 'FCA Mission: Our Future Approach to Consumers' (n 226) 8.

<sup>233</sup> Financial Conduct Authority, 'Consumer Vulnerability Occasional Paper' <[www.fca.org.uk/publication/ocassional-papers/ocassional-paper-8.pdf](http://www.fca.org.uk/publication/ocassional-papers/ocassional-paper-8.pdf)> accessed 5 February 2018.

<sup>234</sup> Financial Conduct Authority, 'Our Mission 2017-How We Regulate Financial Services' <<https://www.fca.org.uk/publication/corporate/our-mission-2017.pdf>> accessed 26 June 2018.

<sup>235</sup> David Severn, 'The Implications of Brexit for UK Consumers of Financial Services: A Think-Piece' <[https://www.fs-cp.org.uk/sites/default/files/consumer\\_panel\\_brexit\\_research\\_october\\_2016.pdf](https://www.fs-cp.org.uk/sites/default/files/consumer_panel_brexit_research_october_2016.pdf)> accessed 7 July 2018. See also Walker, Purves and Blair (n 2) 67–68 paragraphs 2.80-2.85.

## CHAPTER FOUR (4)

### CONSUMER CREDIT FRAUD

#### Introduction

Ancient indeed is the practice of lending money to individuals for private or more clearly non-commercial purposes.<sup>1</sup> ‘Money’, narrow in some respects, has over time, evolved to ‘credit’ and the ‘individual’ is now referred to as the ‘consumer’, thus the phrase ‘consumer credit’.<sup>2</sup> The Consumer Credit Directive defines consumer credit Agreement as “an agreement whereby a creditor grants or promise to grant a consumer credit in the form of a deferred payment, loan or similar financial accommodation, except for agreements for the provision on a continuing basis of services or for the supply of goods of the same kind, where the consumer pays for such services or goods for the duration of their provision by means of instalments”.<sup>3</sup> Minus the exception, this definition is essentially the adoption of the meaning of credit as provided in the Consumer Credit Act 1974<sup>4</sup> which defines credit as ‘including’ a cash loan, and any other form of financial accommodation’.<sup>5</sup> The broadness of the definition and its acknowledged ambiguity was influenced by the desire to couch an all embracing functional definition.<sup>6</sup> The judiciary on the other hand has defined credit as ‘a sum which, in the absence of agreement, would

---

<sup>1</sup>Rosa-Maria G and Francois Julien-Labruyere, *The History of Consumer Credit: Doctrines and Practices* (Macmillan Press Ltd 2000) 3. The Committee on Consumer Policy, *Consumer Protection in the Field of Consumer Credit* (Organisation for Economic Co-operation and Development (OECD) 1977) 7. See also Alfred Hardaker, *A Brief History of Pawnbroking with Full Narrative of How the Act of 1872 Was Fought for and Obtained the Stolen Goods Bill Opposed and Defeated* (Jackson Ruston and Keeson 1892). For the American context see Barbara A Curran, *Trends in Consumer Credit Legislation* (The University of Chicago Press 1965).

<sup>2</sup>Dennis Rosenthal, *Consumer Credit Law and Practice: A Guide* (4th edn, Bloomsbury Professional Ltd 2013) 13.

<sup>3</sup> Consumer Credit Directive (2008/48) Article 3(c).

<sup>4</sup>Rosenthal (n 2) 14.

<sup>5</sup> Consumer Credit 1974 Section (9) (1).

<sup>6</sup>Rosenthal (n 2) 14.

be immediately payable,' entailing deferment, the essential feature of credit.<sup>7</sup> Furthermore where an item enters into the total charge for credit it is not to be treated as credit.<sup>8</sup>

The etymology of 'credit' dictates consumer credit practice in most societies and provides an essential backdrop to understanding the usury laws discussed later in this essay. The Oxford Dictionary defines credit as 'the ability of a customer to obtain goods or services before payment, based on the trust that payment will be made in the future.' The word 'trust', is the etymology of credit. Consumer credit arrangements were in earlier societies, essentially a relationship of trust between the creditor and the borrower.<sup>9</sup>The Romans therefore classified it as contracts with substantive personal relationships whereby the creditor assessed the latter's creditworthiness based on subjective variables.<sup>10</sup>The creditor approaches the transaction with the borrower with a degree of scepticism.<sup>11</sup>Indeed, this is the essence of the pledge or security, the financial affordability assessment, the checking of the credit worthiness of the consumer through credit rating agencies, among others. Therefore, as far as the future fulfilment of the debtor's obligations is concerned the creditor refuses to rely on some blind unhinged trust in the borrower.

From the backdrop above, it seems an irony to commence a study into consumer credit which on balance essentially seeks to enquire into fraud by the creditor. Such an enquiry is however valid because creditors do dishonestly take advantage of vulnerable consumers, particularly so in the area of consumer credit.<sup>12</sup>Indeed historically, suspicion

---

<sup>7</sup> *Dimond v Lovell* [2001] GCCR 2303 CA.

<sup>8</sup> Consumer Credit 1974 (n 5).

<sup>9</sup>The Committee on Consumer Policy (n 1) 7.

<sup>10</sup> *ibid.*

<sup>11</sup> Melanie Tebbutt, *Making Ends Meet: Pawnbroking and Working Class Credit* (Leicester University Press 1983) p 69.

<sup>12</sup> *ibid* 69–100.

has been central in the relationship between the creditor and borrower and both have been said to tread warily.<sup>13</sup>This chapter enquires into the factors which have informed the suspicion and the extent to which the law has historically developed and evolved to deal with frauds and abuse in the creditor and consumer relationship. By fraud it is meant conduct considered as such under the criminal and civil laws of England between the parties in a consumer credit relationship. The first part of the chapter provides a brief historical background to consumer credit in English law, tracing it from earlier times to present-day. In so doing, types of consumer credit transactions are explored in brief such as are relevant to the understanding of the issues discussed in the rest of the essay.<sup>14</sup> The second part of the chapter deals with dishonest and fraudulent practices that can emerge from the relationship and how these are addressed by English civil and criminal law.

Word limit constraints prevent discussion of the position under common law but consumers are vulnerable to misrepresentation which can be a form of fraud.<sup>15</sup>In the context of consumer credit, further to recommendations by the Crowther Committee on the creditor and supplier's joint and several responsibility, which recommendations were adopted as a policy, misrepresentation is particularly relevant in the context 'where there the creditor and the supplier are different entities but there is a nexus between the creditor and the supplier outside the relationship of either with creditor'.<sup>16</sup>Similarly a consumer who enters into a credit transaction on the basis of duress or undue influence can seek remedies under the common law.

---

<sup>13</sup>ibid 69–70.

<sup>14</sup> For a broad approach see Iain Ramsay, 'Regulation of Consumer Credit', *Handbook Research on International Consumer Law* (Edward Elgar Publishing 2010).

<sup>15</sup>William Williamson Kerr, *A Treatise on the Law of Fraud and Mistake as Administered in Courts of Equity* (Bradbury, Evans, and Co 1923) pp 2, 12-96. See also R. Goode, *Consumer Credit Law and Practice* (LexisNexis Butterworths) [33.1]-[33.185]-[33.190].

<sup>16</sup>Goode (n 15) [33.1].

## History of Consumer credit

The history of consumer credit in England is consistent with how it began in ancient societies, that it was largely between individuals.<sup>17</sup> The creditors at the time included farmers, innkeepers, yeoman and pawnbrokers.<sup>18</sup> Professional money lenders came in at a later stage but the industry in the 17<sup>th</sup> century was even considered “spasmodic, irregular, unorganised, a series of individuals, and sometimes surreptitious, transactions between neighbours’.<sup>19</sup> Nevertheless some sense of the history is achieved when some aspects of the credit industry at the time are explored. These include usury, hire purchase, moneylending, and pawnbroking.<sup>20</sup>

The question of usury in England is central to the history of consumer credit in England.<sup>21</sup> The legal aspects are dealt with later in this work but it suffices to state at this point that usury was considered a crime and sin further to religious teaching by the Christian Church, particularly the Catholics.<sup>22</sup> In 1545 however, an Act permitted an interest of 10 per cent but this was reversed by an Act of 1552. The Act of 1572 is considered significant as it afforded protection to the consumer.<sup>23</sup> Further state interventions into usury continued until an Act of 1572 under Elizabeth I restored the 10 per cent interest charge. Although amended several times, the Act of 1854 repealed all usury legislation.

---

<sup>17</sup>Crowther Committee, *Consumer Credit-Report of the Crowther Committee*, vol 1 (Her Majesty’s Stationery Office 1971) p 31.

<sup>18</sup>*ibid* p 8.

<sup>19</sup>*ibid* p 32.

<sup>20</sup>See also generally Sarah Elizabeth Brown, ‘Consumer Credit and Over-Indebtedness: The Parliamentary Response: Past, Present and Future’ (University of Leeds School of Law 2006).

<sup>21</sup>Joseph Bridges Matthews, *The Law of Moneylending, Past and Present: Being a Short History of the Usury Laws in England, Followed by a Treatise upon the Moneylenders Act, 1900* (Sweet and Maxwell 1906).

<sup>22</sup>*ibid*. See also Crowther Committee (n 17) p 32.

<sup>23</sup>Crowther Committee (n 17) p 33.



Trademen's credit is another perspective through which the history of consumer credit can be explored.<sup>24</sup> The trademen in this era, apart from selling goods, also travelled across the country to collect debts resulting from goods giving out on a deferred payment basis.<sup>25</sup> The history of trademen's credit is a window to the dependence culture of families around the time as well as the power that the creditor had over the debtor. These included imprisonments among others.<sup>26</sup> The development in the 19<sup>th</sup> Century of cash sales at fixed prices ushered in modern sales and broke the credit power of the trademen. Modern shopping and credit then became normal.<sup>27</sup>

Pawnbroking is a significant aspect to the history of consumer credit in England.<sup>28</sup> The practice involves a debtor pledging his goods to obtain some form of credit.<sup>29</sup> Although it is assumed that those who patronised it were principally the poor, there is evidence that the rich<sup>30</sup> and royalty even pawned. The nature of the industry lent itself to fraud and abuse.<sup>31</sup> In 1745 therefore there was an enquiry into pawnbroking which led to the enactment of the 1571 Act. This was followed by an Act in 1603 which was meant to control theft in the industry. This was significant due to the second-hand goods prevalent in the industry.<sup>32</sup> Between 1784-1800, there were altogether about nine acts enacted to control pawnbroking.<sup>33</sup> The Act of 1796 and Pawnbrokers Act of 1800 were significant in protecting the vulnerable poor. The Pawnbrokers Act 1872<sup>34</sup> was preceded by

---

<sup>24</sup>ibid.

<sup>25</sup>ibid pp33-35.

<sup>26</sup>ibid p 34.

<sup>27</sup>ibid.

<sup>28</sup>Select Committee on Pawnbrokers, *Report from the Select Committee on Pawnbrokers; with the Proceedings of the Committee (1870)* (House of Commons 1871). See also Hardaker (n 1).

<sup>29</sup>James Paul Cobbett, *The Law of Pawns or Pledges: And the Rights and Liabilities of Pawnbrokers*: (Crofts and Blenkarn, Law Boksellers 1841).

<sup>30</sup>Crowther Committee (n 17) p 35.

<sup>31</sup>ibid.

<sup>32</sup>Tebbutt (n 11).

<sup>33</sup>ibid.

<sup>34</sup>Crowther Committee (n 17) p 44.

legislative amendments in 1846, 1856, 1859 and 1860. The 1872 act consolidated previous acts and, in the process, extended them. Although undergoing amendments in 1922 and 1960, this act regulated the trade until the enactment of the Consumer Credit Act 1974.

An equally essential aspect to consumer credit is hire purchase agreements<sup>35</sup> which involve 'a letting of goods on hire with an option to the hirer to purchase them by bringing his rental payments up to a stated credit price'.<sup>36</sup> Originating from France and the United States, it came to England in the 19<sup>th</sup> century.<sup>37</sup> It was essentially a conditional sale agreement, which distinction is clarified with the enactment of the Factors Act 1889 which afforded a conditional buyer the option of passing title to an innocent buyer.<sup>38</sup> The Bills of Sale made its use difficult and the moneylenders Act had no bearing on it.<sup>39</sup> The case of *Helby v Matthews*<sup>40</sup> gave Hire purchase its modern form.<sup>41</sup>

Hire purchase introduces the concept of finance houses which are critical to the examination of fraudulent practices within consumer credit. Initially hire purchase transactions were financed by either the manufacturer or the dealer, but finance houses came in 1860s when wagon companies were established.<sup>42</sup> They had essentially three sources, direct American large scale set ups and finance created by large manufacturers

---

<sup>35</sup>James John Mcmanus, 'Law and Power: A Study of the Social and Economic Development of the Law Relating to Consumer Credit' (University of Dundee 1985) for further background to English consumer credit and hire purchase.

<sup>36</sup>Crowther Committee (n 17).

<sup>37</sup>*ibid* p 42.

<sup>38</sup>*ibid* p 43.

<sup>39</sup>*ibid*.

<sup>40</sup>*Helby v Mathews* [1875] AC 471.

<sup>41</sup>Crowther Committee (n 17) p 43.

<sup>42</sup>*ibid* pp 43-46.

of goods sold on hire purchase.<sup>43</sup> The question of abuse of consumers within hire purchase transactions are discussed later in this essay.

Another aspect of consumer credit which was to act as precursor to the Moneylenders Act was bills of sale.<sup>44</sup> Essentially a non-possessory chattel mortgage it is a document by which property in goods is transferred from one person to another, the grantor of the bill remaining in possession.<sup>45</sup> Early legislation on bills of sales sought to protect the lender requiring the registration of bills of sale at the High Court.<sup>46</sup> Later legislation including the Bills of Sale Act 1882 and the Betting and Infants Act 1892 however sought to deal with abuse against the consumer.<sup>47</sup>

The consumer credit industry today involves a network of complex industries including pawnbrokers, hire purchasers, credit cards among others. This industry however has faced several issues in relation to the consumer's place within it. In a significant government paper titled *'Fair, Clear and Competitive: the Consumer Credit Market in the 21<sup>st</sup> Century'* many issues were noted including information problems pre-exchange, undue post contractual challenges, unfair practices, illegal money lenders and over-indebtedness.<sup>48</sup> These were called the drivers for reforms to create a transparent consumer credit market.<sup>49</sup> As noted in the Preface the sector is hugely significant to individuals and to the economy as a whole with fall in consumer spending always a cause for concern. The need to regulate the sector cannot therefore be over emphasised.

---

<sup>43</sup>ibid.

<sup>44</sup>ibid pp 36-38.

<sup>45</sup>ibid p 37.

<sup>46</sup>ibid.

<sup>47</sup>ibid p 37-38.

<sup>48</sup> 'Fair Clear and Competitive: The Consumer Credit Market in the 21st Century' 4-5 <[www.gov.uk/government/publications/fair-clear-and-competitive-the-consumer-credit-market-in-the-21st-century](http://www.gov.uk/government/publications/fair-clear-and-competitive-the-consumer-credit-market-in-the-21st-century)> accessed 18 March 2003.

<sup>49</sup> ibid.

## **Protecting the consumer against fraud in the consumer credit industry**

The many forms of credit available in England at the time demonstrate the extent of the individual's dependence on credit for survival.<sup>50</sup> This dependence sometimes created vulnerability to the parties in a transaction, where dishonest practices emerge. The law has developed in response to the need to protect parties in the transaction. In the case of consumer credit, it is important to observe that the parties can be the consumer, the retailer and the finance house.<sup>51</sup> However, this essay focuses mainly on fraudulent conducts effected against or with the consumer by the other parties and how the criminal and civil law has historically regulated such conducts.

## **Regulating consumer credit under the civil law-statutory**

### **Unconscionableness**

The Money-lenders Act 1900<sup>52</sup> sought to provide individuals, from a civil perspective, an avenue to challenge agreements by moneylenders which were excessive. The Act had been occasioned by the apparent absence of express legal provisions for the protection of consumers a situation which led to abuses.<sup>53</sup> The House of Commons appointed a committee to investigate the abuses in the industry but this committee failed to complete its work within the session, consequently a new Select Committee was appointed. The Committee highlighted a range of abuses.<sup>54</sup>

The recommendation led to the enactment of the Moneylenders Act. This gave the court power to re-open transactions where the interest or the expenses charged was considered

---

<sup>50</sup>Tebbutt (n 11) See.

<sup>51</sup>Crowther Committee (n 17).

<sup>52</sup>Moneylenders Act 1900 .

<sup>53</sup>R. Goode, 'Usury in English Law' (1982) 1 Arizona Journal of International and Comparative Law <Heinonline> accessed 30 January 2016.

<sup>54</sup>ibid.

harsh and unconscionable.<sup>55</sup> From a legal standpoint, the 1900 Act had significant weaknesses.<sup>56</sup> First the Act applied to only loans and excluded from its remit major areas of consumer credit. Second the Act rejected a licensing system preferring rather a registration system but this was ineffective.<sup>57</sup> The cases reported under the Act perhaps strengthened the case against its repeal. First in *re A Debtor*<sup>58</sup> the Court of Appeal rejected the contention made earlier in *Wilton v Osborne*<sup>59</sup> that relief may be granted to the borrower if the transaction was such that the court of equity would relieve on the grounds of its being harsh and unconscionable. Another weakness evident in a series of cases concerns the question of 'excessive'. Where the loan was unsecured the courts consistently held that in the absence of clear statutory guidance on rate of interest considered excessive, it was not their place to do so, arguing the words are vague.<sup>60</sup> Furthermore, the circumstances where the individual was considered vulnerable was equally unclear.<sup>61</sup> Perhaps it was logical that fraud, misrepresentation under pressure and any unconscionable circumstance should relieve the borrower.

The weakness in the 1900 Act led to the enactment of the 1927 Act which addressed the question of registration.<sup>62</sup> Furthermore, the Act put a ceiling of forty-eight per cent on loans and made the transaction excessive, unconscionable and harsh.<sup>63</sup> The Act stipulated the formalities of a contract and the terms of the contract. Nevertheless both Acts were limited to only loans.<sup>64</sup> Further, enforcement under the Acts was only at the instigation of

---

<sup>55</sup> Moneylenders Act 1900 (n 55) Clause 1.

<sup>56</sup> Goode (n 56).

<sup>57</sup> Goode (n 15) [47.5]. Goode (n 56).

<sup>58</sup> *Re a Debtor* [1995] Ch 66.

<sup>59</sup> *Wilton & Co v Osborne* [1901] 2 KB 110 (KBD).

<sup>60</sup> Goode (n 56).

<sup>61</sup> *ibid.*

<sup>62</sup> Matthews (n 21). Goode (n 56).

<sup>63</sup> Goode (n 15) [47.5].

<sup>64</sup> Goode (n 56).

the borrower with no institution having the power to do so. In terms of consumer fraud or protection such a situation was crucial.<sup>65</sup>

### **Extortionate bargains**

In response to concerns about the Moneylending Acts, the Consumer Credit Act 1974 introduced the extortionate credit test. This provided that a '*credit bargain is extortionate if it requires the debtor or a relative of his to make payments (whether unconditionally, or on certain contingencies) which are grossly exorbitant, or Otherwise grossly contravenes ordinary principles of fair dealing*'. In determining whether a credit bargain is extortionate, the Act provides that regard was had to among others, interest rates prevailing at the time it was made, the factors mentioned in subsection (3) to (5), and any other relevant considerations.

Some of the factors applicable under subsection (2) in relation to the debtor includes-his age, experience, business capacity and state of health; and the degree to which, at the time of making the credit bargain, he was under financial pressure, and the nature of that pressure. Factors applicable under subsection (2) in relation to the creditor included the degree of risk accepted by him, having regard to the value of any security provided; his relationship to the debtor and whether or not a colourable cash price was quoted for any goods or services included in the credit bargain.

It is clear that the ambit of the provision was wide as the courts power is exercisable to any credit agreement in which the debtor is an individual where the amount exceeds 5000 and it is an exempt agreement.<sup>66</sup> There was no distinction made between credit for business and consumer credit. The Act embraced all forms of credit not just money

---

<sup>65</sup>Gilbert Crensil, 'Fraud-A Comparative Analysis', *Research Handbook on International Financial Crime* (Edward Elgar Publishing 2015).

<sup>66</sup>Goode (n 56).

loans.<sup>67</sup> The court considers the credit agreement and the bargain, any other transaction in computing total charge for the credit. The Act dealt with rate disclosure as well. In other words ancillary contracts as well were covered. Extortionate was interpreted to be gross, not necessarily burdensome or unreasonable. Almost akin to harsh and unconscionable 'but in fixing it at the level stipulated in the contract, the creditor has been guilty of moral turpitude by taking a grossly unfair advantage of the debtor's circumstances' no court to adjust contract if it found it extortionate.<sup>68</sup>

The court was not concerned with unfairness at large.<sup>69</sup> The court had to determine itself as the Act did not point which way. The initial burden of proof was on the consumer and then it shifted to creditor. The court could among others set aside or order repayment by the creditor. The Act has however been criticised<sup>70</sup> as making no significant difference from the Money-lenders Act as reflected in<sup>71</sup>A. *Ketley Ltd. v Scott*.<sup>72</sup> It must be added that the Pawnbrokers Act 1872 (as amended) also imposed restrictions on charges as a way of protecting the consumer.<sup>73</sup>

### **Misrepresentation under the Consumer Credit Act 1974**

Under the Consumer Credit Act 1974, section 75 provides that if the debtor under a debtor-creditor-supplier agreement falling within section 12 (b) or (c) has, in relation to a transaction financed by the agreement, any claim against the supplier in respect of a misrepresentation or breach of contract, he shall have a like claim against the creditor, who, with the supplier, shall accordingly be jointly and severally liable to the debtor.<sup>74</sup>

---

<sup>67</sup> *ibid.*

<sup>68</sup> *ibid.*

<sup>69</sup> *ibid.*

<sup>70</sup> *ibid.*

<sup>71</sup> *ibid.*

<sup>72</sup> *A Ketley Ltd v Scott [1981] ICR 241.*

<sup>73</sup> Pawnbrokers Act 1872.

<sup>74</sup> s 75 Consumer Protection Act 1987/1974.

The consumer's ability to bring the claim is subject to meeting the conditions in section 75A which includes among others, that the supplier cannot be traced, the supplier's insolvency or the debtor after taking several steps cannot have the debt satisfied.<sup>75</sup> The creditor's liability is tailored to that of the supplier, and the source of the supplier's liability is to be found not in the CCA 1974 but in the general law of contract<sup>76</sup> including the Misrepresentation Act 1967, the Supply of Goods (Implied Terms) Act 1973, the Unfair Contract Terms Act 1977 (UCTA 1977), the Sale of Goods Act (SGA 1979), the Supply of Goods and Services Act 1982 (SGSA 1982), the Consumer Contracts (information, Cancellation and Additional Charges) Regulations 2013 ('the 2013 Regulations') and now the Consumer Rights Act (CRA 2015). The Law Commission's comment on the general law of misrepresentation is noted below on the section on deceptive practices.

### **Unfair relationships**

The response to the concerns raised on extortionate credit bargains sought to be addressed by the introduction of the unfair relationships test by the Consumer Credit Act 2006. This introduced Section 140A to 140C to the Consumer Credit Act 1974. The Act provides under section 140B that the court may determine that the relationships between a lender and a borrower arising out of a credit agreement (or the agreement taken with any related agreement) is unfair to the borrower because of: any of the terms of the credit agreement or any related agreement, the way in which the lender has exercised or enforced any of its rights under the agreement or any related agreement, or any other thing done or not done by or on behalf of the lender either before or after the making of the agreement or any related agreement. Applying to new agreements from April 2007, the court in

---

<sup>75</sup>s. 75A *ibid*1974 .

<sup>76</sup>Goode (n 15) [33.7].



exercising its powers under the Act was required, under section 140B to take into account any matter it considers relevant including those relating to the creditor and debtor and things done by associates of the creditor which the court was required to consider as done by the creditor.

The Act does not define unfair relationships but rather gave the court the freedom to determine whether an unfair relationship has occurred by setting out broad factors which it must take into account. The regime is flexible and the courts have the latitude to determine unfair relationships. Unfair relationships are examined under two broad areas: contract terms and business practices.<sup>77</sup> There is no definition of relationships but it has been defined as '*a continuing state of affairs and involves and affects all aspects of the mutual dealings of the parties*'.<sup>78</sup> Relying on previous law, unfair was assessed from various angles.<sup>79</sup> First regard is had to the provisions of the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs)<sup>80</sup> which provide that a contract term not individually negotiated would be unfair if contrary to the requirement of good faith, causes significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer. When applied to unfair relationships the rates and charges under the contract would be relevant.

Similarly relevant are the provisions of UCTA<sup>81</sup> which regulate the extent to which civil liability for breach of contract, or for breach of duty, can be avoided by means of contract

---

<sup>77</sup>Office of Fair Trading, 'Unfair Relationships: Enforcement Action under Part 8 of the Enterprise Act 2002'

<[https://uk.practicallaw.thomsonreuters.com/Link/Document/Blob/I42aaa5640c5511e498db8b09b4f043e0.pdf?targetType=PLC-multimedia&originationContext=document&transitionType=DocumentImage&uniqueId=4705d643-52be-4ead-bb45-29587e52d627&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](https://uk.practicallaw.thomsonreuters.com/Link/Document/Blob/I42aaa5640c5511e498db8b09b4f043e0.pdf?targetType=PLC-multimedia&originationContext=document&transitionType=DocumentImage&uniqueId=4705d643-52be-4ead-bb45-29587e52d627&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1)> accessed 24 July 2018.

<sup>78</sup>ibid.

<sup>79</sup>ibid.

<sup>80</sup>Unfair Terms in Consumer Contracts Regulations (UTCCR) 1999.

<sup>81</sup>Unfair Contract Terms Act 1977.

terms. In relation to terms, section 140A(1)(a)<sup>82</sup> provides the relationship would be unfair by virtue of the terms of the credit or related agreement, or it may be a combination of terms and business practices or other acts or omissions of the lender. In relation to business practices under section 140A (1)(b) (c),<sup>83</sup> the question has been cases which are in clear breach of the law and those which do not breach the law such as Domestic Infringements Order, Community Infringements, Consumer Protection from Unfair Trading Regulations. Applicable to licensing,<sup>84</sup> some of the issues relevant to this are business practices considered deceitful or oppressive,<sup>85</sup> unfair or improper, irresponsible lending practices where the non-status lending guidelines were relevant, debt collection guidance,<sup>86</sup> breach of data protection Act, FSMA 2000,<sup>87</sup> industry practice and codes of practices and findings of relevant ombudsman including the Financial Ombudsman Service (FOS).<sup>88</sup>

The provisions regarding unfair relationships have been applied in a number of cases. In *Harrison v Black Horse Ltd*<sup>89</sup> 'it is the relationship between the parties which must be determined to be unfair, not their agreement, although it is envisaged that the terms of the agreement may themselves give rise to an unfair relationship'.<sup>90</sup> Another question in *Harrison* was whether an unfair relationship arises where the lender fails to notify the borrower of the commission he will receive when selling a payment protection policy.

---

<sup>82</sup>Consumer Credit 1974 (n 5)140A(1)(a) .

<sup>83</sup>ibid140A (1)(b) (c) .

<sup>84</sup>Office of Fair Trading, 'Consumer Protection from Unfair Trading' <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284442/oft1008.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284442/oft1008.pdf)> accessed 24 July 2018.

<sup>85</sup>ibid.

<sup>86</sup>Brown (n 20).

<sup>87</sup>Financial Services and Markets Act 2000 2000.

<sup>88</sup>Office of Fair Trading (n 87).

<sup>89</sup> *Harrison v Black Horse Ltd* [2011] GCCR 11327, [2011] EWCA Civ 1128.

<sup>90</sup>ibid.

The court held in the negative. In *Paragon Mortgages Ltd v McEwan-Peters*<sup>91</sup> it was held that there was no unfair relationship where demand was common place. In *Mohamad Khodari v Fahad Al Tamimi*<sup>92</sup> and *Shafik Rahman v HSBC Bank*,<sup>93</sup> it was held that the Courts would take primary account of commercial considerations and prevailing industry practice. The courts have also held that account could be taken of related agreements in assessing unfair relationships. In all cases, the burden of proof is on the debtor to demonstrate a prima facie case.

Critical in the application of this policy is the statutory requirement under section 140D of the 1974 Act that the Office of Fair Trading under section 229 of the Enterprise Act 2002 must provide guidance on how the Part 8 provisions interact with unfair relationships. A criticism of the law has emerged in relation to the certainty of the provisions. In particular it has been suggested that it does not comply with Article 1, Protocol 1 of the European Convention Human Rights, but a committee tasked with investigating this rejected it.<sup>94</sup> Further to *Wilson v First Country Trust Ltd*<sup>95</sup> however the third limb has been criticised as being uncertain.

### **Licensing**

There are many provisions within the Consumer Credit Act 1974 which serve to protect the consumer in the United Kingdom. One such core provisions is that it prevents anyone from operating consumer credit business unless he has been granted necessary the licence.<sup>96</sup> The licence is subject to periodic renewal and any contravention of the requirement is an offence. The licence may be standard or group and covers different

---

<sup>91</sup>*Paragon Mortgages Ltd v McEwan-Peters* [2011] GCCR 11367, [2011] EWHC 2491 (Comm).

<sup>92</sup>*Mohamad Khodari v Fahad Al Tamimi* [2008] GCCR 8561, [2008] EWHC 3065 (QB).

<sup>93</sup>*Shafik Rahman v HSBC Bank* [2012] EWHC 11 (Ch).

<sup>94</sup>Rosenthal (n 2) [25.6].

<sup>95</sup>*Wilson v First Country Trust Ltd* [2003] GCCR 4931.

<sup>96</sup>Consumer Credit 1974 (n 5) section 21. See generally Part III.

types of businesses.<sup>97</sup> Indeed to prevent businesses from dealing with unlicensed individuals, agreements made with debtors or hirers upon the introduction by an unlicensed person is only enforceable with the authority of the relevant regulator. The question of what a consumer credit business is is not straightforward but there is an indication that regularity of granting loans or bridging finance is required<sup>98</sup> although a single transaction may be so construed.<sup>99</sup> Grant of licence is subject to the fitness test which takes into account among others competence.<sup>100</sup> Some of the indicative requirements are conducts not fulfilling the requirements of CPUT 2008, Business Protection from Misleading Marketing Regulations 2008. The licence can be revoked and sanctions imposed.<sup>101</sup> The regulator operates a register to protect the vulnerable public.<sup>102</sup>

### **Disclosure**

There is a strong affinity between fraud and the concept of disclosure. Indeed the characterisation of conducts as fraudulent often hinges on the defendant's disclosure or non disclosure of information. Information itself is critical in examining fairness and the perfect market.<sup>103</sup> A consumer credit agreement requires meeting certain standards. The subject headings that need to go with the agreement are prescribed by statute while the form and content are regulated under regulations made under section 60.<sup>104</sup> Section 61 sets out requirements for a properly executed contract.<sup>105</sup> The transaction relationship has

---

<sup>97</sup> See discussion in Rosenthal (n 2) 324–335.

<sup>98</sup> *Mohamad Khodori v Fayad Al Tamimi* [2008] GCCR 8 561, [2008] EWHC 3065 (QB). Rosenthal (n 2) 322.

<sup>99</sup> Rosenthal (n 2) 331–333.

<sup>100</sup> *ibid* 326.

<sup>101</sup> Consumer Credit 1974 (n 5) section 32.

<sup>102</sup> Rosenthal (n 2) 326.

<sup>103</sup> See Iain Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (3rd edn, Hart Publishing 2012) where Ramsay discusses perfect market as well as Chapter One of this thesis.

<sup>104</sup> Consumer Credit 1974 (n 5).

<sup>105</sup> *ibid*.

to be governed by three levels of disclosure. First the consumer must be given the pre-contract disclosure of information which must be consistent with UTCCR<sup>106</sup> or where distance by the Financial Services Distance Marketing Regulations 2004, the agreement for the transaction and the final copy of the executed contract. The regulations prescribe information that must be in the agreement including Key Financial information. Finally, the terms must be fair.<sup>107</sup> The consumer had right of set off<sup>108</sup> but now has rights during the agreement including the right to withdraw, cancel, entitlement to information, among others.<sup>109</sup> The consumer's post contractual rights are regulated by the Consumer Credit Act 2006 including notice of sums in arrears and interests on judgments.

### **Data protection**

In contrast with the creditor's duty to disclose is the obligation on the part of the business to keep its obligations to protect the consumer's data. Issues regarding data are hugely significant and is one of the areas of significance in the Brexit negotiations. The Data Protection Act 1998 had until recently regulated the data rights of the consumer. This required data processed by data processors to meet the conditions in Schedule 2 including acting fairly and lawfully. The most recent law is the Data Protection Act 2018 which implements EU regulations.<sup>110</sup> There are bodies such as the Information Commissioner, CIFAS and the Steering Committee on Reciprocity Guidelines who assist in regulating consumer data to ensure that the consumer's data is not used for fraud purposes or abused without consent. The consent sought by most businesses before the coming into effect of the new data protection law is a case in point, even though it is valid to ask whether it was not a box ticking exercise. The individual has the right to access his data, right to prevent

---

<sup>106</sup> Unfair Terms in Consumer Contracts Regulations (UTCCR) (n 83).

<sup>107</sup> Rosenthal (n 2) 140–146.

<sup>108</sup> *ibid* 126–129.

<sup>109</sup> See generally Rosenthal (n 2) Chapter 10.

<sup>110</sup> General Data Protection Regulation 2018.

data processing that would cause damage or distress, right to prevent direct marketing, right to compensation among others.<sup>111</sup>

It is recognised that the advent of storing credit information, credit scoring and credit bureaux has significantly helped in consumers accessing credit through impartial assessments and among others reducing costs, saving time and bad debts.<sup>112</sup> The information held by credit reference agencies regarding the consumer must be accurate and the consumer has right of access to it.

### **Restructuring the consumer credit debt**

Another way that a consumer who is indebted is able to seek relief is through an Individual Voluntary Arrangements (IVA). This enables the debtor to enter into arrangements with their creditors through normally an organisation.<sup>113</sup> Incidentally the original aim of an IVA was not to support consumers but to support company directors.<sup>114</sup> The nominee or supervisor or an insolvency practitioner seeks the approval of 75 per cent of the unsecured creditors. Research shows most IVAs relate to consumers<sup>115</sup> so a simple IVA protocol exists to support consumers. Another option available to the consumer is administration orders.<sup>116</sup> Provided for poor persons in debt this has existed since 1883 and provides an opportunity for the consumer to repay their debts<sup>117</sup> but they have been criticised for not being effective.<sup>118</sup> Of course the standard bankruptcy procedure is available and enables the consumer to petition for bankruptcy supported by the official

---

<sup>111</sup> See generally Data Protection Act 2018 in particular sections 92-100.

<sup>112</sup> See generally Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (n 106) 420-424; See also Rosenthal (n 2) 293-312.

<sup>113</sup> Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (n 106) 490.

<sup>114</sup> *ibid* 491.

<sup>115</sup> *ibid*.

<sup>116</sup> *ibid* 492-493.

<sup>117</sup> *ibid* 492.

<sup>118</sup> *ibid*.

Candidate Number: 1341103

receiver.<sup>119</sup> It is generally based upon statutory provisions.<sup>120</sup> The consumer must pay fees which can act disincentive to pursuing bankruptcy.

Further to the Enterprise Act 2002 the individual is discharged after twelve months.<sup>121</sup> Irresponsible debtors are then punished through Bankruptcy Restriction Orders.<sup>122</sup> Due to 'commercial morality the government does not encourage bankruptcy.'<sup>123</sup> People can also apply to the official receiver for a debt relief order at a cost.<sup>124</sup> A key issue under bankruptcy is whether it is consistent with the concept of social majeure in contract law which has been defined as a 'special occurrence' in a consumer's life such sickness or unemployment which causes the consumer difficulties in paying debt owed.<sup>125</sup>

### **Consumer Rights Act 2015**

The Consumer Rights Act 2015 was enacted to give consumers rights of redress against terms and notices in a contract with a trader. The consumer can seek such redress where the terms or notices, where contrary to the requirements of good faith, causes significant imbalance in the relationship with the trader. The Act repeals a number of prior legislations such as UCTA<sup>126</sup> and UTCCR<sup>127</sup> and Sale of Goods Act. The tests for any claim against a trader are that the product must be of satisfactory quality, fit for purpose and must be as described. The Act however does not incorporate all the recommendations

---

<sup>119</sup> *ibid* 493–498.

<sup>120</sup> Insolvency Act 1986 Sections 283, 307-308A.

<sup>121</sup> Enterprise Act 2002 2002 Part 10.

<sup>122</sup> *ibid* Schedule 20, section 2.

<sup>123</sup> Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (n 106) 493–495.

<sup>124</sup> *ibid* 497–498.

<sup>125</sup> *ibid* 498. See also Iain Ramsay, 'Consumer Credit Law, Distributive Justice and the Welfare State' (1995) 15 *Oxford Journal of Legal Studies* 177.

<sup>126</sup> Unfair Contract Terms Act 1977 (n 84).

<sup>127</sup> Unfair Terms in Consumer Contracts Regulations (UTCCR) (n 83).

of the Law Commission as highlighted in the Report on Consumer Redress for Misleading and Aggressive Practices.<sup>128</sup>

### **Regulating consumer credit-the criminal law**

The state has always intervened to protect citizens against conduct considered criminal. In consumer credit, regulation of the relationship between the creditor and the debtor involves historically exploring offences such as usury, larceny and its related offences such as theft and deception, abusive means of recovery of debt including insolvency, conspiracy to defraud, money laundering, among others. Word restrictions prevents discussion of other offences including money laundering.<sup>129</sup>

#### **Conspiracy to Defraud**

Similarly relevant to consumer credit fraud is the offence of conspiracy to defraud.<sup>130</sup> It involves more than one person coming together to commit an offence. In the context of consumer credit, it occurs when among others the supplier and lender conspire to commit an offence against the consumer. Goode has stated that where *'a fraud of any sophistication is perpetrated in the consumer credit field, the chances are that more than one person is involved, and where two or more are gathered for nefarious purposes, the criminal law discerns a conspiracy'*<sup>131</sup> In the field of consumer credit a consumer can be the victim in a conspiracy by other non private stakeholders to defraud.

#### **Usury**

---

<sup>128</sup>The Law Commission and the Scottish Law Commission, 'Consumer Redress for Misleading and Aggressive Practices' (The Law Commission and The Scottish Law Commission 2012) LAW COM No 332, SCOT LAW COM No 226.

<sup>129</sup> Rosenthal (n 2) 369–375.

<sup>130</sup>Goode (n 15) [71.1]-[71.7].

<sup>131</sup>ibid [71.1].



The regulation of usury is the genesis of any discussion to regulate consumer credit under the criminal law in England.<sup>132</sup> Usury, curiously, was considered a crime in early England, as far back as the days of the Edward the Confessor.<sup>133</sup> Although usurers were punished with banishments by the 12<sup>th</sup> century under Hen II Circa 1187,<sup>134</sup> they were subjected to the discipline of the Ecclesiastical Courts.<sup>135</sup> Statutory prohibition of usury, called ‘dry exchange’ was confirmed by the 3 Hen. VII<sup>136</sup> and 11 Hen. VII<sup>137</sup>. The statute of 15 Edw III<sup>138</sup> confirmed the legal position although the irony is that it was by a statute of the same year repealed stating that the “statute did not of our free will proceed, the same be void, and ought not to have the name or strength of a statute, and therefore we have decreed the said to be void”<sup>139</sup>

By 3 Hen VII C.6 (o)<sup>140</sup> it was enacted that “*all unlawful chevisance and usury shall be extirpate; all brokers of such bargains shall be set on the pillory, put to open shame, be half a year imprisoned, and pay 20l*”. The statute of 37 Hen VIII C9<sup>141</sup> suggested in its preamble that the language of the previous acts had caused difficulties such that it had limited impact in prosecutions. The language had been described as obscure and dark in sentences words and terms causing many doubts, ambiguities and raising several questions. Consequently, it abolished all previous acts and introduced a ten per cent

---

<sup>132</sup>Goode (n 56). See also Crowther Committee (n 17). See also Matthews (n 21).

<sup>133</sup>Goode (n 56).

<sup>134</sup>Hen II Circa 1187.

<sup>135</sup>See Norman Jones, *God and the Moneylenders; Usury and Law in Early Modern England* (Basil Blackwell Ltd 1989) for detailed historical, religious and philosophical contentions that influenced the various usury laws. Matthews (n 21) 4.

<sup>136</sup>3 Hen. VII.

<sup>137</sup>11 Hen VII.

<sup>138</sup>15 Edw. III.

<sup>139</sup>ibid.

<sup>140</sup>3 Hen VIII C.6.

<sup>141</sup>37 Hen VIII C.9.

interest ceiling. The Act provided that offenders suffer imprisonment, a fine and ransom at the Kings will and pleasure.

Repealing 37 Hen VIII C 9,<sup>142</sup> the statutes of 5 & 6 Edw VI c.20<sup>143</sup> put an absolute prohibition on usury. The reasoning behind this change was that the statute had been misconstrued to license usury when this was against the Holy Scriptures.<sup>144</sup> This change was however short-lived because it failed, causing usury to “*much more exceedingly abound*”. For this reason, the statute 18 Elizabeth c 8<sup>145</sup> re-enacted 37 Hen VIII C 9<sup>146</sup> putting the maximum ceiling as 10 percent. Although many have suggested that this fixed the legal rate of interest at 10 percent, it has been suggested it did not legalise it.<sup>147</sup> The statute was continued by 27 Elizabeth c 11,<sup>148</sup> 35 Eliz c 7<sup>149</sup> and 39 Eliz c 18.<sup>150</sup> The application have not consistent. In *Burton’s* case<sup>151</sup> the transaction was held not usurious, while in *Clayton’s*<sup>152</sup> case the transaction was held to be usurious.

A shift in this evolutionary journey began through a series of reductions in the interest rate. The interest rates were reduced from 10 to 8 per cent by a temporary Act 21 Jac I c 17<sup>153</sup> to stem the tide of economic downturn partly blamed on “interest in loan continuing at so high a rate at 10l for 100l for a year, does not only make men unable to pay their debts, and continue the maintenance of trade”. The Act was made perpetual by section 5

---

<sup>142</sup>37 Hen VIII C.9.

<sup>143</sup>5 & 6 Edw VI C.20.

<sup>144</sup>Matthews (n 21).

<sup>145</sup>18 Elizabeth C.8.

<sup>146</sup>37 Hen VIII C.9 (n 144).

<sup>147</sup>Matthews (n 21) p 17.

<sup>148</sup>27 Elizabeth C.11.

<sup>149</sup>35 Elizabeth C.7.

<sup>150</sup>39 Elizabeth C.18.

<sup>151</sup>*Burton’s case Kings Bench Mich 33 & 34 Eliz* as reported in .Matthews (n 21) pp 11-21.

<sup>152</sup>*Clayton’s Case Common Pleas, Pasch 37 Eliz* as discussed in .Matthews (n 21) pp 19-21.

<sup>153</sup>21 Jac I C.17.

of 3 Car I c.4.<sup>154</sup>The next Statute of Usury was 12 Car II c 13,<sup>155</sup> and this reduced the interest rate from 8 to 6 per cent. This statute was later confirmed by 13 Car II St 1, c.14.<sup>156</sup> This change was influenced by the success of reduction from 10 to 8 per cent stating that it enhanced trade and the interest was thus brought in line with international rates.

Up until this point in history, the penalty for breach of the usury laws was still imprisonment. However, although the trend in reduction continued, the penalty changed. The statute 12 Anne St 2, c 16<sup>157</sup> reduced the interest rate to 5 per cent and taking out the penalty for imprisonment. The next statutes enacted were related to particular areas. First, 6 Geo I. c. 18,<sup>158</sup> s.12 eliminated usury against corporations, body politick as well as partnerships. The 5 per cent was equally extended by 14 Geo. III. C. 79<sup>159</sup> to mortgages and securities of lands. The next series of 58 Geo III c 93<sup>160</sup> regulated usury in the bill of exchange and promissory note. The final Act continued until January 1856.

For any offence carrying criminal consequences, there would often be numerous attempts at avoiding it and usury was no exception. It is important to highlight that the law, at least in earlier times, was partially applied.<sup>161</sup> From the *Dialogus de Scaccario* it is learnt that in the reign of Henry II Jews were allowed to take ordinary rate of interest two pence in the pound per week or 431/2 per cent per annum but compound interest was forbidden. It was not until the Statute of Jewry (3 Edw. I)<sup>162</sup> that Jews subjected to the same law as

---

<sup>154</sup>3 Car I C.4.

<sup>155</sup>12 Car II C.13.

<sup>156</sup>13 Car II St 1, C.14.

<sup>157</sup>12 Anne St 2, C.16.

<sup>158</sup>6 Geo I. C.18, s.12.

<sup>159</sup>14 Geo. III C.79.

<sup>160</sup>58 Geo III C.93.

<sup>161</sup>Matthews (n 21) pp 1-6.

<sup>162</sup>3 Edw. I.

Christians. However Jews evaded it by binding the borrower to the periodical delivery of merchandise with a pecuniary penalty for every default. As a result, Writ of Expulsion of Jews was enacted which they were expelled. The various schemes raised significant questions about their effectiveness. In the end it was commercial considerations that caused usury to be abolished as a criminal offence. By the time the Moneylenders Act<sup>163</sup> was enacted usury was no longer a criminal offence.

By the late 1960s interest rates continued to be a major issue. A survey undertaken in showed that consumer interest rates were in the region of 40 to 50%.<sup>164</sup> A major problem at the time was the consumers' lack of awareness of the interest rates on their loans with interest rates higher than some consumers thought. Creditors advertised credits with phrases such as 'low payment' and 'easy terms' without the actual figures.<sup>165</sup> The Advertisements (Hire Purchase) Act 1967, although requiring goods advertised to have the true rate, had no enforcement provisions so was unsurprisingly ignored. Another challenge the consumer faced was non-availability of cash cost of credit. Compulsory rate disclosure was made only in relation to loans made pursuant to the Moneylenders Acts. It was thus pursuant to the recommendations of the Crowther Committee that compulsory rate disclosure was introduced in the 1974 CCA. Rate disclosure enables consumers to shop for bargains, enables intelligent decision making, encourages competition and enables comparison by the consumers.<sup>166</sup>

### **Larceny, Theft and related offences**

Frauds in the consumer credit industry can similarly be explored through offences aimed at dealing with dishonest and abusive deprivation of ownership of goods and services or

---

<sup>163</sup> Moneylenders Act 1900 (n 55) 1900.

<sup>164</sup> Terence G Ison, *Credit Marketing and Consumer Protection* (Croom Helm Ltd 1979) 176.

<sup>165</sup> *ibid* 176–179.

<sup>166</sup> *ibid* 179–183.

recovery of goods. Integral to the examination of issue of ownership is the offence of theft which in simple form relates to any activity to deprive someone ownership of goods.<sup>167</sup> Unsurprisingly this was the focus of earlier legislation.<sup>168</sup> The reason is because the question of ownership or the *leitmotif* was considered was central to the business of pawnbroking as it raised ambivalent transactions.

The history of the examination of this issue brings pawnbroking to the fore. Under the common law, it was the case in Saxon England that the sale of goods must take place in open market in the presence of credible witnesses under the principle called market overt.<sup>169</sup> In order to ensure the effectiveness of this principle, special days were reserved for market activities in any town except London where all days were market days except Sunday.<sup>170</sup> Further to the principle market overt, any sale consistent with the principle alters the property. In relation to pawnbroking however, an exception was made. This means that further to 1 Jac I 21,<sup>171</sup> the sale of any goods wrongfully taken to a pawnbroker did alter the property meaning the, rightful owner could have a verdict against the defendant, whether the thief or the pawnbroker. The common law position at the time was any person who bought a stolen article had to restore to the true owner.<sup>172</sup> Pawnbroking was not a sale and the Pawnbrokers Act<sup>173</sup> made that distinction. Thus explaining why the market overt which related only to a sale was not applicable to pawnbroking which is not a locking up, rather a circulation of the property. It must however be stressed that the case of *Hoare*<sup>174</sup> has two contrasting reports. However it appears that Nolans's report was

---

<sup>167</sup>Tebbutt (n 11).

<sup>168</sup>*ibid.*

<sup>169</sup>Cobbett (n 29) pp 64-70.

<sup>170</sup>*ibid* p 65.

<sup>171</sup>1 Jac I 21.

<sup>172</sup>Cobbett (n 29) p 65.

<sup>173</sup>Pawnbrokers Act (n 76) 1800.

<sup>174</sup>*Hartop v Hoare 2 Stra 1187.*

inconsistent with most of the authorities and there were cases where claimants were successful even though there had been fraud which they did not commit or they were not cautious.<sup>175</sup> This however did not relieve the claimant of all sense of caution.

The offence of Larceny as a precursor to theft was also relevant in checking theft in pawnbroking.<sup>176</sup> The statute 21 Hen 8 c 11<sup>177</sup> provided that on a conviction for larceny restitution of goods would have to be pursued by the prosecutor or the victim must bring an appeal for robbery.<sup>178</sup> Where the victim failed to recover from the prosecution after a court orders for restitution, then the victim brought an action for trover to recover.<sup>179</sup> The victim was equally able to claim for produce from a stolen article. Further to the statute 7 & 8 Geo 4, c 29<sup>180</sup> offenders were punished for goods which were fraudulently or feloniously obtained.

Laws against stolen property were extensive and covered many stakeholders including employees and professionals.<sup>181</sup> The challenge against fraud was strong such that a distinction existed between fraud and larceny, addressed by an instruction of a misdemeanour which was defined as any conduct that employs false pretences to obtain property from other persons with intent to defraud or cheat the person of the same.<sup>182</sup> Further provisions for restoration of stolen goods were provided in police Acts.

---

<sup>175</sup>Cobbett (n 29) p 68.

<sup>176</sup>ibid p 70-71.

<sup>177</sup>21 Hen 8 C.11.

<sup>178</sup>Cobbett (n 29) p 70-71.

<sup>179</sup>ibid p 71.

<sup>180</sup>7 & 8 Geo 4, C 29.

<sup>181</sup>Cobbett (n 29) pp 71-72.

<sup>182</sup>ibid p 72.

The 1603 Act Against Brokers<sup>183</sup> was significant in regulating criminal trade practices.<sup>184</sup> The protection against stolen goods was the focus of earlier legislation.<sup>185</sup> Hundreds of small retailers had sprung up in the late 16th century and the Act was targeted at those who accepted pledges. The retailers were synonymous with second hand dealers due to their affinity.<sup>186</sup> Theft was thus common abuse. It is said that the 1603 Act had little practical effect and the pawnbroker was considered the Treasurer of the Thieves' exchequer, the Common Fender of all Bulklers and Shoplifts in the town'.

Under Elizabeth I, a public registry for sales and pawns was established. When in 1638, a charter was granted to the citizens of London, it contained a similar proposal for the establishment of a public registry.<sup>187</sup> The joint impact of the 1603 and the public registry were negligible for several reasons.<sup>188</sup> First the transparent nature of the registry 'compromised the reputation of too many wealthy pledgers'. It also prejudiced the marriage prospects of daughters whose dowry had to be raised at pawnbrokers. Further it affected the creditworthiness of traders and attracted jealousy from competitors. The net impact was that 'the borderline between legitimate and illegal pawning was consequently ill-defined and entirely dependent upon the pawnbrokers, often involving transactions which whilst not illegal were morally questionable.<sup>189</sup> Shopkeepers it said, 'frequently cheated those to whom they owed money by pledging goods obtained just before their credit was exhausted and absconding with the proceeds'.<sup>190</sup>

---

<sup>183</sup>Act Against Brokers 1603 1603.

<sup>184</sup>Tebbutt (n 11) p 70.

<sup>185</sup>ibid.

<sup>186</sup>ibid pp 69-100.

<sup>187</sup>ibid p 70.

<sup>188</sup>ibid.

<sup>189</sup>ibid.

<sup>190</sup>ibid.

Laws on ownership of property took a major turn with the enactment of the Theft Act 1968.<sup>191</sup> A person handles stolen goods if knowing or believing them to be stolen goods he dishonestly receives the goods, or dishonestly undertakes or assists in their retention, removal, disposal or realisation by or for the benefit of another person, or if he arranges to do so.<sup>192</sup> Appropriation has been defined as the assumption of the rights of another person.<sup>193</sup> following *Gomez*<sup>194</sup> where the consumer or the supplier both dishonestly appropriates property they commit both deception and theft. Further to *Gomez*<sup>195</sup> and *Atakpu*,<sup>196</sup> *Hircock*<sup>197</sup> where the court decided two separate offences were committed was wrong. It is also arguable where a person deals with property as owner, the person would be considered as having stolen.

Another dimension to the issue of theft is unlawful pawning which was banned further to s.33 of the Pawnbrokers Act 1872 s.33.<sup>198</sup> However the Consumer Credit Act 1974<sup>199</sup> repealed unlawful pawning. Unlawful pawning is now addressed by section 6(2) of the Theft Act 1968<sup>200</sup> which provides that a person commits unlawful pawning where having possession or control whether lawfully or not, of property belonging to another, parts with the property under a condition he may not be able to perform. The prosecution has the obligation to find that the defendant parted with the property under a condition he could perform. The law is unclear as it appears there is difference in language between the pawning provision and the Theft provisions. The critical issue is whether the defendant

---

<sup>191</sup>Theft Act 1968.

<sup>192</sup>ibid s.1 .

<sup>193</sup>ibid s.3.

<sup>194</sup>*Director of Public Prosecutions v Gomez* 1993 AC 442 1993 1 ER 1 HL.

<sup>195</sup>ibid.

<sup>196</sup>*R v Atakpu* 1994 QB 69 4 ER 215 CA.

<sup>197</sup>*R v Hircock* 1978 67 Cr App Rep 278 CA.

<sup>198</sup>Pawnbrokers Act (n 76).For detailed discussion see Goode (n 15) [71.27]-[71.29].

<sup>199</sup>Consumer Credit 1974 (n 5).

<sup>200</sup>Theft Act (n 191).



is guilty if he is a bona fide purchaser who resells. The House of Lord have held in the negative in *R v Bloxam*.<sup>201</sup>

The consumer can be a victim to deception in a consumer credit transaction. One such prohibited offence under s 15 of the Theft Act<sup>202</sup> is obtaining by property by deception. The section provides that a person who by deception dishonestly obtained property belonging to another, with the intention of permanently depriving the other of it. The question has been what deception is and it has been said to be a 'misstatement 'as to the present intentions of the person using the deception'. The issue of whether after an initial act of theft further acts of theft are committed has been concluded in *Gomez*<sup>203</sup> as the offence only takes place when possession takes place. It must however be stressed *Gomez*<sup>204</sup> is itself criticised as being uncertain. Another aspect to deception is puffing which under the common law was lawful, but subsequently held to be unlawful if the maker did not believe in the truth of what he said. The section was also applicable where the seller sells goods for which he has no title or authority to title or non-existent or encumbered goods. It is similarly arguable that overcharging for goods or services, further to *R v King and Stockwell*<sup>205</sup> and *R v Silverman*,<sup>206</sup> may amount to deception.

There is the offence of fraudulent trading by the supplier against the consumers.<sup>207</sup> This can happen in a situation where the supplier or retailer takes orders in full knowledge of his inability to satisfy them. The origin of this legislation is the Theft Act which considered such practice is effectively theft applied in the case of *R v Hall*.<sup>208</sup> Any defence

---

<sup>201</sup>*R v Bloxam* 1983 1 AC 109 1982 1 ER 582 HL.

<sup>202</sup>Theft Act (n 191).

<sup>203</sup>*Director of Public Prosecutions v Gomez* (n 194).

<sup>204</sup>*ibid.*

<sup>205</sup>*R v King and Stockwell*.

<sup>206</sup>*R v Silverman*.

<sup>207</sup>See Goode (n 15) [71.227]-[71-228].

<sup>208</sup>*R v Hall* 1973 QB 126 1972 2 ER 1009 CA.

of plausibility was closed by the offence of fraudulent under the Companies Act. Although initially provided under section 458 the Companies 1985, now the provision is available under the companies Act 2006<sup>209</sup> which precludes fraudulent trading since the 2006 came into effect after 1 October 2007. The provision has been considered in a few cases including *R v Lockwood*<sup>210</sup> where it was held that there is one standard of dishonesty in criminal cases and there is no distinction between the standard for commercial men and reasonable and honest people.

Significantly, the Fraud Act 2006 repealed most sections of the Theft Acts.<sup>211</sup> The Act has further connection with consumer credit in that where it is shown that the defendant made false representation, failed to disclose information or abused its power in relationship with the consumer, the defendants would then be convicted for fraud.

### **Misleading and aggressive practices**

Further to the recommendations by the Molony Committee, the Trade Descriptions Act 1968<sup>212</sup> was enacted subsequently to replace the Merchandise Marks Acts 1887-1953 and<sup>213</sup> to deal with the protection of the consumer from a criminal perspective, principally in relation to misrepresentations made to the consumer. The Act was meant to deal with the problems related mainly to enforcement and substantive deficiencies raised by the Committee and came into force on 30 November 1968.

---

<sup>209</sup>Companies Act 2006 2006 s.993.

<sup>210</sup> *R v Lockwood* (1986) 2 BCC 99333.

<sup>211</sup> Fraud Act 2006 Schedule 3.

<sup>212</sup>Trade Descriptions Act 1968. See generally Graham Stephenson, *The Criminal Law and Consumer Protection* (Barry Rose (Publishers) Ltd 1983).

<sup>213</sup>Stephenson (n 212) pp 1-2.

Not meant to directly protect the consumer<sup>214</sup> the common issue encountered under the Act relates to applying false trade descriptions to goods, s.1,<sup>215</sup> and misleading pricing. The relevant provision was section 11 which regulates misleading indications in relation to recommended prices, a trader's previous prices or giving misleading indication in connection with actual prices<sup>216</sup> and making false statements. Although the offences created by the section did not require dishonesty or intention to deceive or knowledge that the description was false. The Act made provision for no fault defence of mistake and accident. There were a number of Codes of Practice which were enacted further to the Consumer Protection Act 1987.<sup>217</sup> The problems<sup>218</sup> raised with the Act included its complexity. Furthermore, case law was not particularly helpful. A further issue raised with the Act was the close affinity between the civil law on breach of contract and misrepresentation, thus influencing the civil courts willingness to impose criminal liability. These issues affected its effectiveness.

Another legislative effort at protecting the consumer against deceptive and misleading practices by suppliers is the enactment of the Fair Trading Act 1973.<sup>219</sup> These included provisions which provided that a person shall not in the course of a business furnish to a consumer in connection with the carrying out of a consumer transaction ... a document which includes a statement which is a term of that transaction and is void. The application of this provision was criticised following the cases of *Cavendish Woodhouse Ltd v*

---

<sup>214</sup>ibid p 2.

<sup>215</sup>Trade Descriptions Act (n 212) s.1.

<sup>216</sup>ibid s.11.

<sup>217</sup>Consumer Protection Act 1987 (n 77) sections 25 and 26.

<sup>218</sup>Ison (n 48) p 333-405.

<sup>219</sup>Fair Trading Act 1973. See also Goode (n 15) [71-223].

*Manley*,<sup>220</sup> *Hughes v Hall*<sup>221</sup> and *R v Afzal Suleman*.<sup>222</sup> The Act also contained provisions for alternative dispute resolution including arbitration.

The Consumer Protection Act 1987 is another legislation that was enacted to deal with misleading pricing in the criminal context.<sup>223</sup> The trigger for this legislation was the fact that s.11 of the Theft Act<sup>224</sup> was defective, enabling traders to continue to give misleading information without falling foul of the law. The section for instance did not apply to services or accommodation and neither was the picture of what was intended to be caught by the provisions. The Act created the offence of a supplier giving a consumer misleading indication.<sup>225</sup> Section 21 defined misleading indication and the offence was applicable to services and facilities<sup>226</sup> and accommodation and contained defences<sup>227</sup>

The enactment of the Consumer Protection from Unfair Trading Regulations 2008 (As amended)<sup>228</sup> represented a significant development in the protection offered consumers in the consumer credit under criminal law. The CPUR 2008 implements the European Directive the Unfair Commercial Practices 2005.<sup>229</sup> The aim was to harmonise consumer protection regulation across the European Union. The Act is also relevant to the civil law as the public enforcement can be undertaken by public bodies. The Act is applicable to business to consumer transactions and came into force on 26 May 2006. The broad scope meant potential duplication and to avoid this it repealed partly or wholly many provisions

---

<sup>220</sup>*Cavendish Woodhouse Ltd v Manley* 1984 148 JP 299 82 LGR 376 QBD.

<sup>221</sup>*Hughes v Hall* 1981 RTR 430 QBD.

<sup>222</sup>*R v Afzal Suleman* 2006 EWCA Crim 2187.

<sup>223</sup>See generally Stephenson (n 212). See also Ison (n 48).

<sup>224</sup>Theft Act (n 191) s.11.

<sup>225</sup>Consumer Protection Act 1987 (n 77) s.20.

<sup>226</sup>*ibid* section 22.

<sup>227</sup> *ibid* section 24.

<sup>228</sup>Consumer Protection from Unfair Trading Regulations 2008.

<sup>229</sup> For detailed treatment see Marios Koutsias and Chris Willett, 'The Unfair Commercial Practices Directive in the UK' (2012) 5 *Erasmus Law Review* 237.

in existing law including partially repealing Part III of the Consumer Protection Act 1987 and most of the provisions of the Trade Descriptions Act 1968. The general clause prohibits commercial practice which is contrary to professional diligence and materially distorts or is likely to distort the economic behaviour of the average consumer. The provisions are applicable to all stages of the transaction including before, during and post completion. Generally the Act prohibits unfair commercial practices. The main criticism against the regulations is that it provides for public law enforcement for which reason the Law Commission undertook some studies.

From a criminal perspective, the regulations prohibit many offences. These include misleading actions except 5(3)(b),<sup>230</sup> misleading omissions, aggressive practices and specific unfair commercial practices which are altogether about 29 offences. There is no particular order to the categorisation of the offences. There are offences which relate to the claims regarding the trader including the trader claiming to be a signatory to a code of conduct. Some also relate to claims about the trader's product. Another category relates to direct promises made to consumers regarding particular transactions including undertaking to provide after sales service to consumers with whom the trader has communicated prior to a transaction.

Advertising is similarly important to deceptive practices against vulnerable consumers. It means showcasing or introducing a credit or hire agreement to the public.<sup>231</sup> The 1974 Act brings into its ambit every form of advertising including circulars and catalogues. However there are statutes that regulate advertising; for advertisements for credit secured

---

<sup>230</sup>Consumer Protection from Unfair Trading Regulations (n 228)5(3)(b).

<sup>231</sup> Rosenthal (n 2) 275.

Candidate Number: 1341103

on land,<sup>232</sup> consumer hire agreements<sup>233</sup> and in respect of financial services.<sup>234</sup> The main issue with advertising has been what is meant by the word 'public'. Importantly, a section of the public has been interpreted as meaning the 'public'<sup>235</sup> as well as communication to members of a group'.<sup>236</sup> Crucially the advert must have been published by a business carried on by the advertiser.<sup>237</sup>

Further to the repeal of section 46 of the 1974 Act by CPUT, it is only adverts where goods and services are not available for cash and infringements of the advertising regulations which are subject to the CPUT. *R v Kettering Magistrates Court, ex parte MRB Insurance Brokers Ltd*<sup>238</sup> wrongly stated APR still misleading under the Consumer Protection Act 1987.<sup>239</sup> The general law of misrepresentation has however been criticised as not helping the average consumer. In this regard the Law Commission in a report titled *Consumer Redress for Misleading and Aggressive Practices* stated that this private law is complex,<sup>240</sup> the remedies are uncertain and recommended the enactment of a new law that would give consumers a statutory right of redress against the trader.<sup>241</sup>

### **Consumer credit offences**

There are certain offences created by the 1974 Consumer Credit Act, particularly Schedule 1 which protects the consumer. These were actually about thirty five but most have been repealed. These are among others canvassing debtor creditor agreement off trade

---

<sup>232</sup> Consumer Credit 1974 (n 5); Consumer Credit (Advertisements) Regulations 2004; Consumer Credit (Advertisements) Regulations 2010.

<sup>233</sup> Consumer Protection from Unfair Trading Regulations (n 228).

<sup>234</sup> Financial Services and Markets Act 2000 (n 90).

<sup>235</sup> *R v Delmayne* [1969] 2 All ER 980.

<sup>236</sup> *Log Book Loans Ltd v The Office of Fair Trading and Nine Regions Ltd (t/a Log Book Loans) v the Office of Fair Trading* [2010] GCCR 10501; CCA/2009/0010 & CCA/2009/0011.

<sup>237</sup> Consumer Credit (Advertisements) Regulations 2010 (n 232).

<sup>238</sup> *R v Kettering Magistrates Court, ex parte MRB Insurance Brokers Ltd* [2000] GCCR 2701.

<sup>239</sup> Consumer Protection Act 1987 (n 77) section 20.

<sup>240</sup> The Law Commission and the Scottish Law Commission (n 131).

<sup>241</sup> *ibid.*

premises<sup>242</sup> and canvassing ancillary credit services off trade premises.<sup>243</sup> Taking advantage of vulnerable minors by sending circulars to them<sup>244</sup> or taking pledges from them<sup>245</sup> amounts to offences. There are about four offences relation to credit reference including refusal to give the name of the reference agency,<sup>246</sup> failure of an organisation to disclose filed information<sup>247</sup> and among others failure of credit reference agency to correct information.<sup>248</sup> The offences are all summary offences.

The failure of a credit intermediary to comply with section 160A requirement has not yet been inserted into Schedule 1. Like FSMA 2000 and indeed CPUT 2008, the offences create both criminal and civil sanctions and while the former sometimes lead to acquittal, the latter may lead to the agreements been unenforceable. Plethora of legislative changes have meant the FCA have varied enforcement powers as well as the court imposing custodial sentences where the defendant is unable to satisfy the defence under section 168 (1).

### **Wrongful recovery by creditor**

There are also a range of offences related to the recovery of debt or enforcement.<sup>249</sup> They are important in consumer credit because they demonstrate the vulnerability of the consumer, particularly in situations of over-indebtedness.<sup>250</sup> Over indebtedness is a major

---

<sup>242</sup> Consumer Credit 1974 (n 5) Schedule section 49 (1).

<sup>243</sup> *ibid* Schedule section 154.

<sup>244</sup> *ibid* Schedule section 50 (1).

<sup>245</sup> *ibid* Schedule section 114 (2).

<sup>246</sup> *ibid* Schedule section 157 (3).

<sup>247</sup> *ibid* Schedule section 158 (4).

<sup>248</sup> *ibid* Schedule section 159 (6).

<sup>249</sup> Goode (n 15) [71.230]-[71-263].

<sup>250</sup> See Rosenthal (n 2) 355–367 on enforcement and recovery.

aspect to consumer credit. Moreover they stand against the principle of self help which is synonymous of older criminal law.<sup>251</sup>

The vulnerability of the consumer was evident in early legislation regarding the treatment of the consumer under the prevailing criminal law.<sup>252</sup> The individual debtor was considered a criminal in England and was imprisoned as a result. This pointed to a significant problem of over indebtedness and Parliamentary attitudes to the debt is well examined<sup>253</sup> In *Fowler v Paget*,<sup>254</sup> Lord Kenyon emphasized the issue when he stated that “bankruptcy is considered a crime and a bankrupt in the old laws is called an offender”. The passing of the Insolvent Debtors (England) Act 1813<sup>255</sup> which enabled individual traders to commence legal action to be discharged was followed by various legislations finally culminating in non-traders being able to file for bankruptcy proceedings in the Insolvent Debtors Act 1842. The debtors Act 1869 finally abolished debtors prison.

The vulnerability of the consumer as reflected in the historical treatment of indebted individual raises the question of how the criminal law today protects the consumer. The offence of theft is relevant in this regard and the questions have arisen in relation to the retaking of goods by the debtor and in what circumstances it would amount to theft. Detailed discussion is beyond the scope of this work but it suffices where the debtor takes peacefully it might be difficult for the creditor to argue theft. Further relevant offences include blackmail,<sup>256</sup> burglary,<sup>257</sup> criminal damage,<sup>258</sup> using violence for the purposes of

---

<sup>251</sup>Goode (n 15) [71.230]-[71.240].

<sup>252</sup>Michael Lobban, ‘Consumer Credit and Debt’, *The Oxford history of the laws of England: Volume XII 1820-1914 Private Law*, vol XII (Oxford University Press 2010).

<sup>253</sup>Brown (n 20).

<sup>254</sup>*Fowler v Paget (1798) 7 Term Rep 509; 101 ER 1103.*

<sup>255</sup>Insolvent Debtors Act 1813.

<sup>256</sup>Theft Act 1978 (c.31) s.21.

<sup>257</sup>ibid s 9(2).

<sup>258</sup>Criminal Damage Act 1971 s 10(2)(a).



entry,<sup>259</sup> harassment of debtors<sup>260</sup> and demanding payment for unsolicited goods. The existence of the offences serves to protect the vulnerable consumer from abuse by the creditor.

## Conclusion

Consumer credit has had a long history. From its initial status as a benevolent act between individuals, it took on a commercial status. The commercial dimension of consumer credit is particularly important to the growth of western economies. Consumer credit is important to individuals because as stated in the Preface it helps lifestyle budgeting, balancing saving and spending and income smoothing. Households may commit future income to present consumption needs based on their lifetime income expectations'.<sup>261</sup> The need to regulate consumer credit is to prevent financial exclusion.<sup>262</sup> The commercial status of consumer credit is a factor to the frauds and abuse that arose within the aspects of consumer credit. This shift in economic emphasis and the consequential increase in fraud and abuse drove the many parliamentary enquiries into the industry and certainly influenced the legislative and administrative measures which followed, the Consumer Credit 1974, being the most recognisable. The industry continues to grow and faces the historical frauds, abuse and the over indebtedness. Consumer protection would therefore always be a relevant issue. While this chapter has highlighted the issues within the industry and the laws available, later chapters would discuss the extent of enforcement structures which protect the consumer.

---

<sup>259</sup> Criminal Law Act 1977 s 6(1).

<sup>260</sup> Administration of Justice Act (AJA 1970) 1970 S 40.

<sup>261</sup> From Professor Ramsay's 'Consumer Credit Regulation After the Fall: International Dimensions' (2011) as cited in Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (n 106) 362–364.

<sup>262</sup> *ibid* 373–375.

## CHAPTER FIVE (5) CONVEYANCING FRAUD

### Introduction

In feudal England, land defined not only economic wealth, but power and social status.<sup>1</sup> It is not in doubt that in modern England it has largely retained its economic value. Today, a home represents the single most important investment most individuals make. Unsurprisingly therefore, land is closely related to fraud. Many thus devise schemes to acquire it or use it as a tool to commit other serious crimes. Conveyancing is the lawful transfer and acquisition of interests in land and this practice began in ancient times.<sup>2</sup> The strong relationship between land and fraud is reflected in the sense that a loosely regulated real estate sector could lead to varied types of frauds including wrongful acquisition of land, money laundering, tax evasion, identity theft, mortgage and property frauds, in addition to causing economic hardships. A recent historical case in point is the mortgage sub-prime phenomenon in the real estate sector which caused the global financial crisis.<sup>3</sup> History shows therefore that the legislatures focused on fraud and enacted laws to deal with them<sup>4</sup> as it was the most important part of the common law in the medieval era.<sup>5</sup>

This chapter discusses fraudulent conducts perpetuated in the ownership, transfer and acquisition of interests in land under English law. A detailed subject, it is here presented

---

<sup>1</sup>SFC Milsom, *Historical Foundations of the Common Law* (2nd edn, Butterworths & Co (Publishers) Ltd 1981) p 99.

<sup>2</sup>See Robert C Ellickson, 'Ancient Land Law: Mesopotamia, Egypt, Israel' [1995] Faculty Scholarship Series <[http://digitalcommons.law.yale.edu/fss\\_papers/410](http://digitalcommons.law.yale.edu/fss_papers/410)> for an eloquent presentation of ancient land law including procedures for conveyancing.

<sup>3</sup>See generally G Kaufman and R Bliss, *Financial Institutions and Markets-2007-2008-The Year of the Crisis* (Palgrave Macmillan US 2009). See also Will, Handelman and Brotherton (n 447). Nicholas Ryder and Broomfield Kerry, 'Predatory Lending and White Collar Crime: C Critical Reflection' (2014) 25 International Company and Commercial Law Review 287.

<sup>4</sup>WJ Jones, *The Elizabethan Court of Chancery* (Oxford University Press 1967) pp 429-431.

<sup>5</sup>Sir WS Holdsworth, *Some Makers of English Law* (Cambridge University Press 1938) p 40.

in outlined form due to word restrictions. It is pertinent, in examining fraudulent conveyancing, that the history of the practice is explored from earlier times. The chapter commences with a brief history of English private ownership of land from the Anglo-Saxon period to the present time.<sup>6</sup> The chapter then discusses various types of frauds in land transfer in the civil, criminal and regulatory senses in England. The discussion on fraud relates to how it affects vulnerable persons. It is the present author's submission that under the current general system of conveyancing in England, lenders may under certain circumstances be considered vulnerable. This vulnerability is similarly discussed. A brief mention is made in the concluding section on the weaknesses of the present system as this is discussed in detail later in chapter 8 of this thesis.

### **History of commercial market in land in England**

Land can be privately or publicly owned. Conveyancing fraud is used generally within the context of the transfer of private land. Yet historically land in England was publicly owned. It is thus appropriate to set the context of conveyancing fraud by looking at the origin of private and commercial ownership of land.

The starting point for the origin of land transfer in England is the history of land law. English law began in 449 AD, the same year that the Angles, Saxons and Jutes came together to form England.<sup>7</sup> The society in the Anglo-Saxon era was communal and land was held by the community for predominantly agrarian purposes<sup>8</sup>, a system called the common or open field system of cultivation. Large ownership of land was public and it determined social and political power.<sup>9</sup> This means that there was no private ownership of

---

<sup>6</sup>The present author has adopted the structure of Sir Holdsworth. A more complex treatment of the subject is Hudson (n 24).

<sup>7</sup>Sir WS Holdsworth, *Sources and Literature of English Law* (Oxford University Press 1925) p 1.

<sup>8</sup>Milsom (n 683) p 99.

<sup>9</sup>ibid.

land as the society was as it was largely feudal,<sup>10</sup> the holding of land in return for the rendering of services.<sup>11</sup> Developments in the Anglo-saxon period turned the village community into a manor, an estate grouped round a hall and demesne farm and cultivated by the Lord as an agrarian and economic whole.<sup>12</sup> Crucially, the Lords of manor is the beginning of individualistic ownership of land.<sup>13</sup> The public ownership of land for community purposes implied the absence of commercial property. Such situation meant that very little alienable land existed and therefore little frauds existed. Indeed no doctrine of ownership or possession was present as feudalism logically placed several restrictions on alienability of land.<sup>14</sup>

English land law made a huge leap in the medieval era<sup>15</sup> which ends with land law having entered the modern era called the law of real property.<sup>16</sup> For several reasons, including progress in the common law, it is considered the most critical phase in the history of English law. More importantly, the development of private land law made progress in the medieval era as<sup>17</sup> the power of alienation was enhanced.<sup>18</sup> The statute of *Quia Emptores* was enacted in 1290 to deal with the restraint on substitution<sup>19</sup> in the relationship between the mesne and mesne landlord.<sup>20</sup> It applied only to conveyances in fee simple<sup>21</sup> and not

---

<sup>10</sup> Sir Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I*, vol 1 (Cambridge University Press 1923) pp 66-73.

<sup>11</sup> See generally Alfred William Brian Simpson, *A History of the Land Law* (Second Edition, Oxford University Press 1986) 2-24.

<sup>12</sup> *ibid* p 72.

<sup>13</sup> *ibid* p 74.

<sup>14</sup> See Pollock and Maitland (n 692) pp 329-351.

<sup>15</sup> See generally Sir Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I*, vol 2 (Cambridge University Press 1923) pp 80-106.

<sup>16</sup> Sir WS Holdsworth, *A History of English Law*, vol 3 (3rd edn, Methuen & Co Ltd 1922) p 254.

<sup>17</sup> *ibid*.

<sup>18</sup> *ibid* pp 73-74. See also Simpson (n 693) 45-80.

<sup>19</sup> Milsom (n 683) pp 110-112.

<sup>20</sup> Holdsworth, *A History of English Law* (n 718) pp 79-80. See also Simpson (n 693) pp 21-24, 54-56. Milsom (n 683) pp 113-118.

<sup>21</sup> Holdsworth, *A History of English Law* (n 26) p 81.

extended to the crown<sup>22</sup> it provided that 'from henceforth it shall be lawful to every free man to sell at his own pleasure his lands or tenements or parts of them, so that the feoffee shall hold the same lands or tenements of the chief lord of the same fee, by such service and customs as his feoffor held before'.<sup>23</sup> Secondly, any restriction on alienation by the landlord became obsolete by the abolition of incident of homage.<sup>24</sup> In 1327, an enactment was passed to abolish a 1256 ordinance that imposed a restriction to seek the king's licence on any alienation by the tenant in chief.<sup>25</sup>

Further, restraints were imposed on alienation to religious bodies. The clause of mortmain was enforced by the Provisions of Westminster in 1279 by the statute *De Viris Religiosis*.<sup>26</sup> Significant in this regard is the *Frankalmoin* which refers to when 'an abbot or prior, or another man of religion, or of holy church, holdeth of his lord'.<sup>27</sup> This is effectively charitable holding of land. The most frequent of donees in this regard were churches and monasteries. The Statutes of Mortmain put a restraint on the indiscriminate grants of land to religious bodies.<sup>28</sup>

Furthermore, where a religious entity alienated land to the secular the land ceased to be held by that tenure. The tenures<sup>29</sup> obviously ought to be distinguished from the incidents of tenures which included homage, wardship, and marriage, escheat and forfeiture. The monastic houses were great landowners and accumulated rather than sold. Parliament helped the situation by enacting the Statute of Uses in 1535 and the Statute of Enrolments in 1536. Among others, the confiscation of Waltham Abbey in 1540 and the dissolution

---

<sup>22</sup> *ibid.*

<sup>23</sup> *ibid* p 90.

<sup>24</sup> *ibid* p 83.

<sup>25</sup> *ibid.*

<sup>26</sup> *ibid* pp 86-87. See also Simpson (n 693) pp 53-54.

<sup>27</sup> Holdsworth, *A History of English Law* (n 718) pp 34-37.

<sup>28</sup> *ibid* p 36.

<sup>29</sup> See generally Pollock and Maitland (n 692) pp 229-329.

of the monasteries and the distribution of their lands were crucial factors that helped in the development of a commercial market in land.

The development of the doctrine of real action, that is an action by which the specific demanded thing could be recovered, was similarly central in the development of private land ownership.<sup>30</sup>The most important of these are the writ of right of groups by which tenants could bring action against a mesne Lord.<sup>31</sup>Equally significant is the writ of novel disseisin which was positive royal ordinance that protects the person who is seised or possessed of the property.<sup>32</sup>The doctrine of tenures had equally been established around this period.<sup>33</sup> This defined the manner in which land was held as either free or unfree tenure.<sup>34</sup> The former meant land held under the protections of courts of common law and the real actions. The latter referred to situations where these did not apply.<sup>35</sup>

Magna Carta<sup>36</sup> dealt with the mischief where during the anglo-Saxon era, a man could only alienate bookland but not folkland.<sup>37</sup>In the medieval era, this was restricted first by the interest of the expectant heir.<sup>38</sup>However the end on the 13th century, the ancestor could alienate as he pleased in his life time.<sup>39</sup>Secondly there were restraints imposed in the interests of the right and duties involved in the relation of Lord and Tenant.<sup>40</sup> Magna Carta secured for lords of tenants their right to try actions begun by writ of right. It had

---

<sup>30</sup>See generally Holdsworth, *A History of English Law* (n 718) pp 3-28. See also Simpson (n 693) 25-46. See FW Maitland, 'Forms of Action at Common Law'.

<sup>31</sup>Holdsworth, *A History of English Law* (n 718) pp 5-6.

<sup>32</sup>ibid pp 8-11.

<sup>33</sup>See generally ibid pp 29-72.

<sup>34</sup>ibid pp 29-30.

<sup>35</sup>ibid p 30.

<sup>36</sup>ibid pp 78-79. Simpson (n 693) p 55.

<sup>37</sup>Holdsworth, *A History of English Law* (n 718) p 73.

<sup>38</sup>ibid.

<sup>39</sup>ibid p 76.

<sup>40</sup>ibid.

become of little value by Edward I's reign and subsequently suffered from the failure to pass statutes of limitation.

Another significant factor which helped in the development of private property was the movement away from labour services to money rents. This was caused among others by the rise of centralized government in England which kept the peace, the insular position which kept it free from foreign invasion, and the rise of the woolen industry.<sup>41</sup> Favourable economic conditions led to change from animal husbandry system to money rents.<sup>42</sup> Equally significant is the revolt of 1381<sup>43</sup> and the Black Death which swept the country and broke the existing agricultural organisation of the manor.<sup>44</sup> Around the 14th and 15th centuries manufacturing growth led to rise for labour services leading to an increase in cost which triggered a parliamentary response by the Statutes of Labourers.<sup>45</sup> Subsequently the doctrine of seisin<sup>46</sup> was extended to estates and the growth of these concepts and growth incorporeal concepts including rents and advowsons<sup>47</sup> led to an advancement of alienation.

The modern era in English law is in addition to the developments in the anglo-saxon and medieval era, driven by several factors which occurred after the legislative lull in the 18<sup>th</sup> century. Commercial market was influenced by evolution of the concept of mortgage as a charge by way of legal mortgage introduced by the 1925 Law of Property Act s.87.<sup>48</sup> The settlements Acts of 1882 to 1925 also affected this development even though its contribution have been questioned. Lords Halsbury indicated in *Bruce v Ailesbury* [1892]

---

<sup>41</sup> *ibid* p 202.

<sup>42</sup> *ibid*.

<sup>43</sup> *ibid* p 203.

<sup>44</sup> *ibid*.

<sup>45</sup> *ibid* p 203-204.

<sup>46</sup> *ibid* pp 88-101.

<sup>47</sup> *ibid* pp 138-171.

<sup>48</sup> Law of Property Act 1925 s.87. See also Simpson (n 693) pp 243-247.

AC 356<sup>49</sup> that the purpose of the Acts was to 'release the land from the fetters of the settlement-to render it a marketable article notwithstanding the settlement'. Significant evolution occurred affecting among others, landlord and tenants, chattels real and estates, forms of lease among others.<sup>50</sup> Another step which encouraged a private market in land is the introduction of a voluntary system on the enactment of the Land Transfer Act 1875.<sup>51</sup> The impact of this legislation is however minimal.<sup>52</sup> The Real Property Commissioners reports were to influence and reforms. The 1857 report titled Registration of Title argued among others the merits of a system of registration of assurances will afford protection and security to those who are equitably entitled to it and will check fraud and dishonesty against buyers and lenders. The pivotal development in the modern era is undoubtedly the development of the compulsory registration system under the 1925 Land Registration Act.<sup>53</sup> A temporary development in the public ownership of land was abolished by the Housing Act 1980 which introduced the Right to Buy Schemes. Schemes to ensure a vibrant housing market are today not in short supply including the Help to Buy Schemes. The Land was amended by the 2002 and Registration. Although many legal reforms took place, it is suggested parliamentary legislative urged on by entrepreneurs that made the most significant changes.<sup>54</sup>

Today, land ownership is basically freehold and leasehold with several rights in land. The introduction of the conveyancing protocol by the Law Society standardized conveyancing with roles defined for the various professionals involved. Generally, estate agents market properties and prospective buyers obtain mortgage funding from banks and financial

---

<sup>49</sup>*Bruce v Ailesbury* [1892] AC 356.

<sup>50</sup>See Simpson (n 693) pp 247-269.

<sup>51</sup>Land Transfer Act 1875.

<sup>52</sup>Simpson (n 693) p 282.

<sup>53</sup>Land Registration Act.

<sup>54</sup>Simpson (n 693) p 291.



institutions through advice from financial brokers. The vendors' solicitors deduce title, and it is then investigated by the buyers' solicitors who equally may have the bank as a client. The buyer puts insurance in place after which contracts are exchanged and the transaction completed. This is then registered at the Land Registry after payment of Stamp duty land Tax. The Registry is a record of all interests relating to the land.<sup>55</sup>

Conveyancing often involves large sums of money which may be transferred about three times per transaction. It is also technical and requires knowledge of varied areas of law.<sup>56</sup> Third, it requires the co-operation of many professionals and agencies. Almost all land transactions require funding from financial institutions which often instruct the lawyers to equally represent their interest. As a result, it is the norm for lawyers to act for both parties in a conveyancing transaction. Altogether a complex conveyancing sector is created to which consumers can be vulnerably exposed to frauds. More importantly however, how has the pace of English law evolved and kept up with frauds relating to land.

### **Protection against fraud abuse under the Common Law**

It is arguable that the common law has always been against fraud. Lord Mansfield, commenting on the notoriety of the Elizabethan statutes against fraud stated that *'the principles and rules of the common law as now universally known and understood are so strong against fraud in every shape that the common law would have attained every end*

---

<sup>55</sup>See Robert Abbey and Mark Richards, *A Practical Approach to Conveyancing*: (18th edn, Oxford University Press 2016) for general discussion on practical modern conveyancing. See also *Conveyancing Handbook* (Law Society).

<sup>56</sup>For a detailed earlier conveyancing work see William Hayes, *An Introduction to Conveyancing and the New Statutes Concerning Real Property with Precedents and Practical Notes*, vols 1 & 2 (5th Edition, SSweet 1840).

*proposed by the two statutes of Elizabeth*.<sup>57</sup> The present author discusses both common law and equitable principles against fraudulent conveyances under misrepresentation and deceit, undue influence and duress and the doctrine of notice.

### **Deceit**

Deceit, it has been noted, is the type of that fraud which was in earlier times pleaded as a trespass on the case during proceedings.<sup>58</sup> Where a misrepresentation is considered to be fraudulent it is either called fraudulent misrepresentation or deceit.<sup>59</sup> Deceit has affinity with land sales. A purchaser may for instance after conveyance, bring an action for fraudulent misrepresentation in the transaction,<sup>60</sup> or the title,<sup>61</sup> or may recover the purchase money if the circumstances of the case entitles him to rescind the contract.<sup>62</sup> In *Nationwide Building Society v Dunlop Haywards & Corbetts*,<sup>63</sup> the claimants were successful in their claim for deceit for overvaluation against one of the defendants.

The merit of a claim in deceit consists in the fact that the claimant can rely on it even if there was no direct contract. The most important case is *Peek v Gurney Derek v Peek*<sup>64</sup> where the court held that in order to sustain an action in deceit, there must be proof of fraud and nothing short of that will suffice.<sup>65</sup> The defendant's motive in making the representation is irrelevant.<sup>66</sup> Since a consumer's case is likely to be against a company,

---

<sup>57</sup> See William Roberts, *A Treatise on the Construction of the Statutes: 13 Eliz. C.5, and 27 Eliz. C.4, Relatin to Voutary Conveyances, and on the Nature and Force of Different Considerations of Support of Deeds and Other Legal Instruments, in the Courts of Law* (1800) p 1 citing from Cowper 434 .

<sup>58</sup> William Williamson Kerr, *A Treatise on the Law of Fraud and Mistake as Administered in Courts of Equity* (Bradbury, Evans, and Co 1923) 267.

<sup>59</sup> See generally George Spencer Bower and KR Hundley, *Actionable Misrepresentation* (Butterworths 2000) but in particular pp 58-112. See also John Cartwright, *Misrepresentation, Mistake, and Non-Disclosure* (3rd edn, Sweet and Maxwell 2012) pp 185-238.

<sup>60</sup> *Fuller v Wilson* 3 QB 58, 68.

<sup>61</sup> *Pillmore v Hood* 5 Bing NC9.

<sup>62</sup> *Early v Garrett* 4 M & R 687.

<sup>63</sup> *Nationwide Building Society v Dunlop Haywards & Corbetts* [2009] EWHC 254 (Comm).

<sup>64</sup> *Derry and others v Peek* (1886) 1 ER Rep 1 (House of Lords).

<sup>65</sup> See also *Nocton v Lord Ashburton* [1914] AC 932 (HL).

<sup>66</sup> *Pasley v Freeman* 3 TR 51.

it must be noted that in respect of directors of a company, the claim in deceit would succeed only if the company have authorised the representations.

### **Misrepresentation in land sales<sup>67</sup>**

A vendors relationship with a purchaser is not subject to moral law.<sup>68</sup> The caveat emptor rule loosely '*let the buyer beware*' is widely relied upon as the foundation of current conveyancing practice and procedure.<sup>69</sup> There are so many exceptions to the rule as far as conveyancing is concerned that the Law Commission has suggested that the rule might be legally unsafe.<sup>70</sup> Misrepresentation is basically the failure to disclose material facts which might influence the line of prudent contractor but not give right to avoid the contract.<sup>71</sup> The principle flows from the following dictum of Lord Atkin at paragraph 224 of *Bell v Lever Brothers Ltd*.<sup>72</sup> It is among others not applicable to contracts of *uberrimae fidei*, where a fiduciary relationship exists between the parties and where a positive representation would become distorted by silence. If the purchase of the home is the most important transaction for the family then the doctrine of misrepresentation is of paramount importance in land sales.<sup>73</sup> This was particularly so where the case did not fall directly within the ambit of the statutes against fraudulent conveyances.<sup>74</sup>

Generally speaking, where a claimant is induced by a false statement of fact into entering a contract, then the claimant could make a claim for actionable misrepresentation against

---

<sup>67</sup>Kerr (n 58) 12–96.

<sup>68</sup>Edward Burtenshaw Sugden, *A Practical Treatise of the Law of Vendors and Purchasers of Estates* (5th Edition, Butterworths 1818) 1–11.

<sup>69</sup>Conveyancing Standing Committee, 'Caveat Emptor in Sales of Land' (Law Commission) A Consultation Paper p 4.

<sup>70</sup>*ibid.*

<sup>71</sup>See generally Bower and Hundley (n 59). Conveyancing Standing Committee (n 69) P 6.

<sup>72</sup>*Bell v Lever Brothers Ltd* [1932] AC 161.

<sup>73</sup>Conveyancing Standing Committee (n 69) 7.

<sup>74</sup>Melville Madison Bigelow, *A Treatise on the Law of Fraud; on Its Civil Side*, vol Volume 2 (Little Brown, and Company 1890) 19.

the defendant.<sup>75</sup> Misrepresentation is particularly relevant to land sales which involve representations by various stakeholders in the transaction. Misrepresentation often takes place at the beginning of the transaction and before exchange of contracts mostly before completion of the transaction.<sup>76</sup> Where this occurs, it necessitates the claim.

The misrepresentation might come in various forms; it could come by silence or by written communication. For instance an estate agent may misdescribe the information in the property sales. A purchaser may only succeed in a claim in misrepresentation if the defendant made it in writing by his conveyancer. A crucial issue in relation to land sales is whether the vendor can exclude misrepresentations on some facts. While it appears that this might be the case, it must be stressed that this would not exclude liability for fraud or recklessness. This is captured in the Law Society Conditions of Sale which provides that ‘neither party can rely on any representation made by the other, unless made in writing by the other or his conveyance, but this does not exclude liability for fraud or recklessness’

While this clause has been designed by the Law Society to present a fair balance between the interests of buyer and seller and members of the Law Society's Conveyancing Quality Scheme, judicial orientation raises questions. In *Foodco (T/A Muffin Break) UK LLP & Others v Henry Boots Development Ltd*,<sup>77</sup> the court held that the non reliance clause in the contract satisfied the requirement of reasonableness arguing among others that each of the tenants was advised by solicitors, the term itself was open to negotiation and certainty

---

<sup>75</sup>*MCI WorldCom International Inc v Primus Telecommunications Inc* [2004] EWCA Civ 957. See also *Evans v Bricknell* 6 Ves 174. *Royal Bank of Scotland Plc v Chandra and Another* [2011] EWCA Civ 192.

<sup>76</sup>*Morrell & Another v Stewart & Another* [2015] EWHC 962 (ch). *Hasten Development Ltd v Derek William Bleaken* [2012] EWHC 12 (ch).

<sup>77</sup>*Foodco (T/A Muffin Break) UK LLP & Others v Henry Boots Development Ltd*, LTL 9/3/2010: [2010] EWHC 358 (Ch).

was important in contracts. In *Morgan v Pooley*<sup>78</sup> the court noted that the clause excluding liability was valid. Similarly in *Lloyd v Browning*<sup>79</sup> the Court of Appeal upheld the exclusive clause. Also in *Francis v Knapper*<sup>80</sup> the claimant's claim for negligent misstatement failed as although the defendants have made misrepresentations regarding the physical condition of the property, it had not induced the claimant's decision to purchase the property. Reference can also be made to *P & P Property Ltd v Owen White and Catlin LLP*<sup>81</sup> where a claim in breach of warranty and breach of trust brought by a developer against a solicitor failed as the court held no such obligation. In *Destine Estates Ltd v Muir* submissions on<sup>82</sup> undue influence and misrepresentations were unsuccessful. The current authorities seem to indicate the challenge in relying on oral representations. Statutory negligent misrepresentation is provided under s.2 (1) of the Misrepresentation Act 1967. Briefly, whilst the burden of proof in establishing that the representor had no reasonable grounds in believing in the truth of the statement is on the claimant under common law, the role is reversed under statute. Similarly, under common law, there is no requirement that the claimant entered into a contract, but this is the case under statute.

### **Protection against fraud in Equity**

#### **Clog or fetter**

Originating from the case of *Vernon Bethell*,<sup>83</sup> a major aspect to equitable protection afforded to individuals against mortgagors is the principle that the equity which arises on failure to exercise the contractual right cannot be fettered or clogged by any stipulation

---

<sup>78</sup>*Morgan v Pooley* [2010] EWHC 2447 (QB).

<sup>79</sup>*Lloyds v Browning* [2013] EWCA Civ 1637.

<sup>80</sup>*Francis v Knapper* [2016] EWHC 3053 (QB).

<sup>81</sup>*P & P Property Ltd v Owen White and Catlin LLP* [2016] EWHC 2276 (ch).

<sup>82</sup>*Destine Estates Ltd v Muir* [2014] EWHC 4191 (ch).

<sup>83</sup>*Vernon Bethell* [1761] 2 Eden 113. See 'Mortgage', *Halsbury's Law of England* (5th edn, Butterworths Lexis Nexis 2010) for mortgages generally and para 107 for mortgagor's equity of redemption.

contained in the mortgage or entered into as part of the mortgage transaction.<sup>84</sup> Applicable to all mortgage transactions, the principle became relevant when the usury laws were repealed in 1854.<sup>85</sup> In the leading case of *Krelinger v New Patagonia Meat v. Cold Storage Co. Ltd*<sup>86</sup> Lord Parkers draws a distinction between terms in a mortgage transaction which directly clash with the borrowers equitable right to redeem such as terms which give the mortgagee a beneficial interest in the property or the option to acquire the beneficial interest.<sup>87</sup> The second distinction relates to terms which offer the mortgagee collateral advantage which is a financial return in relation to the mortgaged property. The doctrine was meant to apply to the former.<sup>88</sup> ;

The few cases where the subject has been examined are *Krelinger v New Patagonia Meat v Cold Storage Co. Ltd*<sup>89</sup> and more recently, *Jones v Morgan*.<sup>90</sup> In essence the principle operates to invalidate only a term in a mortgage transaction which conflicts with the borrower's right to redeem but is inapplicable to a term which is in substance a transaction separate and independent from the mortgage transaction. Indeed pursuant to *Santley v Wilde*,<sup>91</sup> the right to a collateral advantage can remain secured after the principal and interest have been paid off. Nevertheless there are circumstances which may render collateral advantage objectionable. First where it is unconscionable and has been imposed in a morally reprehensible manner, where it has been imposed as a penalty intended to

---

<sup>84</sup> *Samuel v Jarrah Timber & Wood Painting Corporation* [1904] AC 323, 325.

<sup>85</sup> Alan Berg, 'Clogs on the Equity of Redemption-or Chaining an Unruly Dog' [2002] Journal of Business Law 335.

<sup>86</sup> *Krelinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25, 46.

<sup>87</sup> Berg (n 85).

<sup>88</sup> *ibid.*

<sup>89</sup> *Krelinger v New Patagonia Meat and Cold Storage Co. Ltd* [1914] A.C. 25, 46 (n 86).

<sup>90</sup> *Morgan v Pooley* [2010] EWHC 2447 (QB) (n 78).

<sup>91</sup> *Santley v Wilde* [1899] 474 2 (ch).

deter redemption or early redemption. The second situation refers to where the term collateral is considered as misdescription as it directly interferes with the right to redeem.

### **Undue Influence**

It is trite, pursuant to existing case law to opine that undue influence as a specie of fraud is applicable to real property transactions.<sup>92</sup> Generally acknowledged to cause continuing confusion,<sup>93</sup> it was defined in *Royal Bank of Scotland v Etridge No 2*<sup>94</sup> as ‘a relationship where one has acquired over another a measure of influence or ascendancy of which the ascendant person then takes unfair advantage ... without any specific acts of coercion’. Pursuant to *Daniel v Drew*<sup>95</sup> the donor’s will must be the ‘offspring of her own volition’ and the influence, whether in the form of persuasion or advice must not ‘invade the free volition of the donor’.

In real estate transactions, a vulnerable purchaser can be subject to illegitimate pressure by the developer, financial adviser, estate agents and even solicitors and case law abound in this respect. As a matter of public policy, presumption of influence is said to exist in the relationship between legal, religious and medical advisors further to *Allcard v Skinner*<sup>96</sup> as well as between a husband and wife. Lord Nicholls stated that the test is not comprehensive<sup>97</sup> and unsurprisingly, the scope is getting wider. For example the reasoning in *Macklin v Dowsett*<sup>98</sup>, approved in *Turkey v Awadh & Turki*<sup>99</sup> suggests that a party to a commercial transaction can be in a vulnerable position. Logically therefore, the

---

<sup>92</sup>For a detailed treatment of the subject see Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (Sweet and Maxwell 2006) pp 81-235.

<sup>93</sup>*Niersmans v Pesticcio* [2004] EWCA Civ 372.

<sup>94</sup>*Royal Bank of Scotland v Etridge No 2* [2002] 1 AC 773.

<sup>95</sup>*Daniel v Drew* [2005] EWCA Civ 507.

<sup>96</sup>*Allcard v Skinner* [1887] 36 Ch D 145.

<sup>97</sup>*Royal Bank of Scotland v Etridge No 2* [2002] 1 AC 773 (n 94).

<sup>98</sup>*Macklin v Dowsett* [2004] EWCA Civ 904.

<sup>99</sup>*Turkey v Awadh & Turki* [2005] EWCA Civ 382.

rebuttal of the presumption has been premised on the defendant such as a lender, demonstrating that the claimant had unimpeachable independent legal advice.<sup>100</sup>

### **The doctrine of Notice**

Pursuant to the doctrine of notice, a person who seeks to appropriate a property to his use with knowledge of a prior legal or equitable interest may be prevented from doing so. An individual may appeal to this doctrine in protecting his interest in a property.<sup>101</sup> Constructive notice,<sup>102</sup> distinguished from actual notice,<sup>103</sup> entails seeking to draw legal inference from established facts and does not admit of dispute.<sup>104</sup> It has been said to mean “whatever is notice enough to excite the attention of a man of ordinary prudence and call further enquiry is in equity, notice of all facts to the knowledge of which an inquiry suggested by such notice, and prosecuted with due and reasonable diligence would have led’.<sup>105</sup>

The claimant cannot rely on willful ignorance<sup>106</sup> or deliberately choosing to conduct reasonable enquiry. An individual is vulnerably exposed if he uses a solicitor but failure to use a solicitor is immaterial.<sup>107</sup> The doctrine of notice is principally applicable to titles in land and many cases<sup>108</sup> have been decided in this regard such as *Hall v Smith*<sup>109</sup> and

---

<sup>100</sup> *Royal Bank of Scotland v Etridge No 2* [2002] 1 AC 773 (n 94).

<sup>101</sup> See generally Kerr (n 58) 171–204. See also Sugden (n 68) 620–660. See also Enonchong (n 92) pp 349–428.

<sup>102</sup> *Maitland v Backhouse* 17 LJ (121)(ch).

<sup>103</sup> *Slade v Dare* 20 Bear 284. See also *Taylor v Stibbert* 2 Ves Jr 437. See also Sugden (n 68) 636–638. Enonchong (n 92) pp 351–363 for some discussion on the O’Brien doctrine.

<sup>104</sup> Sugden (n 68) 638–648.

<sup>105</sup> Enonchong (n 92) pp 365–428 for detailed academic and practical discussions.

<sup>106</sup> *Owen v Homan* 14 HL 997.

<sup>107</sup> *Kennedy v Green* 3 M & K 669.

<sup>108</sup> Kerr (n 58) 178–185, 204.

<sup>109</sup> *Hall v Smith* 14 Ves 426.



*Hamilton v Royse* where there was no trace of deed.<sup>110</sup> The status of the principle has nevertheless significantly reduced in recent times.

### **Breach of Trust**

The doctrine of breach of trust is relevant in cases of mortgage fraud which expose the vulnerability of conveyancing clients, consumers or even lender clients.<sup>111</sup> Where a purchaser or lender has paid monies to a solicitor, they are at the mercy of the solicitor in terms of how the funds would be disbursed, even though the relationship is to be governed by the terms of the retainer including the CML Handbook. Pursuant to *AIB Holdings UK Plc v Mark Redler & Co Solicitors* [2013],<sup>112</sup> “the solicitor holds his client’s money on trust merely because it remains the property of his client until disbursed to a third party in accordance with the client’s instructions”. The court further noted that ‘it is, I think, common ground in the light of these and other judicial observations that a solicitor who parts with client money before completion without authority commits a breach of trust’.

Completion has been defined as ‘the completion of genuine contract by way of exchange of real money in payment of the balance of the purchase price for real documents that will the purchaser the means of registering the transfer of title to the property that he agreed to buy and share’. Proceedings have been brought against solicitors further to breach of trust in several cases, a fundamental reason for this position is that it enables the lender to avoid possible contention by the defendants that the lenders suffered loss as a result of contributory negligence as provided under the Law Reform (Contributory Negligence)

---

<sup>110</sup>*Hamilton v Royse* 2 Sch 326.

<sup>111</sup>Anis Waiz, ‘Mortgage Fraud: Breach of Trust’ [2016] Westlaw.

<sup>112</sup>*AIB Holdings UK Plc v Mark Redler & Co Solicitors* [2014] UKSC 58.

Candidate Number: 1341103

Act 1945.<sup>113</sup> Further to *Lloyds TSB Bank Plc v Markandan 7 Uddin*,<sup>114</sup> contributory negligence is not applicable to breach of trust cases.

Natural to most fraud, it is often a defence if one can demonstrate that a firm acted honestly and reasonably and this flows from section 61 of the Trustee Act 1925 which provides that "... if it appears to the court that a trustee, whether appointed by the court or otherwise, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain directions of the court in the matter in which he committed such breach, then the court may relieve him either wholly or partly from personal liability for the same."<sup>115</sup>The solicitors firm must provide a paper trail demonstrating that the loss arising out of the transaction did not flow from his or his firm's conduct and that their conduct satisfied the requirement of reasonableness.

### **Proprietary Estoppel**

Proprietary estoppel is an equitable doctrine by which an individual can assert right to a property.<sup>116</sup> The doctrine at its basic level refers to a situation where one has relied on another's representations to one's detriment.<sup>117</sup> However, its possible application to a consumer purchaser was considered in the case of *Scott v Southern Pacific Mortgages*<sup>118</sup>

The material facts are Mrs Scott the appellant had agreed in 2005 to sell her house to the

---

<sup>113</sup>Waiz (n 111).

<sup>114</sup>*Lloyds TSB Bank Plc v Markandan 7 Uddin* [2012] EWCA Civ 65.

<sup>115</sup>Trustee Act 1925 s. 61.

<sup>116</sup>*Yeoman's Row Management Ltd v Cobbe* [2008] UKHL 55.

<sup>117</sup>*A-G of Hong Kong v Humphreys Estate (Queens Gardens) Ltd* [1987] AC 114. See generally Andrews Burrows, *Principles of English Law of Obligations* (Oxford University Press 2015).

<sup>118</sup>*Scott v Southern Pacific Mortgages* [2014] UKSC 52. See also Andreas Televantos and Lorenzo Maniscalco, 'Proprietary Estoppel and Vendor Purchaser Constructive Trusts' (2015) 74 *Cambridge Law Journal* 27.

North East Property Buyers at a significant under value under a sale and rent back scheme. The purchaser had not revealed that it was purchasing through a mortgage. This came to the appellant's attention only after the property was repossessed by the mortgagee, Southern Pacific Mortgages. The two questions the Court considered were whether the appellant at exchange acquired proprietary rights and if so whether the transaction of the purchaser acquiring the legal estate and granting the charge was one indivisible transaction such that the appellant could assert against the respondent an equitable right arising on completion. The appellant's claim to have a proprietary claim failed due to the rule in *Abbey National Building Society v Cann* [1991] 1 AC 56.<sup>119</sup> The court, fully acknowledging the fraudulent conducts perpetuated against the appellant, held for the respondent but Lady Hale rejected the indivisibility of transaction to contracts of sale, thus rejecting the all or nothing approach.

### **Protection against conveyancing fraud under civil law - statutory**

#### **The Statute of 136-7**

Protections for purchasers under English law also originate from statute.<sup>120</sup> The first statute against fraudulent conveyances is 50 Edw 3, c.6 of 1376-7.<sup>121</sup> Rendered in full,<sup>122</sup> the statutes provide that

*the Commons pray that whereas divers persons, as well heirs of tenements as others, borrow money or goods of many people of the kingdom, and then give all their tenements and chattels to their friends, by collusion of having the profits thereof at their pleasure, and then betake themselves to Westminster, St. Martin, or other privileged places, and live in great state ('countenance') on other goods, in manner aforesaid, so that creditors shall be greatly put to it to get a small part of their debts, on releasing the rest; and then the debtors return to their houses, and have back their tenements, goods, and*

<sup>119</sup> *Abbey National Building Society v Cann* [1991] 1 AC 56.

<sup>120</sup> Sugden (n 68) 550-551 and more generally pages 550-620.

<sup>121</sup> Bigelow (n 74) 21-22. See also Kerr (n 58) p 144.

<sup>122</sup> The statute is cited in Bigelow (n 74) 21-22.

*chattels at their pleasure by assent of their said friends; and by reason of such frauds and collusions many persons of the kingdom are very sorely grieved, and some entirely destroyed; therefore the Commons pray remedy by a writ of debt against such occupiers of such tenements and chattels, or other suitable remedy. In answer the King wills that if it shall be found that such feoffments were made by collusion, the creditors shall have execution on the said lands as before, as if no such feoffments had been made.*

### **3 Hen 7, c.4 (1487-8)**

Another statute is the 3 Hen 7, c 4 (1487-8) which provided<sup>123</sup> that

*where (as) oftentimes deeds of gift of goods and chattels have been made to the intent to defraud creditors of their duties, and the person that maketh the said deeds goeth to sanctuary or other places privileged, and occupieth and liveth with the said goods and chattels, their creditors being unpaid, it is ordained that all deeds of gift of goods and chattels, made or to be made of trust, to the use of that person that made the same deeds, be void and none effect.<sup>124</sup>*

This statute supplements the first one, relating only to conveyances of land.<sup>125</sup> The statute indicates that trusts were obnoxious as being fraudulent devices for avoiding duties,<sup>126</sup> a view still holding true.

### **The Statute of Uses**

The Statute of Uses<sup>127</sup> is another statute against fraud<sup>128</sup> which provided that lands, among others

*transferred by solemn livery must be so done without covin or fraud, yet divers and sundry imaginations, subtle inventions, and practices have been used, whereby hereditament have been conveyed by fraudulent feoffments, fines, recoveries and other assurances made to secret uses, intents, and trusts, etc by*

---

<sup>123</sup>ibid 22–24. See also Kerr (n 58) p 144.

<sup>124</sup>Cited in Bigelow (n 74) 22–24.

<sup>125</sup>ibid 22–23.

<sup>126</sup>ibid 23.

<sup>127</sup>27 Hen. 8, c.10 (1535).

<sup>128</sup>Bigelow (n 74) 23–24.

*occasion of which fraudulent feoffments etc and many heirs have been unjustly at sundry times disinherited, the lords have lost have lost their wards, marriages etc and scantily any person can be certainly assured of any lands by them purchased, ... etc'.*

The enactment that those who had use in lands conveyed should henceforth stand and be seised thereof was evaded by technical trusts such as secret reservation of benefits, by a vendor of property conveyed, to outward appearance, absolutely<sup>129</sup> and it was said 'fraud is always appareled and clad with a trust, and a trust is a cover of fraud'.<sup>130</sup> These gave way to tradition and subsequently merged with the law of deceit and became the basis for the assertion that the Elizabethan statutes were declaratory of the common law.<sup>131</sup>

### **The statute for the protection of creditors in England-voluntary conveyances against creditors**

A noteworthy statute passed for the protection of creditors is the statute 13 Eliz. c.5.<sup>132</sup> Among others the statute preceded the one for the protection of purchasers. The statute having listed in section 1, the nature of the conveyances to which it is applicable provides in section 2 provided that all conveyances and dispositions of property made with the intention of defrauding creditors shall be null and void.<sup>133</sup> It was universally acknowledged as Lord Mansfield stated, that the statute is declaratory of a common law.<sup>134</sup> This statute applies to both real and personal property and only provides for creditors the remedies which are available both in law and equity.<sup>135</sup>

---

<sup>129</sup> *ibid.*

<sup>130</sup> *Twyne's case*, 3 Coke, 80.

<sup>131</sup> Bigelow (n 74) 24.

<sup>132</sup> See SW Worthington, *A Treatise on the Statutes of Elizabeth against Fraudulent Conveyances; the Bills of Sale Acts, 1878 and 1882; and the Law of Voluntary Dispositions of Property* (Stevens and Haynes 1887) 1–134 for general and detailed discussion on the statute. See also Bigelow (n 74) treating the subject also from the perspectives of both English and US laws, although biased for the latter.

<sup>133</sup> Worthington (n 132) 2–3.

<sup>134</sup> Roberts (n 57). See also Worthington (n 132) p 3.

<sup>135</sup> Worthington (n 132) pp 2–3.

**The statute for the protection of purchasers in England**

The statute 27 Eliz. C.4 was enacted principally for the protection of purchasers in respect of conveyances, estates, gifts, grants, charges and limitations of uses made for the intent to defraud and deceive such persons as shall purchase the same land.<sup>136</sup> Again, although the word voluntary is not used in the statute, the statute makes all voluntary conveyances void against the subsequent purchasers. The purchaser is one with money or valuable consideration.<sup>137</sup> The reason for the rule is that “ when the court finds that the same land has been disposed off to two different persons, one of whom paid for it and the other not, it considers that the volunteer has no rights to stand in the way of the purchaser and from the mere fact of no consideration, having been paid by the former, it presumes such fraud in the two transactions in their relation to one another as to bring them within the scope of the Act and will not allow this presumption to be rebutted’.

The doctrine which was well settled did not however apply in a situation where the consideration provided by the second purchaser was grossly inadequate<sup>138</sup> and that it was merely a contrivance to get rid of the voluntary deed and the authority is *Twine*’s case. In applying the statute, the status of the volunteer was immaterial as the statute required that there must be a real consideration paid or a fair interchange of some rights, interest, profit or benefit, accruing to the one party or some forbearance, detriment, laws, or responsibility given, suffered or undertaken by the other.<sup>139</sup>

---

<sup>136</sup>See *ibid* 187–242.

<sup>137</sup>*ibid* 218.

<sup>138</sup>*ibid* 244–245.

<sup>139</sup>*ibid*.

### **The Consumer Credit Act 2006**

The Consumer Credit Act 2006 was heralded as a welcome development in the protection against vulnerable consumers in relation to consumer credit including mortgages.<sup>140</sup> The Act's birth was preceded by a white paper "*Fair Clear and Competitive: The Consumer Credit Market in the 21<sup>st</sup> Century*"<sup>141</sup> which made the protection of the consumer as its primary purpose. The amending Act came into effect on 30 March 2006 and protects the consumer from unfair relationships by creditors who may provide credit facilities such as mortgages.<sup>142</sup> It has been highlighted in the discussion on consumer credit that the usury laws and the money lending acts protected the consumer in credit facilities. Regarding mortgages by lenders for instance, the extortionate credit provisions were not generally applicable.<sup>143</sup> The 2006 Act introduces unfair relationships provisions for the protection of the consumer and this provides in section section 140A(1) that the court may make an order ... if it determines that that the relationship between the creditor and the debtor arising out of the agreement ... is unfair to the debtor because of, among others, any of the terms of the agreement, the way the creditor has exercised or enforced any of his rights under the agreement, any other thing done (or not done) by, or on behalf of the creditor (either before or after the making of the agreement'.<sup>144</sup>

A key issue that arose during the passage of the Act was the definition of an unfair relationship. The government refused to provide one, instead deferring to the judiciary to deal with such cases as and when they arose. The issue as to the difference between

---

<sup>140</sup>Lara McMurty, 'Consumer Credit Act Mortgages: Unfair Terms, Time Orders and Judicial Discretion' (2010) 2 Journal of Business Law 107.

<sup>141</sup>'Fair Clear and Competitive: The Consumer Credit Market in the 21st Century' <[www.gov.uk/government/publications/fair-clear-and-competitive-the-consumer-credit-market-in-the-21st-century](http://www.gov.uk/government/publications/fair-clear-and-competitive-the-consumer-credit-market-in-the-21st-century)> accessed 18 March 2003.

<sup>142</sup>See introductory section of the Consumer Credit 2006.

<sup>143</sup>Richard A Starnes, 'Consumer Fraud and the Elderly: The Needs for Uniform System of Enforcement and Increased Civil and Criminal Penalties' (1996) 4 Elder Law Journal <Heinonline>.

<sup>144</sup>Consumer Credit 1974 s.140A(1) .

protection under the Act and equitable remedies such as are available under the doctrine of undue influence.<sup>145</sup>The protection under the Act is wider and gives the court liberty to do as it considers fair including setting aside or amending the provisions in the agreement in favour of the consumer.<sup>146</sup>Further as noted above, the categories of protection under the Act are wider in that it covers first mortgages not protected under FSMA, any second mortgage and all mortgages but not applying to mortgages granted by exempt bodies and within section 16 criteria and mortgages where the high net worth debtor or business exemptions under sections 4-5 of the 2006 Act. The 2006 Act also protects consumers by making provision for time orders under section 136 where it is provided that “the court may ... include such provision as it considers just for amending any agreement or security in consequence of a term of the order”. It is argued this offers a better way of protecting consumers than other approaches, including the protection offered under normal regulations such section 36 of the Administration of Justice Act. Regrettably few consumers take advantage of it.<sup>147</sup>

## **Measures for regulating conveyancing fraud under the criminal law**

### **Usury**

Usury, curiously, was considered a crime in early England, as far as back as the days of the Edward the Confessor.<sup>148</sup>The characterization of usury as a crime in early England found expression in the context of land transfer within mortgages. Mortgages referred basically to the giving of land as security for loan and was settled even in the Domesday

---

<sup>145</sup>McMurty (n 140).

<sup>146</sup>ibid.

<sup>147</sup>See *Burrell v Helical ( Bramshott Place) Ltd* [2015] EWHC 3727 (ch); HLR 18; [2016] CTTLC 1; [2016] 1 P & CR DG21 where an action by an tenants who had assigned their leases to third parties and had sought to claim fee to the landlord failed. .

<sup>148</sup>R. Goode, ‘Usury in English Law’ (1982) 1 Arizona Journal of International and Comparative Law <Heinonline> accessed 30 January 2016.



Book.<sup>149</sup>Characterised into various forms, the regulation of *mortuum vadium* was prohibited by the church as usurious since the mortgagee in possession took the profits of the land which did not go towards the reduction of the mortgagor's debt.<sup>150</sup>This was considered unjust and usurious although it was accepted by the King's Court and considered a species of usury.<sup>151</sup> It is further noted by Maitland that where a stranger or the mortgagor disseised the gagee the latter received no protection from the King's court.<sup>152</sup>Other practices considered usurious were where the lender retained part of the money purported to be advanced for the borrower to take up at future time, the legal rate of interest running meanwhile upon the whole sum, beneficial lease granted at the same time with a loan of money by lessee to lessor, thus affording to the lender a profit beyond the interest, contract for a lease to be granted by mortgagor to mortgagee in consideration of forbearance, stipulation in a mortgage for the mortgagee to act as receiver at a commission.<sup>153</sup>

The regulation of usury has been described as the genesis of any discussion to regulate consumer credit under the criminal law in England.<sup>154</sup>The discipline of the Ecclesiastical Courts of usurers was extended to lenders of land upon whose death their properties were disposed.<sup>155</sup>Christians were not deterred by the characterization of mortgage as sin and the punishment thereof.<sup>156</sup>Controversy however surrounded whether the grant of

---

<sup>149</sup>See generally also Simpson (n 11) pp 242-247.

<sup>150</sup>Joseph Bridges Matthews, *The Law of Moneylending, Past and Present: Being a Short History of the Usury Laws in England, Followed by a Treatise upon the Moneylenders Act, 1900* (Sweet and Maxwell 1906) 31.

<sup>151</sup>ibid.

<sup>152</sup>As noted in ibid 31-32.

<sup>153</sup>Examples as discussed in ibid 32-33.

<sup>154</sup>Goode (n 148). See also Crowther Committee, *Consumer Credit-Report of the Crowther Committee*, vol 1 (Her Majesty's Stationery Office 1971). See also Matthews (n 150).

<sup>155</sup>See Norman Jones, *God and the Moneylenders; Usury and Law in Early Modern England* (Basil Blackwell Ltd 1989) for detailed historical, religious and philosophical contentions that influenced the various usury laws. Matthews (n 150) 4, 31-32.

<sup>156</sup>Matthews (n 150) 3132.

Candidate Number: 1341103

beneficial lease was usurious.<sup>157</sup> Beneficial lease referred to the system of paying a sum of money as consideration for term of years.<sup>158</sup> This it appeared was patronised by the Christians.<sup>159</sup>In the end it was commercial considerations that caused usury to be abolished as a criminal offence. By the time the Moneylenders Act<sup>160</sup> was enacted usury was no longer a criminal offence. <sup>161</sup>

### **Conspiracy to Defraud**

Highly relevant to real property fraud is conspiracy to defraud. In *Kelly v Bakir*,<sup>162</sup> proceedings were brought against an estate agent on the basis that it was part of a conspiracy to defraud the owner of the property, having bought property at a significant undervalue. It was however held that the purchase was at arms-length. Another real estate case where the Crown succeeded against the defendants is *R v Kallakis and Williams*.<sup>163</sup> Conspiracy to defraud itself had originated not as a substantive offence but one meant to cure the abuse of procedure in legal proceedings. It is common that large scale frauds in the real estate sector often involved more than one person.

### **Theft Act 1968 and Forgery and Counterfeiting Acts 1981**

The deception provisions under the Theft Act Forgery and Counterfeiting Acts 1981 and are applicable to fraudulent land transfer activities, what is informally called mortgage fraud. Mortgage fraud is considered a huge problem, although it peaks at seasons of good property market. Persons, including companies, could find themselves the subject of criminal proceedings for mortgage fraud which is the fraudulent means used in the

---

<sup>157</sup> *ibid* 32.

<sup>158</sup> *ibid*.

<sup>159</sup> *ibid*.

<sup>160</sup> Moneylenders Act 1900 1900.

<sup>161</sup> For further reading see Warren Swain and Karen Faiweather, 'Usury and the Judicial Regulation of Financial Transactions in Seventeenth-and Eighteenth-Century England', *Unconscionability in European Private Financial Transactions-Protecting the Vulnerable* (Cambridge University Press 2010).

<sup>162</sup> *Kelly v Bakir* [2008] (Unreported) Chancery Division.

<sup>163</sup> *R v Kallakis and Williams* [2013] EWCA Crim 709.

acquisition of funding for the purchase of property. The courts take a serious view of it such as in *R v Kierman*<sup>164</sup> where the Court of Appeal held that the prosecution's failure to invite the employee on whom the deception had occurred was immaterial in a mortgage fraud claim. However, in *R v. Preddy*<sup>165</sup> the House of Lords ruled that a defendant could not be held guilty for mortgage fraud under section 15 (1) of the Theft Act further to a Law Commission Report<sup>166</sup> addressing this mischief. Of course this situation was resolved when section 15A was inserted into the Theft Act 1968 further to the Theft (Amendment) Act 1996. Mortgage fraud would now be considered under the generic Fraud Act 2006.

### **FSMA 2000**

The general prohibition in FSMA 2000 against dealing in regulated activity by unauthorized persons is relevant to consumer protection in property transactions. Indeed this is the first statutory regime for regulation of mortgages. An important case which preceded the introduction of the Act is *National Westminster Bank Plc v Skelton*<sup>167</sup> where the court among others held that a pleaded equitable set off arising from a counterclaim for an unliquidated sum cannot defeat a claim to possession. The Act was enacted with consumer protection at its heart. Subsequently, the Mortgages and Home Finance: Conduct of Business sourcebook (MCOB) came into force on 31 October 2004. This makes a distinction between types of customers and refers to vulnerable customers.<sup>168</sup> The definition of vulnerable consumer is however restrictive referring only to people with

---

<sup>164</sup>*R v Kierman (Gabriel) [2008] EWCA Crim 972.*

<sup>165</sup>*R v Preddy [1996] UKHL 13 1996.*

<sup>166</sup>*ibid.*

<sup>167</sup>*National Westminster Bank v Skelton [1993] 1 WLR 72.*

<sup>168</sup>Mortgages and Home Finance: Conduct of Business Sourcebook (MCOB)' <[www.handbook.fca.org.uk/handbook/MCOB/](http://www.handbook.fca.org.uk/handbook/MCOB/)> accessed 28 March 2017 13.1.3C.

Candidate Number: 1341103

mental difficulties.<sup>169</sup> In *Dickinson v UK Acorn Finance Ltd*,<sup>170</sup> the mortgagors sought to rely on section 26 to defeat the interest of the defendants. However the court upheld the defendant's submissions that it was an abuse of process for the mortgagors to seek to rely on section 26 two after the possession order had been granted. In *Thacker v Northern Rock Plc*<sup>171</sup> the defendants had sought to argue the compliance to principle in *Skelton* and the regulatory under MCOB supercede the respondent's bank's right to possession. Relying on section 151(2) of the 2000 Act, which provision is redrafted as section 138(e) further to the Financial Services Act 2012. The court disagreed with the defendants arguing rather they may be entitled to damages. The section provides that "no contravention makes any transaction void or unenforceable."<sup>172</sup>

### **Money Laundering Legislations**

The vulnerability of individuals and mortgagees are often exposed under money laundering offences. Broadly, money Laundering, being the process by which the criminally acquired money is converted into legitimate sources is relevant to real property. It is a criminal offence which is often linked to many other offences such as conspiracy to defraud and where it involves professionals, regulatory breaches. In the area of real property, money laundering and its related drug trafficking regulations provisions are extremely relevant.<sup>173</sup> Real property investment is one of the core means by which money launderers would seek to place, lay and integrate their criminally acquired funds. More particularly, vulnerable individuals may find that that their properties are sold without their knowledge through forgery of their identity and stakeholders such as the

---

<sup>169</sup> *ibid* 13.1.3D.

<sup>170</sup> *Dickinson v UK Acorn Finance Ltd* [2015] EWCA Civ 1194; [2016] HLR 17; [2016] CTL 20.

<sup>171</sup> *Thacker v Northern Rock Plc* [2014] EWHC 2107 (QB).

<sup>172</sup> Financial Services Act 2012 section 138(e).

<sup>173</sup> The Law Society of England and Wales, 'Anti-Money Laundering Practice Note'.

HM Land have been at the forefront in trying to address this fraud.<sup>174</sup> The repercussions can be dire for innocent parties in the transaction. The obligation to check the identity of the purchaser is onerous as failure to do so may lead to claim being brought against the solicitor even though the solicitor would succeed if he had acted above board *P & P Property Ltd v Owen White and Catlin LLP*.<sup>175</sup> However in *Purrunsing v A'Court & Co and House Owners Conveyancers Ltd*<sup>176</sup> money laundering issues are discussed. It is a claim against a solicitor in breach of trust for failure to follow money laundering provisions and related guidance.

Proceeds of Crime Act POCA 2002,<sup>177</sup> deals with the unlawfulness in retention or use of the proceeds of criminal conduct, and these make it a criminal offence for among others, concealing, disguising, converting, transferring or moving criminal property (POCA 327),<sup>178</sup> or being knowingly involved arrangements which one knows or suspects would help another acquire retain use or control criminal property,<sup>179</sup> or acquiring, using or coming into possession of criminal property, where criminal property includes real property. The real estate industry feature 'independent legal professionals', 'high value dealers', 'estate agents', and among others financial institutions and all these are subject to money laundering provisions, in particular Money Laundering Regulations 2007.<sup>180</sup>

The procedural aspects of money laundering regulations are now regulated by the Money Laundering Terrorist Financing and Transfer of Funds Regulations 2017<sup>181</sup> and extended

---

<sup>174</sup>Lynne Feddon and Jessica Prasad, 'UK Property Fraud What You Need to Know' <[blog.landregistry.gov.uk/property-fraud-all-you-need-to-know](http://blog.landregistry.gov.uk/property-fraud-all-you-need-to-know)> accessed 25 March 2017.

<sup>175</sup>*P & P Property Ltd v Owen White and Catlin LLP* [2016] EWHC 2276 (ch) (n 81).

<sup>176</sup>*Purrunsing v A'Court (a firm) Anor & Co House Owners Conveyancers Ltd*.

<sup>177</sup>Proceeds of Crime Act 2002.

<sup>178</sup>ibid s. 327.

<sup>179</sup>ibid s. 328.

<sup>180</sup>Money Laundering Regulations 2007 reg. 3.

<sup>181</sup> Money Laundering, Terrorist Financing and Transfer of Funds Regulations 2017.

the regulation to broad range of financial institutions, focusing on measures they had to implement to prevent money laundering activities.<sup>182</sup> It regulated both main stream and ancillary financial institutions and professional institutions such as lawyers and accountants. The regulations<sup>183</sup> expect the establishment of internal controls and communication, identification procedures, recognition of suspicious transactions and record keeping. <sup>184</sup>Similarly relevant are the various warning cards of the Law Society and the Solicitors Regulatory Authority.

### **Fraud Act 2006**

The Fraud Act 2006 replaces several of the deception related provisions in the Theft Act 1968 and is thus now relevant in the prosecution of real property related offences.<sup>185</sup> The Act is applicable to all stages of a property transaction including the registration period as the Land Registry forms contain a note warning against dishonest responses and indicating it would be prosecuted under the Fraud Act 2006. Enacted in 2006 as a generic legislation for the prosecution of fraud offences,<sup>186</sup> the Act provides in sections 1 (1) and (2) that fraud is by false representation, failure to disclose information and abuse of position.<sup>187</sup> The Act's provisions would be particularly relevant in mortgage fraud cases which may not necessarily be presumed under conspiracy to defraud or the money laundering provisions. The offence of failure to disclose information for instance would be relevant in cases of misrepresentation by professionals.<sup>188</sup> This may be applicable where solicitor for instance fails to disclose material information to a lender client. The

---

<sup>182</sup>Money Laundering Regulations 2007 (n 180) reg. 3.

<sup>183</sup>ibid Part 2.

<sup>184</sup>The Law Society of England and Wales (n 173) and related documents.

<sup>185</sup>Fraud Act 2006 Schedule 3.

<sup>186</sup>'Fraud: Report on a Reference under Section 3(1)(e) of the Law Commissions Act 1965' (2002) LAW COM No 276, Cm 5560 <<http://www.lawcom.gov.uk>>.

<sup>187</sup>Fraud Act (n 185) s. 1 (1) & (2) .

<sup>188</sup>ibid s.3.

Candidate Number: 1341103

Land Registry forms designed as purchase deeds for instance contain a warning to that effect. Moreover where a professional has dishonestly abused their position then section 4 would be relevant in that regard.<sup>189</sup> The mens rea under the provision relates to dishonesty under the *Ghosh* Test.<sup>190</sup> Where aspects of real property fraud involve other offences the theft laws, banking laws, tax laws, false accounting, companies Act offences among others continue to remain as part of the armoury under criminal regulation of the financial services in England. The Fraud Act in relation to real property transactions was examined in *R v Cornelius*<sup>191</sup> where a solicitor acting for both lenders was accused of fraud in relation to a mortgage in which he had personal interests in the transaction. The Court of Appeal upheld the defendant's appeal against his conviction by adopting a strict approach to the application of the law to the facts. It is the present author's submissions that the facts demonstrate the existence of dishonesty and the decision is clearly regrettable.

## Conveyancing fraud - Regulatory Law

### Solicitors

Regulation is another important means by which vulnerable persons are protected.<sup>192</sup> The regulation of solicitors is very fundamental to regulation of fraud and certainly so in respect of conveyancing. A solicitor is used in reference to '*an officer of the court appointed by members of the public to act for them, generally for a fee, in their legal business or in matters which require the skill and knowledge usually possessed by a*

---

<sup>189</sup> *ibid* s.4 .

<sup>190</sup> *R v Ghosh* [1982] QB 1053; See also discussions on *Ivey v Genting Casinos (UK) Ltd t/a Crockfords* [2017] UKSC 67 in Chapter 2.

<sup>191</sup> *R v Cornelius* [2012] EWCA Crim 500.

<sup>192</sup> See generally Robert Baldwin, Martin Cave and Martin Lodge, *The Oxford Handbook on Regulation* (Oxford University Press 2010).

*member of court of law*'.<sup>193</sup>Originally called attorneys solicitors have been in existence since the 12<sup>th</sup> century but became solicitors after the passing of the Supreme Court of Judicature Act 1873 which created an amalgam of the attorney, the solicitor, the proctor and the court official.<sup>194</sup>

In respect of conveyancing, during the early anglo-saxon era and feudal period where there was restriction on alienation of land, the little conveyancing work as was available was done by internal staff of the monasteries and the royal who in Edward IV's reign had about a fifth of all land in England.<sup>195</sup>When the cycle of events led to a conveyancing market in the 16<sup>th</sup> century however, conveyancing became the mainstay of practitioners in the country as it was by nature local.<sup>196</sup>The need for lawyers in conveyancing was crucial as English property law was very complicated. Secondly it was acknowledged that in practice it was defective and it was stated that 'of the law of real property of England a very considerable proportion is in one of these two predicaments: either the want of security against the existence of latent deeds renders actually unsafe a title which is yet marketable or the want of means of procuring the formal requisites if title renders unmarketable a title which is substantially unsafe'. Nevertheless there was the 'mischief arising everywhere by the rash adventures of sundry ignorant men that meddle so much in weighty matters'.<sup>197</sup>

---

<sup>193</sup>Harry Kirk, *A Portrait of a Profession-A History of the Solicitor's Profession, 1100 to the Present Day* (Oyez Publishing Limited 1976) 1. See also Robert Maugham, *Treatise on the Law of Attorneys and Solicitors and Agents* (J & W T Clarke 1825) 4.

<sup>194</sup>Kirk (n 193) 1. see a brief history Holdsworth, *A History of English Law* (n 718) pp 34-37. Andrew Boon, *The Ethics and Conduct of Lawyers in England and Wales* (3rd, Hart Publishing 2014) pp 38-55.

<sup>195</sup>Kirk (n 193) 25.

<sup>196</sup>*ibid* 125-126.

<sup>197</sup>*ibid* 126 citing from the First Four Hundred, by Miss Margaret Blatcher-printed in 1970.



The challenge to secure conveyancing work to only lawyers or professionals was one of the first battles fought.<sup>198</sup> Conveyancing professionals now include solicitors, licensed conveyancers, Cilex professionals.<sup>199</sup> The property division of the Law Society started the Conveyancing Quality Scheme (CQS),<sup>200</sup> and the Solicitors Regulation Authority (SRA) who provide regularly practice notes to support the professions. The SRA is the regulatory arm of the profession and solicitors are held to high account and must behave honestly in all property transactions.

There is no dearth of cases of prosecution against solicitors. A more recent one is *Rahim v Arch Insurance Co (Europe) Ltd*<sup>201</sup> where the defendants succeeded against the claimant in their contention that they were not liable to indemnify the claimant as she had been found to have been dishonest. Similarly, the claimant's contention that she was not aware the lender was a client in the mortgage fraud transactions failed. The courts have power among others pursuant to section 49 of the Solicitors Act 1974<sup>202</sup> (As Amended) to make orders as they think fit, one which Bidder QC HHJ described in *Michael Azuka Otopo v SRA*<sup>203</sup> as 'a very wide power'.

### **Financial Conduct Authority**

Further to the 2012 Financial Services Act, The Financial Conduct Authority (FCA) is the body mandated by law to regulate the financial professionals in the field of conveyancing.<sup>204</sup> These financial professionals include mortgage brokers, independent

---

<sup>198</sup>See *ibid* 125–137.

<sup>199</sup>See Boon (n 194) for regulation of lawyers generally.

<sup>200</sup>See details on 'Conveyancing Quality Scheme Accreditation' <[www.lawsociety.org.uk/supportservices/accreditation/conveyancing-quality-scheme](http://www.lawsociety.org.uk/supportservices/accreditation/conveyancing-quality-scheme)> accessed 24 March 2017.

<sup>201</sup>*Rahim v Arch Insurance Co (Europe) Ltd* [2016] EWHC 2967.

<sup>202</sup>Solicitors Act 1974 s 49.

<sup>203</sup>*Michael Azuka Otopo v Solicitors Regulatory Authority* [2016] EWHC 2924 (Admin); [2016] WL 06820879.

<sup>204</sup>Financial Services Act 2012 (n 172) 1 (A).

financial providers, banks and lending institutions.<sup>205</sup> All the statutory regulations on money laundering are relevant in the work of the FCA. The focus of the FCA as far the conveyancing is concerned is the protection of the consumer.<sup>206</sup> The mortgage lending industry itself has a body, the Council of Mortgage of Lenders (CML) who have in turn produced a handbook that regulates the work of conveyancers.<sup>207</sup>

### **Estate agents**

Another category of professionals crucial to the fight against fraudulent conveyance are estate agents. Estate agency work is defined by the Estate Agents Act 1979 as introducing or negotiating with people who want to buy or sell freehold or leasehold property including, agricultural property where this is done in the course of the business according to instructions from the client.<sup>208</sup> Estate agents are regulated by the Estate Agents Act 1979 and the Consumer Protection from Unfair Trading Regulations 2008<sup>209</sup> and Business Protection from Misleading Marketing Regulation 2008.<sup>210</sup> In terms of regulation all estate agents are required by law to belong to an approved redress scheme dealing with complaints about the buying and selling residential property.<sup>211</sup> This a requirement of the Consumers Estate Agents and Redress Act 2007.

The professional bodies which regulate the work of estate agents include the Royal Institution of Chartered Surveyors<sup>212</sup> and the National Association of Estate Agents<sup>213</sup>

---

<sup>205</sup>See generally chapter 1 of Andrew Haynes, *Financial Services Law Guide* (4th edn, Bloomsbury Professional Ltd 2014).

<sup>206</sup>See Financial Services Act 2012 (n 172) 1 (B) (3) (a). See also, 'Protecting Consumers' <[www.fca.org.uk/about/protecting-consumers](http://www.fca.org.uk/about/protecting-consumers)> accessed 24 March 2017.

<sup>207</sup>'CML Lenders Handbook for Conveyancers' <[www.cml.org.uk/lenders-handbook/](http://www.cml.org.uk/lenders-handbook/)> accessed 24 March 2017.

<sup>208</sup>Estate Agents Act 1979 (1)(1).

<sup>209</sup>See above discussion above-Consumer Protection from Unfair Trading Regulations 2008.

<sup>210</sup>Business Protection from Misleading Marketing Regulations 2008.

<sup>211</sup>Estate Agents Act (n 208)1 (1) (2) (c).

<sup>212</sup>'Regulation' <[www.rics.org.uk/regulation/](http://www.rics.org.uk/regulation/)> accessed 24 March 2017.

<sup>213</sup>'Consumer Protection Regulations' <[www.naea.co.uk/lobbying/consumer-protection-regulations/](http://www.naea.co.uk/lobbying/consumer-protection-regulations/)>.

these professional bodies have codes of conduct and it is a requirement to which every estate agent must comply. According to the EA 1979, a person cannot be an active agent if an undischarged bankrupt or has been banned. The purpose of the legislation is to ensure that estate agents deal with clients honestly, fairly and promptly.<sup>214</sup> There are several other legislations regulating estate agents including the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013,<sup>215</sup> Town and Country Planning Control of Advertisement Regulations 1992,<sup>216</sup> 73 of the Town and Country Planning Control of Advertisement Regulations 2007.<sup>217</sup> In *Nationwide Building Society v Dunlop Haywards & Corbetts*<sup>218</sup> the claimants were successful in their claim of deceit for overvaluation and negligence in relation to Corbetts.

### Conclusion

The chapter has been a brief overview of English land law and frauds with regards to how vulnerable persons are protected. It is clear from the laws discussed above that various laws exist to check frauds. This does not however imply that the courts would be liberal in their application or consumers can just put them into a melting pot and submit them. A case in point is *Portman Building Society v Dusangh*<sup>219</sup> where the defendants sought to defeat the claimant's claim by arguing doctrine of *non est factum*, undue influence and/or misrepresentation and the claimant had constructive knowledge of the reluctant equity against his son and unconscionable bargain. The lower court dismissed all grounds and an appeal on the third was equally dismissed by the court of appeal. It is also the case

---

<sup>214</sup>See s. 18 of Estate Agents Act (n 208).

<sup>215</sup>Consumer Contracts (Information, Cancellation, and Additional Charges) Regulations 2013.

<sup>216</sup>Town and Country Planning (Control of Advertisements) (England) Regulations 1992 S. 73.

<sup>217</sup>*ibid.*

<sup>218</sup>*Nationwide Building Society v Dunlop Haywards & Corbetts* [2009] EWHC 254 (Comm) (n 63).

<sup>219</sup>*Portman Building Society v Dusangh* [2000] EWCA Civ 142.

Candidate Number: 1341103

that the current system of conveyancing places a deal of reliance on professionals in particular solicitors and valuers. To combat fraud in England a shift in this reliance is needed. These issues are discussed in later chapters of this work.

## CHAPTER SIX (6)

# LEGAL ENFORCEMENT OF CONSUMER RIGHTS IN CRIMINAL LAW

### Introduction

Law is made in general anticipation that some may fall foul of it. This recognition means it is made, particularly statute law, with provisions for its enforcement.<sup>1</sup> Likewise vulnerable victims of fraud should have recourse against the perpetrators. Fortunately, English 'law' has always afforded people the opportunity to seek redress where they consider themselves to be victims of fraud.<sup>2</sup> This chapter briefly considers historically, the structures and procedures that have been available to individual victims of fraud under the criminal law in England.<sup>3</sup> While the focus is on fraud, the processes are largely consistent with the general processes laid down for seeking redress.<sup>4</sup>

The Traditional criminal system presents challenges when used in combating fraud for the consumer, for which reason alternatives exist.<sup>5</sup> This chapter briefly examines these options. First possible direct actions by the consumer are discussed. The next section examines representative criminal actions taking on behalf of the consumer in relation to consumer-oriented statutes or legislations. These would explore actions by Trading Standards (TS) and the Competitions Markets Authority (CMA) pursued further to

---

<sup>1</sup>See Helen Xanthaki, *Drafting Legislation Art and Technology of Rules for Regulation* (Hart Publishing 2014) Chapter 13 Drafting Penal Provisions.

<sup>2</sup>Sir James Fitzjames Stephen, *A History of the Criminal Law of England*, vol 1 (MacMillan and Co 1883) 60–61.

<sup>3</sup>See TB Hadden, 'The Development and Administration of the English Law of Criminal Fraud' (PhD, University of Cambridge 1967) for detailed focused study on the substantive laws.

<sup>4</sup>See brilliant discussion on why this is necessary in Terence G Ison, *Credit Marketing and Consumer Protection* (Croom Helm Ltd 1979) 354–376.

<sup>5</sup>See David Fitzpatrick, 'The Traditional Criminal Justice System: Its Efficacy in Dealing with Financial and Economically Motivated Crime', *Research Handbook on International Financial Crime* (Edward Elgar Publishing Ltd 2015).

legislations such as the Consumer Unfair Trading Regulations 2008. Finally, institutions and organisations taking actions on behalf of consumers under non-consumer specific legislations are examined.

### **Direct actions for redress by the consumer victim of criminal fraud**

#### **Self-remedy**

Historically, one of the options available to the individual in earlier times is to seek personal remedy. The suggestion was made at the beginning of this thesis that the individual has always had some form of recourse in early English law. Criminal law originates from private vengeance which degenerated into private war, blood feuds and anarchy.<sup>6</sup> Crime was considered an act of war. This was provided in the laws of Alfred and exceptional provision was made for the King's, the Lord's or the Church's peace or protection.<sup>7</sup> Stephen says that 'peace was an exceptional privilege, liability to war the natural state of things'.<sup>8</sup> Beyond even vengeance the summary procedure called the law of infanthief is one of the earliest criminal procedures.<sup>9</sup> It provided persons with the right to inflict punishment on wrong doers for offences,<sup>10</sup> such as giving thieves the right to determine the fate of the wrongdoer. The laws provided for thieves to be killed and sometimes imprisoned.<sup>11</sup> Those who provided refuge to thieves also suffered similar fate. Summary execution<sup>12</sup> was a common procedure. The consumer today has power of arrest and self-defence. Yet it is in extremely rare circumstances that the consumer may need to employ the few remaining self-remedies available especially in combatting fraud. For

---

<sup>6</sup>Stephen (n 2) 60.

<sup>7</sup>ibid.

<sup>8</sup>ibid.

<sup>9</sup>ibid 59.

<sup>10</sup>ibid 62–63.

<sup>11</sup>ibid 62.

<sup>12</sup>ibid.

instance, one of the rare circumstances it can be envisaged in the context of this study that the consumer may employ self-defence is where a business attempts to employ force to enforce debt against the consumer in the latter's home.

### **The consumer's resort to the police**

One of the options available to the consumer in pursuing redress when a victim of fraud is to contact the police. Early police procedure in summary involved 'the sherries of counties, the bailiffs of hundreds, the reeves and men of townships being officers having the duty to arrest criminals and recover stolen property all through the assistance of the institution of frankpledge by which every man was accountable for all his neighbours. One of the principal responsibilities was raising the hue and cry and tracking thieves and stolen property.<sup>13</sup> This later became the responsibility of the justices of peace, but such equivalent powers individuals possessed.<sup>14</sup> The basis of such arrests was reasonable grounds<sup>15</sup> and warrants called hue and cry were issued with no right of forced entry.<sup>16</sup>

Generally speaking the police is an institution that exists to prosecute serious crimes within every society. Logically therefore prosecution of crimes committed by businesses against consumers is impacted by the perception whether crimes committed by businesses are serious crimes or otherwise. There are broad issues that affect the prosecution of crimes committed by businesses against consumers. First there is the perception that institutions are generally law-abiding and it is individuals who are trouble makers.<sup>17</sup> In this regard the police seem to treat consumers and businesses according to their social economic status. Secondly the general attitude of organised groups is against enforcement

---

<sup>13</sup> *ibid* 66.

<sup>14</sup> WS Holdsworth, *A History of English Law*, vol 1 (3rd edn, Methuen & Co Ltd 1922) 294.

<sup>15</sup> *ibid*.

<sup>16</sup> *ibid* 294-295.

<sup>17</sup> See discussion in Ison (n 4) 354-359.

against businesses.<sup>18</sup> Indeed there is a gender twist even to this argument that most police officers are men and therefore that can be a disincentive to prosecute businesses when the complaints are usually made by women. These broader issues affect the way in practical terms the consumers complaint to the police are handled. First it appears that even the police do not treat fraudulent acts by businesses as crimes.<sup>19</sup> For instance research conducted shows that many reports are made to the police of crimes committed by individuals but there are no comparable statistics of complaints made by consumers against businesses.

Furthermore, even when consumers have had the courage to make complaints against businesses the police often do not prosecute these businesses.<sup>20</sup> Indeed often police forces have statistics of offences by retailers against consumers but none by consumers against retailers. The above issues and the fears of businesses bringing complaints against even the police including the fear of consumer floodgates leading to unmanageable caseload by the police have all served to ensure that the police play a very minimal role in protecting consumers.<sup>21</sup> Today, consumers who are victims of fraud make complaints, often online, through Action Fraud and the National Fraud Intelligence Bureau which are part of the City of London.<sup>22</sup> Where it involves serious fraud the complaint is likely to be made to a regulatory body such as the FCA.

---

<sup>18</sup> *ibid* 355–355.

<sup>19</sup> *ibid* 355–357.

<sup>20</sup> *ibid* 356.

<sup>21</sup> *ibid* 357–358.

<sup>22</sup> Action Fraud, 'ActionFraud Is the UK's National Fraud and Cyber Crime Reporting Centre' <<https://www.actionfraud.police.uk/>> accessed 15 September 2018.



**The Consumer and the right to seek internal review of administrative decision on prosecution**

Driven by the need to cut costs associated with judicial reviews meant that the court of appeal in *R v Christopher Killick*,<sup>23</sup> while acknowledging the victim's right to seek judicial review, similarly indicated that it need not do so. As a direct result of the ruling, since June 2013 the Victim Right to Review Scheme<sup>24</sup> was implemented which gives victims right to review for qualifying decisions. These are decisions not to charge and to discontinue all charges thereby ending proceedings to offer no evidence in all proceedings.<sup>25</sup> The revised Scheme which came into effect on 10 December 2013, defines victim as 'any person who has made an allegation to the police, or had allegation that they have been directly subjected to criminal conduct under the National Crime Standard NRCS'.

Since 10 December 2013 however the victim is 'a person who has suffered harm, including physical, mental or emotional or economic loss which was directly caused by criminal conduct'.<sup>26</sup> The Code provides enhanced protection to particular groups such as vulnerable or intimidated victims, among others, including victims of serious crimes. However, there are only limited circumstances that it applies. Procedurally,<sup>27</sup> the victim must submit the request within 5 working days even though this is extendable to 3 months. The review request is then considered by an officer not involved in the original decision, a subsequent opportunity is then provided for independent review.

---

<sup>23</sup>*R v Christopher Killick* [2011] EWCA Crim 1608.

<sup>24</sup>'Code of Practice for Victims of Crime' :<[www.gov.uk/government/publications/the-code-of-practice-for-victims-of-crime](http://www.gov.uk/government/publications/the-code-of-practice-for-victims-of-crime)>.

<sup>25</sup>ibid.

<sup>26</sup>Paragrapgh 4 ibid.

<sup>27</sup>See generally ibid 19–39.

**The Consumer and the right to seek judicial review of administrative decision on prosecution**

A potent tool in the hands of the consumer in English law is the right to seek judicial review of the decisions made by public or state agencies who have the power to bring prosecutions on the consumer's behalf in fraud cases. Judicial review, viewed broadly consists of the court's powers to review decisions of judges, to review decisions of the courts such as a decision to refuse to exercise jurisdictions in a matter, to review decisions of public bodies and to review legislations made by law making bodies which in the UK presently relates to the compatibility of such legislations to the human rights provisions such as the ECHR and EU law.<sup>28</sup> The broad conception of judicial review is ancient with controversies surrounding its origins, specifically whether it originated from the United States or from England.<sup>29</sup> It is arguable though that judicial review originated from the UK.<sup>30</sup>

Administrative judicial review is the aspect we focus on regarding the consumer challenging the decisions of the state prosecuting agencies in criminal cases. The term public bodies have been construed broadly by the courts as bodies established by statutory provisions or more importantly or where it exercises a public function.<sup>31</sup> A notable authority for this is *R v Panel for Takeovers and Mergers Ex P Datafin*<sup>32</sup> where the court held that decision of a privately constituted body was subject to judicial review where that body exercises a public function. Lord Diplock lists the grounds for judicial review

---

<sup>28</sup>See generally JH Baker, *An Introduction to English Law* (4th edn, Butterworths Lexis Nexis 2002) 135–154.

<sup>29</sup>Edith G Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventh Century* (Harvard University Press 1963) <HathiTrust Digital Library>.

<sup>30</sup>*ibid.*

<sup>31</sup>Baker (n 52) 151–153.

<sup>32</sup>*R v Panel for Takeovers and Mergers Ex P Datafin* [1987] 1 QB 815.

Candidate Number: 1341103

are unlawfulness or illegality, irrationality or unreasonableness, procedural impropriety, legitimate expectation or where the decision breaches human rights provisions.<sup>33</sup> The remedies available for judicial review are quashing orders, prohibition, mandatory, declaration, injunction<sup>34</sup>. The court can also award costs in favour of the successful claimant.

Further to the Civil Procedure Rules 1998 (as amended), a Pre-action protocol for judicial review directs claimants on the procedures for judicial review.<sup>35</sup> Generally, the Claimant's claim for judicial review must be preceded by a Letter before claim sent to the defendant the Respondent who then has limited days to respond. Where the claimant's response is unsatisfactory to the claimant, the latter can then proceed with the claim for judicial review at the Administrative Court of the High Court. The Claim for judicial must be made promptly in any event not later than 3 months.

The consumer victim in these circumstances can rely on this medium to seek to challenge the decision of the prosecuting agencies.<sup>36</sup> Where the claim is properly pursued judicial review can be a powerful tool to challenge the decision not to proceed with the prosecution. Where the prosecuting agency has failed to follow the appropriate procedures, the consumer could claim judicial review based on procedural impropriety.

### **The Consumer and private prosecution**

English law permits private persons to bring criminal prosecutions against a defendant.

This implies that a consumer in his personal capacity is able to bring prosecutions against

---

<sup>33</sup> *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374.

<sup>34</sup> For some history on injunctions see David W Raack, 'History of Injunctions in England before 1700' (1986) 61 *Indiana Law Journal* <<http://www.repository.law.indiana.edu/ilj/vol61/iss4/1>>.

<sup>35</sup> Civil Procedure Rules 1998.

<sup>36</sup> Barry A. Rider, 'Self Regulation: The British Approach to Policing Conduct in the Securities Business, with Particular Reference to the Role of the City Panel on Take-Overs and Mergers in the Regulation of Insider Trading' (1978) 1 *Journal of Comparative Law and Securities Regulation* 319.

companies and businesses.<sup>37</sup> Stephen has noted that ‘every private person has exactly the same right to institute any criminal prosecutions like the Attorney-General or anyone else. A private person may not only prosecute anyone for high treason or a seditious conspiracy, but A may prosecute B for a libel upon C, for an assault upon D, or a fraud upon E, although A may have no sort of interest in the matter, and C, D and E, may be altogether averse to the prosecution’.<sup>38</sup>

The present position on the issue is premised upon section 6 the Prosecutions of Offences Act 1985 which provides that ‘(1) subject to subsection to (2) below, nothing in Part shall preclude any person from instituting any criminal proceedings or conducting any criminal proceedings to which the Director’s duty to take over the conduct of proceedings does not apply.’<sup>39</sup> The section further provides that (2) where criminal proceedings are instituted in circumstances in which the Director is not under a duty to take over their conduct, he may nevertheless do so at any stage’.<sup>40</sup> Indeed the Supreme Court has held in *R (on the application of Gujra) v CPS*<sup>41</sup> that the Director can take over in order to discontinue where the Full Code Test applies.

There are however certain practical considerations which affect the consumer’s exercise of this right.<sup>42</sup> The consent of the Director of Public Prosecutions (DPP) is required for the prosecutions of certain serious offences.<sup>43</sup> This clearly affects the consumer’s right to exercise his rights. The consumer’s ability to gather evidence may be limited and it could

---

<sup>37</sup>Fraud Advisory Panel, ‘Private Prosecutions for Fraud Offences’ [2013] FRAUD FACTS <[www.fraudadvisorypanel.org](http://www.fraudadvisorypanel.org)>.

<sup>38</sup>Stephen (n 2) 495.

<sup>39</sup>Section 6 Prosecutions of Offences Act 1985.

<sup>40</sup>Prosecutions of Offences Act 1985 s. 6.

<sup>41</sup>*R (on the application of Gujra) v CPS* [2012] UKSC 52.

<sup>42</sup>Crown Prosecutions Service, ‘Private Prosecution (Legal Guidance)’ <<https://www.cps.gov.uk/legal-guidance/private-prosecutions>> accessed 17 February 2018.

<sup>43</sup>*ibid.*

open the consumer to civil actions or malicious prosecution where the action fails.<sup>44</sup> Finance obviously affects the consumer's ability to institute prosecutions. These issues are further discussed in a later chapter.

### **The Consumer and Criminal Compensations**

It is clear from the above that in early criminal law, procedures such as private vengeance and the tithing system whereby assets were recovered provided a means of compensation for the client. Over time, compensation increasingly diminished in value as the object of criminal trial. The punishment for the offender literally has no financial benefit to the consumer, thus explaining why the civil remedy was often the avenue open to the consumer or victim. However, problems associated with such private prosecutions has meant that the criminal law had to intervene.

Compensation orders were introduced in 1972 by sections 35 to 38 of the Powers of Criminal Courts Act 1973 (as amended).<sup>45</sup> This provided the victim the right to seek for a compensation order during sentencing or the compensation can be provided by the court. As noted above, the procedural and evidential challenges made it daunting for the consumer, even though restrictions have been minimized by *R v Thompson Holidays Ltd*<sup>46</sup> permitting prosecution in respect of the same statement at the suit of individual complainants.

The Powers of Criminal Courts (Sentencing) Act 2000<sup>47</sup> allows the grant to consumers or victims compensation orders against defendants in a matter. It is clear from the provision that it relates to the grant for personal injuries or loss or damage that the victim may have

---

<sup>44</sup> *ibid.*

<sup>45</sup> Sections 35-38 Powers of Criminal Courts Act 1973.

<sup>46</sup> *R v Thompson Holidays Ltd.*

<sup>47</sup> Powers of Criminal Courts (Sentencing) Act 2000.

suffered as a result of the defendant's conduct. Importantly, further to the courts holding in *R v Corbetts*<sup>48</sup> it is immaterial whether the offence was caused intentionally or unintentionally by the Defendant to the victim's action. Rightly, the appropriateness of the quantum that the victim is entitled is a decision of the court which further decides the manner and how the payment is to be effected. Indeed, the question of compensation could be complex especially in situations where there are multiplicity of victims and the financial resources of the defendant are limited. For these reasons while the court's approach is to divide assets pro rata, the overriding object is to achieve equity for all victims.<sup>49</sup>

The power to seek award for loss of property under section 4 of the Forfeiture Act 1870<sup>50</sup> in indictable offences was however said to be inapplicable to cases under the Trade Descriptions Act 1968.<sup>51</sup> One of the reasons include the fact that there was loss of property. Civil action can be brought under section of the Civil Evidence Act 1968. It is important to highlight as above indicated that the consumer can also benefit from any compensation orders that the court makes further to proceedings for the confiscation of assets under the Proceeds of Crime Act 2002 (POCA).<sup>52</sup> The confiscation or restraint orders themselves are made further to sections 301 to 303 of POCA.<sup>53</sup>

Crucially, the court has held that a private prosecutor can institute proceedings for confiscation and compensation. The court held in the case of *R (Virgin Media Ltd) Ltd v Zinga*<sup>54</sup> that a private prosecutor could take advantage of the provisions of s 6 of POCA

---

<sup>48</sup> *R v Corbetts* [1993] 14 Cr App R (S) 101.

<sup>49</sup> Jonathan Fisher, 'Fraud in Civil and Criminal Law', *Research Handbook on International Financial Crime* (Edward Elgar Publishing Ltd 2015) 327.

<sup>50</sup> Section 4 Forfeiture Act 1870.

<sup>51</sup> Trade Descriptions Act 1968.

<sup>52</sup> Proceeds of Crime Act 2002.

<sup>53</sup> Sections 301-303 *ibid*.

<sup>54</sup> *R (Virgin Media Ltd) Ltd v Zinga* [2014] EWCA Crim 52.

2002.<sup>55</sup> It is suggested that such proceedings commenced by the private prosecutor would serve the public interest. Section 6(2) POA 1985-need to take over proceedings.<sup>56</sup>The court may also request that the CPS assists the private prosecutor. The details are beyond the scope of this work but there are clear guidelines and procedures for such decision to be taken over by the CPS where the Full Code Test and evidential sufficiency tests are met. There is also the issue of conflict of interests.

### **Representative criminal actions on behalf of the consumer under consumer specific fraud laws**

#### **OFT and Competitions Market Authority**

The Office of Fair Trading was an independent competition and consumer protection authority.<sup>57</sup> It is a non-ministerial government department which was established by statute in 1973. It became a statutory corporation on 1 April 2003 further to the Enterprise Act 2002.<sup>58</sup> Its decisions are subject to appeal by the Competition Appeal Tribunal. In addition to competition law breaches, the OFT also has powers to investigate and prosecute companies and individuals for offences under the Enterprise Act 2002<sup>59</sup> in relation to Cartel activity, the Consumer Credit Act 1974,<sup>60</sup> the Consumer Protection Distance Selling Regulation 2000<sup>61</sup> and the Unfair Terms in Consumer Contracts Regulations 1999.<sup>62</sup> A 2003 memorandum of understanding regulates the OFT's activities vis-à-vis the Serious Fraud Office and the BERR. Its activities were in 2013 taken over

---

<sup>55</sup>Section 6 Proceeds of Crime Act 2002 (n 111).

<sup>56</sup>Sect 6 (2) *ibid*.

<sup>57</sup>See Michael Levi, *Regulating Fraud: White-Collar Crime and the Criminal Process* (Cambridge University Press 1987) 193–194.

<sup>58</sup>Enterprise Act 2002 2002.

<sup>59</sup>*ibid*.

<sup>60</sup>Consumer Credit 1974 1974 (As Amended).

<sup>61</sup>Consumer Protection Distance Selling Regulation 2000.

<sup>62</sup>Unfair Contract Terms Act 1977.

by the Competitions and Markets Authority. The CMA has been undertaking market investigations across sectors whilst the Trading Standards Services deals with enforcement of consumer law.<sup>63</sup>

### **Trading Standards Services**

The National Trading Standards Services (NTS), a national organisation working through and coordinating local and regional trading standard teams across the country, still protects the interest of consumers.<sup>64</sup> Regional NTS commence proceedings against business entities.<sup>65</sup> NTS enforcement covers mass marketing scam, illegal money lending, estate agents and enforcement issues that go beyond local authorities' boundaries.<sup>66</sup> There are a few issues that arise in respect of the criminal prosecution functions of the NTS.<sup>67</sup> It is considered that in regions where they blend negotiation and prosecution it creates problems.<sup>68</sup> Furthermore, resource constraints mean that only serious consumer complaints are pursued.<sup>69</sup> It is also suggested NTS prosecutions at Magistrates are not strong deterrents.<sup>70</sup> These concerns notwithstanding the NTS continues to play a significant role in enforcing pure consumer protection statutes even in the face of legal hurdles.<sup>71</sup>

---

<sup>63</sup> Competition and Markets Authority (CMA), 'CMA Annual Report and Accounts 2016/17' (Competition and Markets Authority 2017) 35 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/628985/cma-annual-report-accounts-16-17-print-ready.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/628985/cma-annual-report-accounts-16-17-print-ready.pdf)> accessed 11 July 2018.

<sup>64</sup> The National Trading Standards, 'The National Trading Standards' <<http://www.nationaltradingstandards.uk/>> accessed 18 February 2018.

<sup>65</sup> *ibid.*

<sup>66</sup> *ibid.*

<sup>67</sup> See generally Ison (n 4) 354–395.

<sup>68</sup> *ibid.* 362–368.

<sup>69</sup> *ibid.* 368.

<sup>70</sup> *ibid.* 372.

<sup>71</sup> *Tesco Supermarkets Ltd v Natras* 1972 AC 153 (n 16).



## **Representative criminal actions on behalf of the consumer under non-consumer specific fraud laws**

### **The Serious Fraud Office**

It has been noted that the police are not the only prosecuting agencies in England. With specific reference to fraud, the Serious Fraud Office is one of such agencies with lead responsibility for investigating and prosecuting complex or serious fraud further to section 13 of the CJA 1987. It was established further to the Fraud Trials Committee Report (The Roskill Report)<sup>72</sup> which recommended in 1983 that a single unified body be charged with the detection, investigation and prosecution of serious fraud cases.<sup>73</sup> In 1987 therefore section 1 of the Criminal Justice Act established the SFO which has wide investigative powers further to section 2 of the CJA 1987.<sup>74</sup>

Having varied arms, the individual and investment domain is responsible for frauds on consumers such as boiler room scams and advanced fee fraud.<sup>75</sup> The Mutual Legal Assistant Unit deals with requests for assistance from overseas and also organises outgoing requests.<sup>76</sup> Among others, the SFO would take into account whether the value of the alleged fraud exceeds £1 million pounds, whether there is widespread public concern and whether the case requires highly specialised knowledge. In undertaking its functions, the SFO works with various other agencies such as the National Fraud and Strategic Authority, the Joint Vetting Committee, the Serious Organised Crime Agency

---

<sup>72</sup>The Fraud Trials Committee Report (Roskill Committee Report)' (The Home Office and the Lord Chancellor's Department 1986) <<https://www.sfo.org.uk/download/the-roskill-report-fraud-trials-committee-/?wpdmdl=6885>>. Serious Fraud Office, 'SFO Historical Background and Powers' <<https://www.sfo.gov.uk/publications/corporate-information/sfo-historical-background-powers/>> accessed 17 February 2018.

<sup>73</sup>Stephen Gentle and Louise Hodges, *Kingsley Napley Serious Fraud: Investigation & Trial* (4th edn, LexisNexis Butterworths 1998) paragraph 2.2.

<sup>74</sup>Sections 1 and 2 Criminal Justice Act 1987.

<sup>75</sup>Gentle and Hodges (n 133) paragraph 2.5.

<sup>76</sup>*ibid* paragraph 2.15-2.16.

(SOCA) and the Department for Business, Enterprise and Regulatory Reform, now Department for Business, Innovations and Skills (DBIS).<sup>77</sup>

While it has had some notable successes, it has also had some failures. Some of the key prosecutions the SFO have succeeded in are the LIBOR cases where it was successful in convicting Peter Charles Johnson, Jonathan James Matthew and Alex Pabon and Jay Merchant for conspiracy to defraud but failed in respect of Ryan Reich and Stylianos Contogoulas. Other convictions include *R v Tom Alexander William Hayes*.<sup>78</sup> Indeed, a cloud of uncertainty hangs over its future with Theresa May, the current Prime Minister seeking its abolishment.

### **The Crown Prosecution Service**

The general structure and functions of the Crown Prosecution Service has already been addressed above. It was established further to the Prosecution of Offences Act 1985. It is sufficient to state however that the CPS initiates most of the fraud prosecutions in England. Established in November 2005, the CPS Fraud Prosecution Service advises the Police on charging in fraud cases. It has a national remit although based in London.<sup>79</sup> It also works with the complex casework centre through its special casework section. The remit of the CPS involves fraud cases which are outside the scope of the other prosecuting agencies.<sup>80</sup> These include complex cases involving stock exchange practices, regulatory bodies, banking issues, computer misuse, significant and complex cases of money laundering among others. It also deals with other fraud prosecuting agencies in undertaking its work.<sup>81</sup>

---

<sup>77</sup> *ibid* paragraphs 2.19-2.21.

<sup>78</sup> *R v Tom Alexander William Hayes [2015] EWCA Crim 1944*.

<sup>79</sup> Gentle and Hodges (n 133) paragraphs 2.23-2.25.

<sup>80</sup> *ibid* paragraphs 2.29-2.31.

<sup>81</sup> *ibid* paragraph 12.32.

Candidate Number: 1341103

### **Financial Services Authority/Financial Conduct Authority**

The FSA was established under the Financial Services and Markets Act 2000.<sup>82</sup>FSMA 2000<sup>83</sup> states that the FSA exists to create market confidence, the protection of consumers and the reduction of financial crime. It has already been noted that the FSA has both criminal and civil powers which can be enforced against regulated and non-regulated firms and individuals who commit fraudulent offences. Headed by a chairman, FSA fraud investigations are generally dealt with by the enforcement division as well as the financial crime and intelligence division.<sup>84</sup> Its work is further supported by the four operations teams which are led by financial crime experts. It has a range of sanctions such as withdrawal of regulated status, imposition of financial penalties, seeking of injunctions among others.<sup>85</sup>Further to the FSA 2012 the FCA took over the functions of the FSA. The first criminal action by the FCA under the Consumer Credit 1974 was against Mr Dharam Prakash Gopee and he acted as an unlicensed consumer credit lender. The present author acted for one of Mr Gopee's victims, a semi-literate vulnerable adult woman who was having difficulty selling her property. Mr Gopee demonstrated his audaciousness by even challenging the application to remove his charge which was on the victim's property. Fortunately his defence failed.

### **The Department for Business, Enterprise and Regulatory Reform /Department for Skills and Innovations**

The FCA similarly works with other agencies in undertaking its statutory functions.<sup>86</sup> The Department for Business, Enterprise and Regulatory Reform was established in 28 June

---

<sup>82</sup>Financial Services and Markets Act 2000.

<sup>83</sup>ibid Section 22.

<sup>84</sup>See Jonathan Russen, *Financial Services: Authorisation, Supervision, and Enforcement: A Litigator's Guide* (Oxford University Press 2006) 91–116.

<sup>85</sup>See generally Financial Conduct Authority, *FCA Handbook* (Financial Conduct Authority) <[www.fca.org.uk](http://www.fca.org.uk)>.

<sup>86</sup>Gentle and Hodges (n 133) paragraph 2.47.

2007 as a replacement for the Department for Trade and Industry. It is now Department for Business, Innovations and Skills (DBIS). It exists to promote among others, the interests of employers and consumers, while ensuring that it reviews and promotes free and fair markets in regulatory reform. For our purposes, the BERR, also prosecutes suspected misconducts including fraudulent trading, breach of bankruptcy/disqualification orders and breach of health and safety legislation and insolvency

It can permit other agencies to undertake investigations on its behalf. The Company's Investigation Branch (CIB) carries out investigation into suspected corporate abuse further to the Secretary of State's powers under the Companies Act.<sup>87</sup> The CIB has since April 2006 merged with the insolvency service. It may handle complaints against active incorporated companies and limited liability partnerships based in England and Wales. They undertake such investigations where there are reasonable grounds to suspect fraud, serious misconduct or material irregularity in a company's affairs.<sup>88</sup>

### **Serious Organised Crime Agency (SOCA)**

The Serious Organised Crime Agency was established on 1 April 2006 to replace the National Criminal Intelligence Service and the National Crime Squad further to SOCPA 2005. The Home Secretary is responsible to Parliament for the overall performance of SOCA and the bulk of its functions and responsibilities are undertaken by the specialist crime and financial unit. It deals with false accounting.<sup>89</sup> The Chair and Director General of the Board that manages SOCA are appointed by the Home Secretary. There are four directorates within SOCA which helps it to handle its core function as an intelligence led body which works closely with other law enforcement bodies in the investigation of

---

<sup>87</sup>ibid paragraphs 5.52-5.57.

<sup>88</sup>ibid paragraphs 5.52-5.57.

<sup>89</sup>ibid paragraph 3.276.

serious criminality throughout the United Kingdom.<sup>90</sup> Importantly, it has no prosecutorial function. Among others, its target areas are drug and people trafficking, money laundering and fraud against individuals and the private sector, high tech crime among others. It has overall responsibility for monitoring Suspicious Activity Reports (SAR) submitted by firms under the Proceeds of Crime Act 2002 and a Terrorism Act 2000. It also works with other agencies in the fight against serious fraud in the UK.

### **Confiscation orders and restraint orders**

While it is doubtful whether the full purpose for the institution of confiscation orders can be achieved in reality, it is arguable that is a powerful tool for protecting victims of crime.<sup>91</sup> Power is granted<sup>92</sup> to state prosecuting agencies to pursue actions aimed at confiscation proceeds of crime.<sup>93</sup> The making of confiscation orders protect the victim of crime in that it is directly linked with a simultaneous order by the Crown Court for the making of compensation orders. The test for the Court is satisfaction that the defendant was convicted of an offence, or committed for sentence, before the Crown Court. Secondly the Crown Court confiscation proceedings must be initiated by the prosecuting agency or the court must itself believe that it is appropriate do so. The assets forming the basis of the confiscation proceedings must be criminal property.

Similar to civil proceedings is the tool for preventing the criminal from benefitting from dealings on what is referred to as realisable property and prevent fraudsters hiding money and compensate victims.<sup>94</sup> The court must be satisfied in an application for a restraint

---

<sup>90</sup> *ibid.*

<sup>91</sup> See generally Jonathan Fisher and others, *The Law of Investor Protection* (2nd edn, Sweet and Maxwell 2003) 475–488 26-001-26-036. See generally Gentile and Hodges (n 133) paragraphs 12-12-127.

<sup>92</sup> Proceeds of Crime Act 2002 (n 111).

<sup>93</sup> Kenneth Murray, 'Confiscation and Forfeiture', *Research Handbook on International Financial Crime* (Edward Elgar Publishing Ltd 2015).

<sup>94</sup> Jonathan Fisher and Jane Bewsey, *The Law of Investor Protection* (Sweet and Maxwell 1997) 330–331 paragraphs 23-035-23-039.

order that the defendant has benefitted from criminal conduct. The court may make such order if it believes it is appropriate for ensuring that the restraint order may be effective.

### **The consumer and the corporation**

Critical in an examination of fraud and abuse by businesses is the basis on which the business becomes liable. The proposition that the corporation can commit frauds against consumers brings to the fore many issues including vicarious liability and corporate criminal liability. The detailed examination of the broad principle of corporate liability is beyond the scope of this work.<sup>95</sup> Briefly however the development of the concept of corporate liability began in the 19th century when the court ruled that the word person could apply to corporations.<sup>96</sup> Subsequently the industrial revolution and the statutory obligations of local authorities and corporations such as railway companies influenced the development of the concept.<sup>97</sup> First the concept of vicarious liability emerged when masters were made liable for the conducts of their servants where the latter's conducts were based on the consent of the former. The fusion of the twin obligations of servants and local authorities and municipalities created the concept of corporate liability.<sup>98</sup>

Subsequently, the question arose regarding the place of mens rea within the traditional offences.<sup>99</sup> Referring to the Court of Common plea's holding that a corporation could be liable for offence of trespass, it was held that since corporations had no such social duties

---

<sup>95</sup>For a good discussion see Peter Cartwright, *Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK* (Cambridge University Press 2001) 96–125; Celia Wells, *Corporations and Criminal Responsibility* (2nd edn, Oxford University Press 2001); Celia Wells and Oliver Quick, *Lacey, Wells and Quick: Reconstructing Criminal Law* (4th edn, Cambridge University Press 2010); James Gobert, *Rethinking Corporate Crime* (LexisNexis Butterworths 2003).

<sup>96</sup> *Royal Mail Steam Packet Co v Braham* 1877. Wells (n 5) 86–87.

<sup>97</sup> Wells (n 5) 87–90.

<sup>98</sup> *ibid* 88–90.

<sup>99</sup> *ibid* 89.

Candidate Number: 1341103

of morality, it could not be held corporately liable.<sup>100</sup> A corporation had no understanding or will so could not commit crime. Further challenges came by way of procedures including the nature of imposing punishment such as imprisonment on corporations.

Contrary to the civil sense, there is generally no vicarious criminal liability in English law.<sup>101</sup> This means that the employer is not responsible for offences committed by the employee as decided in *Huggins*<sup>102</sup> in 1703. This is the origin of the doctrine. Criminal vicarious liability was later approved in *Mousell Brothers v London and North Western Railway Company*<sup>103</sup> where it was said that sometimes Parliament can make a principal criminally liable in absolute terms which would then make the principal liable if the act is done by his servants.<sup>104</sup> The extensive construction sense of vicarious liability by which the employer is responsible for the acts of its employee is in the criminal sense restricted by statutory due diligence defences are which available for the defendant and the concept mens rea is similarly not available.<sup>105</sup>

The issue is well discussed under the *Tesco Supermarkets Ltd v Natras*<sup>106</sup> where Tesco argued successfully that the employee had no directing mind.<sup>107</sup> It is further suggested that a distinction must be made between acts of the employee and mens rea; the employer is responsible for the former but not the latter.<sup>108</sup> However where the employer has

---

<sup>100</sup> *Great North of England Railway Case 1846.*

<sup>101</sup> *Huggins 1730 2 Stra at 885.*

<sup>102</sup> *ibid.*

<sup>103</sup> *Mousell Brothers v London and North Western Railway Company 1917 2 KB 836.*

<sup>104</sup> For an example see Property Misdescriptions Act 1991 Section 1 (1).

<sup>105</sup> *Cartwright (n 5) 93–95.*

<sup>106</sup> *Tesco Supermarkets Ltd v Natras 1972 AC 153.*

<sup>107</sup> *Cartwright (n 5) 94–95.*

<sup>108</sup> *ibid 95–96.*

delegated its responsibilities to the employee, then the employer would be liable.<sup>109</sup> It is therefore dependent on the particular facts of each case.

After *Moussell* the offence had to be statutory.<sup>110</sup> From this stage corporate liability developed through a succession of cases which focused on public welfare and identification cases. The overriding bases are the doctrines of vicarious liability and the identification principle the latter of which is applicable to non-regulatory offences. In simple terms the concept of corporate liability is more applicable in the strictly consumer legislation while the identification principle helps in the serious offences. The present state of the law was summarised in *R v Nelson Group Securities*<sup>111</sup> where it was held that where the primary rules do not apply and agency and vicarious liability are not applicable then ordinary cannons of interpretation would apply. The consumer can take solace in the fact that 'the judicial mood of strict interpretation of health and safety, consumer protection, and other regulatory offences' exists.<sup>112</sup> It is suggested that when the principle of corporate liability is applied in the sense of pure consumer protection legislations, it is relatively less difficult to achieve conviction due to some of the provisions being strict liability, whereas if applied in other fraud legislations in the financial services context requiring mens rea, it is relatively difficult to achieve conviction. There is consideration for the extension of the concept of strict liability which is applicable under the Bribery Act.<sup>113</sup>

It was discussed in Chapter Three circumstances under which there can be personal liability under the civil and criminal law. Further to those discussions senior management

---

<sup>109</sup> *ibid.*

<sup>110</sup> *Pearks Gunston & Tee Ltd v Ward [1902] 2 KBI*. See also Wells (n 5) 91.

<sup>111</sup> *R v Nelson Group Securities [1998] 4 All ER 331*.

<sup>112</sup> Wells (n 5) 104–105.

<sup>113</sup> Rhys Novak, Robert Bond and Paul Henty, 'Looking to the next 12 Months: 10 Issues for UK Compliance Officers' [2015] *Compliance & Risk*.



with responsibility and control in corporations can be liable under the criminal law when the court merges the personality of the person to held accountable with that of the culpability of the relevant actor.<sup>114</sup> By so doing the acts of the employee becomes the acts of the employer. There can also be vicarious liability in restitution under equity. Finally the issue can be looked at from under regulatory law. This can happen under the Approved Persons Code under the FCA Handbook.

### **Regulatory Crime and Consumer Law**

Mention was made of the concept of regulatory offence. It is one of the conceptual challenges in consumer protection which surface within the context of the criminal law. Specifically, a distinction is made between real crime and regulatory crime.<sup>115</sup> Limiting his discussion to consumer specific regulations, Professor Cartwright draws a distinction between real crime which are offence referred to as *mala in se* or 'sins with legal definitions' and quasi crime such as offences *mala prohibita*, 'acts which are not criminal in any real sense, but are acts which, in the public interest, are prohibited under a penalty'.<sup>116</sup> The latter is called regulatory crime.

Professor Ramsay makes three distinctions. First, there are over inclusive statutory standards which are enforced by sanctions of strict criminal liability, generally tempered by certain statutory offences. The primary sanction is a fine rather than imprisonment. Second, specialised bureaucracy is under a duty to enforce the relevant acts which in practice would involve the exercise of discretion by the agency in the implementation and enforcement of standards. Third, the courts involved in the day to day implementation of the acts are usually the lay bench magistrates' court, although the higher courts also play

---

<sup>114</sup> See discussion in Barry Rider and others, *Market Abuse and Insider Dealing* (2nd edn, Tottel Publishing 2009) 365–381.

<sup>115</sup> See generally Cartwright (n 5) for a detailed excellent discussion but in particular 82–86.

<sup>116</sup> *ibid* 82–83.

a significant role in in developing the text of the acts.<sup>117</sup> Further features of regulatory offences are that little stigma is generally attached to them, they are committed by a business, frequently a corporation,<sup>118</sup> they are generally not enforced by the police but by other regulatory body and it involves strict liability.<sup>119</sup> However, the distinctions noted are not clear-cut as the factors overlap.<sup>120</sup> The present author's concept of consumer fraud, discussed further the final chapter of thesis, in the criminal law context comes within the ambit of real crimes. It is expected that regulatory law as envisaged by Professor Cartwright comes under the broad concept of consumer protection.

### **Challenges with prosecuting fraud**

The consumer's recourse against the business in cases of fraud can be by private or public prosecution. Some of the consumer's challenges in respect of private prosecution have been discussed above. Similarly, mentioned have been some of the challenges that the consumer faces when relying on the police for consumer fraud offences. This section briefly addresses broad issues in relation to prosecuting fraud in England and Wales.

Although police forces including the Metropolitan Police were established after 1829, public prosecuting of criminal offences began after the Crown Prosecution Service was established in 1880. The traditional criminal procedure is that a member of the public may lay information, or it may originate from a trading standards officer. The police or the relevant body conducts investigations to check whether an offence has been committed or not and further details provided for use as evidence in court. The CPS, when contacted, advises the police on the merits of prosecution and whether it is the public

---

<sup>117</sup>Iain Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (3rd edn, Hart Publishing 2012) 183. See also Cartwright (n 95) 83.

<sup>118</sup>Cartwright (n 5) 84.

<sup>119</sup>ibid.

<sup>120</sup>ibid.

interest to do so. It is the burden of the prosecution to prove their case beyond every reasonable doubt.

Further to the Phillips report which raised concerns about the then procedures for criminal prosecution, the Police and Criminal Evidence Act 1980 (PACE) together with the accompanying Codes were enacted to deal both with the statutory and detailed procedures relating to how the police deals with suspects before trial.<sup>121</sup> The Codes are said to be a constitutional oddity since they are not statutory instruments. There are about five Codes of Practice and amendments effected further to the Criminal Justice Act (CJA) 2003.<sup>122</sup> They were modelled along judges' rules on trials to ensure compliance to the Code. Furthermore, section 78 of PACE was enacted to provide the sanction of not admitting evidence where it was not followed.<sup>123</sup>

The test for the efficacy of any established procedures are how they meet the purpose for which they were designed. The prevailing general procedures for criminal proceedings, were in respect of fraud prosecutions, considered inadequate, thus necessitating reforms.<sup>124</sup> It is difficult to achieve successful fraud prosecutions.<sup>125</sup> The causes are broadly evidential, procedural and substantive law.<sup>126</sup> One primary reason is the need to prove that the defendant had the mens rea for the actus reus.<sup>127</sup> It is also to be noted that the standard for finding the offender liable is beyond every reasonable doubt, a high test

---

<sup>121</sup>Police and Criminal Evidence Act 1980.

<sup>122</sup>Criminal Justice Act 2003.

<sup>123</sup>Section 78 Police and Criminal Evidence Act 1980 (n 121).

<sup>124</sup>'The Fraud Trials Committee Report (Roskill Committee Report)' (n 72).

<sup>125</sup>See generally Levi (n 57).

<sup>126</sup>Fitzpatrick (n 5).

<sup>127</sup>David Ormerod and David Perry, *Blackstone's Criminal Practice 2018* (Oxford University Press 2017) <Westlaw> accessed 5 July 2017. Anthony Arlidge and Jacques Parry, *Arlidge and Parry on Fraud* (5th edn, Sweet and Maxwell 2016). See also Simon Farrell QC, Nicholas Yeo and Guy Ladenberg, *Blackstone's Guide to The Fraud Act 2006* (Oxford University Press 2007).

that makes conviction difficult to achieve.<sup>128</sup> Judicial contribution to the difficulty relates to decisions such as the *Tesco Supermarkets Ltd v Natrass*<sup>129</sup> as well as *R v Ghosh*.<sup>130</sup>

It was in this light that the Roskill Committee was appointed to look into fraud prosecution. The Committee made about one hundred and twelve recommendations including among others the establishment of a special fraud prosecuting body the SFO, and early involvement of counsel and reform of preparatory hearings. Some of the reforms undertaken have included establishment of fraud protocols, introduction of pre-trial hearings such as preliminary hearings, improvement of case management hearings and preparatory hearings which together engender expeditious disposal of cases where matters of law, evidence and timetabling are resolved before the jury is sworn. Further measures include provisions to deal with transfer of fraud cases to the Crown Court with power lying with heads of prosecuting bodies, timetabling and case management issues are then dealt with by the court which in a fraud case may be long.<sup>131</sup>

Another crucial issue is disclosure<sup>132</sup> which follows a protocol.<sup>133</sup> Mistakes with disclosure can cause trials to fail. It is important to note that the process if not handled well may lead to adverse inference been drawn against the defence. This failure could equally attract a warning from the judge. It is also not a fishing expedition. Third party material is subject to margin of consideration. Now electronic or technological systems are used

---

<sup>128</sup> Andrew Ashworth, *Principles of Criminal Law* (6th Edition, Oxford University Press 2009).

<sup>129</sup> *Tesco Supermarkets Ltd v Natrass* 1972 AC 153 (n 16).

<sup>130</sup> *R v Ghosh* [1982] QB 1053.

<sup>131</sup> Gentle and Hodges (n 133) 9.37-9.40.

<sup>132</sup> See generally Gentle and Hodges (n 133) paragraphs 5.1-5.113.

<sup>133</sup> *ibid* paragraphs 5.55.

to enhance disclosure.<sup>134</sup> Further *R v Pearson and Cadman Disclosure* is also linked to defence statements under section 5 of CPIA 1996.<sup>135</sup>

The question of jury in respect of fraud cases similarly deserves mention. The trial by jury<sup>136</sup> was introduced to England by the Norman Dukes.<sup>137</sup> The jury was “a body of neighbours summoned by some public officer to give upon oath, a true answer to some question”.<sup>138</sup> Its sphere was wide.<sup>139</sup> Proposals for fraud trials without jury are currently not in force as questions are raised about their appreciation of issues.<sup>140</sup> The length of trial also means jurors on fraud trials may never serve again for a long time. An agreed questionnaire identifies conflicts of interest to ensure impartiality. Jurors may be agreed by the prosecution and the defence in fraud cases. Directions are then given to the jury and standard directions exist in this regard from the Judicial Studies Board. Further significant core issues in relation to fraud trials are legal professional privilege,<sup>141</sup> abuse of process,<sup>142</sup> public interest immunity<sup>143</sup> and mutual legal assistance in international disputes.<sup>144</sup>

It is thus evident that many reforms have been made to assist fraud trials. These changes notwithstanding, fraud trials remain challenging with the ghost of the Blue Arrows trial still hunting criminal prosecution of serious fraud. Proving intention would always be

---

<sup>134</sup> *ibid* paragraphs 5.61-5.66.

<sup>135</sup> Section 5 Criminal Procedure and Investigations Act 1996.

<sup>136</sup> Holdsworth (n 38) see generally 312-350.

<sup>137</sup> Sir Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I*, vol 1 (Cambridge University Press 1923) 120.

<sup>138</sup> Holdsworth (n 38) 312.

<sup>139</sup> *ibid* 313.

<sup>140</sup> Gentle and Hodges (n 133) 9.91. See also Fitzpatrick (n 5) who advocates judge and professionals improving the length of fraud trials.

<sup>141</sup> Gentle and Hodges (n 133) paragraphs 4.1-4.478.

<sup>142</sup> *ibid* paragraphs 4.79-4.124.

<sup>143</sup> *ibid* paragraphs 4.125-4.139.

<sup>144</sup> See International Criminality Unit, *Requests for Mutual Legal Assistance in Criminal Matters Guidelines for Authorities Outside of the United Kingdom-2015* (12th edn, Home Office 2015).

challenging. This explains the introduction of Deferred Prosecution Agreements, a position which does not lack opponents.

## Conclusion

This Chapter has explored in brief the history of criminal proceedings both in general and as they relate to consumers. A clear conclusion drawn from the discussion in Chapter Two and this chapter is the unbelievably structured existence in earlier times in England of courts and processes for private individuals to seek relief for reprehensible conducts which may be described as crimes. The individual who is the consumer has always had, even in the communal settings and in the boroughs, some form of recourse against fraud. It is evident that the evolution of criminal procedures has ensured that more better structures are erected to assist the consumer including the opportunity for individuals to pursue their own proceedings if so desired. Nevertheless, the existence of these procedures does not mean it is straightforward for the consumer in criminal proceedings. Criminal litigation is very technical involving significant costs.<sup>145</sup> There are sure challenges even if fraud prosecutions are undertaken by state organisations and these are discussed in more detail in Chapter Eight. The challenges notwithstanding, it is arguable that English law has advanced in structuring options for the consumer to seek redress for acts of fraud.

---

<sup>145</sup>See Richard Alexander, 'The Pursuit of Criminal Property', *Research Handbook on International Financial Crime* (Edward Elgar Publishing Ltd 2015).

## **CHAPTER SEVEN (7)**

# **THE CONSUMER'S REDRESS UNDER ENGLISH CIVIL AND REGULATORY LAW**

### **Introduction**

The civil mode of bringing proceedings under English law is juxtaposed against the criminal system. Civil proceedings apply where a private person, an individual or organisation, brings an action against another party pursuant to a cause of action under the civil law and by following procedures which regulate the conduct of civil proceedings, including the remedies available under same. The procedures for obtaining redress by victims of fraud under English civil law are not divorced from the general processes available for other causes of action. Having already examined the substantive law on fraud, this chapter deals with how the individual victim of fraud practically obtains redress.

The first part of the chapter explores specific civil and regulatory processes the consumer can employ for seeking or obtaining redress for the consumer with specific references to financial services, consumer credit and conveyancing transactions. The second part of the chapter deals with the role of organisations devoted to protecting the consumer in consumer specific statutes. The third part looks at the role of institutions dedicated to non-specific statutes but whose functions protect consumers and investors such as the FCA. These are representative organisations and institutions which derive their legitimacy fundamentally from statutory provisions and whose functions directly and indirectly protect the consumer. It concludes on the theme that while the seeds for the civil and regulatory approaches for protecting victims of fraud may have been laid in earlier times,

organic reforms have vastly enhanced the measures for seeking redress for the consumer under English civil law.

## **Direct actions by the consumer**

### **Self-remedy**

The consumer can adopt certain actions personally and independent of an external organisation in order to resolve frauds it has suffered. These measures are often pre-litigation. By focusing on present procedures for civil litigation in England, a modern observer may assume that pre-action procedures introduced by the Woolf Reforms are of recent origin. This is not the case. It appears that pre-action measures existed in times past for the resolution of civil disputes. There was, among others, a provision which regulated the resolution of disputes among burgesses that suggests the existence of pre action measures in earlier times.<sup>1</sup>The plaintiff was required to demand thrice at the defendant's house and should do him right and whatever law requires, refusal upon which a reasonable complaint to the justice of the town.<sup>2</sup>Plucknett has observed that the 'object of the provision was to prevent matters coming into court before it was clear that private negotiations had been tried and failed.'<sup>3</sup>The consumer in today's world would still make contact with the business and explore internal dispute resolution mechanisms. Right to set off, where the contract price has not been fully paid, complaints on trading platforms, right to cancellation, rescission, cooling off periods are among some of the available self-help remedies.<sup>4</sup>Generally most consumer disputes are resolved at this state without need for further action. Increasingly, consumers are using social media to name and shame

---

<sup>1</sup>Theodore Frank Thomas Plucknett, *A Concise History of the Common Law* (Liberty Fund Inc 1956) 383.

<sup>2</sup>*ibid.*

<sup>3</sup>*ibid.*

<sup>4</sup> Colin Scott, 'Enforcing Consumer Protection Laws', *Handbook of Research on International Consumer Law* (Edward Elgar Publishing 2010).



businesses and to warn others of businesses whose practices are fraudulent. This is a complex area that could lead to claims against consumers if the information put out is unfounded.

### **Media**

The consumer can also seek assistance through the role played by the media in particular local newspapers. There is limited research in England on the role played by the general media in assisting consumers to deal with consumer problems. Indeed research is at a very preliminary stage by Oxford University.<sup>5</sup> It is suggested that there are two principal means by which the consumer seeks help.<sup>6</sup> First by writing to them to seek assistance in the situations where the consumer's purchase of an item was pursuant to an advert in the relevant newspaper.<sup>7</sup> The disadvantage to this option is that the consumers receipt of the assistance by the newspaper is subject to the latter's willingness to do so.<sup>8</sup> Also, some newspapers operate readers advisory services and these assist consumers in pursuing claims against businesses.<sup>9</sup> However the means by which the media broadly protects consumers is in generally how they pursue cases against businesses.<sup>10</sup> In this regard social media has been very prominent as a tool for consumers. British Broadcasting Corporation (BBC) programmes on rogue traders and builders altogether help in protecting consumers in the United Kingdom. In the UK organisations such as *Which?* have been very instrumental in assisting the consumer in dealing with problems with businesses.<sup>11</sup>

---

<sup>5</sup> See University of Oxford-Faculty Law, 'Informality and the Media in Consumer Protection in Emerging Economies' <<https://www.law.ox.ac.uk/research-and-subject-groups/informality-and-media-consumer-protection-emerging-economies>> accessed 15 September 2018 where the University of Oxford is undertaken research.

<sup>6</sup> Ison (n 27) 240.

<sup>7</sup> *ibid.*

<sup>8</sup> *ibid.*

<sup>9</sup> *ibid* 240–241.

<sup>10</sup> *ibid* 241–242.

<sup>11</sup> *Which?*, '60 Years of Which?' <<https://www.which.co.uk/about-which/who-we-are/timeline>> accessed 15 September 2018.

Suggestions were made regarding the possible introduction in the United Kingdom of what was referred in North America as Better Business Bureaux but there is no indication that such steps or agencies were introduced.<sup>12</sup> Further issues to take into account are that trade offences are not regularly reported by newspapers.<sup>13</sup> More crucially is the fact that local newspapers depend on advertisements by local businesses and these affects their willingness to support complaints against the businesses. Furthermore, they are also afraid of libel claims being mounted against them by the businesses. The future of local newspapers looks bleak as even the *Evening Standard* in London is facing challenges.

### **Citizens Advice Bureau**

An independent organisation that similarly helps the consumer in dealing frauds is the Citizens Advice Bureau (CAB). The service is free to the public although it has faced funding cuts over the years. Conceived in 1935 as a government information service for welfare during war time, they were established on 4 September 1939.<sup>14</sup> Although it has public support, it is independent and helps consumers with a wide range of legal issues.<sup>15</sup> It has volunteers who assist individuals in finding the right course of action in dealing with their matters. There is often a lawyer present at CABs who provides legal advice or signposts consumers to legal aid firms that is able to assist the consumer. One of the disadvantages of the advice bureau is that they normally lack specialist advisors and the knowledge of the advisors is often limited.<sup>16</sup> In this regard they often do not have knowledge of the technical processes of bringing proceedings against business by the

---

<sup>12</sup> Ison (n 27) 242–245.

<sup>13</sup> Ison (n 6).

<sup>14</sup> Citizens Advice Bureau, 'History of the Citizens Advice Service' <<https://www.citizensadvice.org.uk/about-us/how-citizens-advice-works/who-we-are-and-what-we-do/history-of-the-citizens-advice-service/>> accessed 16 September 2018.

<sup>15</sup> Terence G Ison, *Credit Marketing and Consumer Protection* (Croom Helm Ltd 1979) 236–239.

<sup>16</sup> *ibid* 237.

consumer.<sup>17</sup> In the present author's experience as a practitioner, persons who contact CABs are often set along the path of litigation and when the technical procedures of litigation confront the claimant, often the CAB is not available to continue assisting, especially where the person is not entitled to legal aid. Funding cuts have also affected the work of CABs.<sup>18</sup> Nevertheless it is undeniable that CABs play a very instrumental role protection consumers in the United Kingdom with reference to mainly consumer specific legislations.

### **The consumer and court litigation**

The consumer has the option of pursuing court litigation where all other options have failed in resolving the dispute. Generally, English law permits the consumer to directly bring civil actions against businesses. Under the common law, the consumer can bring contractual claims against the defendant in the matter where the requirements under the cause of action are satisfied, for instance, a claim for deceit further to a contract.<sup>19</sup> Although the Magistrates Court<sup>20</sup> has some basic jurisdictions in civil matters, the English civil court system<sup>21</sup> basically includes essentially the County Courts, the High Courts, Court of Appeal and the Supreme Court which replaced the House of Lords.<sup>22</sup> The County Courts, governed by a plethora of statutes,<sup>23</sup> have jurisdiction in consumer credit claims,<sup>24</sup> housing and land disputes, contract and tort, claims for recovery of land and relief from

---

<sup>17</sup> *ibid.*

<sup>18</sup> For discussion on funding see Peter Spiller and Kate Tokeley, 'Individual Consumer Redress', *Handbook of Research on International Consumer Law* (Edward Elgar Publishing 2010).

<sup>19</sup> *Derry and others v Peek* (1886) 1 ER Rep 1 (House of Lords).

<sup>20</sup> Magistrates Courts Act 1980.

<sup>21</sup> See generally Emily Finch and Stefan Fafinski, *Legal Skills* (4th edn, Oxford University Press 2013). See also Ian McLeod, *Legal Method* (4th edn, Palgrave Macmillan 2002). See generally Stuart Sime, *Civil Procedure* (6th edn, Oxford University Press 2003) 11–20.

<sup>22</sup> See Constitutional Reform Act 2005. For the general principles underlying the system see Sir Jack IH Jacob, *The Fabric of English Civil Justice* (Stevens & Sons Limited 1987).

<sup>23</sup> County Courts Acts 1984. See Courts Act 1971, Section 16 and Courts and Legal Services Act 1990 Section 71.

<sup>24</sup> Sime (n 21) 14.

forfeiture.<sup>25</sup> The higher courts are more relevant to perhaps non-consumer specific fraud legislations claims and appeals.

In earlier times such consumer fraud claim processes would normally take place in the local, communal, private or the Royal<sup>26</sup> courts.<sup>27</sup> An instance of the local court is the county court<sup>28</sup> and examples of the private courts were the ecclesiastical and lay courts of larger land owners. The principal court for dealing with fraud claims of equity, until the merger was the Court of Chancery which was located in Westminster Hall in London.<sup>29</sup> There were other smaller courts such as the provincial courts including the Oxford and Cambridge.<sup>30</sup>

Following questions about the fitness of the traditional civil court system to meet the needs of the consumer, the small claims track, not court, was introduced. The small claims track is particularly relevant to low value consumer fraud claims.<sup>31</sup> The bulk of consumer disputes involve relatively small amounts. Indeed in a study conducted in 1968 and 1969 out of a total of 1,238 actions in county courts only one related to an individual suing a firm. Retail transactions disputes were in the majority of cases brought in the county courts. Most of the cases were brought by businesses against consumers and very few cases brought by consumers against businesses. Ison sums it up this way that; '*delinquent buyers were commonly hauled into court. Delinquent sellers were not.*' Reforms

---

<sup>25</sup>ibid.

<sup>26</sup>Theodore Frank Thomas Plucknett, *A Concise History of the Common Law* (5th edn, The Law Book Exchange Ltd 2001) 146–147.

<sup>27</sup>WS Holdsworth, *A History of English Law*, vol 1 (3rd edn, Methuen & Co Ltd 1922) 5. See generally Plucknett (n 1) 83–94.

<sup>28</sup>See generally Holdsworth (n 27) 6–11.

<sup>29</sup>WJ Jones, *The Elizabethan Court of Chancery* (Oxford University Press 1967) 6. See generally Holdsworth (n 27) 395–476. Plucknett (n 26) 180–181.

<sup>30</sup>Jones (n 29) 348–377.

<sup>31</sup>See generally John Baldwin, *Small Claims in the County Courts in England and Wales* (Oxford University Press 1997).

introduced in 1970 enable alternative dispute resolutions such as arbitration, adjudication and conciliation including the introduction of court forms. Yet it is suggested that some of the changes helped small businesses rather than consumers.

There was a general feeling among consumers that the court is not the right place for them to take on businesses. Scott has observed and rightly that *'all other things being equal, the greater the loss the more likely is a consumer to escalate their complaint to more costly and time consuming process'*.<sup>32</sup> However the introduction of the small claims system within the county court has helped to improve the situation considerably.<sup>33</sup> Indeed today one can talk about online claim courts which have further made it easier for the consumer to bring court actions against businesses. Generally, consumers do not feel comfortable speaking to judges. Although some of the challenges faced by consumers can be remedied by employing the services of solicitors, it is very evident that the cost of solicitors is a disincentive to the consumer use of a solicitor. This is helped by the consumer's visit to CABs which are free. Despite the many improvements and reforms, it is evident that in respect of consumer specific legislations court actions would always be limited.

Today the consumer faces more significant funding challenges. Legal Aid which is the means by which the government assists consumers with the cost of the claims is in principle available to consumers for civil matters in England but it has suffered considerable cuts in recent times.<sup>34</sup> Significantly it is not available for all types of claims. Even so, there are considerable tests which must be met in order to qualify. People also have questions about the quality of legal aid lawyers or even their commitment and the

---

<sup>32</sup> Scott (n 4).

<sup>33</sup> See generally Baldwin (n 31).

<sup>34</sup> See Spiller and Tokeley (n 18).

present author has experienced these many times when signposting. However a peer review system in England and accreditation schemes ensure that quality is maintained.<sup>35</sup> An alternative to legal aid is the Contingency Fee Agreement or the CFA which provides an avenue for the consumer to get the assistance of a lawyer.<sup>36</sup> The solicitors get paid based upon the success of the claim with the fee been higher than normally would be charged.<sup>37</sup> While historically unlawful in the United Kingdom, it is now lawful further to a number of provisions. While it has encouraged people to have access to the courts, it has been criticised on the basis that it fosters a litigation culture which promotes unethical behaviour from solicitors, a criticism which is not necessarily true.<sup>38</sup> The challenges associated with court claims have made others suggest it might be unrealistic.<sup>39</sup>

### **Enforcing through Equity and the common law**

The consumer may bring claims under the common law or in equity. In respect of serious fraud claims under non-specific consumer statutes, the small claims court is not the appropriate venue particularly as they may involve large amounts. The concept of constructive trust<sup>40</sup> applies where a third party holds money for a defendant in circumstances where the third party, which could be a financial institution, realised or must have realised that the money had been obtained in a fraudulent manner.<sup>41</sup> For constructive trust to be imposed by the court there must have been knowing receipt<sup>42</sup> or

---

<sup>35</sup> *ibid.*

<sup>36</sup> *ibid.*

<sup>37</sup> *ibid.*

<sup>38</sup> *ibid.*

<sup>39</sup> Scott (n 4).

<sup>40</sup> Jonathan Fisher, 'Fraud in Civil and Criminal Law', *Research Handbook on International Financial Crime* (Edward Elgar Publishing Ltd 2015) 318.

<sup>41</sup> See generally Jill E Martin, *Modern Equity* (16th edn, Sweet and Maxwell 2001) 296–338. See also *Paragon Finance plc v DB Thakerar & Co [1999] 1 All ER 400*. See *JJ Harrison (Properties) Ltd v Harrison 2000 1 BCLC 162* in the context of fraud.

<sup>42</sup> Martin (n 41) 310–318. See also Fisher (n 40) 318–319.

dishonest assistance.<sup>43</sup> The investor can trace under both the common law and equity<sup>44</sup> to pursue his beneficial interest in property.<sup>45</sup> Tracing is not a particularly straight forward concept.<sup>46</sup> In respect of conveyancing fraud negligence can be one of such grounds as significantly demonstrated recently.<sup>47</sup> The remedies available to the modern claimant in civil proceedings under English law are similar to those under early law to the extent that they are determined by the cause of action. An action based in contract results in principally damages or compensation while those based in tort leads to damages.<sup>48</sup>

### **Class actions**

The clear limitations experienced by an individual consumer taken personal court action against the business is minimised by the procedure referred to as class or public interest actions.<sup>49</sup> There are many justifications which have been given for class actions including that of cost savings for both the claimant and the business defendant.<sup>50</sup> The savings often manifest in showing that different individuals are then not bringing multiple claims against the business defendant.<sup>51</sup> A distinction is often made between recoverable and non-recoverable individual claims where an individual can sometimes benefit from the

---

<sup>43</sup> Martin (n 41) 306–310. See also Fisher (n 40) 319.

<sup>44</sup> See generally Martin (n 41) 300–301, 677–711. See also Fisher (n 40) 319–320.

<sup>45</sup> *Boscawen v Baywa*: 1995 4 All ER 769 per Lord Millet at 387.

<sup>46</sup> *Burrow Clowes International Ltd (in Liquidation) v Vaughan* 1992 4 All ER 22.

<sup>47</sup> *P & P Property Ltd v Owen White and Catlin* [2018] EWCA Civ 1082 (CA).

<sup>48</sup> See generally FH Lawson and Harvey Teff, *Remedies of English Law* (2nd edn, Butterworths & Co (Publishers) Ltd 1980).

<sup>49</sup> Iain Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (3rd edn, Hart Publishing 2012) 262–273; Deborah R Hensler, 'Using Class Actions to Enforce Consumer Protection Law', *Handbook Research on International Consumer Law* (Edward Elgar Publishing Ltd 2010); David Royce and others, 'Class Actions' (December 2017) <<https://gettingthedealthrough.com/area/82/jurisdiction/65/class-actions-2018-england-wales/>> accessed 15 September 2018; Frances Murphy and others, 'Class/Collective Actions in the UK (England and Wales): Overview' (7 January 2018) <[https://uk.practicallaw.thomsonreuters.com/6-618-0351?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](https://uk.practicallaw.thomsonreuters.com/6-618-0351?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1)> accessed 15 September 2018.

<sup>50</sup> Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (n 49) 262.

<sup>51</sup> *ibid.*

class judgment where his individual claim might be considered non-recoverable.<sup>52</sup> Class actions are opposed on the basis that it effectively leads to legalised blackmail where defendants are compelled to defend actions even though clearly such actions do not have merits.<sup>53</sup>

Class actions in the manner in which they are pursued in the United States are not available to claimants in England. Further to the Woolf reforms, a recommendation was made for what is referred to in the United Kingdom as Group Litigation Order. There are significant differences between the normal class action and the group litigation order. First the individual would have to opt in into a group litigation order in order to participate<sup>54</sup> It is in this regard that distinction is drawn between the group litigation order and the concept of the representative claimant who 'sues on behalf of all similarly situated individuals who will opt out of the litigation but are otherwise not required to actively participate'. Further the GLO provides 'skeletal regulation of the various issues that might arise in the course of the action'.<sup>55</sup>

Under Rule 19 representative claims enables claims to be pursued by another person or persons on behalf of others where they share the same interest in the claim. Details of representative claims are spelt out in the CPR rule 19.6.1. This provides that where more than one person has the same interest in a claim it may be begun or continued according to the court's order by or against one or more of the persons who has the same interest as representatives of any other persons who have that interest. The courts can similarly direct that an individual or a person may not act as a representative.<sup>56</sup> Any judgment made by

---

<sup>52</sup> *ibid* 262–263.

<sup>53</sup> *ibid*.

<sup>54</sup> *ibid* 264.

<sup>55</sup> *ibid*.

<sup>56</sup> Civil Procedure Rules 1998 SI 1998/3132 19.6.2.



the courts is binding on the parties or persons involved in the litigation but may only be enforced by or against the person which is not a party to the claim with the permission of the court.<sup>57</sup> It is further suggested that representative actions in the United Kingdom have suffered from the limitation going back to the decision of the court in *Markets & Company Ltd v Knight Steamship Co Ltd*.<sup>58</sup> The case requires parties in representative actions to have the same interest. This means that individuals with differing contract and individual damage claims cannot be aggregated within any action.<sup>59</sup> Further, more than one party can be named as claimant or defendant to a claim. Further parties could also be added to pending claims.

Collective actions can similarly be brought in the Competition Appeals Tribunal (CAT) under the Competition Act 1998 (As Amended) by section 81 and Schedule 8 of the Consumer Rights Act 2015. The procedures are further clarified under Rules of Procedure (SI 2015/1648) and Guide to Proceedings.<sup>60</sup> The group litigation order effectively means the order which is made by the courts to provide for the case management of claims which give rise to, or related issues of fact or law.<sup>61</sup> It is suggested that group litigation orders in the United Kingdom have been used for high value claims and are not appropriate for small claims.<sup>62</sup> It is very clear in the way GLOs and representative claims are regulated that there is a reluctance to encourage a litigious culture in the United Kingdom. The manner RBS settled the claim with the shareholders shows the power of joint actions.

---

<sup>57</sup> *ibid* 19.6.4(a).

<sup>58</sup> *Markets & Company Ltd v Knight Steamship Co Ltd [1908-1910] All ER Rep.*

<sup>59</sup> *ibid.*

<sup>60</sup> For further details see Royce and others (n 49); Murphy and others (n 49).

<sup>61</sup> Civil Procedure Rules 1998 SI 1998/3132 (n 56).

<sup>62</sup> Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (n 49) 266.

### **Rights of actions for private persons in financial services**

While it is reasonable for institutions to have the mandate to pursue actions on behalf of private persons, it is appropriate if private persons could also exercise that right themselves. Under FSA 1986, the consumer could bring a claim against the defendant under prescribed circumstances.<sup>63</sup> The main provision under FSMA was section 150<sup>64</sup> but further to amendments introduced by FSA 2012, the current position on claims by private persons<sup>65</sup> is premised upon section 138D of FSMA 2000 which provides among others that “*a rule made by the PRA may provide that contravention of the rule is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty*” and “*A contravention by an authorised person of a rule made by the FCA is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty*”. Among others, other persons can bring the action in prescribed circumstances. Word restrictions prevent detailed discussions, but relevant authorities are referenced.<sup>66</sup>

### **Judicial Review**

The consumer victim can rely on judicial review to seek to challenge the decision of regulatory bodies.<sup>67</sup> The remedies available for judicial review are quashing orders,

---

<sup>63</sup>Financial Services Act 1986 s. 62. See also sections 62A (enacted by section 193 CA 1989), 166, 171 (6), 185 (6), 3, 5, 95, 56, 57 and 58 (3) Financial Services Act 1986. See also *Grant v National Board [1956] AC 649*.

<sup>64</sup>Financial Services and Markets Act 2000 s.150. Financial Services and Markets Act 2000 See also sections 20(3), 26, 27, 202 (3), 71 and 241.

<sup>65</sup>Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001 (SI 2001/2256) Regulations 3, 6 (2) and (3).

<sup>66</sup>Barry Rider, Charles Abrams and Michael Ashe, *Guide to Financial Services Regulation* (3rd Edition, CCH Editions Ltd 1997) for discussion on FSA 1986 Section 62. See also Jonathan Russen, *Financial Services: Authorisation, Supervision, and Enforcement: A Litigator's Guide* (Oxford University Press 2006) 117–135 for FSMA 2000. For a current discussion see George Walker, Robert Purves and Michael Blair, *Financial Services Law* (4th edn, Oxford University Press 2018) 636–665 from 15.01-15.108.

<sup>67</sup>Barry A. Rider, ‘Self Regulation: The British Approach to Policing Conduct in the Securities Business, with Particular Reference to the Role of the City Panel on Take-Overs and Mergers in the Regulation of Insider Trading’ (1978) 1 *Journal of Comparative Law and Securities Regulation* 319.

prohibition, mandatory, declaration, injunction. The court can also award costs in favour of the successful claimant. Further to the Civil Procedure Rules 1998 (as amended) pre-action protocol for judicial review guides claimants on the procedures for claims to the High Court. The term public bodies has been construed broadly by the courts as bodies established by statutory provisions or more importantly or where it exercises a public function.<sup>68</sup>The courts have held that the decision of a privately constituted body was subject to judicial review where that body exercises a public function.<sup>69</sup> The grounds for judicial review are unlawfulness or illegality, irrationality or unreasonableness, procedural impropriety, legitimate expectation or where the decision breaches human rights provisions.<sup>70</sup> Where the claim is properly pursued judicial review can be a powerful tool to challenge the decision by a public body not to bring proceedings on the consumer's behalf.

### **Ombudsman Schemes**

A non-litigious approach to consumer protection is the work of the Financial Ombudsmen Service (FOS) which comes after unsuccessful resolution in matters which include mortgage and PPI<sup>71</sup> by internal dispute resolution channels.<sup>72</sup>The FOS was established in December 2001 in order to provide quick and less formal alternative means of resolving disputes.<sup>73</sup>Further to section 17 of FSMA there are two jurisdictions of the FOS, but the details are beyond the scope of this work. First the consumer must submit a complaint to the firm and it is only after the firm has issued a final response letter that the consumer

---

<sup>68</sup>*R v Panel for Takeovers and Mergers Ex P Datafin [1987] 1 QB 815.*

<sup>69</sup>*ibid.*

<sup>70</sup>*ibid.*

<sup>71</sup>Financial Conduct Authority, *FCA Handbook* (Financial Conduct Authority) DISP App 1 and DISP App 3 <[www.fca.org.uk](http://www.fca.org.uk)>.

<sup>72</sup>*ibid* DISP I.

<sup>73</sup>Financial Services and Markets Act 2000 (n 64) Part XVI of section 225.

can go to the FOS. When the FOS has received the complaint it deals with it according to its internal processes.

Further to section 231 of FSMA the FOS has power to request more information from the firm. Under section 228 of FSMA, the FOS can make awards which must be determined by reference to what is in the opinion of the Ombudsman fair and reasonable in the circumstances of the case. The Ombudsman takes into account the laws, regulations, rules and guidance, standards and codes of conducts to make decisions. The FOS can award financial compensation to the consumer. It can also direct the firm to take corrective action. The Legal Services Ombudsman exists to protect consumers of legal services and has similar principles.<sup>74</sup>

### **Consumer compensation schemes**

Consumer compensation schemes become relevant when the consumer cannot rely on the firm due to circumstances such as bankruptcy. Further to the Clucas Report, the Stock Exchange had a discretionary compensation which was in existence prior to the emergence of the 1986 Financial Services Act called the Investors Compensation Scheme (ICS).<sup>75</sup> The Act expanded the scope of individual investors who are covered under the compensation scheme by covering all forms of investments.<sup>76</sup> The scheme began in August 1988 and protected investors who used authorized firms.<sup>77</sup>

The Financial Services Compensation Scheme (FSCS) is the current scheme and its purpose is defined in section 213 (1) of FSMA. In brief <sup>78</sup>the consumer, an eligible

---

<sup>74</sup>See generally Mary Seneviratne, *The Legal Profession: Regulation and the Consumer* (Sweet and Maxwell 1999).

<sup>75</sup>JUSTICE, 'The Protection of the Small Investor' (JUSTICE Educational and Research Trust 1992) 34.

<sup>76</sup>ibid.

<sup>77</sup>JUSTICE (n 75).

<sup>78</sup>For detailed treatment see Adam Samuel, *A Practitioner's Guide to Consumer Financial Services Complaints and Compensation* (2nd edn, Sweet and Maxwell 2017). See also Adam Samuel, *Consumer*

claimant, must have made a protected claim against a relevant person who is in default. The consumer must have assigned the whole or part of his right to the FSCS. The consumer's claim can be made personally or by another person on behalf of the consumer. This provides that the FSCS must establish a scheme for compensating persons in cases where relevant persons are unable or are likely to be unable to satisfy claims against firms. Like its predecessors,<sup>79</sup> the FSCS is funded by levies paid by authorised persons so funding can be a potential challenge. The scheme is thus not a replacement for rational investment decision making.<sup>80</sup> Professor Singh has raised a few questions about the scheme including its complexity, consumer awareness of the scheme, the timing for payment to consumers, among others.<sup>81</sup> Meanwhile real estate consumers are protected under the Law Society Compensation Scheme which has no limit.<sup>82</sup> The SRA is contemplating reducing the indemnity cover limit for firms, a step about which concerns have been raised regarding its impact on consumers.

### **The role of consumer specific agencies**

#### **The Competition and Markets Authority (CMA)**

The Competition and Market Authority (CMA) is an institution that protects the interest of vulnerable consumers in England. It was formed on 1st October 2013 but actually began operating on 1st April 2013.<sup>83</sup> It recently replaced the Competition Commission

---

*Complaints and Compensation: A Guide for Financial Services Market* (1st edn, City and Financial Planning 2005).

<sup>79</sup>JUSTICE (n 75) 37–40.

<sup>80</sup>JUSTICE (n 75).

<sup>81</sup> Dalvinder Singh, 'Northern Rock, Depositors and Deposit Insurance Coverage: Some Critical Reflections' (2010) 2 *Journal of Business Law* 55.

<sup>82</sup>For detailed treatment see Seneviratne (n 74).

<sup>83</sup>See generally Competition and Markets Authority (CMA), 'How the CMA Investigates Competition and Consumer Issues' (25 September 2014) <<https://www.gov.uk/government/collections/how-the-cma-investigates-competition-and-consumer-issues>>.

(CC)<sup>84</sup> and the Office of Fair Trading (OFT). The CC was not a regulator<sup>85</sup> and was formed as a replacement for the monopolies and mergers Commission of 1999. The CMA is the single body which took over the functions of the CC and OFT's Consumer enforcement Powers.<sup>86</sup> The CMA therefore is responsible for among others, bringing enforcement proceedings in favour of the consumer against businesses which act in breach of competition regulations, Unfair Terms in Consumer Contract Directives and regulations, Consumer Rights Act 2015.<sup>87</sup> It would be noted that CMA functions are more related to consumer protection regulation. The CMA has been undertaking market investigations across sectors whilst the Trading Standards Services (TSS) deals with enforcement of consumer law.<sup>88</sup>

### **National Trading Standards (NTS)**

The National Trading Standards (NTS), a national organisation working through and coordinating local and regional trading standards teams across the country protects the interest of consumers.<sup>89</sup> Regional NTS commence proceedings against business entities.<sup>90</sup> NTS enforcement covers mass marketing scam, illegal money lending estate agents, and enforcement issues that go beyond local authorities' boundaries.<sup>91</sup> The NTS is funded by the Business Innovation and Skills and the Food Standards Agency (FSA) but works in collaboration with institutions such as the Chartered Trading Standards

---

<sup>84</sup>See generally 'Competition Commission' which is archived <<https://www.gov.uk/government/organisations/competition-commission>> accessed 18 February 2018.

<sup>85</sup>'Competition Commission' (n 84).

<sup>86</sup>Competition and Markets Authority (CMA) (n 83).

<sup>87</sup>ibid.

<sup>88</sup>Competition and Markets Authority (CMA), 'CMA Annual Report and Accounts 2016/17' (Competition and Markets Authority 2017) 35 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/628985/cma-annual-report-accounts-16-17-print-ready.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/628985/cma-annual-report-accounts-16-17-print-ready.pdf)> accessed 11 July 2018.

<sup>89</sup>The National Trading Standards, 'The National Trading Standards' <<http://www.nationaltradingstandards.uk/>> accessed 18 February 2018.

<sup>90</sup>ibid.

<sup>91</sup>ibid.

Institute.<sup>92</sup> Consumers can report any trading standards issues by contacting one of the local partners.<sup>93</sup>

One of the disadvantages of trading standards departments are their inaccessibility to the general public. The special role played by trading standards department meant local authorities had renamed them trading standards department of consumer protection departments further to the Trade Descriptions Act 1968. Nevertheless they were unique in that they attended consumers residence where they were able to gather a lot of information that were able to assist the consumer if court proceedings were issued.

### **The National Trading Standard Estate Agency Team**

The National Trading Standard Estate Agency Team takes its powers under the Estate Agent Act 1979. The NTS Estate Agency Team is responsible for enforcing the powers under the 1979 Act which includes issuing banning and warning orders, approving and monitoring consumer redress teams and working in conjunction with Citizen Advice Bureau and Chartered Trading Standard institute to provide generic advice on estate agency matters.<sup>94</sup> Where an Estate Agent is the subject of a prohibition or warning order it can lodge an appeal to the First Tier Tribunal of General Regulatory Chamber.

Unfortunately, the NTS has stated that it does not have the resources to give consumer advice nor can it be involved in resolving disputes or complaints against businesses. It therefore refers consumers to the Citizens Advice Bureau or to one of the three Ombudsman Redress Teams. These are the Property Ombudsman's, Ombudsman Services; Property, and the Property Redress Team. These redress schemes help in

---

<sup>92</sup>ibid.

<sup>93</sup>ibid.

<sup>94</sup>'National Trading Standards Estate Agency Team' <<http://www.powys.gov.uk/en/licensing-trading-standards/national-trading-standards-estate-agency-team/>> accessed 18 February 2018.

Candidate Number: 1341103

resolving disputes between consumers and estate agent businesses. For instance, the TPO recently reported that it upheld the sales particulars which an estate agent provided to a buyer which gave an incorrect impression on material facts. The Estate Agent was found to have breached paragraph 71 of the TPO Code which obligate Estate Agents to accurately and clearly describe what they are selling and the Consumer Protection of Unfair Trading Regulations 2008 (CPUT) which requires an Estate Agent to disclose all information material to an average buyer.<sup>95</sup>

### **Role of organisations and institutions with broad consumer mandates**

#### **Solicitors' Regulatory Authority (SRA)**

Another institution to which a consumer can direct his complaint is the Solicitors' Regulatory Authority (SRA).<sup>96</sup> While the Law Society represents the interest of solicitors in England and Wales, the SRA is the regulatory body of the solicitor profession. Where a consumer has a complaint against a solicitor or a firm of solicitors and the consumer has exhausted internal administrative procedures and is not satisfied with the outcome he can make a complaint to the SRA.<sup>97</sup> The SRA has a number of enforcement powers which it can impose on the firm of solicitors if they are found in breach of laws or rules. These include fines and rebukes, reprimands or severe reprimands.<sup>98</sup> The SRA would apply these sanctions further to its powers under the Legal Services Act 2007 if it is believed that the solicitor has acted in breach of any of its principles.<sup>99</sup>

---

<sup>95</sup>See generally Marios Koutsias and Chris Willett, 'The Unfair Commercial Practices Directive in the UK' (2012) 5 Erasmus Law Review 237.

<sup>96</sup> See generally Seneviratne (n 74).

<sup>97</sup>See generally Solicitors Regulatory Authority, 'Solicitors Regulatory Authority Disciplinary Procedure Rules and Guidance' <<http://www.sra.org.uk/solicitors/handbook/discproc/content.page> and <http://www.sra.org.uk/consumers/solicitor-check/publications/disciplinary-guidance.page>>

<sup>98</sup>ibid.

<sup>99</sup>Legal Services Act 2007.



Candidate Number: 1341103

The SRA also has the power to publish regulatory protections on its website, this is particularly the case where the solicitor's firm is found guilty by the Solicitor's Disciplinary Tribunal (SDT) where the individual is found to have breach the rules of the SDT.<sup>100</sup> The SDT takes its powers under statute<sup>101</sup> and the procedures are set out in the SRA Disciplinary Procedure Rules 2011.<sup>102</sup> Some of the factors which the SDT takes into account in issuing proceedings are whether the behaviour was dishonest or lack integrity, whether the behaviour was premeditated, repeated or systematic, whether the solicitor abused the position of authority or trust and where among others the victim of the conduct was vulnerable.<sup>103</sup> The SRA before it issues proceedings needs to be satisfied that it is in the public interest to do so.<sup>104</sup> Public interest consideration includes the need to promote public confidence and accountability through a public hearing, the need to resolve material disputes over facts, proportionality among others.<sup>105</sup> Where a Consumer is dissatisfied with the conduct of a solicitor or solicitor's firm, a consumer can report to the Legal Ombudsman who seek to resolve the consumer's concerns.<sup>106</sup>

### **The Department of Trade and Industry (DTI)**

One of the bodies that historically protected the investor is the Department of Trade and Industry (DTI).<sup>107</sup> The Secretary of State had power to act to protect investors where it was evident that the management of a company would not serve investors or the public's best interests due sometimes to bankruptcy or insolvency.<sup>108</sup> The DTI under the Company

---

<sup>100</sup>Solicitors Regulatory Authority (n 97).

<sup>101</sup>Solicitors Act 1974 s. 47.

<sup>102</sup>SRA Disciplinary Procedure Rules 2011.

<sup>103</sup>See generally Solicitors Regulatory Authority (n 97).

<sup>104</sup>See generally *ibid.*

<sup>105</sup>*ibid.*

<sup>106</sup>'Legal Ombudsman' <<http://www.legalombudsman.org.uk>> accessed 22 February 2018.

<sup>107</sup>Michael Levi, *Regulating Fraud: White-Collar Crime and the Criminal Process* (Cambridge University Press 1987) 194–195.

<sup>108</sup>See generally James J Fishman, 'Enforcement of Securities Laws Violations in the United Kingdom' (1991) 9 *International Tax & Business Lawyer* 131. Rider, Abrams and Ashe (n 66) 396–397.

Directors Disqualification Act 1986<sup>109</sup> as well as the official receiver or a liquidator could apply to the court for an order making it a criminal offence for a person named in order to be involved in the management, promotion or winding up of a company based in the United Kingdom.<sup>110</sup> There were occasions where under section 59 of the FSA,<sup>111</sup> individuals were banned and also under the Company Directors Disqualifications Act.<sup>112</sup> The powers the DTI had were greater than the powers under the Financial Services Act 1986. An order could be sought where one is convicted of an offence involving the management of the company, including insider dealing,<sup>113</sup> following an error report from an inspector appointed under the Companies Act or under section 105 of the FSA 1986 or pursuant to an investigation by the Serious Fraud Office (SFO).<sup>114</sup> However these powers were criticised as not being effective in protecting the interests of investors.<sup>115</sup>

#### **The Panel on Takeover and Mergers (The Panel).**

The Panel on Takeover and Mergers (The Panel)<sup>116</sup> whose functions protects investors across EEA and the Isle of Man is an independent body whose primary function is to administer the City Code on Takeovers and Mergers (The Code).<sup>117</sup> The Panel among others, supervises and regulates takeover bids and merger transactions on a regulated market, ensure the integrity of the UK Financial Market.<sup>118</sup> The Panel has powers to

---

<sup>109</sup>Company Directors Disqualifications Act 1986.

<sup>110</sup>Rider, Abrams and Ashe (n 66) 395–397.

<sup>111</sup>Financial Services Act 1986 (n 63).

<sup>112</sup>*ibid* s 59.

<sup>113</sup>*R v Goodman (1993)*.

<sup>114</sup>Financial Services Act 1986 (n 63).

<sup>115</sup>Rider, Abrams and Ashe (n 66) 396–397.

<sup>116</sup>Chapter 1 of Companies Act 2006.

<sup>117</sup>The Panel on Takeovers and Mergers, 'The Takeover Code 12th Edition' <[www.thetakeoverpanel.org.uk](http://www.thetakeoverpanel.org.uk)>.

<sup>118</sup>See generally Barry A. Rider, 'Self Regulation: The British Approach to Policing Conduct in the Securities Business, with Particular Reference to the Role of the the City Panel on Take-Over and Mergers in the Regulation of Insider Trading' (1978) 1 *Journal of Comparative Law and Securities Regulation* 319. Rider, Abrams and Ashe (n 66) 57–58. See also Fishman (n 108).

Candidate Number: 1341103

restrain a person from acting in breach of rules or to act inconsistent with the rules<sup>119</sup> and the ability to request companies to disclose only public information, the breach of which the private person is entitled to imprisonment of a term not exceeding two years or a fine or both. The Panel has a range of enforcement powers including sanctions.<sup>120</sup> It can also order a defendant to pay such compensation as it thinks just and reasonable including payment of interest. The Panel can also make an application to court if it is satisfied that there is a reasonable likelihood that a person would contravene a rule-based requirement or that a person has contravened a rule-based requirement or disclosure requirement. It appears that an individual investor does not have the right to seek an injunction at the High Court.<sup>121</sup>

#### **Civil Recovery under Part 5 of the Proceeds of Crime Act 2002**

It is unquestionable that the civil mode of recovery of assets is particularly important in protecting the interests of investors. This assertion is strengthened when one considers the fact that the defendant to criminal proceedings may for reasons such as death or absconding not be available for criminal proceedings to be brought against him or her. It is in this regard that the civil mode of recovery becomes important. The relevant provision is section 40 of the Proceeds of Crime Act 2002,<sup>122</sup> the essence of which is the recovery of the property which is obtained through unlawful conduct and cash, which is or represents property obtained through unlawful conduct or which is intended to be used in unlawful conduct to be forfeited.<sup>123</sup> It is important to note that unlawful under the Proceeds of Crime Act is purely a criminal concept and the property must have been obtained through that wilful criminal conduct. The National Crime Agency (NCA), the

---

<sup>119</sup>Companies Act 2006 (n 116) paragraph 946.

<sup>120</sup>ibid s 952.

<sup>121</sup>ibid 955 3.

<sup>122</sup>Proceeds of Crime Act 2002 s. 40.

<sup>123</sup>ibid s 40. Fisher (n 40) 320–321.

Candidate Number: 1341103

SFO and the CPS<sup>124</sup> are relevant authorities, that can apply to the High Court for the grant of a recovery and interim freezing order. The NCA demonstrates willingness to use its powers.<sup>125</sup> Regrettably the investor cannot take any direct action personally under POCA section 5 to recover property.

### **The Securities Industry Board, The Financial Services Authority and the Financial Conduct Authority**

The Financial Services Authority (FSA), further to the FSA 1986 and the Financial Services and Markets Act 2000 (FSMA), was established to become the main regulatory body supervising the entire financial services.<sup>126</sup> By assuming this function, the FSA protected investors in the United Kingdom.<sup>127</sup> It was responsible for both prudential and conduct regulation over a complex system many considered a maze.<sup>128</sup> The Securities Industry Board (SIB) on the other hand was established with supervisory functions over the security industry in the United Kingdom.<sup>129</sup> Pursuant to the FSA 1986 the SIB was able to bring civil actions against offenders under prescribed circumstances.<sup>130</sup> This was a power that was exercisable by the SIB on behalf of consumers who enter into transactions and perhaps suffered as a result of acts and conduct by the defendants in the matter. It must be stressed that the SIB was the representative but not the agent of investors.<sup>131</sup> Rider has indicated that one consequence of such a position was for the SIB

---

<sup>124</sup>Proceeds of Crime Act 2002 (n 122).

<sup>125</sup>*NCA v Azam & others (No 2)*.

<sup>126</sup>See generally Rider, Abrams and Ashe (n 66).

<sup>127</sup>See generally Russen (n 66).

<sup>128</sup>For a study of the role of the FSA and SIB see Fishman (n 108).

<sup>129</sup>Caroline Currie, 'Civil Enforcement as a Regulatory Device-an Analysis of Administrative and Civil Enforcement under the Financial Services Act 1986' (1996) 3 *Journal of Financial Crime* 319.

<sup>130</sup>Financial Services Act 1986 (n 63).

<sup>131</sup>Rider, Abrams and Ashe (n 66) 398.

Candidate Number: 1341103

to decide whether or not to bring actions and it could be obliged to do so by investors.<sup>132</sup> Secondly it is the SIB rather than investors which was required to carry the cost of any action which naturally brought lack of resources of the SIB into sharp focus.<sup>133</sup>

Some, indeed the Conservative government of 2010, considered the FSA responsible for the failings which caused the major financial crash. In response, the Conservative government established the Financial Conduct Authority (FCA) further to the Financial Services Act 2012.<sup>134</sup> The FCA has one of its primary objectives the protection of consumers.<sup>135</sup> This important function is directly related to the need to protect the consumer in relation to investment decisions. The question then arises as to how the FCA approaches this important function of protecting consumers. A very detailed subject, it is here highly summarised.<sup>136</sup> The FCA's enforcement actions could be looked at from a number of ways. One can first view the FCA's enforcement action from its sanctions and market abuse which is noted at s.123 of the Financial Services and Markets Act 2000.<sup>137</sup> The FCA may also undertake enforcement when the firm fails in the assessment of its compliance procedures and systems further to Section 53 and Schedule 6 of FSMA, the Financial Services and Markets Act (Threshold Conditions) Regulations 2013 SI 2013/555, Senior Management Systems and Controls Sourcebook (SYSC), Article 13 of MiFID and Article 6 (2), among others.<sup>138</sup>

---

<sup>132</sup> *ibid* 397.

<sup>133</sup> *ibid*.

<sup>134</sup> Financial Services Act 2012.

<sup>135</sup> Section 6 of the *ibid*. 'Protecting Consumers' <[www.fca.org.uk/about/protecting-consumers](http://www.fca.org.uk/about/protecting-consumers)> accessed 24 March 2017.

<sup>136</sup> For detailed treatment see Barry Rider and others, *Market Abuse and Insider Dealing* (Bloomsbury Professional Ltd 2016). See also Financial Conduct Authority, 'Our Mission 2017-How We Regulate Financial Services' <<https://www.fca.org.uk/publication/corporate/our-mission-2017.pdf>> accessed 26 June 2018. See also Travers Smith Regulatory Investigations Group, 'FCA and PRA Enforcement Action: Themes and Trends' [2016] Compliance Officer Bulletin 1.

<sup>137</sup> Financial Services and Markets Act 2000 (n 64).

<sup>138</sup> Barry Rider and others, *Market Abuse and Insider Dealing* (2nd edn, Tottel Publishing 2009) 319–337.

The FCA deems enforcement action as a weighty decision.<sup>139</sup> For this reason several factors are taken into account in selecting cases for enforcement.<sup>140</sup> A key distinction between the FSA and the FCA is the fact that the latter is seen both as a regulator and an enforcer. Among others, the FCA considers the seriousness of the misconduct including its effect on the markets, the extent of any profit accrued or avoided as a result of the misconduct, whether the person has voluntarily cooperated with the FCA in taking corrective measures and whether an individual's conduct involved dishonesty or abuse of a position of authority or trust, among others.

An appropriate way of describing the FCA's enforcement function is to describe it as risk-based enforcement.<sup>141</sup> The FCA would take action in order to protect the markets, consumer protection, financial crime or in furtherance of its objectives as a regulatory body. In this regard the purpose of the FCA enforcement function are deterrence, change in behaviour and resistance in the industry, holding those responsible for serious breaches accountable with proportionate penalties and sanctions and removing wrongdoers from the industry or imposing restrictions where appropriate.<sup>142</sup>

Principles based enforcement is the FCA's approach to its function.<sup>143</sup> This effectively means that the FCA simply sets the general principles or outcomes to achieve in relation to activities by industry players and would consider conducts by market participants in relation to whether the essence of particular principles or regulatory principles have been breached or not. This is very similar to the approach adopted by the Solicitors Regulatory Authority (SRA) which is the body that regulates solicitors in England and Wales.

---

<sup>139</sup>For a very detailed discussion see Rider and others (n 136) 289–317.

<sup>140</sup>EG 2 Financial Conduct Authority, *FCA Handbook* (n 71) See 2.1-2.7.

<sup>141</sup>Rider and others (n 138) 293–294.

<sup>142</sup>1B Financial Services Act 2012 (n 134).

<sup>143</sup>Financial Conduct Authority, *FCA Handbook* (n 71).

Significantly, the FCA takes enforcement actions with particular reference to High Level principles for business and failures in systems and controls obligations, particularly where there has been misconduct that falls outside of the technical provisions of the market abuse regime.<sup>144</sup> This is evidenced in cases such as FSA Final Notice to Roberto Chiarion Casoni and the FCA Final Notice to Deutsche Bank AG and Citigroup Global Markets Limited.<sup>145</sup> Among the options available to the FCA are publication of statements and penalties further to FSMA s.123 (3).

Further to FSMA s.381 the FCA may make an application to the court for injunctions where there is reasonable likelihood that any person would engage in market abuse, among others.<sup>146</sup> There are several factors the FCA must consider in an application for injunction, including among others the nature and seriousness of the contravention or expected contravention, the cost FCA will incur in applying for enforcement injunction and the benefit of results.<sup>147</sup> The case of *Financial Conduct Authority v Da Vinci Invest Ltd*<sup>148</sup> is important in this regard. Publications are regulated by the DEPP 6.4.2 which effectively states that such a such publication must further the overriding objective of the FCA which is deterrence. The regulation of penalties is enshrined in the FCA's decision procedure in penalties which expresses the factors to be taken into account in relation to the particular circumstances of the case. The FCA is approaching its enforcement activities seriously across all sectors including financial and market abuse.<sup>149</sup>

---

<sup>144</sup>EG ibid 2.8-2.11.

<sup>145</sup>See Rider and others (n 138) 293–294.

<sup>146</sup>Section 381 Financial Services and Markets Act 2000 (n 64).

<sup>147</sup>See generally EG 10 Financial Conduct Authority, *FCA Handbook* (n 71).

<sup>148</sup>*Financial Conduct Authority v Da Vinci Invest Ltd* [2015] EWHC 2401.

<sup>149</sup>See generally Financial Conduct Authority, 'FCA Enforcement Annual Performance Account Annual Report 2016/17' (Financial Conduct Authority 2017) <<https://www.fca.org.uk/publication/annual-reports/enforcement-annual-performance-account-2016-17.pdf>> accessed 11 July 2017.

### **The FCA and restitution**

As a victim, the consumer's interest is also protected by the powers under section 383 of FSMA which permits the FCA to apply to the court for an order for payments to the consumer. The court must be satisfied that a person's market abuse behaviour has given rise to the profit under section 383(2)(a) or other persons have suffered loss or affected by the abuse under section 383(2)(b). Under section 383(4) it can order another person to make a payment to the FCA. The court may order and distribute the money received under section 383(5).<sup>150</sup> Further to EG 11.3, the factors the FCA would take into account in deciding whether to apply under 383 or 384 includes whether the losses are identifiable, whether alternative redress was available and whether persons can bring their own proceedings.<sup>151</sup> In respect of the preference the FCA has noted that it would usually consider illustrative enforcement before it considers application to the court.

### **FCA's pre-enforcement powers**

There are varieties of measures which the FCA implements in undertaking its pre-enforcement functions.<sup>152</sup> First disclosure obligations relate to the requirements in listings contained in part 6 of FSMA that issuers must through the regulatory submission service provide information that is not public knowledge that if known would lead to substantial movement in the price of their listed securities, what is then referred to as price sensitive information. This obligation arises from Article 1(1) of MAD. 1, transposed into UK law through s.118C of the FSMA.<sup>153</sup> Where such professionals fail to make such disclosures, it could lead to civil liability for market abuse. This raises the question of the balance between the professionalism of confidentiality and disclosure obligations of

---

<sup>150</sup>Section 383 (5) Financial Services and Markets Act 2000 (n 64).

<sup>151</sup>See also *ibid* Section 384 (3) and the defence under Section 123.

<sup>152</sup>Rider and others (n 138) 243–287.

<sup>153</sup>Section 118 (C) Financial Services and Markets Act 2000 (n 64).



professionals. In this regard note must be taken of Article 6 of the Directive which enjoins immediate disclosure albeit subject to confidentiality and some exemptions.<sup>154</sup> It must be noted that the FCA favours enhanced disclosures.<sup>155</sup> The FCA also takes account of the Takeover Code and its implications in disclosure obligations of issuers or professionals.<sup>156</sup>

The FCA also protects consumers through its information gathering powers. The FCA requires proactive disclosure or provision of information particularly in relation to supervisory investigative activities.<sup>157</sup> It may use skilled persons to undertake this function.<sup>158</sup> Further, the FCA protects the interests of the consumer through its investigatory powers.<sup>159</sup> The general power is set out in section 167 of FSMA 2000 and provides that the FCA must investigate where there is good reason to do so under s.167 (1). The FCA can investigate activities of both authorised persons and unauthorised persons further to sections 167 and 168 respectively.<sup>160</sup> The conduct of the investigations under 167 are provided in sections 170 and 171 FSMA 2000.<sup>161</sup>

The question is asked regarding the extent to which statements obtained during FCA interviews, particularly compulsory ones, can be admissible during criminal trials.<sup>162</sup> It appears that the FCA avoids using its statutory powers of requests in order not to jeopardise criminal trials. Equally significant to the work of the FCA includes the need to ensure that firms are complying with compliance procedures and systems.<sup>163</sup> The

---

<sup>154</sup>Rider and others (n 138) 250–251.

<sup>155</sup>ibid 251.

<sup>156</sup>ibid 252.

<sup>157</sup>See generally ibid 257–281.

<sup>158</sup>Section 165 Financial Services and Markets Act 2000 (n 64).

<sup>159</sup>See generally Rider and others (n 138) 273–287.

<sup>160</sup>Sections 167 and 168 Financial Services and Markets Act 2000 (n 64).

<sup>161</sup>ibid Section 170 and 171.

<sup>162</sup>Rider and others (n 138) 282–283.

<sup>163</sup>See ibid 286–287.

division of compliance would require that firms continue to meet their requirements for authorisation including the suitability requirements to protect against financial crime.

### **FCA enforcement and fairness**

Fair treatment of consumers is important to the FCA.<sup>164</sup> Similarly, the FCA's enforcement actions could be looked at from several ways and the FCA has weaved high standards of fairness and transparency into the whole process. In short, there is a Regulatory Decisions Committee RDC which functions as the authority's supervision and enforcement body, separating its obligations under section 395.<sup>165</sup> Further where notices are served respondents and third parties are allowed to make representations in defence of the alleged violations.<sup>166</sup> Another way transparency is shown by the FCA in its enforcement function is to ensure that the respondent has access to the material the FCA is relying on to bring proceedings against the respondent. Further, the respondent can make an application to the Upper Tribunal under section 394(1) of FSMA 2000 to challenge decisions. While section 13 the FSA 2010<sup>167</sup> (As amended) mixed to section 391(4) of FSMA 2000 permits the FCA to publish information on its notices, this is restrained where such publication is considered to be unfair to the person with respect to whom action was taken or prejudicial to the interest of consumers, or detrimental to the stability of the UK financial system s.391(6) of FSMA.

---

<sup>164</sup>Toni Williams, 'Open the Box: An Exploration of the Financial Services Authority's Model of Fairness in Consumer Financial Contracts', *Unconscionability in European Private Financial Transactions-Protecting the Vulnerable* (Cambridge University Press 2010). See also Peter Cartwright, 'Conceptualising and Understanding Fairness: Lessons from and for Financial Services', *Unconscionability in European Private Financial Transactions-Protecting the Vulnerable* (Cambridge University Press 2010).

<sup>165</sup>Section 395 Financial Services and Markets Act 2000 (n 64).

<sup>166</sup>*ibid* s. 126.

<sup>167</sup>Financial Services Act 2010 s. 13.

### **FCA and Consumer Credit Regulation**

The FCA protects the interests of consumers by being responsible both for the enforcement of general consumer protection legislation including the Consumer Protection from Unfair Trading Regulations 2008 and related consumer credit regulations which were replaced by CRA 2015 on 1 October 2015.<sup>168</sup> In relation to its regulatory enforcement, the FCA is identified as having taken over the regulation of consumer credit in the United Kingdom from April 2014 from the Office of Fair Trading (OFT).<sup>169</sup> It regulates both authorised and unauthorised firms.

Some key issues can be identified in respect of the FCA's approach to consumer credit regulation. First, the FCA has retained most of the guidance, rules and regulations that the OFT had previously issued. Second the FCA's approach to regulating the consumer credit industry is very similar to its approach in regulatory and financial services as discussed above.<sup>170</sup> The Consumer Credit Sourcebook part of the FCA's Handbook relate to the regulation of consumer credit.<sup>171</sup> It contains comparable principles including High Level standards which apply to all firms and the other specialist rules which are specific to particular sectors called specialist sourcebooks. At the heart of the principles for business is the need to treat the consumer fairly.<sup>172</sup> It must be stressed that the FCA also has prudential and client money rules relating to better management which is one way by which the interest of the consumer is protected.<sup>173</sup>

---

<sup>168</sup>Financial Conduct Authority, 'Consumer Credit Regulation: The Journey so Far' (4 August 2016) <<https://www.fca.org.uk/news/speeches/consumer-credit-regulation-journey-so-far>> accessed 21 February 2018. 'Protecting Consumers' (n 135). See also 'Competition Commission' (n 84).

<sup>169</sup>See Financial Services Act 2012 (n 134).

<sup>170</sup>Financial Conduct Authority, 'Guide for Consumer Credit Firms' <[www.fca.org.uk/consumer-credit](http://www.fca.org.uk/consumer-credit)>.

<sup>171</sup>*ibid.*

<sup>172</sup>*ibid* 12.

<sup>173</sup>See generally Financial Conduct Authority, *FCA Handbook* (n 71).

### **The FCA and unfair contract terms under the Consumer Rights Act 2015**

Pursuant to the CRA 2015, contracts between consumers and businesses are supposed to be fair. It is important to first address the point of how the FCA and the Competition Markets Authority cooperate in dealing with the fairness of contracts. Further to a memorandum of understanding between the two organisations, the FCA deals with fairness of contracts where the contract relates to financial services and consumer notices. Furthermore, where the concerned firm is not a firm or an appointed representative, the FCA would normally liaise with the CMA or another consumer rights regulator as appropriate.

The FCA has powers as a regulator and as an unfair contract terms enforcer under the CRA 2015. It must however be stressed that the FCA as a regulator and unfair contract terms enforcer does not have the power to grant redress to consumers who have suffered loss because of an unfair term. The consumers' recourse is through the Financial Ombudsman Service (FOS). Nevertheless where the use of the unfair term amongst others amounts to a rule breach or it causes loss to consumers, the FCA can apply to court for restitution or require restitution in accordance with the Enforcement Guide.<sup>174</sup> The authority can use its powers under section 404 of the Act to make rules requiring authorised persons, electronic money issuers and payment service providers to establish and operate consumer redress schemes.<sup>175</sup> The FCA can also impose a requirement and authorised defendants under section 404F7<sup>176</sup> of the act to establish and operate a scheme that corresponds to or was similar to a consumer redress scheme under section 404<sup>177</sup> of the Act.

---

<sup>174</sup>EG11 *ibid.*

<sup>175</sup>Section 404 Financial Services and Markets Act 2000 (n 64).

<sup>176</sup>Section 404F7 *ibid.*

<sup>177</sup>Section 404 *ibid.*

The terms or the notices which can be reviewed for fairness within the meaning of the CRA are the mandatory statutory or regulatory provisions or the provisions or principles of an international convention to which the UK or the EU is a party. It is a requirement under section 68 of the CRA that written terms of consumer contracts, or consumer notices in writing are transparent.<sup>178</sup> The terms or notices are unfair, if contrary to the requirement of good faith, they cause a significant imbalance in the party's rights and obligations to the detriment of the consumer. Regulators have the powers in relation to production of information under CRA Schedule 5.<sup>179</sup> Under paragraph 14 of Schedule 5 an enforcer or an officer of an enforcer may give notice to the person requiring the person to provide the enforcer with information specified in the notice. The FCA would normally try to cooperate and deal amicably with the relevant firm in trying to resolve disputes.

### **The FCA and the Ageing Population**

A key plank to the regulation of consumers within financial services is how the FCA approaches its ageing population. Since ageing is one of the factors under the FCA's vulnerability assessments one may wonder why there is a separate focus on the ageing population? The FCA considers significant the interests of the ageing population which it defines as “... *people aged 55+ as at the earliest age at which a defined contribution pension can be drawn, with the predominant focus on 65+ and 75+*”.<sup>180</sup> The FCA believes that where firms do not consider the interest of older consumers it results in exclusion, poor customer outcomes and potential harm.<sup>181</sup>

---

<sup>178</sup>Section 68 Consumer Rights Act 2015.

<sup>179</sup>Schedule 5 *ibid.*

<sup>180</sup>Financial Conduct Authority, ‘Ageing Population and Financial Services’ 7 <<https://www.fca.org.uk/publication/occasional-papers/occasional-paper-31.pdf>> accessed 26 June 2018.

<sup>181</sup>*ibid.*

While the FCA believes that older consumers are necessarily vulnerable, it believes that they experience transient or permanent vulnerability. This may be as a result of many factors including their health, increased harm for financial shocks, low financial knowledge or confidence and sometimes life events that they go through including bereavement, relationship breakdown or loss of income.<sup>182</sup> For this reason the FCA expects firms to design products and services by anticipating change in future needs and circumstances of older consumers, offering assistance throughout the relationship.<sup>183</sup>

The FCA takes note of later life lending to vulnerable older consumers where products such as lifetime equities and mortgages come into the picture.<sup>184</sup> The FCA therefore expects firms to comply to its regulatory module and rules on Mortgage Conduct of Business rules in relation to lending to older customers in the area of lifetime mortgages, as well as retirement interest only mortgages. It also expects regulated advisor's advice to older customers to be robust including giving free pension advice, advice on fraud scams and financial abuse, age discrimination and pricing strategies including following the report of the Financial Services Consumer Panel (DP 16/1) and finally to respects the Senior Investor Vulnerability diagrams by the Committee on Retail Investors.

### **The FCA and Product Regulation**

The regulation of products to the elderly raises a key aspect of consumer protection in financial services, product regulation. Ultimately, the detriment consumers suffer has been associated with quality of the complex financial product businesses sell to them. This is the case in terms of endowment policies, and Madoff's products and pensions.<sup>185</sup>

---

<sup>182</sup> *ibid* 7–8.

<sup>183</sup> *ibid* 8.

<sup>184</sup> *ibid* 57–71.

<sup>185</sup> HM Treasury, 'Consultation Outcome-Amendments to the UCITS Directive (UCITS V)' (31 October 2018) <<https://www.gov.uk/government/consultations/consultation-on-amendments-to-the-ucits-directive-ucits-v/amendments-to-the-ucits-directive-ucits-v>> accessed 30 July 2018.

Product regulation is a contentious aspect of consumer regulation important to the EU and the FCA.<sup>186</sup> The EU product regulation commenced in 1985 further to the Directive on Undertakings for Collective Investment in Transferable Securities called the UCITS regime.<sup>187</sup> UCITS provides cross border passports rights for Collective Investment Schemes (CIS) in the form of UCITSs and their managing companies. The current version is UCITS V Directive 2014/91/EU which among others requires the production of Key Investor Information Document (KIID).

The FSA took product regulation seriously<sup>188</sup> and the FCA has continued this work. It requires firms to prepare product information for consumers depending on whether it is a PRIIP packaged product, a NURS-KII and COBS 13 modules are relevant in this regard.<sup>189</sup> Where it is a UCITS or PRIIPS, the FCA defers to the requirement under them. Indeed, where it is life policy it must comply with the Solvency II Directive information.<sup>190</sup> The details of the key information document are in COBS 13.2 and in COBS 14. While product regulation has many benefits, its variables such as structuring and financial design, engineering of financial products<sup>191</sup> and marketing complexity makes it a difficult task.<sup>192</sup> Indeed sometimes it is questioned whether it is not a misallocation of regulatory resources. It is however submitted that it is a necessary aspect of protecting the consumer against fraud.<sup>193</sup>

---

<sup>186</sup>See generally Moloney Niamh, *How to Protect Investors-Lessons from the EC and UK* (Cambridge University Press 2010) but particularly 134-191.

<sup>187</sup> Undertakings for Collective Investment in Transferable Securities Directive (85/611) [1985] O.J. L375/3.

<sup>188</sup>Financial Services Authority, 'Product Intervention FS/3-Feedback on DP11/1' <[https://www.fca.org.uk/publication/feedback/fs11\\_03.pdf](https://www.fca.org.uk/publication/feedback/fs11_03.pdf)> accessed 26 June 2018.

<sup>189</sup>Financial Conduct Authority, *FCA Handbook* (n 71) COBS 13.2 and 14.

<sup>190</sup>*ibid* Annex to 13 .2.

<sup>191</sup>Niamh (n 186) 142-145.

<sup>192</sup>*ibid* 157-191.

<sup>193</sup>*ibid* 137-142.

### **The FCA and Consumer Responsibility**

One of the statutory obligations of the FCA is to ensure that consumers take responsibility for the decisions they make in relation to financial services.<sup>194</sup> By consumer responsibility it is meant ‘circumstances in which a consumer’s ability to recover compensation from a business may, depending on circumstances, be reduced or rejected as a result of the consumer’s recklessness, carelessness or failure to take reasonable steps to mitigate a loss’.<sup>195</sup> The FOS takes similar approach to court mitigation.<sup>196</sup> The FSA discussion document was heavily criticised by the FOS including attacking the term balance of responsibilities.<sup>197</sup> First it is required that consumers do not use the seeming protection that the state affords as an excuse to evade the sense of responsibility for the financial decisions that they make.<sup>198</sup> At the same time firms are also expected not to behave in a reckless manner that takes advantage of the vulnerability of consumers.<sup>199</sup>

The poignant question therefore is how one draws the balance between the responsibilities of businesses and the responsibilities of the consumer? According to an FCA report there was a general willingness on the part of both firms and consumers to take responsibilities for their actions.<sup>200</sup> Consumers approach financial services and consumer credit businesses with scepticism and lack of trust. While firms' attitude towards consumers are

---

<sup>194</sup>Financial Conduct Authority, ‘FCA Mission: Our Future Approach to Consumers’ <<https://www.fca.org.uk/publication/corporate/our-future-approach-consumers.pdf>> accessed 26 June 2018.

<sup>195</sup>Financial Ombudsman Service, ‘Financial Ombudsman Service Response to FSA Discussion Paper (DP08/5) on “Consumer Responsibility”’ <<http://www.financial-ombudsman.org.uk/publications/policy-statements/response-to-FSA-DP08-5.html>> accessed 26 June 2018.

<sup>196</sup>ibid.

<sup>197</sup>ibid.

<sup>198</sup>ibid.

<sup>199</sup>Office of Fair Trading, ‘Irresponsible Lending-OFT Guidance for Creditors’ <[http://webarchive.nationalarchives.gov.uk/20140402162813/http://www.offt.gov.uk/OFTwork/publications/publication-categories/guidance/consumer\\_credit\\_act/oft1107](http://webarchive.nationalarchives.gov.uk/20140402162813/http://www.offt.gov.uk/OFTwork/publications/publication-categories/guidance/consumer_credit_act/oft1107)> accessed 24 July 2018.

<sup>200</sup>See Midge Clayton and others, ‘Consumer Responsibility-Identifying and Closing the Gaps’ <[https://www.fca-pp.org.uk/sites/default/files/fca\\_practitioner\\_panel\\_consumer\\_responsibility\\_report\\_september\\_2013.pdf](https://www.fca-pp.org.uk/sites/default/files/fca_practitioner_panel_consumer_responsibility_report_september_2013.pdf)>



Candidate Number: 1341103

2014. Making the regulation of Pay Day lenders its mandate, the FCA introduced interest rate caps after much consultation on HCSTC.<sup>206</sup> This was further to its statutory mandate under Section 137 FSMA 2000. This took effect on 2 January 2015. The raft of measures meant that the total cost cap to the borrower was going to be 100%.<sup>207</sup> The impact of such a policy is the question. There has been a noticeable drop in pay day lenders, according to the FCA about 35%.<sup>208</sup>

The question of interest rates cap triggers the question of fairness and welfare in consumer credit. The dilemma is that it is paternalistic and goes against the welfare of the poor.<sup>209</sup> The patent decline in borrowing by poor persons confirm this position. But the FCA takes the view that it is protecting consumers who are vulnerable.<sup>210</sup> In addressing over indebtedness, it is important to note the role of 'social force majeure-the possibility of adjusting the terms of a consumer credit contract if an individual has suffered an unforeseen change of circumstances'. Statutory protections have come by way of Section 75 of CCA 1974, Tribunals Courts and Enforcement Act 2007 section 117A-E and section 93 of the Consumer Credit Act 1973,<sup>211</sup>

The regulation of default interest by the FCA has historical roots in the doctrine of anatocism<sup>212</sup> which is the prohibition of charging interest rates on interest and the ability

---

<sup>206</sup>Financial Conduct Authority, 'Detailed Rules for the Price Cap on High-Cost Short Term Credit- Including Feedback on CP14/10 and Final Rules' <<https://www.fca.org.uk/publication/policy/ps14-16.pdf>> accessed 28 May 2018. See also Financial Conduct Authority, 'FCA Confirms Price Cap Rules for Payday Lenders' (11 November 2014) <<https://www.fca.org.uk/node/19396>> accessed 21 April 2018.

<sup>207</sup>Financial Conduct Authority, 'Detailed Rules for the Price Cap on High-Cost Short Term Credit- Including Feedback on CP14/10 and Final Rules' (n 206) 5.

<sup>208</sup>Financial Conduct Authority, 'FCA Confirms Price Cap Rules for Payday Lenders' (n 206).

<sup>209</sup>Ramsay, 'Consumer Credit Law, Distributive Justice and the Welfare State' (n 204).

<sup>210</sup>Financial Conduct Authority, 'Detailed Rules for the Price Cap on High-Cost Short Term Credit- Including Feedback on CP14/10 and Final Rules' (n 206) 7.

<sup>211</sup> See *Office of Fair Trading v Lloyds TSB Bank Plc [2007] UKHL 48*.

<sup>212</sup>Iain Ramsay, 'Regulation of Consumer Credit', *Handbook Research on International Consumer Law* (Edward Elgar Publishing 2010).

to write down debts through fresh start of bankruptcy.<sup>213</sup> Irresponsible lending was confronted in the Consumer Credit Act 2006 s. 25 of the 1974 Act. Critics argue that it is a controversial way of consumer protection.<sup>214</sup> However, it is argued that it is common around the world. For high interest rates above market cluster are considered as proxy for fraud.<sup>215</sup> The subject is linked to social welfare and competition in the market thus caution must be taken for price controls. It has been suggested that the solution is in social lending?<sup>216</sup>

Considered by the EU in the 1995 review of the 1987 Directive. The test of suitability of creditor was changed to duty to explain. While the effect is questionable due to default arising out of problems in circumstances of consumers, the issue raises the distinction between paternalism and autonomy and the question of irrational exuberance.<sup>217</sup> The FSA's approach was considered meta regulation in lending but in the end, this is connected to fair treatment of customers.<sup>218</sup>

### **The FCA and competition**

State actors and consumer protection institutions promote competition as a policy with the view that it is in the consumer's best interest. Competition is thus the primary goal of EU policy and a domestic strategic objective of the FCA.<sup>219</sup> The assumption is that by discouraging monopolies, a crowded field would create rivalries among businesses as they seek to win over consumers.<sup>220</sup> The irony is that 'adversaries' sometimes perceive

---

<sup>213</sup> *ibid.*

<sup>214</sup> *ibid.*

<sup>215</sup> Ramsay, 'Consumer Credit Law, Distributive Justice and the Welfare State' (n 204).

<sup>216</sup> See also Iain Ramsay, 'Comparative Consumer Bankruptcy' (2007) 1 University of Illinois Law Review 241.

<sup>217</sup> Ramsay, 'Regulation of Consumer Credit' (n 212).

<sup>218</sup> *ibid.*

<sup>219</sup> Financial Conduct Authority, 'FCA Mission-Our Approach to Competition' 6 <<https://www.fca.org.uk/publication/corporate/our-approach-competition.pdf>> accessed 26 June 2018.

<sup>220</sup> *ibid.*

each other as allies who need to protect their commercial interests by creating mergers to create monopolies and cartels to fight their common interests. The FCA's competition objective is limited directly to the UK and is pursued along three fronts.<sup>221</sup> First it conducts market studies and adjust rules in the public interest. Second it enforces UK and EU competition law the former's statute law being the Competition Act 1998. Thirdly, driven by the consumer interest for reduced costs and prices, high service standards and quality and increased access to financial services, the FCA implements regulation that enhances effective competition.<sup>222</sup> The FCA is still in in early stages and it is thus difficult to assess its effectiveness. The EU Consumer Credit Directive adopts full harmonization but if the UK withdraws from the EU, it may, subject to the terms of exit, no longer be subject to EU competition law. In any event concerns have been raised about whether harmonisation works in cross border transactions.<sup>223</sup>

## Conclusion

The consumer victim of fraud has identifiable pathways in English civil law to pursue redress. From earlier times, courts have existed with opportunities for the individual to pursue claims under the civil law. Although the procedures were complex and seemed to supersede substantive law, the passing of time enabled the merger of the distinct areas of common law and equity to provide a clear-cut path for the consumer. Similarly clear was the intervention of Parliament through legislative enactments which provided institutions with the power to pursue measures to protect the consumer. The measures are broad entailing both preventive legal and regulatory, as well as procedures for contentious

---

<sup>221</sup>ibid 6-7.

<sup>222</sup>ibid 77.

<sup>223</sup>Michael G Faure and Claire Leger, 'The Directive on Criminal Sanctions for Market Abuse: A Move towards Harmonizing inside Trading Criminal Law at the EU Level?' (2015) 9 Brooklyn Journal of Corporate, Financial & Commercial Law 387.

Candidate Number: 1341103

proceedings to seek redress where the consumer has already become a victim of fraud or abuse. The discussion did not explore in detail the complicated nature of the challenges both institutions and individuals face in employing these measures. This is the subject of the next chapter which seeks to critically analyse the entire system for the protection of the consumer in England.

## CHAPTER EIGHT (8)

### A CRITICAL ASSESSMENT OF THE MECHANISM FOR PROTECTING THE CONSUMER IN ENGLISH LAW

#### Introduction

The manifest absence in ancient English law of formal dividing lines between what later became civil, criminal and regulatory or administrative law raises the question whether despite these structural divisions, relationships exist among them in modern law.<sup>1</sup> The response is in the affirmative. The purpose of this final chapter is to address among others the relationship between these various areas of law in protecting the consumer against fraud.<sup>2</sup> This Chapter reemphasises the broad conception of the consumer established in Chapter One and proffers a generic definition of consumer vulnerability, arguing that it makes sense than the concept of average consumer used in the Directive.

Emphasising that consumer protection is an umbrella term used to describe the measures for protecting the consumer in English law, the chapter asks, among others, whether the denunciation of the offence of fraud makes it necessary to use the phrase consumer fraud where it is obvious that a business has committed fraud against the consumer. It further explores whether it is possible to identify a philosophy of consumer protection, distinguishing it from the rationales for consumer protection. The present author considers how Rawls Theory of Justice and the concepts of original position and veil of ignorance could be applied to consumer protection.<sup>3</sup> The chapter then discusses the connection between private and public enforcement. The question is also asked whether

---

<sup>1</sup> See Sir WS Holdsworth, *A History of English Law*, vol 2 (Methuen & Co Ltd 1922).

<sup>2</sup> For a different approach see Colin Scott, 'Enforcing Consumer Protection Laws', *Handbook of Research on International Consumer Law* (Edward Elgar Publishing 2010).

<sup>3</sup> See John Rawls, *Justice as Fairness: A Restatement* (Harvard University Press 2003).

the same standards must be used to protect different classes of consumers. It enquires whether there is the need to enact further law and would submit that perhaps that is not the way to go. Since the FCA assumed control of consumer credit regulation, the chapter discusses the interface of consumer credit regulations and financial services regulation regarding protecting consumers. It also makes recommendations and proposals specific or generic in the context of financial services, conveyancing fraud and provides framework for practical protection. The issues discussed cover a broad range. Naturally this impacts detailed examination, but the reader is referred to further sources for reference.<sup>4</sup>

In discussing fraud, moral and ethical aspects were examined including mention made of Judea-Christian and Islamic finance.<sup>5</sup> However word restrictions did not enable considerations of other important aspects. First, it is acknowledged that all three jurisdictions grapple with the problem of interpretation.<sup>6</sup> Secondly, how is conflict resolved in case of clash of perspectives between ethical finance and national laws? Furthermore, what is the relationship between regulatory aspects of English law vis-a-vis religious laws? It is acknowledged that the sources are different but are they in substance different? These issues are beyond the scope of this thesis.

---

<sup>4</sup> See generally Peter Spiller and Kate Tokeley, 'Individual Consumer Redress', *Handbook of Research on International Consumer Law* (Edward Elgar Publishing 2010). See also Terence G Ison, *Credit Marketing and Consumer Protection* (Croom Helm Ltd 1979). See also Scott (n 2).

<sup>5</sup> Nabil A Saleh, *Unlawful Gain and Legitimate Profit in Islamic Law: Riba, Gharar and Islamic Banking* (2nd edn, Graham & Trotman 1992). Gilbert Crensil, 'Fraud-A Comparative Analysis', *Research Handbook on International Financial Crime* (Edward Elgar Publishing 2015).

<sup>6</sup> See generally Rodney Wilson, *Legal and Regulatory Governance Issues in Islamic Finance* (Edinburgh University Press Ltd 2012).

## Consumer protection and Consumer Fraud

The suggested exploration of the relationship between *consumer protection* and *consumer fraud* assumes that the two phrases are established distinct concepts in law. This is not the case with respect to the latter in English law and literature. Most major works aimed at dealing with the subject of preventing abuse and unfair practices against the consumer are referred to as consumer protection and this author is not aware of any reputable work titled consumer fraud. Professor Ramsey titles his work *Consumer Law*<sup>7</sup> and Professors Howells, Weatherill<sup>8</sup> and Cartwright<sup>9</sup> use 'consumer protection'. The stances adopted by these reputable authors maintain the status quo in England in that no statute employs the phrase consumer fraud. The approach in English law therefore is to employ the broad concept of consumer protection and discuss fraudulent conducts within that ambit.

A more arguable basis justifying the stance of these major authors is perhaps the frank realisation that any quest to draw such distinction is an illusion. Professor Atiyah makes a profound statement that sums up and perhaps justifies the approach to the subject in English law. He states that:

*"Consumer protection was a major legislative preoccupation throughout the nineteenth century, and it was not by any means confined purely to prevention of fraud. But in any event the attempt to distinguish sharply between the prevention of fraud and broader protection of the consumer is and was virtually impossible. Since fraud was often difficult to prove, it was very common for Parliament to legislate on the principle of preventing modes of commercial behaviour which facilitated fraud, whether or not fraud was actually committed."*

---

<sup>7</sup>Peter Cartwright, *Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK* (Cambridge University Press 2001). See also Peter Cartwright, *Consumer Protection in Financial Services* (Kluwer Law International 1999).

<sup>8</sup>Geraint Howells and Stephen Weatherill, *Consumer Protection Law* (2nd edn, Ashgate Publishing Limited 2005).

<sup>9</sup>Iain Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (3rd edn, Hart Publishing 2012).

*... It is not possible to justify such legislation simply by arguing that it prevents fraud: the ambit of the legislation is much broader than fraud. But it was designed to prevent the facilitation of fraud, and it was generally assumed that the freedom which the consumer was required to give up was one of very little value to him and was more outweighed by the benefit of the statutory protections. Arguments about the sacred principle of freedom of contract only rarely appeared in debates on this legislation<sup>10</sup>*

The reasons for Parliament's stance according to Professor Atiyah is the difficulty of proof for fraud and the recognised difficulty in making distinctions between fraudulent conducts and acts which facilitated fraud. Professor Rider's indication that protecting victims of financial fraud '*... involves giving attention to matters which are not always legal and unlawful in the black and white sense of the criminal law*',<sup>11</sup> supports this position. Indeed, when one takes into account the fact that a generic definition for fraud in the criminal law came into existence in England in 2006 after the enactment of the Fraud Act,<sup>12</sup> and there is at present no generic definition for fraud in English civil law, one sees the prudence of the use of the phrase consumer protection rather than consumer fraud. Nevertheless, the present approach raises a few critical questions.

There is the recognition from Professor Atiyah's comments above of a difference between acts of fraud and other conducts which are not frauds; even though fraud is difficult to prove. This distinction is trite in general English law, the distinction between innocent misrepresentation and deceit or fraudulent misrepresentation being cases in point.<sup>13</sup> Some however contend that although it is recognised that fraud is a difficult concept to prove, it is a conduct that most people recognise when they see it and one which is not difficult

---

<sup>10</sup>Patrick Selim Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press 1979) 545.

<sup>11</sup>Barry Rider, Charles Abrams and Michael Ashe, *Guide to Financial Services Regulation* (3rd Edition, CCH Editions Ltd 1997) page 703.

<sup>12</sup>See Fraud Act 2006.

<sup>13</sup>See generally William Williamson Kerr, *A Treatise on the Law of Fraud and Mistake as Administered in Courts of Equity* (Bradbury, Evans, and Co 1923). See also George Spencer Bower and KR Hundley, *Actionable Misrepresentation* (Butterworths 2000). Also Peter MacDonald Eggers, *Deceit: The Lie of the Law* (Informa Law from Routledge 2009).



to prove in practice. The CPS appears to have taken that position after the Adoboli trial stating that a simple concept of dishonesty runs through fraud.<sup>14</sup> It is questionable whether dishonesty is a 'simple concept'. Indeed it is simplistic to so suggest. Nevertheless it is valid to enquire whether the difficulty of proving a wrongful conduct or indeed definitional challenges are adequate justifications why Parliament should not legislate specifically on it, or for the term to be used informally in academic and professional literature?

For several reasons this is a relevant question. First, it is arguable that most legal concepts including offences or wrongs are theoretically difficult to define and in practice are difficult to prove.<sup>15</sup> Secondly, the phrase commercial fraud is used at least in legal literature in England. McGrath's QC titles his work '*Commercial Fraud in Civil Practice*'.<sup>16</sup> Goldspink and Cole use '*International Commercial Fraud*' and Professor Levi discusses '*commercial fraud*'.<sup>17</sup> As stated in Chapter Two of this thesis, it is noted that the phrases are grammatical errors since nouns rather than adjectives are modifying the noun '*fraud*'. The convenience of use has already been acknowledged. Yet expressions where nouns are used in describing fraud are common in England including tax fraud, revenue fraud, accounting fraud, benefit fraud and much closer to our purpose mortgage fraud. Moreover, businesses in the financial sector, specifically the insurance industry, use the phrase insurance fraud to describe fraud by consumers against

---

<sup>14</sup> Crown Prosecutions Service, 'Kweku Adoboli Convicted of Two Counts of Fraud' (*The Blog of the Crown Prosecution Service*, 20 November 2012) <<http://blog.cps.gov.uk/2012/11/kweku-adoboli-convicted-of-two-counts-of-fraud.html>> accessed 27 June 2018.

<sup>15</sup> Michael Gale, Sarah Gale and Gary Scanlan, *Fraud and the Plc* (LexisNexis UK 1999) 5.

<sup>16</sup> Paul McGrath, *Commercial Fraud in Civil Practice* (Oxford University Press 2014).

<sup>17</sup> Michael Levi, *Regulating Fraud: White-Collar Crime and the Criminal Process* (Cambridge University Press 1987).

businesses. Uncommon however is the phrase *consumer fraud* in the sense of a business committing fraud against the consumer.

It is relevant to ask whether the inclusion of provisions prohibiting businesses from committing fraud in generic consumer legislations does not affect the remedies or punishments that businesses suffer for frauds against consumers. The failure of Parliament to legislate specifically on consumer fraud and its inclusion within broad legislations on consumer protection means that in principle the courts are obliged to apply the remedies or punishments in those statutes which may not have taken account of the serious or unique characteristics of fraud.

The case for the use of consumer fraud may be enhanced by considerations of fairness.<sup>18</sup> As discussed in Chapter Six on the approach the police take to consumer complaints against businesses, most reasonable persons would question the fairness to ordinary citizens if where the consumer commits acts of fraud against businesses or even the state they are held to high account but similar approach is not accorded to the consumer's complaint. When ordinary citizens commit benefit fraud against the state they are held to account, indeed some are imprisoned and their properties confiscated. A consideration of fairness may lead Parliament to identify business conducts against consumers which may be classed as fraud and may well consequently affect the evidential burden that may be placed on the consumer or the relevant prosecuting agency.

By not using consumer fraud, England appears to be in disharmony with a major jurisdiction such as the United States. A Google Scholar search for consumer fraud comes up with many scholarly materials from the United States on consumer fraud discussed in the sense of frauds against the consumer. Indeed, US states such as New Jersey have not

---

<sup>18</sup> See Ison (n 4) 354–385 for a beautiful discussion.

only adopted the concept of consumer fraud but have further enacted Consumer fraud legislations.<sup>19</sup> Consumer fraud is similarly used in US academia.<sup>20</sup> The use of the phrase consumer fraud would thus bring England into harmony with the United States where the convenient term is used. Others might however criticise the US approach as symptomatic of its informational and litigation model approach to consumer protection.<sup>21</sup>

Fraud has negative connotations which give it a deterrence feature. Currently it appears that it is the consumer who bears that negative burden.<sup>22</sup> It is submitted that where a business commits frauds against consumers it should be called consumer fraud. This recommendation is made only regarding informal use, such as the phrases mortgage fraud or commercial fraud. This sends a strong signal to the business community and acts as deterrence. As above indicated, a generic definition of consumer fraud is when a consumer becomes the victim of conduct described as fraud and prohibited by the criminal or civil fraud laws in any society.

It is the present author's submission therefore that there is a case for the informal, if not formal, use of the phrase consumer fraud where a business commits frauds against consumers.<sup>23</sup> Legislatively speaking, the present author's recommendation is not a call for parliament to formally adopt that term and enact legislations on it. However, to the extent that a statute on general consumer protection contains fraud provisions, a business that falls foul of those provisions can be said informally to have committed consumer fraud. The present author also believes that consumer fraud may also be used in situations where

---

<sup>19</sup> New Jersey Consumer Fraud Act 1960.

<sup>20</sup> Donald P Rothschild and Bruce C Throne, 'Criminal Consumer Fraud: A Victim-Oriented Analysis' (1976) 74 Michigan Law Review 661.

<sup>21</sup> Iain Ramsay, 'Regulation of Consumer Credit', *Handbook Research on International Consumer Law* (Edward Elgar Publishing 2010).

<sup>22</sup> See Ison (n 4) as noted above.

<sup>23</sup> Barry A. Rider, 'Civilising the Law- The Use of Civil and Administrative Proceedings to Enforce Financial Services Law' (1995) 3 Journal of Financial Crime 11.

Candidate Number: 1341103

the discussion focuses on frauds against consumers, for instance academic or professional settings such as the CML's<sup>24</sup> and the Law Society's use of mortgage fraud.<sup>25</sup>

Crucially the present author's approach appears to have been pursued by Professor Levi in the assessment of the socio economic impacts of crime.<sup>26</sup> Consumer fraud was defined as 'a broad category including lottery/prize scams; rogue dialling and other communications-based frauds; 'dishonest' mis-descriptions of products of products and services (such as some 'alternative health care product' or sex aids); gaming frauds (e.g. 'fixed' races and matches upon which bets (including spread betting) have been made; purchases of goods and services that are not sent by the supplier. Frauds involving the sale of cars -for example the handover of a vehicle before full payment is received (for example, after receipt of a false banker's draft, or cheques that are then not honoured) - are also included'.<sup>27</sup> Yet the expression 'fraud against individuals' was by Professor Levi in another report to the EU.<sup>28</sup> Therefore there is the need for consistency.

### **Same legal standards for different businesses?**

The relationship between the consumer and the business in respect of the concept of liability was examined in Chapter Six. A question that was not addressed is whether the same standards of vicarious and corporate criminal liability be applied to different classes of corporations? It is incontestable that there are different classes of businesses with

---

<sup>24</sup> 'CML Lenders Handbook for Conveyancers' <[www.cml.org.uk/lenders-handbook/](http://www.cml.org.uk/lenders-handbook/)> accessed 24 March 2017.

<sup>25</sup> The Law Society of England and Wales, 'Anti-Money Laundering Practice Note'.

<sup>26</sup> Michael Levi, John Burrows and Matthew Hopkins, 'The Nature, Extent and Economic Impact of Fraud in the UK' (Association of Chief Police Officers' Economic Crime Portfolio 2007) 12-13 <<http://orca.cf.ac.uk/48242/>> accessed 20 September 2018.

<sup>27</sup> *ibid* 13.

<sup>28</sup> Michael Levi and others, 'The Economic, Financial and Social Impacts of Organised Crime in the European Union' (European Parliament's Special Committee on Organised Crime, Corruption and Money Laundering (CRIM) 2013) <[http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2013/493018/IPOL-JOIN\\_ET%282013%29493018\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2013/493018/IPOL-JOIN_ET%282013%29493018_EN.pdf)> accessed 20 September 2018.

differing financial and resource strengths. There are large multi-nationals and small and medium-sized companies (SMES). It is legitimate therefore to enquire whether the onerous responsibility of vicarious liability and corporate criminal liability should be applied equally to all these organisations? Should we have the same expectations of a City multinational law firm as we do of a high street law firm where an individual solicitor is a sole trader?

It is suggested that this is a discretion that should be exercised by courts and regulatory bodies in the context of the enforcement of regulatory standards. Indeed, as outlined above, the FCA and the various regulatory bodies take several factors into account in their enforcement activities including the administrative and financial resource strengths of the organisations.<sup>29</sup> It is important no impression is created of difference in treatment by regulatory bodies. There is the impression that the SRA appears to take a hands-off approach to City law firms? While there is no hard evidence to back this claim, it is noteworthy that the SRA abandoned an attempt to establish a unit that specialises in regulating City law firms arguing that it wants to establish a new relationship with firms.

### **The Average Consumer and Consumer vulnerability**

It is undeniable that English law recognises the need to give individuals the right to seek redress for wrongs suffered, where wrongs is used in a loose sense. Historically, that recognition has deepened rather than diminished. The semantic emergence of the word 'consumer' and consumer specific statutes together with its related establishment of enforcement bodies or institutions in the twentieth century are evidence of the unique place the consumer occupies in English law. Even more commendable is the realisation

---

<sup>29</sup> Barry Rider and others, *Market Abuse and Insider Dealing* (Bloomsbury Professional Ltd 2016) 289–317.

that consumers are not persons with the same characteristics. Indeed, this realisation has informed the need to distinguish between the different classes of consumers and create, theoretically and practicably, measures to take account of those differences.<sup>30</sup> It is noteworthy that the EU has played a significant role in the development of consumer protection legislations.<sup>31</sup> Indeed some of the English consumer protection legislations have been transpositions of EU directives. One such influence relevant to our consideration of consumer vulnerability and fraud is the concept of the average consumer introduced into the Consumer Protection from Unfair Trading Regulations<sup>32</sup> by the Unfair Commercial Practices Directive.<sup>33</sup>

### **The average consumer**

The EU has urged<sup>34</sup> that “where certain characteristics such as age, physical or mental infirmity or credibility make consumers particularly susceptible to a commercial practice or to the underlying product and the economic behaviour only of such consumers is likely to be distorted by the practice in a way that the trader can reasonably foresee, it is appropriate to ensure that they are adequately protected by assessing the practice from the perspective of the average member of that group.”<sup>35</sup> The rationale for this stance is the prevention of fraud. It has stated that “the aim of the provision is to capture cases of dishonest market practices (e.g. outright frauds or scams) which reach the majority of

---

<sup>30</sup> Moloney Niamh, *How to Protect Investors-Lessons from the EC and UK* (Cambridge University Press 2010) 30–41.

<sup>31</sup> Jana Valant, ‘Consumer Protection in the EU-Policy Overview’ [2015] European Parliamentary Research Service. See Iain Ramsay, ‘Regulation and the Constitution of the EU Single Market: The Contribution of Consumer Law’ (2010) 50 *Canadian Business Law Journal* 322 for the role consumer law has had on EU jurisprudence.

<sup>32</sup> Consumer Protection from Unfair Trading Regulations 2008.

<sup>33</sup> Unfair Commercial Practices Directive (2005/29).

<sup>34</sup> See *ibid* Recitals 18 and 19 .

<sup>35</sup> See generally 151 to 187 Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (n 9) but in particular 166-167.

consumers, but in reality are devised to exploit the weaknesses of certain specific consumers groups."<sup>36</sup>

The average consumer is not the vulnerable consumer, even though EU jurisprudence has earlier recognised the latter.<sup>37</sup> Indeed according to the EU, the average consumer is the benchmark for the Directive, that is one "who is reasonably well-informed and reasonably circumspect, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice".<sup>38</sup> The quest for the average consumer is thus to enable the discovery of the differences in the reaction of the vulnerable consumer. The average consumer is not a strict inflexible concept, it is 'not a statistical test' and "national courts and authorities are urged to 'exercise their own faculty of judgment, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case."<sup>39</sup>

While "Commission Guidance recognise, among others, the following among vulnerable consumers-the elderly, children and teenagers, "the test is whether the consumer's interpretation or reaction is reasonable".<sup>40</sup> While it is commendable that the Commission enjoins the test of reasonableness, one must question the detour that the business must take in discovering the average consumer, enroute to the discovery of the vulnerable consumer. The question must also be asked whether it is possible to realistically find the 'typical reaction' which is the indication that the consumer is an average consumer. Finally, the question must be asked whether it is not possible to find the vulnerable

---

<sup>36</sup>ibid 166-167.

<sup>37</sup> *Buet and Educational Business Services v Ministere Public* [1989] ECR 1235 (ECJ Case C-382/8).

<sup>38</sup>Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (n 9) 167.

<sup>39</sup>ibid.

<sup>40</sup>ibid.

consumer on the standalone application of the well-known reasonableness test. The future of EU law on UK consumer protection is presently unclear.<sup>41</sup>

### **Defining Consumer vulnerability**

Most consumer agencies or national bodies mandated to deal with consumers recognise vulnerability. Gleaning from all the various definitions noted in Chapter One, it is arguable that some of the identifiable vulnerable features relate to the personal characteristics of the individual or group of persons, such as 'ability to understand more complex transactions, the difficulty in making rational transactions decisions when subjected to high pressure sales techniques and worries about excessive borrowing/lending; and susceptibility to scams'.<sup>42</sup> The corollary is that some of the factors that cause vulnerability are external to the individual or group of persons. For instance, financial products are generally considered complex. The Consumer Affairs Victoria has produced a matrix linking the market and personal variables with various information requirements for satisfactory purchase process.<sup>43</sup>

It is further arguable that although a group may share a dominant feature which may be considered as a source of vulnerability, there are personal differences among individuals which should not be discounted. For instance, while a group may generally be considered vulnerable, there may be unique variations in the degree of vulnerability depending upon the particular disabilities they share, whether it is physical or mental. Further it is submitted that a person may have a characteristic generally considered to be vulnerable

---

<sup>41</sup> David Severn, 'The Implications of Brexit for UK Consumers of Financial Services: A Think-Piece' <[https://www.fs-cp.org.uk/sites/default/files/consumer\\_panel\\_brexit\\_research\\_october\\_2016.pdf](https://www.fs-cp.org.uk/sites/default/files/consumer_panel_brexit_research_october_2016.pdf)> accessed 7 July 2018. George Walker, Robert Purves and Michael Blair, *Financial Services Law* (4th edn, Oxford University Press 2018).

<sup>42</sup> The Report of the Director General General's Inquiry, 'Vulnerable Consumers and Financial Services'.

<sup>43</sup> Consumer Affairs Victoria, 'What Do We Mean by "vulnerable" and "Disadvantaged" Consumers?- Discussion Paper' <[www.consumer.vic.gov.au](http://www.consumer.vic.gov.au)> accessed 11 July 2018.



but may not be vulnerable with respect to a particular transaction. For instance, a lawyer who has physical disability by way of lost leg may not be vulnerable in appreciating the contents of a share purchase agreement even though the disability may be material should the need arise for a visit to the offices of instructing solicitors.

Consequently, a universal definition of vulnerability must embrace all these characteristics, the generic as well as the particular factors as well as the transient nature of vulnerability. To the present author therefore, vulnerability refers to a situation where in relation to a particular transaction, opportunity or situation, an individual or group of persons may relatively be considered susceptible to detriment, harm or injury as a result of the interaction between or among risk factors intrinsic and/or extrinsic to the individual or group of persons, which consideration must practically inform the businesses' approach to the design, marketing and processing of the transaction between the business and the consumer as well as their continuing relationship. It is submitted that this all-embracing definition takes account of both the generic and the particular factors that inform vulnerability as discussed above and in the relevant literature. More importantly, it immediately alerts the business to alter its approach to the consumer where vulnerability emerges.

### **Vulnerability, Financial Services and Consumer Credit**

The FCA has been concerned about the question of vulnerability and has produced an Occasional Guide for practitioners in the financial services industry.<sup>44</sup> This is sort of a best practice document that practitioners are to implement, having been gleaned from practices of many organisations. There are four broad areas the document seeks to explore

---

<sup>44</sup>Financial Conduct Authority, 'Consumer Vulnerability Occasional Paper' <[www.fca.org.uk/publication/ocassional-papers/ocassional-paper-8.pdf](http://www.fca.org.uk/publication/ocassional-papers/ocassional-paper-8.pdf)> accessed 5 February 2018.

with practitioners urged to audit current practice, develop a consumer vulnerability strategy with high level involvement, roll it out and evaluate, improve and maintain it consistently.<sup>45</sup> The FCA has identified several risk factors essential to the consideration of consumer vulnerability within financial services. These include personal factors<sup>46</sup> and triggers which help frontline staff to identify vulnerability.<sup>47</sup> The document encourages policies to be embedded throughout the entire organisation, ensuring constant training and feedback, excellent links with charities among others.<sup>48</sup> The system permits involvement of third parties if it helps the consumer.<sup>49</sup>

The FCA further encourages three particular protocols such as the TEXAS, IDEA and CARERS drills.<sup>50</sup> Further best practices include encouraging a culture where staff are encouraged to understand and empathise with vulnerability, creating specialist vulnerability teams, targets and incentives for those deal with vulnerable clients, giving staff with authority to use their judgment and adopts a flexible approach, specific steps such as appointments for vulnerable clients with particular needs, among others. In summary, it encourages consistent approach embedded throughout the organisation, firms regularly conducting audits and recognising gaps, insistence on performance training for frontline staff, flexible application of terms and conditions of products and services, active seeking of disclosure from customers by staff, clear simple information and explanation throughout product cycle, and data protection issues implemented with correct understanding.<sup>51</sup>

---

<sup>45</sup>ibid 104.

<sup>46</sup>ibid 110–111.

<sup>47</sup>ibid.

<sup>48</sup>ibid 115–116.

<sup>49</sup>ibid 112.

<sup>50</sup>ibid 113–114.

<sup>51</sup>ibid 115–116.

## **The Conveyancing sector and consumer vulnerability**

The present author submits that since conveyancing is a legal transaction, legal professionals must take account of vulnerability factors provided by legal institutions such as the Legal Services Consumer Panel and the Law Society who have Practice Notes on dealing elderly and vulnerable clients<sup>52</sup> This means that the industry must take account of market features such as access barriers, concerns about costs, choice barriers, redress barriers and Individual characteristics. The Panel encourages the development of a vulnerability policy including whether staff have been trained to recognise and respond to the needs of vulnerable consumers, the extent to which staff have knowledge of legal requirements such as data protection laws<sup>53</sup> when processing and recording information about individuals, and are able to comply with those requirements, and are websites and other consumer facing communications accessible? The document enquires whether standard communications sent to consumers are appropriate and generally how vulnerable consumers' needs are met?<sup>54</sup>

### **Vulnerability and standards-should the same standards be used to protect different classes of consumers/persons**

Vulnerability inherently implies the existence of different classes of consumers.<sup>55</sup> The typical investor in financial markets may generally be classified as degree educated and middle to high income earners. There are also institutional investors who directly invest on behalf of consumers who may be vulnerable, for instance in pensions. There is also

---

<sup>52</sup>'Recognising and Responding to Consumer Vulnerability-A Guide for Legal Services Regulators' [2014] Legal Services Consumer Panel.

<sup>53</sup>Data Protection Act 1998.

<sup>54</sup>ibid.

<sup>55</sup> Niamh (n 30) 30-41.

the concept of the small investor.<sup>56</sup>The consumer in consumer credit transactions may be classified as the vulnerable person in polar status to the investor in the securities industry. The consumer in real estate transaction may be the middle-class person, depending upon whether the person is buying for purely home or investment purposes. There is no justification why in principle standards and values be varied in respect of protecting different classes of consumers. All classes of consumers are in principle entitled to the same level of protection.<sup>57</sup> The practical application of the principles may differ in respect of the degree and nature of the vulnerability of consumers, but the standards must remain the same. Indeed, in considering what degree of protection may be appropriate, the FCA must have regard to the differing degrees of risk involved in different kinds of investments or other transactions, the differing degrees of experience and expertise that different consumers may have in relation to different kinds of regulated activity, the need that consumers may have for advice and accurate information: and the general principle that consumers should take responsibility for their decisions.<sup>58</sup>

### **The role of the criminal law in consumer protection**

The criminal law has played a vitally crucial role in the protection of the consumer in English law. Indeed, the ancient law of forestalling which we have identified was crucial in the genesis of the financial services industry and competition law was of a criminal nature.<sup>59</sup> Laws against larceny that preceded theft, all of which offences are crucial to

---

<sup>56</sup>JUSTICE, 'The Protection of the Small Investor' (JUSTICE Educational and Research Trust 1992) 2.14-2.32.

<sup>57</sup> Rider, Abrams and Ashe (n 11) 243 paragraph 701.

<sup>58</sup> See generally Financial Conduct Authority, 'FCA Mission: Our Future Approach to Consumers' <<https://www.fca.org.uk/publication/corporate/our-future-approach-consumers.pdf>> accessed 26 June 2018.

<sup>59</sup>See Chapter 1 of Rider, Abrams and Ashe (n 11).George P Gilligan, 'The Origins of UK Financial Services Regulation' [1997] Company Lawyer.

consumer credit transactions are criminal offences.<sup>60</sup> Indeed the same need to be said of usury offences which were also of a criminal nature. It must be stated that the role the criminal played in respect of real property fraud is not particularly clear except one relates frauds in conveyancing fraud to their origin in larceny and theft. It has been stated how the Theft Act 1968 was used in prosecuting what is informally called mortgage fraud.<sup>61</sup> It has been identified that the criminal law was effective and indeed continues to be effective in protecting the consumer against frauds in among others the food industry and health and safety regulated by local authorities. Nonetheless, it can also be noted that the use of the criminal law in financial services was not as profound as the use of self-regulatory measures.<sup>62</sup> This is particular the case in the regulation the City.<sup>63</sup> The prevention of fraud in Investments was one of the major pieces of legislation enacted to deal with fraud. This law we note was not effective.<sup>64</sup>

The significance however of the criminal law in protecting the consumer against fraud and abuse is contestable. The assessment of the role of the criminal law in consumer protection relates to the consideration of a number of issues. Professor Rider has examined the role of the criminal law and the civil and regulatory law and suggests that no jurisdiction has achieved success employing the criminal law in dealing with serious fraud. Many fraud and white collar authorities are with Professor Rider on this issue.

---

<sup>60</sup> Robert R Pennington, *The Investor and the Law* (Macgibbon & Kee Ltd 1968) 202–203.

<sup>61</sup> *R v Preddy* [1996] UKHL 13 1996.

<sup>62</sup> Rider, 'Civilising the Law- The Use of Civil and Administrative Proceedings to Enforce Financial Services Law' (n 23).

<sup>63</sup> James J Fishman, 'Enforcement of Securities Laws Violations in the United Kingdom' (1991) 9 *International Tax & Business Lawyer* 131. Rider, Abrams and Ashe (n 11).

<sup>64</sup> Rider, Abrams and Ashe (n 11).

Among others he observes rightly that the criminal process has faced 'technical, practical, procedural, and institutional reasons' that had had adverse impact on its effectiveness.<sup>65</sup>

As discussed in Chapter Six, the ability of the criminal process to lead to successful prosecutions is a major issue in consumer protection from fraud<sup>66</sup> and some notable failures have caused consternations.<sup>67</sup> On the other hand it is valid to enquire about whether the success of the criminal law must be assessed only in terms of the successful prosecution it achieves. It is however arguable that where a prosecution begins with the aim of achieving success in criminal conviction, then it is valid to assess the effectiveness by whether that aim was achieved. Another challenge encountered in the use of the criminal in fraud cases relates to the issue of juries.<sup>68</sup> The issue has been whether they are able to appreciate the complicated nature of financial transactions. The qualifications of the professionals involved in the prosecution of fraud cases is another problem encountered in the prosecution of fraud offences, a situation that was certainly the case before the SFO.<sup>69</sup>

There have also been doubts about the practices which may be classified as fraud by the financial services industry, this doubt criticised in no uncertain terms by Lord Langdale MR who commented in *Gillett v Peppercorn* 'it is said that this conduct is every day's practice in the City. I certainly should be very sorry to have it proved that such sort of

---

<sup>65</sup> Rider, 'Civilising the Law- The Use of Civil and Administrative Proceedings to Enforce Financial Services Law' (n 23).

<sup>66</sup> *ibid.* See also George P Gilligan, 'Regulating against White Collar Crime in the Financial Services Sector' <<http://ssrn.com>>. See Gary Fooks, 'Contrast in Tolerance: The Peculiar of Financial Regulation'. Kenneth Mann, 'White Collar Crime and the Poverty of the Criminal Law' (1992) 17 Law and Social Inquiry 561. See also 'The Fraud Trials Committee Report (Roskill Committee Report)' (The Home Office and the Lord Chancellor's Department 1986) <<https://www.sfo.org.uk/download/the-roskill-report-fraud-trials-committee-/?wpdmdl=6885>>.

<sup>67</sup> *R v Cohen* [1992] 142 NLJ 1267 called the Blue Arrows. See also *Saunders v United Kingdom* [1997] 23 EHRR 313.

<sup>68</sup> Rider, 'Civilising the Law- The Use of Civil and Administrative Proceedings to Enforce Financial Services Law' (n 23).

<sup>69</sup> *ibid.*

*dealing is usual; for nothing can be more open to the commission of fraud than transactions of this nature*'. In this modern technology-driven fast paced world, it would not be easy to achieve convictions since fraud often has international character and involves several jurisdictions, some cooperative and others non-co-operative.<sup>70</sup> It is also suggested that the rules of criminal procedure inadvertently lead to the seeming powerful people in the City getting off lightly for fraud. The efficacy of the criminal enforcement procedures particularly in cases of organised crime have similarly been questioned.<sup>71</sup> There is a manifest imbalance and arguably questions have been raised about whether the sanctions for criminal offences are appropriate or commensurate with the serious nature of the offence. Indeed, the complex nature of individual liberties and human rights provisions among others complicate sanctions in the modern world, certainly when compared to sanction in early English criminal law.<sup>72</sup>

Another way by which the technicalities of the criminal law manifests is in attempting to define crime, which is an umbrella term for fraud. In a detailed discussion on the role of the criminal law in consumer protection, Professor Cartwright has indicated that such assessment implies first a consideration of when something is criminal, and secondly when something should be criminal?<sup>73</sup> Varied approaches have been suggested in response to both questions including institutional, procedural, the nature of the acts, the degree of culpability among others. Yet all these approaches are not straightforward and there are contrary responses to them. There is no agreed response to the second question, which is principally the role of the state. Ashworth has set out some principles, but all of

---

<sup>70</sup> *ibid.*

<sup>71</sup> *ibid.*

<sup>72</sup> Sir James Fitzjames Stephen, *A History of the Criminal Law of England*, vol II (MacMillan and Co 1883).

<sup>73</sup> See generally Cartwright, *Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK* (n 7) 63–86.

these are similarly fuzzy.<sup>74</sup> Fraud is a subset of crime. Seeing that crime suffers from definitional challenges, it is unsurprising therefore if fraud faces the same conceptual issues.

The goal for an undertaking determines its effectiveness and the whole essence of this discussion is to examine whether the criminal law is effective in protecting the consumer.<sup>75</sup> Several issues arise in the responding to this issue.<sup>76</sup> First, it is argued consistent with the minimalist argument, that the criminal law should be used when it is necessary to condemn or prevent the conduct.<sup>77</sup> There is however concern that a potential setback could be the development of black markets.<sup>78</sup> Secondly it is argued that the criminal law should be used when it is sufficient.<sup>79</sup> Ashworth disapproves of this on the basis of lack of culpability and how minor the offence can be.

Although it is submitted that there are due diligence and no negligence defences for regulatory offences,<sup>80</sup> Professor Cartwright suggests that "there are difficulties with this analysis'. First, establishing a due diligence defence is not the same as showing an absence of negligence. Secondly, there may be disagreement about whether evidence of negligence is evidence of culpability for the purposes of the criminal law.<sup>81</sup> For instance, over pricing might seem minor but when in large transactions the value would be great for which reason due discretion is exercised by enforcement authorities. A further issue

---

<sup>74</sup> Andrew Ashworth, *Principles of Criminal Law* (6th Edition, Oxford University Press 2009).

<sup>75</sup> for a more recent discussion Dr Nicholas Ryder, 'The Financial Crisis and Financial Crime in the UK: A Critical Analysis of the Response by Financial Regulatory Agencies' (2017) 38 *Company Lawyer* 4.

<sup>76</sup> Cartwright, *Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK* (n 7) 73–82.

<sup>77</sup> *ibid* 72–73.

<sup>78</sup> *ibid* 73.

<sup>79</sup> *ibid*.

<sup>80</sup> *ibid*.

<sup>81</sup> *ibid* 73–74.



is whether the criminal law provides protection.<sup>82</sup> It is agreed with Professor Cartwright that the criminal law is more than censure. The response to this question is examined by reference to the objectives of punishment<sup>83</sup> which include deterrence, incapacitation, rehabilitation, retribution, and restoration. Detailed discussion is however beyond the scope of this work. Despite the above concerns Sir Borrie contends that the criminal law is effective in protecting consumers<sup>84</sup> and Professor Cartwright broadly takes the position that the criminal has a place in consumer protection.

Following the above challenges with the criminal law, it would be a rational consideration to enquire whether we should not approach fraud differently. In view of the acknowledged difficulties Professor Rider has advocated that the civil law should be used by enforcement agencies in England, following the United States approach.<sup>85</sup> In view of some of the major failures the SFO encountered in the UK it appears that this is the way forward. This approach nevertheless faces its own challenges. The Courts in England have been wary of endorsing an approach to resolving frauds committed by businesses without the courts' involvements.<sup>86</sup> This has been demonstrated by its approach to the issue of Deferred Prosecution Agreements.

Some would also suggest that the criminal law should maintain its place due to the high-profile success of the SFO in prosecuting such cases as the LIBOR, the Adoboli cases, among others. It is also right to question whether it is consistent to maintain a conduct as fraud or a crime and then use civil enforcement processes and penal sanctions rather than

---

<sup>82</sup> *ibid* 74.

<sup>83</sup> *ibid* 75–86.

<sup>84</sup> Sir Gordon Borrie, *The Development of Consumer Law and Policy-Bold Spirits and Timorous Souls* (Stevens & Sons Limited 1984).

<sup>85</sup> Rider, 'Civilising the Law- The Use of Civil and Administrative Proceedings to Enforce Financial Services Law' (n 23).

<sup>86</sup> *ibid*.

criminal sanctions. It is these theoretical inconsistencies which confuses the discussion. In response Professor Rider has indicated that the civil burden for proof for fraud is similar to that of the criminal,<sup>87</sup> a position exonerated in *Ivey*.<sup>88</sup> Again, to what extent is it fair to the consumer if when accused of fraud he goes through the criminal process, but the business goes through civil processes?<sup>89</sup>

### **The role of private law in consumer protection**

The role of private law in consumer protection is one that is subject to little debate. It is important to note that private law certainly has been older than public enforcement.<sup>90</sup> Private enforcement in respect of the criminal law can be said to originate from the time when revenge was the main means of individuals seeking remedy for wrongful acts committed against them in the communal society.<sup>91</sup> Self-remedies are relevant to our discussion of the origin of private law. From an earlier period where there appears to have been no distinction, the growth of the common law later created a distinction between the civil enforcement and criminal enforcement.<sup>92</sup>

The existence in English law of the right of individuals to bring action against defendants since the Anglo-Saxon era is crucial to the development of consumer protection. The essential feature is that the individual could commence action within the community.<sup>93</sup> In respect of formal procedures for bringing action, older courts such as the Star Chamber

---

<sup>87</sup> *ibid.*

<sup>88</sup> *Ivey v Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 67.*

<sup>89</sup> See Ison (n 4) 403.

<sup>90</sup> Sir Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I*, vol 1 (Cambridge University Press 1923) 602–603. JH Baker, *An Introduction to English Law* (4th edn, Butterworths Lexis Nexis 2002) 379.

<sup>91</sup> Sir James Fitzjames Stephen, *A History of the Criminal Law of England*, vol 1 (MacMillan and Co 1883) 60.

<sup>92</sup> Baker (n 90) 1.

<sup>93</sup> See *ibid* Chapter One who commences his discussion on the communal.

permitted individuals to bring criminal proceedings.<sup>94</sup> The issue as to the extent to which they protected the vulnerable in society is however not clear. For instance, it is suggested that the plaintiffs in the Star Chamber were not ordinary individuals.<sup>95</sup> Indeed reference is made to the fact that they were royals and different important personalities.<sup>96</sup> The right of private individuals to bring criminal actions is however well documented.<sup>97</sup> Private criminal protection however appear to be have been given way to the civil mode of protection such that that many today may doubt that consumers can bring criminal prosecutions in England, although private prosecutions are becoming popularly again.

The decline of private criminal proceedings meant that private law mode of protecting the individual is seen principally as civil mode of enforcement. Under civil enforcement, the law of contract becomes very relevant in such examination. The classical contract theories enhanced the concept of the freedom of contract and this affected consumer protection in England, although briefly.<sup>98</sup> The law of contract as observed is the pivot for the operation of the markets. The difficulties that were to emerge from constant challenges to the fairness of contracts,<sup>99</sup> together with the principle of caveat emptor demonstrates that public enforcement played little role in consumer enforcement.<sup>100</sup>

Public criminal enforcement can be said to have emerged from the tithing system where the King could ask the people belonging to the system to seek public enforcement.<sup>101</sup> This

---

<sup>94</sup>Michael Stuckey, 'A Consideration of the Emergence and Exercise of Judicial Authority in the Star Chamber' (1993) 19 Monash University Law Review.

<sup>95</sup>ibid.

<sup>96</sup>ibid.

<sup>97</sup>JM Beattie, *Crime and the Courts in England 1660-1800* (Clarendon Press 1986) 268-269.

<sup>98</sup>See generally Atiyah (n 10).

<sup>99</sup>John Christian Bunbury, 'A History of the Action of Deceit on the Case and Related Developments in Contract Law' (Doctorate Thesis, The University of Auckland 2005). See also WT Barbour, *The History of Contract in Early English Equity*.

<sup>100</sup>Atiyah (n 10).

<sup>101</sup>Pollock and Maitland (n 90) 585-601.

later resulted in the emergence of the police system.<sup>102</sup>The emergence of public enforcement in the civil realm could be said to have been significantly influenced by the Molony Report which later led to the establishment of bodies such as local trading standards among others.<sup>103</sup>In the field of conveyancing, public enforcement is recent in view of the fact that most of the criminal legislations are recent. For instance, fraud legislations such as anti-money laundering provisions are enforced by public bodies such as the Serious Fraud Office, the CPS, among others. If the field of consumer credit and financial services were considered in light of larceny and offence of stealing stolen goods then public enforcement in the criminal sphere is old.<sup>104</sup>

In the civil sense the weaknesses of private enforcement influenced the enactment of various legislations as discussed earlier. The Law Commission in respect of the misleading and aggressive practices addressed the fact that private law enforcement was not effective and had weaknesses,<sup>105</sup> for which reason the legislative regime was recommended. Private criminal regime is rare due to cost, technicalities among others.<sup>106</sup>In the financial services industry for instance, public enforcement is more effective. The doctrine of privity of contract is a limiting factor in private civil

---

<sup>102</sup>See generally for the role of the police in enforcement from 17th century Leon Radzinowicz, *A History of English Criminal Law and Its Administration from 1750*, vol 2 (Stevens & Sons Limited 1956).

<sup>103</sup>The Molony Committee, 'Final Report of the Committee on Consumer Protection' (Her Majesty's Stationery Office 1962) Cmnd 1781.

<sup>104</sup>Leon Radzinowicz, *A History of English Criminal Law and Its Administration from 1750*, vol 1 (Stevens & Sons Limited 1948) and Radzinowicz (n 102).

<sup>105</sup>The Law Commission and the Scottish Law Commission, 'Consumer Redress for Misleading and Aggressive Practices' (The Law Commission and The Scottish Law Commission 2012) LAW COM No 332, SCOT LAW COM No 226. See also Ramsay, 'Regulation and the Constitution of the EU Single Market: The Contribution of Consumer Law' (n 31).

<sup>106</sup>See generally Beattie (n 97); See generally Stephen Gentle and Louise Hodges, *Kingsley Napley Serious Fraud: Investigation & Trial* (4th edn, LexisNexis Butterworths 1998); Rider, 'Civilising the Law- The Use of Civil and Administrative Proceedings to Enforce Financial Services Law' (n 23).

enforcement. Regarding tort, the requirements to be met are by themselves a major hindrance.<sup>107</sup>

### **The extent of legislative protection**

In considering the relationship between public and private enforcement, a crucial question to consider is the extent to which the state should intervene in the protection of the consumer. The justification for the state's intervention has been addressed by the discussion in Chapter One of the rationales for consumer protection. This is a question that the Crowther Committee had to consider in relation to consumer credit regulation. It stated thus:

*“given the principles of economic policy which we have advocated, our general view is that the state should interfere as little as possible, the consumer's knowledge of the consumer credit market to the best of his ability and according to his judgement of what constitutes his best interest. While it is understandable and proper for the state to be concerned about the things on which people spend their money, and even to use persuasion to influence the scale of values implied by their expenditure pattern, it remains a basic tenet of a free society that people themselves must be the judge of what constitutes their material welfare. Our examination of the social effect on consumer credit has not uncovered any strong social reason for departing significantly from this view. Since the vast majority of consumers use credit wisely and derive considerable benefit from it, the right policy is not to restrict their freedom of access by administrative and legal measures, but to help the minority who innocently get into trouble to manage their financial affairs more successfully – without, however, also making conditions easier for the fraudulent borrower. The basic principle of social policy must therefore be to reduce the number of defaulting debtors. This is in everybody's interests.”*

Whilst it is agreed in principle with the Committee that a balance must be struck between the state's intervention and the extent of personal responsibility, the Committee appeared

---

<sup>107</sup> see generally Deborah R Hensler, 'Using Class Actions to Enforce Consumer Protection Law', *Handbook Research on International Consumer Law* (Edward Elgar Publishing Ltd 2010) for a discussion on private and public enforcement.

to be more concerned about the defaulting borrower rather than the obligations expected of the creditors to lend responsibly. Indeed, to state that the 'basic principle of social policy must therefore be to reduce the number of defaulting debtors' is concerning. One would have thought since consumers are vulnerable, the focus of the Committee would be on the business. Regrettably this was not the case. Undoubtedly, personal responsibility is crucial to consumer credit, but it requires a balanced approach. It must be pursued with requirements for responsible lending such as the FCA adopts.

### **The role of the regulatory or administrative law**

Regulatory or administrative law has been considered part of the armoury in the protection of the consumer in England. It has been defined as implying the role played by institutional bodies such as the SRA, the FCA, in the regulation of their relevant industries and their professionals. It is expected that administrative processes may not necessarily originate from a regulatory body but may be internal to the business entity. Regulatory law is very important and this recognition was the basis for the structural maze created under the FSA 1986.<sup>108</sup>

The origin of administrative or regulatory law is unclear. Regulatory law in the financial markets have existed since the days when the City regulated itself without external control.<sup>109</sup> As discussed in the Preface the livery companies played significant regulatory role in the City of London.<sup>110</sup> However in terms of strictly consumer law, Sir Gordon Borrie does indicate that it began with the introduction in Part III of the Fair Trading Act of novel powers to seek written assurances of the observance of the laws relating to its

---

<sup>108</sup> See generally Rider, Abrams and Ashe (n 11).

<sup>109</sup> *ibid* 101–127. See also E Victor Morgan and WA Thomas, *The Stock Exchange: Its History and Functions* (ELEK Books Ltd 1962).

<sup>110</sup> See generally David Palfreyman, *London Livery Companies* (Oracle Publishing UK Ltd 2010).

trade.<sup>111</sup> Where the trader failed, the Director General then had the duty pursuant to the Act to seek an injunction against the trader. The powers went beyond merely restricting the assurance to the company due to the concept of limited liability but extended to directors, managers, secretaries or people with similar offices with controlling interest in the business.

An appropriate way of examining the effectiveness of regulatory or administrative law in protecting the consumer is to discuss it within the contours of the recognised modes of regulatory law. These are prior approval, standards, information remedies and self-regulation.<sup>112</sup> It must be noted that they are not cleanly separated from each other as they overlap.<sup>113</sup> Prior approval refers to measures adopted by regulatory bodies such as screening, licensing or authorisation and is the highest form of intervention. Professor Cartwright states that the 'essence of prior approval is that a regulatory agency or similar body is given the power to screen out and exclude suppliers or products which fail to meet minimum standards. The whole approach is thus preventative rather curative.'<sup>114</sup> In this respect, for instance the SRA regulates the training of solicitors ensuring minimum standards in both the academic and practical requirements expected of all those who hold themselves as solicitors.<sup>115</sup> Applying for authorisation as a solicitor also requires that the individual concerned must demonstrate good standards of behaviour by not having criminal convictions. The Approved Persons regime under the FCA Handbook is crucial

---

<sup>111</sup> Borrie (n 84).

<sup>112</sup> See generally Cartwright, *Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK* (n 7) 40–62.

<sup>113</sup> See *ibid* 212–243.

<sup>114</sup> Cartwright, *Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK* (n 7) citing S Breyer.

<sup>115</sup> Solicitors Regulatory Authority, 'Solicitors Regulatory Authority Disciplinary Procedure Rules and Guidance' <<http://www.sra.org.uk/solicitors/handbook/discproc/content.page> and <http://www.sra.org.uk/consumers/solicitor-check/publications/disciplinary-guidance.page>>.

to prior approval. Indeed, the essence of the general prohibition is premised upon prior approval.<sup>116</sup>

Licensing involves ensuring that no firm operates in the industry if it is not authorised to do so.<sup>117</sup> This requirement prevails also in the field of consumer credit and financial services generally. In the financial services industry, the use of authorisation and licensing procedures are profound as discussed in Chapters Six and Seven. There are many individuals against whom the FCA has brought action against including the one against Paul White.<sup>118</sup> Mr White is the fourth person in the LIBOR cases.<sup>119</sup> It is evident that the FCA appears to focus more on individuals than organisations or maybe is more successful with individuals.<sup>120</sup> Nevertheless, there are many other actions against firms.<sup>121</sup> Another profound way by which the FCA protects consumers is to publish list of organisations with which consumers must deal. For instance, on the FCA website it usually warns against firms it considers are dangerous.

It is noteworthy that the FCA has basic minimum academic standards that applicants seeking authorisation must meet and this is not degree level. Many careers require university degrees, but it appears that within the financial services and consumer credit sectors persons rely mainly on their knowledge gained from internal training or basic online courses from various institutions. The present author submits that a well-defined career path requiring a minimum of university degree would be most helpful in addressing

---

<sup>116</sup> See generally Ryder (n 75).

<sup>117</sup> Cartwright, *Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK* (n 7).

<sup>118</sup> 'Former RBS LIBOR Submitter Banned for False Rate Setting' (2016) 8 *Company Lawyer*.

<sup>119</sup> *ibid*.

<sup>120</sup> Financial Conduct Authority, 'FCA Enforcement Annual Performance Account Annual Report 2016/17' (Financial Conduct Authority 2017) <<https://www.fca.org.uk/publication/annual-reports/enforcement-annual-performance-account-2016-17.pdf>> accessed 11 July 2017.

<sup>121</sup> Travers Smith Regulatory Investigations Group, 'FCA and PRA Enforcement Action: Themes and Trends' [2016] Compliance Officer Bulletin 1.



fraudulent behaviour. However, some might contend that the various dishonest behaviours by solicitors and surveyors who follow years of training might defeat this argument. Nevertheless, it is arguable that the thought of losing one's hard earned reputation built after years of study is a vital consideration in professional conduct.

The issue of justification of prior approval is also crucial in this discussion.<sup>122</sup> First it serves to correct market failure which was discussed in Chapter One. Social justifications can similarly be used to justify prior approval as in the case of vulnerable consumers to whom banks and credit providing agencies owe much obligation. It is contended that prior approval is a good tool since it helps regulators to determine the products and services which flood the market place.<sup>123</sup> There are however downsides which include restricting consumer choice. In general, it is undeniable that prior approval is a great tool in consumer protection. It is however not clear in light of consumer vulnerability the extent to which regulators such as the FCA among others decide whether a product is suitable for consumers and whether people would not be subject to fraud. Having said that bitcoin is a product about which the regulators including bank of England have issued many warning notices.

By standards,<sup>124</sup> the regulatory body imposes minimum duties upon the traders just as livery companies did in the early days as discussed in the Preface.<sup>125</sup> There are three aspects of standards Cartwright discusses including specification, performance and target standards. The provisions of the Sale of Goods Act 1979 impose standards. The PRIN module in the FCA Handbook imposes standards of service expected of institutions

---

<sup>122</sup> Cartwright, *Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK* (n 7) 41–42.

<sup>123</sup> *ibid* 42–43.

<sup>124</sup> See generally *ibid* 44–48.

<sup>125</sup> *ibid* 44.

including the need to treat the consumer fairly. However standards are criticised for among others leading to 'unacceptable costs' for the regulatory body which is required to formulate the standards and enforce them. Standards are enforced through either the civil or criminal law and thus the weakness of these forms are applicable here.<sup>126</sup> The cost of regulation is a significant issue that about which solicitors have complained. The funds for the SRA for instance come from the practising fees paid to the Law Society. This is an issue that solicitors have detested especially in light of the fact that they do not appreciate the role the SRA plays for the advancement of the profession. Indeed solicitors feel that the SRA in pushing for non-degree holder entrants to the profession are undermining it. Of course it is expected that members of a profession would seek to protect their interests.<sup>127</sup>

Information remedies refer to the control of the information that a trader provides to a consumer in the business to consumer transaction.<sup>128</sup> Disclosure regulation simply involves the trader helping the consumer to make informed decisions by providing all relevant information. Both the Law Society and the FCA expects businesses to provide consumers relevant information at the commencement of transactions. For the FCA the principles PRIN modules are relevant.<sup>129</sup> The work of the London Stock Exchange and the Panel on Takeover and Mergers are also relevant in mergers for instance. Indeed treating consumers fairly demand disclosure. In a solicitor's dealings with clients, the solicitor is supposed to precede the retainer with a client care letter which discloses all major aspects of the transaction.<sup>130</sup>

---

<sup>126</sup> *ibid* 45.

<sup>127</sup> Palfreyman (n 110) 60–70 See also Preface.

<sup>128</sup> See generally Cartwright, *Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK* (n 7) 48–53.

<sup>129</sup> Financial Conduct Authority, *FCA Handbook* (Financial Conduct Authority) <[www.fca.org.uk](http://www.fca.org.uk)>.

<sup>130</sup> Avrom Sherr, *Client Care for Lawyers* (Sweet and Maxwell 1999).

A crucial debate in this area is whether traders must provide information to consumers where no such legal obligation exists.<sup>131</sup> Despite the criticisms some have raised against mandatory disclosure, it is suggested it be encouraged particularly in circumstances where the individual concerned is vulnerable.<sup>132</sup> It is agreed that disclosure must not be promoted as if it was some sought of blanket measure but flexible for both typical and vulnerable consumers. Another issue is the appropriate standard of information to be provided in complex markets. The need to properly advise vulnerable clients in real estate, consumer credit and financial services transactions cannot be over emphasised.

Professor Cartwright brings to the fore the contradiction in self-regulation since the regulation connotes the idea of a superior organisation controlling the conduct of the regulated.<sup>133</sup> Different definitions have been put forward including 'sanctioned self-regulation', obviously in reference to the fact that self-regulation 'has come to be used particularly of situations in which an activity is controlled in the public interest not by the state itself but by an organisation whose members engage in the relevant activity'.<sup>134</sup> The Fair Trading Act section 124(3) is considered a good example of self-regulation.<sup>135</sup> While some argue that businesses being regulated by people with knowledge of the industry is helpful, it is suggested in the contrary that such people tend to protect their own to the detriment of the consumer. There is no easy way out.

Self-regulation takes place generally by codes of practice which have certain advantages such as being more effective. However, they are voluntary. Concerns about conflict of interest between trade members protecting their members may be addressed by the

---

<sup>131</sup> Cartwright, *Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK* (n 7) 50.

<sup>132</sup> *ibid* 51.

<sup>133</sup> Cartwright, *Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK* (n 7).

<sup>134</sup> cited in *ibid* 54.

<sup>135</sup> Fair Trading Act 1973 Section 124 (3).

creation of a separate regulatory arm such as the Law Society creating the SRA. Codes may be said to be complex themselves, being lengthy and variable.<sup>136</sup> What is however clear is that this is the direction of travel for the regulatory bodies.<sup>137</sup>

Regulatory law itself sometimes need to be enforced.<sup>138</sup> The strategies for enforcement of regulatory law are among others compliance and deterrence, general enforcement powers, criminal law and injunctions. It is undeniable that the consumer in England is inundated with various administrative means of seeking redress. This is commendable. The role of regulatory law is particularly significant in the City where self-regulation was how it was regulated. The SIB played its role, but it was limited.

It is undeniable that self-regulation presents the way forward. However, its effectiveness can be questioned when viewed in light of the not exalted end to the FSA 1986. The FSA is considered to have failed in terms of its regulatory functions under the Act and became the subject of attack by the Conservative government.<sup>139</sup> Regulatory law would in most instances be the prelude to either major civil or criminal actions.<sup>140</sup> A critical issue in this regard is whether the regulatory body should give consumers documents post investigation where consumers intend to pursue their own private actions. Despite the

---

<sup>136</sup> The Panel on Takeovers and Mergers, 'The Takeover Code 12th Edition' <[www.thetakeoverpanel.org.uk](http://www.thetakeoverpanel.org.uk)>. British Bankers Association, Building Societies Association and The UK Cards Association, 'The Lending Code'.

<sup>137</sup> Cartwright, *Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK* (n 7) 54–60.

<sup>138</sup> *ibid* 212–243.

<sup>139</sup> Eilis Ferran, 'The Break-up of the Financial Services Authority' (2011) 31 *Oxford Journal of Legal Studies* 455.

<sup>140</sup> See generally Stuart Bazley, 'The Financial Services and Markets Tribunal and Its Role in the Accountability of the Market Abuse Regime' (PhD Dissertation, Institute of Advanced Legal Studies, School of Advanced Study, University of London 2010). See also David Swift, *Proceedings before the Solicitors Disciplinary Tribunal* (The Law Society of England and Wales 1996). See also Mary Seneviratne, *The Legal Profession: Regulation and the Consumer* (Sweet and Maxwell 1999).

lack of clarity in this area, it is arguable regulatory law is the way forward in terms of protecting the consumer.<sup>141</sup>

### **The role of the civil law in consumer protection**

Significant to the consumer is the role of the civil law. One of the significant challenges faced by the consumer in reliance on the civil law in earlier times is the fact that the deceit claim was not based on contract and thus could only be brought further to an action on the case.<sup>142</sup> This meant that the individual had no cause of action specific to the deceit claim. The causes of action and its complications were other hurdles to which the individual was subject. Another important fact is that there was no concept of the consumer. Laws were passed supposedly to protect all aggrieved persons or the public. The laws in short were not what Professor Cartwright has called truly consumer laws.<sup>143</sup> No considerations were made for the unique features and difficulties which individuals face.

Another important challenge that consumers faced under the civil law has been the issue of costs.<sup>144</sup> Any consumer who chooses to bring an action against a business entity is effectively competing with the power, financially speaking, of the business entity.<sup>145</sup> Any individual who chooses the litigation route must deal with the cost of instructing legal representatives. Generally, litigation lawyers charge hourly rate for time spent on cases.<sup>146</sup> It was possible for the consumer to spend money on legal fees which may exceed that of

---

<sup>141</sup> Rider, 'Civilising the Law- The Use of Civil and Administrative Proceedings to Enforce Financial Services Law' (n 23).

<sup>142</sup> Bunbury (n 99).

<sup>143</sup> Cartwright, *Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK* (n 7) 1–3.

<sup>144</sup> Ison (n 4) 223.

<sup>145</sup> *ibid.*

<sup>146</sup> See Chapter 5 of The Law Society, *The Civil Litigation Handbook* (2nd edn, The Law Society of England and Wales 2007) 105–130 on the subject 'managing litigation for profit'. Ison (n 4) 232–236.

the value of the claim it has against the business entity. The legal costs may also emerge if a barrister is instructed to appear in the matter. Should the matter proceed to hearing then the question of further court costs may appear for the individual.

The complex and complicated nature of fraud claims is also a matter for the consumer. The complicated nature of the claim for the consumer is reflected first in the substantive law. The concept of fraud is itself complicated.<sup>147</sup> The concept of deceit or misrepresentation has been a complicated concept for the consumer.<sup>148</sup> The issues raised include the consumer not recognising the concept of misrepresentation or deceit or representatives sometimes not believing the consumer.

The challenges relating to evidence is another important element of a civil claim. Claimants pursuing deceit claims sometimes have the challenge of distinguishing between the various elements of the claim including the difference between a warranty and a promise and sometimes people fail to realise or recognise the difference between a promise or prediction. It is suggested that this point is particularly true in fraud cases where unless it is very express there is a statement of fact then it is hard for fraud to be implied.

Another critical element is that fraud was not available for anyone who has not consummated the contract. The restriction in circumstances for damages is another important criticism against fraud claims by consumer. Further it is argued that sometimes legal people who act in these matters do not appreciate the technical legal differences in a fraud claim. The technicality of advertising is a case in point.

---

<sup>147</sup>Barry Rider, *Research Handbook on International Financial Crime*.

<sup>148</sup>The Law Commission and the Scottish Law Commission (n 105).

The problems in civil claims also relate to procedural challenges. Examination of causes of action shows multiplicity of claims and just how an individual consumer could make sense of these is challenging. This been the discussion in the entire thesis. Some authors have dealt with truly consumer statutes<sup>149</sup> and others have approached it broadly.<sup>150</sup>The average consumer or investor is neither aware of what it means to draft a letter before claim or action, nor understands the implications of concepts such as time being of the essence. The average consumer cannot understand claim forms or particulars of claim, among others.<sup>151</sup>

For many years since the Anglo-Saxon era there was no small claims court dedicated to consumer issues.<sup>152</sup> The absence of small claims court in the early years severely affected the ability of the consumer to bring civil claims.<sup>153</sup> Another dimension to procedural difficulties relate to how the individual was expected to reconcile the challenges of equitable and common law claims. The fact that individuals sought justice in the Court of Chancery after unsuccessful claims in the common law courts suggests that fraud claims could be particularly long and drawn out legal battle.<sup>154</sup>

Another aspect of consumer claims in civil law is that fraud offences have evolved over the years.<sup>155</sup> Conspiracy to defraud for instance began its journey as a procedural defect. The offence has always had civil and criminal dimensions and there are technical

---

<sup>149</sup>Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (n 9). See also Howells and Weatherill (n 8). Cartwright, *Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK* (n 7). Cartwright, *Consumer Protection in Financial Services* (n 7).

<sup>150</sup>Pennington (n 60). Barry Rider and others, *Market Abuse and Insider Dealing* (2nd edn, Tottel Publishing 2009).

<sup>151</sup>Susan Blake, *A Practical Approach to Effective Litigation* (6th edn, Oxford University Press 2004).

<sup>152</sup>Ison (n 4) 211–232.

<sup>153</sup>See generally John Baldwin, *Small Claims in the County Courts in England and Wales* (Oxford University Press 1997).

<sup>154</sup>See generally Theodore Frank Thomas Plucknett, *A Concise History of the Common Law* (Liberty Fund Inc 1956).

<sup>155</sup>Kerr (n 13). Rider, *Research Handbook on International Financial Crime* (n 147).

difficulties associated with such claims.<sup>156</sup> In terms of consumer credit claims for instance, the introduction of the Money Lenders Act 1900 was heralded as a poignant step in consumer protection from fraud. However, the application of the law was not easy for even judges.<sup>157</sup> The Elizabethan Acts on fraud such as the Act for The Protection of the Creditor was equally not easy to apply.<sup>158</sup> These are very technical matters beyond the appreciation of the ordinary individual.

Similarly related to civil fraud claim is the evolving multiplicity of tests. As already identified, fraud has never had an all-embracing definition under the civil law.<sup>159</sup> There have been various frauds for different sectors and some generic statutes. It is noted that since the Anglo-Saxon era deceit has evolved in a long journey spanning several years. In the consumer credit and conveyancing sectors tests for usury or interest rate abuses have been even more complex as noted in Chapter Four.<sup>160</sup> In conveyancing the tests for frauds are multiple as noted in Chapter Six.<sup>161</sup> The same can be said for criminal offences in financial services including those on misleading statements as discussed in Chapter Three. The question is at what point would these tests stop evolving? The constant evolution of the tests makes it challenging for consumers and even regulators to bring civil claims. It is acknowledged that the CRA 2015 presents a first major consolidated statute to help deal with consumer claims.<sup>162</sup> This consolidated statute also presents its

---

<sup>156</sup>Percy Henry Winfield, *The History of Conspiracy and Abuse of Legal Abuse* (Fred B Rothman & Co 1982).

<sup>157</sup>Joseph Bridges Matthews, *The Law of Moneylending, Past and Present: Being a Short History of the Usury Laws in England, Followed by a Treatise upon the Moneylenders Act, 1900* (Sweet and Maxwell 1906).

<sup>158</sup>SW Worthington, *A Treatise on the Statutes of Elizabeth against Fraudulent Conveyances; the Bills of Sale Acts, 1878 and 1882; and the Law of Voluntary Dispositions of Property* (Stevens and Haynes 1887).

<sup>159</sup>McGrath (n 16).

<sup>160</sup>R. Goode, 'Usury in English Law' (1982) 1 *Arizona Journal of International and Comparative Law* <Heinonline> accessed 30 January 2016.

<sup>161</sup>William Roberts, *A Treatise on the Construction of the Statutes: 13 Eliz. C.5, and 27 Eliz. C.4, Relatin to Vountary Conveyances, and on the Nature and Force of Different Considerations of Support of Deeds and Other Legal Instruments, in the Courts of Law* (1800).Worthington (n 158).

<sup>162</sup>Consumer Rights Act 2015.



own challenges. First it has limited application. In other words, it is not a statute that is applicable to all serious and complex fraud offences. Further, the consumer credit offences still exist.<sup>163</sup>

Another way to assess consumer fraud in civil law is the relationship that the common law has with equity.<sup>164</sup> As stated above consumer claims generally started under the common law.<sup>165</sup> The Court of Chancery itself began about after consultations were made with the Chancellor regarding the quests for justice. Having the common law and the Court of Chancery operating side by side led to serious conflict between the courts.<sup>166</sup> This battle led to both courts trying to outdo each other in terms of procedure. It is not clear the impact these prolong disputes and rivalry had on consumers. When the Judicature Acts were enacted to merge both courts, the conflict changed from between two courts to between two substantive areas of law - the common law and equity. The English courts have jurisdictions in both areas-common law frauds and equitable frauds. However, it was discussed in Chapter Two how the merging of the two jurisdictions has adversely affected the equitable jurisdiction.

Further issues in civil proceedings include the question of standing, the extent to which sometimes regulators can argue that they have standing.<sup>167</sup> In respect of serious fraud, the international element to fraud claims is another dimension to the challenge of fighting fraud under the civil law<sup>168</sup> as well as the question of disclosure which was addressed in

---

<sup>163</sup>Consumer Credit 1974. See Consumer Credit 2006.

<sup>164</sup> Crensil (n 5).

<sup>165</sup> See generally SFC Milsom, *Historical Foundations of the Common Law* (2nd edn, Butterworths & Co (Publishers) Ltd 1981).

<sup>166</sup> See generally Edward Jenks, *A Short History of English Law from the Earliest Times to End of the Year 1911* (Little, Brown and Company 1913) and Chapter 7 of this thesis. Baker (n 90). Plucknett (n 154).

<sup>167</sup> Rider, 'Civilising the Law- The Use of Civil and Administrative Proceedings to Enforce Financial Services Law' (n 23).

<sup>168</sup> *ibid.*

our discussion of financial services fraud in the entire thesis.<sup>169</sup> In England, the absence of the US type class actions is a significant setback to consumers and investors since they are not permitted.<sup>170</sup> Yet in the recent RBS case the shareholders came together in a joint action and were successful in getting the matter settled. Class actions certainly has a major role to play in consumer claims.

### The choice of law

Faced with alternative modes of seeking redress, what choice must the consumer make? Although both the criminal and civil jurisdictions sometimes are reflected in the same statutes,<sup>171</sup> it appears that agencies are more likely to employ the civil rather than the criminal law in proceedings.<sup>172</sup> Similarly, though private criminal prosecution is available to the consumer, the ordinary consumer is more likely to choose the civil rather than the criminal law. The ordinary consumer is more likely to be aware of the civil mode for protecting the consumer than the criminal law. They are both similar in the sense that both media are complex. Complex claims in both jurisdictions are likely to be handled by organisations and regulatory bodies on behalf of the consumer. Administrative and regulatory enforcement are more popular than the traditional civil and criminal jurisdictions in consumer protection.<sup>173</sup> For instance in conveyancing fraud the SRA is very relevant to the consumer. In consumer protection, the relationship between the regulatory law and the criminal law is so close and thus leading to the concept of

---

<sup>169</sup> *ibid.*

<sup>170</sup> Patrick Quirk and John A Rothchild, 'Consumer Protection and the Internet', *Handbook Research on International Consumer Law* (Edward Elgar Publishing Ltd 2010).

<sup>171</sup> See Financial Services and Markets Act 2000.

<sup>172</sup> Rider, 'Civilising the Law- The Use of Civil and Administrative Proceedings to Enforce Financial Services Law' (n 23).

<sup>173</sup> Ison (n 4) 236-251.

regulatory crime discussed above. Logically, regulatory or administrative law often precedes the traditional civil and criminal modes.

### **The limitations of laws in combating fraud in the conveyancing sector**

While there may be plethora of laws against fraud, these are limited in combating it. It has been addressed in the Preface the impact of the 2008 global financial crisis.<sup>174</sup> It is trite that trust, integrity and confidence underpin western financial institutions and in the regulatory systems. Logically, the crisis betrayed trust and confidence. The present author submits that in order to protect investors and consumers and to engender trust by them in the system, the financial system itself must be built on scepticism, meaning trust in the financial system must not be exaggerated. This is true in the real estate sector. The nature of the Law Society's Conveyancing Protocol is such that uncritical trust is placed on the honesty of the key professionals involved in a real estate transaction.

Honesty is central to professional practice, but it is submitted that trust in the professionals in the sector must be critical. Trust can be abused for which reason there are breach of trust,<sup>175</sup> undue influence,<sup>176</sup> among others. There is this uncritical expectation that proper attitudes, behaviours and compliance to code of conducts matter to professionals and if they are made aware of them, they would comply with them.<sup>177</sup> The upshot is that the conveyancing protocol was designed without rigid checks and balances.

It is questionable how lenders critically review valuation reports prepared by surveyors. Further to the agreement for the purchase of a property by a buyer, the buyer's lenders

---

<sup>174</sup>See generally Susan Will, Stephen Handelman and David Brotherton, *How They Got Away With It: White Collar Criminals and the Financial Meltdown* (Columbia University Press 2013). See also Ryder (n 75).

<sup>175</sup>Fraud Act (n 12).

<sup>176</sup>Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (Sweet and Maxwell 2006).

<sup>177</sup>Solicitors Regulatory Authority (n 115).

instruct surveyors to value the property. It is often surprising how in most circumstances, the surveyors' valuation is often exact with the price the buyer agreed with the seller. Furthermore, it is often wondered whether lenders undertake further checks to ensure that information sent by solicitors on Reports on Title are accurate. While it is expected that monies sent to solicitors would be used to pay for the property on behalf of the client, to what extent do lenders ensure that this was indeed the case. In practice most lenders follow up with their instructed solicitors several weeks later when there is delay in receiving the title deeds.

The Land Registry's relationship with solicitors is similarly based on trust of their professional honesty. Solicitors take copies of ID and certify them on behalf of the HM Land Registry further to their due diligence under the anti-money laundering regulations, but what is the guarantee that the ID provided by the client is genuine and that is not a fake ID forged consistent with the details on Land Registry office copies of the property? This is manifested in the recent high-profile vendor fraud or identity fraud case.<sup>178</sup> Similarly, the Land Registry title deed called office copies do not have photographs of the true owners of the property thereby leading to fraudulent persons selling vulnerable people's properties.

Furthermore, the Stamp Duty Land Tax, which can amount to huge sums of money are paid to the solicitors in the hope it would be paid to Her Majesty's Revenue and Customs (HMRC). What if the solicitor does not pay within the 30 days and makes away the money? For the selling solicitor what is the guarantee that redemption funds in respect of sales would be paid to the mortgagee? The misplaced trust similarly manifests in the broker to lender relationship where until recently, lenders just accept a broker's

---

<sup>178</sup> *P & P Property Ltd v Owen White and Catlin [2018] EWCA Civ 1082 (CA)*.

information about the client's employment earnings without question. Fraudulent brokers therefore had a field day inflating the wages of their clients some of whom were not even aware of the schemes. Indeed, developers overvalued properties and similarly offered incentives which fraudulent solicitors did not declare to lenders and clients alike as required by lenders.<sup>179</sup> The dishonesty of professionals became evident to the industry during the financial or housing crisis.

The above brief discussion has exposed the weaknesses in the sector which regulators became aware of during the housing crisis.<sup>180</sup> It is in response to the situation that the Law Society devised the Quality Conveyancing Scheme (QCS).<sup>181</sup> This is a quality scheme which applied more stringent admission criteria for members. The Scheme is renewable every year with checks ensuring that members are holding up to the same standards. The launch of the Scheme was welcomed by lenders who reorganised their relationships with solicitors on their Panel by insisting Panel members be part of the Scheme. It is the present author's submission that the QCS is not the answer to the many issues raised above. For it would not prevent a solicitor who chooses to be dishonest post authorisation by the QCS from doing so. Moreover, there are cost implications.

A second major reason for weaknesses in the system is the failure to perceive the industry as a whole but limiting the Protocol fundamentally to solicitors. Each industry appears to be doing its own thing. This has not been addressed by the QCS. All the individual regulators have not come up with a holistic architecture. Third, there has been little or no effective assessment of the core functions and definitions of the relationships between the various stakeholders in the industry. A highly critical question that must be asked is why

---

<sup>179</sup> 'CML Lenders Handbook for Conveyancers' (n 24).

<sup>180</sup> Will, Handelman and Brotherton (n 174).

<sup>181</sup> The Law Society, 'QCS Core Practice Management Standards'.

funds for conveyancing transactions must necessarily go through instructing solicitors before they go to the seller's solicitor to redeem. Since fraud is about money could there not be a situation where in a purchase transaction, the ultimate destination of funds is evident to the the lenders in the transaction so that the funding bank releases the redemption funds directly to the seller's mortgagee? This situation is critical because a major type of conveyancing fraud is where the seller's solicitor fraudulently transfers completion funds to an unknown destination and fails to redeem. The proposal this author makes is not entirely new to the industry because in the author's experience as a practitioner, he has seen situations, particularly in bridging finance transactions, where the lenders send funds directly to the seller's solicitors. This means funds going through solicitors account is not a prerequisite for the validity of the transaction. Indeed, some solicitors instructed by bridging finance firms decide to register the property themselves rather than allow the purchaser's solicitors to do so.

The present author's recommendation therefore is that solicitors must focus on legal aspects of the transactions and no more. Lenders must focus on financial aspects of the transaction. There is no overarching philosophy to deal with fraud and security of transactions. As stated above, in a situation where each regulator appears to be doing its own thing, there is no overarching strategy developed critically to deal with conveyancing fraud. The Land Registry has its own policies to prevent fraud and only recently developed one with the Law Society,<sup>182</sup> the Law Society Practice Notes, the QCS, the CML Handbook and many others are isolated documents that exist. Yet where is that anti-fraud document built jointly into the Protocol for preventing fraud? Mortgage products are traded on exchanges, but it is related to lending by banks and consumer credit firms.

---

<sup>182</sup> 'Property and Title Fraud-Joint Law Society and HM Land Registry Note' <[www.lawsociety.org.uk/policy-campaigns/articles/property-and-title-fraud-advice-note](http://www.lawsociety.org.uk/policy-campaigns/articles/property-and-title-fraud-advice-note)> accessed 10 February 2018.

Who was checking the aggressive pursuit of the banks overriding objective-to make profit and thereby lending irresponsibly in the subprime market. This means that a regulatory framework that fails to grasp the big picture can spectacularly fail.

### **The limitations of the Law combating fraud in Financial and Consumer Credit Transactions**

The need to perceive industries holistically is similarly a cause of the financial crisis. It is said that *'the crisis was caused by the failure of financial institutions to manage themselves prudently, and of regulators to spot the risks that were building up across the system as a whole'*.<sup>183</sup> Prosecuting serious fraud is challenging.<sup>184</sup> Adopting a practical approach to dealing with the menace in the financial markets Professor Rider notes that *'there is no panacea, the problems are too complex and multifaceted ... it is necessary for all the weapons of the legal system together with those in the regulatory system to be used to prevent and control such frauds and abuses'*.<sup>185</sup> Indeed Professor Rider emphasizes that the problem facing the sector has nothing to with 'inadequacies of the law'.<sup>186</sup> Some of the problems he raises are how benefits of transparency in the sector and how challenges in disclosure affects effective enforcement.<sup>187</sup> He advocates formal and informal disclosure mechanisms.

---

<sup>183</sup> HM Treasury, 'A New Approach to Financial Regulation: Building a Stronger System' (HM Treasury 2011) Cm 8012 3 <<https://www.gov.uk/government/consultations/a-new-approach-to-financial-regulation-building-a-stronger-system>> accessed 11 July 2018.

<sup>184</sup> See David Kirk, 'The Management of Complex Fraud Cases', *Research Handbook on International Financial Crime* (Edward Elgar Publishing Ltd 2015); David Fitzpatrick, 'The Traditional Criminal Justice System: Its Efficacy in Dealing with Financial and Economically Motivated Crime', *Research Handbook on International Financial Crime* (Edward Elgar Publishing Ltd 2015).

<sup>185</sup> Barry A. Rider, 'Policing Corruption and Economic Crime-How Can We Do It Better' (2015) 10 *Frontiers of Law in China* 626.

<sup>186</sup> Rider, 'Civilising the Law- The Use of Civil and Administrative Proceedings to Enforce Financial Services Law' (n 23).

<sup>187</sup> Rider, 'Policing Corruption and Economic Crime-How Can We Do It Better' (n 185).

Further challenges he addresses include exposure and detection of frauds, the ability of powerful people to sometimes aggressively influence enforcement mechanisms including personnel working in the sector, the fallacy of assuming that the main panacea to combating fraud is the work of special agencies and indeed in their independence from government, which he states might lead to isolation, the challenges encountered by civil enforcement including the court's negative attitude to it, costs of regulatory enforcements, among others.<sup>188</sup> Rider thus advocates empowering victims to pursue perpetrators and mentions the development of control liability, intelligence, control and facilitator liabilities, whistle blowing and pursuing unexplained wealth.<sup>189</sup> The international dimension to policing the securities industry presents real difficulties. The complicated issues of former times,<sup>190</sup> although challenging, continue to prevail. Further practicalities of fighting fraud are noted by Parlour.<sup>191</sup> He outlines about ten aspects to this discussion among which are threat analysis, vulnerability analysis, risk management, deterrence model and due diligence.

In light of the many prosecuting bodies in the England, Professor Fisher QC has asked who should prosecute fraud, corruption and financial markets crime?<sup>192</sup> This is a legitimate question. Making reference to the prosecution of LIBOR, financial markets fraud prosecuted by the SFO and a landed banking investment fraud prosecuted by the FCA, Professor Fisher QC rightly advocates for the establishment of an economic crime

---

<sup>188</sup> *ibid.*

<sup>189</sup> *ibid.* Incidentally the theme for the 2018 Cambridge Symposium on Economic Crime is: Unexplained wealth-whose business?

<sup>190</sup> Barry A. Rider, 'Policing the International Financial Markets: An English Perspective' (1990) 16 *Brooklyn Journal of International Law* 179.

<sup>191</sup> Richard Parlour, 'Practicalities of Financial Crime Deterrence', *Research Handbook on International Financial Crime* (Edward Elgar Publishing Ltd 2015) 300–312.

<sup>192</sup> Jonathan Fisher, 'Who Should Prosecute Fraud, Corruption and Financial Markets' (2013) <<http://www.lse.ac.uk/law/Assets/Documents/law-and-financial-markets-project/fisher-who-should-prosecute.pdf>> accessed 17 February 2018.



agency which prosecutes only serious crime so that the FCA can focus on civil penalties for regulatory and compliance breaches.<sup>193</sup>

Professor Ferran, assessing the breakup of the FSA raises questions about the current regulatory architecture.<sup>194</sup> While acknowledging that the FSA had weaknesses such as not implementing the integrated regulator model properly by not paying attention to details of the prudential aspects of its mandate, the integrated regulator model not working in large economies and sending the wrong signals in describing itself as 'non-enforcement led supervisor, he argues that illusions must not be held in respect of the current framework.<sup>195</sup> The crucial reason is the Bank of England has supervised financial crisis in the past,<sup>196</sup> so there is no guarantee that it would work this time. He further notes that there is no perfect system and advocates for an intrusive style of supervision but warns against the tendency to go into laissez faire or other hand, over correction or indeed disruption in enforcement styles or coordination, all issues which arise when multiple supervisors exist where jurisdictions overlap.<sup>197</sup> Referencing Professor Rider, he cautions that dual track regime is not easy in practice.<sup>198</sup>

The phenomenon of high interest rates loans or loan sharks is a challenge in the consumer credit industry. The goal of credit and debt law to protect lower income and disadvantaged consumers are pursued through required disclosures, cooling off periods, regulation of terms, restrictions of remedies on default and control of supplier access to marketplace

---

<sup>193</sup> *ibid.*

<sup>194</sup> Ferran (n 139).

<sup>195</sup> *ibid.*

<sup>196</sup> The Right Honourable Lord Justice Bingham, 'Inquiry into the Supervision of The Bank of Credit and Commerce International'.

<sup>197</sup> Ferran (n 139).

<sup>198</sup> *ibid.*

through licensing, among others.<sup>199</sup> Some however question this view in respect of effectiveness and legitimacy by arguing such measures which alter terms of contract in consumer credit are futile, arguing ironically that it pushes consumers to loan sharks.<sup>200</sup> Professor Ramsay however among others, attacks the contention that there is a natural or obvious legal structure for consumer credit markets and opines that that there is the error of presenting the argument as a priori rather than as a hypotheses that needs to tested.<sup>201</sup> Professor Ramsay argues that although interest rates and price controls are old they are not outmoded if they 'establish a ceiling at a moderately high rate' since they 'protect against high risk credit in markets where sellers often set the terms of exchange and which are prone to overreaching, deception and lack of competition.'<sup>202</sup> In the area of financial compensations Professor Singh has raised the importance of consumer education.<sup>203</sup>

Regarding strictly consumer specific legislations there is the need to increase funding for the public agencies and intermediary enforcement bodies, improvement in class actions including the judiciary changing its present cautious approach, increased funding for legal aid, among others most of which have been discussed thoroughly by many authorities.<sup>204</sup> The present author advocates the proposals made by Professor Rider and others in dealing with fraud in financial services industry and consumer credit industries. Seeing that fraud

---

<sup>199</sup> See generally Dennis Rosenthal, *Consumer Credit Law and Practice: A Guide* (4th edn, Bloomsbury Professional Ltd 2013); Iain Ramsay, 'Consumer Credit Law, Distributive Justice and the Welfare State' (1995) 15 *Oxford Journal of Legal Studies* 177; Ramsay, 'Regulation of Consumer Credit' (n 21) and Chapter Four of this thesis.

<sup>200</sup> Ramsay, 'Consumer Credit Law, Distributive Justice and the Welfare State' (n 199).

<sup>201</sup> *ibid.*

<sup>202</sup> *ibid.*

<sup>203</sup> Dalvinder Singh, 'Northern Rock, Depositors and Deposit Insurance Coverage: Some Critical Reflections' (2010) 2 *Journal of Business Law* 55.

<sup>204</sup> See generally Geraint Howells and others, *Handbook Research on International Consumer Law* (Edward Elgar Publishing Ltd 2010).

abounds the next section seeks to make some recommendations in addressing identifiable challenges in combating fraud in the contexts of this study.

### **Recommendations for combating consumer fraud-multi-disciplinary approach**

When a phenomenon has varied causes it is only logical that a multifarious approach is expended in tackling it.<sup>205</sup> This discussion has revealed that fraud has varied causes that require a multi-dimensional approach in combating it. It is the present author's firm position that a major reason why frauds occur in financial services and in real estate is the absence in the industries of an over-arching regulatory framework created with the philosophy to prevent fraud. The present author does not submit that the architecture has been created to enhance fraud. Rather it has been created to enhance the making of money. This has become the culture. The Preface discussed the culture and power of livery companies. Professor Rider also discusses several factors that enhanced self-regulation in the City, which factors could also be disincentives to enforcement.<sup>206</sup> City culture is best captured by Clarke when he states that:

*“ ... it is intrinsic to the City that it is prone to scandals: it's business is money, very large sums of it, much of it other people's, and some of it the state's money; and although some of its institutions perform financial functions that are simple and stable, the work of most is to perform complex and ever-evolving manipulations with money so as to make it available to others on attractive terms with a view to a profit or fee. Such business inevitably gives rise both to fraudsters, whose object is to manipulate money for private ends regardless of purported public service, and to innovators who invent new manipulations, which may on the one hand constitute a more efficient or otherwise desirable service, or no more than sleight of hand and a quick profit.”<sup>207</sup>*

---

<sup>205</sup> Rider, 'Civilising the Law- The Use of Civil and Administrative Proceedings to Enforce Financial Services Law' (n 23).

<sup>206</sup> Rider, Abrams and Ashe (n 11).

<sup>207</sup> Michael Clarke, *Regulating the City Competition Scandal and Reform* (Open University Press 1986) 1 and 2.

Culture is a cause of fraud.<sup>208</sup> According to the Australian Civil Code, by culture it is meant '... *an attitude, policy, rule,, course of conduct or practice existing within the body corporate generally or in the part of the body corporate generally or in the part of the body corporate where the relevant activity takes place*'.<sup>209</sup> The existence in the City of a culture oriented towards money making is confirmed in a series of interviews granted to the BBC by Kweku Adoboli and in a detailed lecture he gave at Liverpool John Moores University.<sup>210</sup> He has thus called for a cultural shift. If Adoboli's past affects the credibility of this claim then it is worth noting that Sir Andrew Bailey has made similar call.<sup>211</sup> Indeed, this call is a reaffirmation of an acknowledged fact within financial services including by the FCA who have produced a detailed paper featuring many works by key authorities in the sector.<sup>212</sup> It is important to regulators and industry alike.<sup>213</sup> Research shows about 83% of industry leaders believe that culture within financial services is integral to fighting fraud in the industry. The next section makes recommendations for creating this culture. The discussion is woven along two strands; the creation of a generic fundamental philosophy of consumer protection and the creation of a skeptical regulatory culture.

---

<sup>208</sup> Financial Conduct Authority, 'Transforming Culture in Financial Services Discussion Paper DP18/2' 3 <<https://www.fca.org.uk/publications/discussion-papers/dp18-2-transforming-culture-financial-services>> accessed 26 June 2018.

<sup>209</sup> Criminal Code Act 1995 Section 12.3(6).

<sup>210</sup> Kweku Adoboli, *Kweku Adoboli: Lessons from Financial Catastrophe* (Liverpool John Moores University 2017) <<https://www.youtube.com/watch?v=ORQAPYR-W7I>> accessed 27 June 2018. See also Kweku Adoboli, *Putting Humanity before Profit* (Liverpool John Moores University 2017) <[https://www.youtube.com/watch?v=67Q7A\\_oC\\_6c](https://www.youtube.com/watch?v=67Q7A_oC_6c)> accessed 27 June 2018.

<sup>211</sup> Andrew Bailey, 'Culture in Financial Services-a Regulator's Perspective' (Bank of England 9 ay 2016M) <<https://www.bankofengland.co.uk/-/media/boe/files/speech/2016/culture-in-financial-services-a-regulators-perspective.pdf?la=en&hash=088A4BBDA75375CCD822EE715A35BC662FCD8A6D>> accessed 26 June 2018.

<sup>212</sup> See generally Financial Conduct Authority, 'Transforming Culture in Financial Services Discussion Paper DP18/2' (n 208).

<sup>213</sup> Pedro Machado, 'Regulating Conduct and Culture in the Financial Industry', *Conduct and culture: what priorities in the financial services industry* (Harvard Law School Forum on Corporate Governance and Financial Regulation 2016) <<https://corpgov.law.harvard.edu/2016/08/06/regulating-conduct-culture-in-the-financial-industry/>> accessed 15 June 2018.

### **Philosophy of consumer protection**

The rationales for consumer protection were examined in Chapter One.<sup>214</sup> However rationales do not provide the philosophical framework for protecting the consumer. While imperfect market theories, paternalism, among others, provide reasons why we should protect the consumer, they do not provide the philosophical principles that must underlie this protection. Philosophical principles mean the first principles, fundamental beyond which exists no other reason for the protection of the consumer. The principle becomes the guide or the most fundamental ideology, that "... is something primary that helps in explaining phenomena ... a starting point of a valid argumentation. The principles of reason cannot be proven, since in order to prove anything you need to have a starting point, and a starting point is a principle."<sup>215</sup> In this regard, the present author proposes that the principles in Professor John Rawls justice as fairness concept can be applied to consumer protection as the philosophical foundation of consumer protection. Indeed, other academics have similarly applied this principle in consumer protection including Wardhaugh who does so in the context of consumer arbitration.<sup>216</sup>

### **Justice as Fairness**

In the Theory of Justice Rawls discusses the fundamental question of how to establish a just and fair society politically and socially. He responds to it by creating a hypothetical situation where persons have been tasked to create that society. He opines that they would create a society guided by two broad principles. Calling them the principles of justice as fairness, he states thus:

---

<sup>214</sup>Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (n 9).

<sup>215</sup>Takis Tridimas, *The General Principles of EC Law* (Oxford University Press 1999) 1–3.

<sup>216</sup> Bruce Wardhaugh, 'Unveiling Fairness for the Consumer: The Law, Economics and Justice of Expanded Arbitration' (2014) 26 *Loyola Consumer Law Review* 101.

*First Principle*

*Each person has the same inderfeisible claim to a fully adequate scheme of equal liberties, which scheme is compatible with the same scheme of liberties for all; and*

*Second Principle*

*Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be the greatest benefit of the least advantaged, consistent with the just savings principle,<sup>217</sup>*

Rawls opines that they would reach that conclusion because they would be making that decision from an original position behind a veil of ignorance. By original position, Rawls states thus:

*"Justice as fairness hopes to extend the idea of a fair agreement to the basic structure itself. here we face a serious difficulty [...]. the difficulty is this: we must specify a point of view from which a fair agreement between free and equal persons can be reached; but this point of view must be removed and not distorted by the particular features and circumstances of the existing basic structure. The original position, with the feature I have called the "veil of ignorance", specifies this point of view."<sup>218</sup>*

*"In the original position, the parties are not allowed to know the social positions or the particular comprehensive doctrines of the persons they represent. They also do not know persons' race or ethnic group, sex, or various native endowments such as strength and intelligence, all within the normal range. We express these limits on information figuratively by saying the parties are behind a veil of ignorance."<sup>219</sup>*

Therefore in affinity with the original position is the concept of veil of ignorance. The original position, the veil of ignorance and the principles of justice, originate and are similar to David Hume's 'judicious spectator', Kant's categorical imperative procedure' Adam Smith's 'impartial spectator', Rousseau's general will, and Sidgwick's 'point of

---

<sup>217</sup>Rawls (n 3) 42–43.

<sup>218</sup>ibid 15.

<sup>219</sup> ibid.

view of the universe<sup>220</sup> and the Golden Rule, for it is suggested that the parties would not propose to structure a society that will be inimical to their interests, thus, the principle of fairness.

### **Equal system of equal basic rights**

Consistent with Rawl's first principle of justice, a just and fair over-arching regulatory framework that combats fraud must establish a culture that gives each person an equal right to the most extensive total system of equal basic rights compatible with a similar system of rights for all. The application of the justice as fairness principle to the protection of the consumer requires that the prevalent system of protection, laws, rights, remedies and enforcements affords every person the most extensive protection without discrimination.<sup>221</sup> Regulators, designing this system of extensive of rights from an original position and behind a veil of ignorance would ensure such rights are extensive. The veil of ignorance is not ignorance of the industry but rather ignorance of one's place in that industry. The application of the principles of justice is consistent with the FCA's approach to consumer protection which recognises different people but upholds fairness.<sup>222</sup> The principle of fair treatment is contained in the High Level PRIN principles.<sup>223</sup>

### **Recognition of vulnerability**

Consistent also with Rawls' second principle of justice as fairness, a just and fair over-arching regulatory framework that combats fraud must establish a culture that takes

---

<sup>220</sup> Samuel Freeman, 'Original Position' (The Stanford Encyclopedia of Philosophy 2016) <<https://plato.stanford.edu/archives/win2016/entries/original-position/>>.

<sup>221</sup> Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (n 9) shows among others that this is the object of consumer protection generally. .

<sup>222</sup> See generally Financial Conduct Authority, 'FCA Mission: Our Future Approach to Consumers' (n 58).

<sup>223</sup> Financial Conduct Authority, *FCA Handbook* (n 129) PRIN 2.1.1. See also Toni Williams, 'Open the Box: An Exploration of the Financial Services Authority's Model of Fairness in Consumer Financial Contracts', *Unconscionability in European Private Financial Transactions-Protecting the Vulnerable* (Cambridge University Press 2010).

account of vulnerable persons. The import of Rawls's second principle is the recognition that in society persons are different and due to various reasons including natural factors, some persons could be disadvantaged. A just and a fair system that combats fraud must take vulnerable persons into account. The FCA approach to consumer protection recognises vulnerability which is consistent with Rawls' second principle of justice as fairness.<sup>224</sup>

### **A culture that promotes individual responsibility**

A just and fair over-arching regulatory framework that combats fraud must establish a culture that expects a high sense of responsible conduct from individuals. Indeed, Adoboli has said traders must be simulated to see the consequences of their actions.<sup>225</sup> This should make employees ask themselves how they would feel if they were investors and staff recklessly gamble with their hard-earned money or pensions? How would they feel if they instructed solicitors to sell their property and may fail to redeem their mortgage but runs away with their money? For everyone can be a vulnerable consumer. A trader with such a mindset would reflect deeply before engaging in reckless drive for profit.

Instilling a deep sense of responsibility in employees in financial services cannot be overemphasised. Indeed, the FCA has noted that focus on senior managers alone is not enough.<sup>226</sup> The vital place of the individual in preventing fraud is best summed up by Lori Richards of Security Exchange Commission (SEC) in a lecture where he noted poignantly:

---

<sup>224</sup> See generally Financial Conduct Authority, 'Consumer Vulnerability Occasional Paper' (n 44). See also Financial Conduct Authority, 'FCA Mission: Our Future Approach to Consumers' (n 58).

<sup>225</sup> Lucy McNulty, 'Kweku Adoboli: Senior Manager Rules "Just Not Going to Work"' *Financial News* (London, 8 February 2018) <<https://www.fnlondon.com/articles/kweku-adoboli-senior-manager-rules-just-not-going-to-work-20180205>> accessed 26 June 2018.

<sup>226</sup> Claire Dickinson, 'FCA Says Focus on Top Managers in Not Enough to Drive Cultural Change' *Financial News* (London, 12 March 2018) <<https://www.fnlondon.com/articles/fca-says-focus-on-top-managers-is-not-enough-to-drive-cultural-change-20180312>> accessed 27 June 2018.



*What makes a person commit Fraud? It is individuals after all, who commit Fraud. At the core of all fraud, even fraud by large corporate entities, there are decisions and actions by individuals. As such the decision to bend or to break the rules is an innately personal one. So, my question what makes a person commit fraud-is relevant in every instance. I think it's helpful for regulators to consider this question, as I think it can help identify factors that may make fraud more or less likely to occur. This is enormously important to us regulators, as we have a profound interest in minimizing the instances of fraud and harm to investors.<sup>227</sup>*

It is hard to add further to the above observations. The FCA Senior Managers Arrangements Systems and Controls High Level principles are crucial to the culture of responsibility<sup>228</sup> and to the Enforcement regime.<sup>229</sup> Similarly, the imposition of liabilities on those with control within organisations.<sup>230</sup> Finally where an individual's sense of responsibility emanates from a moral philosophy the space must be created for such expression.<sup>231</sup>

### **Organisational culture**

A regulatory framework that combats fraud would require the promotion of an organisational culture premised on just and fair principles. The concept of original position would enable institutions to ask themselves, that 'imagine that we are now starting a business, what should be our overriding philosophy'? This requires questioning traditional thinking including Milton Friedman's ideology that *'the social responsibility*

---

<sup>227</sup> Lori Richards, 'Why Does Fraud Occur and What Can Deter or Prevent It?', *32nd Southwest Securities Enforcement Conference* (Securities and Exchange Commission 2008) <<https://www.sec.gov/news/speech/2008/spch090908lar.htm>> accessed 26 June 2018.

<sup>228</sup> Financial Conduct Authority, *FCA Handbook* (n 129) See SYSC.

<sup>229</sup> *ibid* see EG.

<sup>230</sup> Christopher Stears, 'Control Liability and Compliance: Tools for Controlling Financial Crime', *Research Handbook on International Financial Crime* (Edward Elgar Publishing 2015).

<sup>231</sup> Steven Shavell, 'Law versus Morality as Regulators of Conduct' (2002) 4 *American Law and Economics Association* 227. Kwame Gyekye, *Tradition and Modernity: Philosophical Reflections on the African Experience* (Oxford University Press 1997) 192. See also Barry Rider, 'The Enemy Within' [2010] *Quantum Finance in Perspective* 25.

*of business is to increase its profits*'.<sup>232</sup> Reflection on the concept of original position challenges this narrow ideology, for must a business have one sole purpose? Can multifaceted reasons why a business exists be mutually inclusive? Can a non-profit purpose be compatible with profit motives? Can short term profit motives be mutually inclusive with long term profit motives?<sup>233</sup> These are responsible queries informed by original position.

### **Industry wide Transactional Protocol**

It is submitted that to create a just and fair culture that combats fraud, a multi sectoral or industrial transactional protocols must be adopted or defined, where possible for the sectors in question which involve all identifiable stakeholders. It is this author's submission that where such protocols can be defined they enable industry participants to identify possible fraud paths and define the solutions accordingly. For instance, the question can then be asked what possible frauds can occur in the consumer's relationship to the broker in real estate or financial services? The next possible issue is the identification of possible paths for money transactions within the Protocol? The question then ought to be asked whether these movements of money are necessary. The crucial question then is what can be done to streamline the process and prevent fraud? Furthermore, such a system must be established on a culture of scepticism but not one trusting of the professional stakeholders as discussed in detail above.

---

<sup>232</sup> Friedman Milton, 'The Social Responsibility of Business Is to Increase Its Profits' *New York Times Magazine* (New York, 13 September 1970) <<https://www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html>> accessed 21 July 2018.

<sup>233</sup> Mark S Schwartz, Meir Tamari and Daniel Schwab, 'Ethical Investment from a Jewish Perspective' 112:1 *Business and Society Review* 137.

### **Industry-wide fraud protocol**

It is further proposed that a just and fair approach to fighting consumer fraud must involve joint efforts by all the participants in the industry. As illustrated above the creation of a joint protocol would involve joint efforts by the stakeholders in the industry and this can be fed into the establishment of a joint fraud action group. It is expected that such joint fraud action group would be greater in number to the group that would form the protocol as it may include fraud combating agencies in the relevant country.<sup>234</sup> It is acknowledged that in the UK these are already taking place in both the real estate and financial services industries. For instance, in order to prevent consumer fraud, the police, the banks and Trading Standards have established the Banking Protocol in October 2016.<sup>235</sup> It is reported that the establishment of the Protocol has prevented over nine million worth of fraud with about 101 arrests been made nationwide. This achievement is in the first year of operation.<sup>236</sup> In the mortgage fraud sector the National Fraud Authority produced a progress report 'Working together to stop mortgage fraud' indicated that joint action is on the way.<sup>237</sup> The same can be said of the efforts by the Law Society and HM Land Registry who recently produced a joint action advice note on property and title fraud.<sup>238</sup> The real estate sector is broader and the inclusion of other stakeholders may be helpful.

---

<sup>234</sup> See HM Treasury (n 183) where the diagram of the regulatory architecture feature only few institutions.

<sup>235</sup> 'Finance Industry, Police and Trading Standards Unite to Tackle Fraud' (13 December 2017) <<https://www.ukfinance.org.uk/finance-industry-police-and-trading-standards-unite-to-tackle-fraud>> accessed 10 February 2018.

<sup>236</sup> *ibid.*

<sup>237</sup> National Fraud Authority, 'Working Together to Stop Mortgage Fraud-Progress Report 2010' (National Fraud Authority 2010) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/118467/mortgage-fraud-report2010.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/118467/mortgage-fraud-report2010.pdf)> accessed 24 July 2018.

<sup>238</sup> 'Property and Title Fraud-Joint Law Society and HM Land Registry Note' (n 182).

### **A software engineering approach to regulation**

To the present author, a key plank to solving fraud in financially intensive sub-sectors of the economy is moving away from the current paradigm based on trust of commercial stakeholders to one built on skepticism. To create a just and fair culture that combats fraud, there must be in existence clearly defined paths of routine supervision, checks and balances implemented at short irregular temporal periods. The field of information technology, particularly software programming and information systems generally is pertinent.<sup>239</sup> Information technology is important to the FCA's information gathering role and it can appoint skilled persons to effect such functions.<sup>240</sup>

The overriding benefit of information technology to the battle against fraud rests on the principle of abstraction. At a narrow technical level, it means the need to eliminate duplication by automation. The meaning can be extended to refer to the need to analyse human systems and processes and automate them.<sup>241</sup> For instance in Chapter Four, mention was made of the benefit of credit scoring to access to credit. This objective assessment has been largely achieved through automating, not just the process of gathering relevant financial information from different sources, but the process of applying and assessing consumer's qualification for credit. It is indeed a cliché to suggest, due to overwhelming prevalence of evidence, that information system helps in combatting fraud. It must be stressed that information technology can similarly be used to enhance fraudulent acts.<sup>242</sup>

---

<sup>239</sup> Gilligan (n 66).

<sup>240</sup> Financial Services and Markets Act 2000 (n 171). See Rider and others (n 150) where the relevance of Enforcement Guide (EG) and Supervision Manual (SUP).

<sup>241</sup> See generally Chromatic, *Extreme Programming Pocket Guide* (1st edn, O'Reilly Media Inc 2003) particularly 69-71.

<sup>242</sup> Crentsil (n 5).

### **A software engineering approach to regulation**

To the present author, a key plank to solving fraud in financially intensive sub-sectors of the economy is moving away from the current paradigm based on trust of commercial stakeholders to one built on skepticism. To create a just and fair culture that combats fraud, there must be in existence clearly defined paths of routine supervision, checks and balances implemented at short irregular temporal periods. The field of information technology, particularly software programming and information systems generally is pertinent.<sup>239</sup> Information technology is important to the FCA's information gathering role and it can appoint skilled persons to effect such functions.<sup>240</sup>

The overriding benefit of information technology to the battle against fraud rests on the principle of abstraction. At a narrow technical level, it means the need to eliminate duplication by automation. The meaning can be extended to refer to the need to analyse human systems and processes and automate them.<sup>241</sup> For instance in Chapter Four, mention was made of the benefit of credit scoring to access to credit. This objective assessment has been largely achieved through automating, not just the process of gathering relevant financial information from different sources, but the process of applying and assessing consumer's qualification for credit. It is indeed a cliché to suggest, due to overwhelming prevalence of evidence, that information system helps in combatting fraud. It must be stressed that information technology can similarly be used to enhance fraudulent acts.<sup>242</sup>

---

<sup>239</sup> Gilligan (n 66).

<sup>240</sup> Financial Services and Markets Act 2000 (n 171). See Rider and others (n 150) where the relevance of Enforcement Guide (EG) and Supervision Manual (SUP) .

<sup>241</sup> See generally Chromatic, *Extreme Programming Pocket Guide* (1st edn, O'Reilly Media Inc 2003) particularly 69-71.

<sup>242</sup> Crentsil (n 5).

The concept of micro and macro in software development require that problems must be defined broadly and then broken down into smaller units. Applying this concept to regulation within financial services means that supervision, checks and balances must be implemented at both smaller and larger levels.<sup>243</sup> It requires supervision of the individual, teams, departments, organisations, sectors, and countries. The broad approach pursued in the FCA Handbook supports this position.<sup>244</sup>

The source code concept in software engineering can inspire a culture of compliance. It is the version of a computer programme as originally written.<sup>245</sup> Applied in the context of combating fraud, it would require that anti money laundering KYC checks be effected with original and primary documents and from primary sources.<sup>246</sup> This means institutions must be pessimistic of sources of funds and effect checks with employers and relevant tax authorities such as the HMRC. Professionals' statuses must be verified with relevant regulatory bodies. Of course, this could raise data protection issues, but these would require seeking consents for such source code enquiries.<sup>247</sup> In order to prevent fraud one must verify information with the relevant source institutions imminently.

Similarly, the concepts of testing and debugging are relevant to the practical aspect of combatting fraud. Programming codes are run, instantly tested so problems are instantly debugged. The process is called verification and resolution. The concept of testing and

---

<sup>243</sup>Gilligan (n 66).

<sup>244</sup> Financial Conduct Authority, *FCA Handbook* (n 129).

<sup>245</sup> Linux Information Project, 'Source Code Definition' (23 May 2004) <[http://www.linfo.org/source\\_code.html](http://www.linfo.org/source_code.html)> accessed 27 June 2018.

<sup>246</sup> See generally Legal Sector Afinity Group, 'Anti Money Laundering Guidance for the Legal Sector' <<http://www.lawsociety.org.uk/policy-campaigns/articles/anti-money-laundering-guidance/>> accessed 27 June 2018. See also Financial Action Task Force, 'Who We Are' <[www.fatf-gafi.org.uk/about/historyofthefatf/](http://www.fatf-gafi.org.uk/about/historyofthefatf/)> accessed 24 March 2017. See generally Bob Blunden, *The Money Launderers: How They Do It and How to Catch Them At ...* (2nd edn, Management Books 2000 Ltd 2009). See also Peter Camp, *Solicitors and Money Laundering: Compliance Handbook* (The Law Society of England and Wales 2004).

<sup>247</sup> See Data Protection Act 2018. See also General Data Protection Regulation 2018.

debugging means internal supervisors must be pessimistic of information or reports received and verify instantly, so problems can be resolved. For instance, consumer credit firms report to the FCA electronically using the GATHERING Better Regulatory Information ELECTRONICALLY (GABRIEL).<sup>248</sup> Like Professor Ferran has stated whatever structures being implemented requires proactiveness, a key lesson the FCA itself learnt from the recent crisis.<sup>249</sup>

The present author's proposals for a creating a culture that makes it difficult to commit fraud have focused on recommending a philosophy for generic consumer protection and secondly creating a regulatory culture involving all stakeholders. Recognising that no human institution is impeccable, it is valid to enquire whether the proposals are rigid enough to deal with for instance organised crime. Mortgage fraud often involves professionals.<sup>250</sup> However, it is suggested that it is less probable that an organised gang can easily function under the combined plethora of measures proposed which involve so many organisations. The strength of the proposals made in this thesis, including the supervisory checks and balances and enforcement procedures advocated, complementing the many measures already advocated by Rider and others, if implemented should go a long way to combat any threat of organised crime. A key merit of the proposals in this thesis is that it disapproves the situation where only regulators are focused upon as responsible for combating fraud and contends that the buck stops with all stakeholders.<sup>251</sup> The proposals help nip frauds in the bud.

---

<sup>248</sup> Financial Conduct Authority, 'Guide for Consumer Credit Firms' 35 <[www.fca.org.uk/consumer-credit](http://www.fca.org.uk/consumer-credit)>.

<sup>249</sup> Ferran (n 139).

<sup>250</sup> National Fraud Authority (n 237).

<sup>251</sup> The Cambridge International Symposium on Economic Crime, 'Economic Crime-Where Does the Buck Stop? Who Is Responsible-Facilitators, Controllers and or Their Advisors?' (4 September 2016) <<http://www.crimesymposium.org/PDFfiles/2016%20Programme.pdf>> accessed 27 June 2018.

## Potential Impact of Brexit

The implications of the Brexit process on consumer protection, like most other sectors, is uncertain at present. The uncertainty stems from the fact that the terms of the withdrawal agreement have not been agreed. The extent to which United Kingdom laws would align or diverge are presently uncertain. According to the Government White Paper the United Kingdom's prefers a relationship of Enhanced Equivalence with the EU. The bulk of present EU law would effectively be enshrined into United Kingdom laws.<sup>252</sup> Therefore, it is unlikely that things would change in the short term.

Meanwhile a specific study on the likely impact of the United Kingdom's exit has been undertaken by the United Kingdom Consumer Services Panel.<sup>253</sup> The report suggests the absence presently of any quantitative report of the benefits of the EU on the United Kingdom.<sup>254</sup> Secondly the report compared prior United Kingdom provisions on financial services with the EU and notes that both have been mutually beneficial to the consumer.<sup>255</sup> For instance, the United Kingdom has a much stronger regime in some areas. These include compensation and redress where the Investor Compensation Scheme Directive and Insurance Guarantee Scheme apply, in dispute resolution and in conduct of investment business and product intervention where the United Kingdom has long standing requirements and under existing laws which supersede the market regulation requirements under MiFiD II and MiFIR. The EU on the other hand has more extensive provisions in the area of funds where the Deposit Guarantee Scheme and UCITs Directive apply, in relation to disclosure and governance structures under which the PRIIPs apply, in Treating Customers Fairly where the Consumer Credit Directives, Distance Marketing,

---

<sup>252</sup> European Union (Notification of Withdrawal) Act 2017.

<sup>253</sup> See generally Severn (n 41).

<sup>254</sup> *ibid* See paragraph 8.

<sup>255</sup> *ibid* see generally 6-10.



General Data Protection, Unfair Contracts Terms Directive, Unfair Commercial Practices Directive and Shareholder Rights apply and finally in terms of future initiatives where the provisions of the CMU and the Green Paper on Retail Financial Services supersede provisions of the United Kingdom.

The Panel finally recommends the following: financial services firms must be under a duty of care in dealings with consumers, regulators must plug gaps and inconsistencies in regulation, pursue inclusive financial services sector, robust authorisation and supervision of firms, improve disclosure regimes, consumers should get tight to cancel, cool-off and payback early a financial product, fair terms on agreements, firm's must assess affordability, appropriateness or suitability, transparency on costs and charges, portability of products, product intervention, dispute resolution by an independent body and compensation for consumers where firm's default.<sup>256</sup> The report concludes the consumer protection agencies must not fear United Kingdom's exit; that the fear is misplaced for four reasons.<sup>257</sup> First the United Kingdom's membership of international organisations which set high level standards including the G20 and IOSCO.<sup>258</sup> Secondly the United Kingdom has clearly been the instigator of regulations on Financial services. Third the United Kingdom has history of emphasis on conduct of business regulation and finally whatever level of relationship the United Kingdom establishes with the EU it would require acceptance of some EU law.

## Summary

Consumer protection from fraud and abuse by businesses is an irony. The sense implied in this proposition is dissimilar from the one made at the beginning of the thesis.

---

<sup>256</sup> *ibid* See pages 10-13.

<sup>257</sup> Severn (n 41) see generally 5.2.

<sup>258</sup> See discussion in Rider and others (n 150) Chapter 16.

Businesses, no matter what legal form they take, are composed of individuals. The shareholders and directors of companies are individuals, so are the members of partnerships and owners of sole trading businesses. To state therefore that one is examining the protection of consumers from frauds and abuse by businesses is in actual sense to propose that one is examining the protection of individuals from frauds by other individuals. Business legal forms become the mechanism fraudulent individuals use to achieve their ends. Fraud is not inherent in a company, a limited liability partnership or sole trading. Rather it is individuals who choose these forms for fraudulent purposes to hurt the vulnerable in society, the consumer.

The foregoing discussion has highlighted the measures which are available to protect the consumer from fraud in England. The discussion began by noting in the Preface the existence of guilds and Livery Companies who created a business and a cultural environment in the City of London that among others protected the consumer. These unique institutions were however criticised for operating effectively as monopolies. The political influence of Livery companies was highlighted and used as a springboard to examine the influence and impact of political and civil rights persons in consumer protection, particularly where there have been frauds such as the credit crunch of 2008 and how the United States and the US responded to same. Further windows to the origin of consumer protection were discussed including the works of trading standards and local weights and measures departments. The essay then explored the economic, social, parliamentary, philosophical, and religious influences on the growth of consumer protection in England. In Chapter Two the concept of fraud was examined and this was followed up with discussions on frauds in financial services, consumer credit and conveyancing sectors. A broad approach to consumer protection was adopted for which

reason the essay discussed the roles played by public bodies and agencies in protecting the consumer.

It is obvious that legally and administratively, the consumer has several alternatives for redress, some of which have been old. This thesis has examined the alternatives as they have prevailed in England from earlier times. It has been clear that some of the modern methods of protection began in earlier times and have only been enhanced presently. The thesis has not made a clear legislative proposal except to advocate for change in the culture of businesses especially within financial services. Prosecuting fraud is expensive. Resources are expended to this end because it is believed it is in the public interest. Yet one wonders whether it is indeed in the public interest when the cost of combatting fraud is assessed. The sanctions that are imposed on businesses are subsequently clawed back from increased cost of services to the consumer. If indeed City firms invest to make profit for noble ends such as pensions, then to what extent is it in the public interest to dissipate their revenue for failures in compliance that lead to money laundering offences? It is for these reasons that new methods for combatting fraud are needed. These include increased use of information technology, increased reliance on Deferred Prosecution Agreements (DPA), a section 7 type 'failure to prevent' mental element to corporate prosecutions among others.<sup>259</sup> These measures are mostly criminal and as has been noted the criminal

---

<sup>259</sup> Lisa Osofsky, 'Ensuring Our Country Is a High Risk Place for the World's Most Sophisticated Criminals to Operate' (The Cambridge International Symposium on Economic Crime 2018, Jesus College Cambridge University, 9 March 2018) <<https://www.sfo.gov.uk/2018/09/03/lisa-osofsky-making-the-uk-a-high-risk-country-for-fraud-bribery-and-corruption/>> accessed 25 September 2018; Camilla de Silva, 'Corporate Criminal Liability, AI and DPAs' (Herbert Smith Freehills Corporate Crime Conference 2018, 21 June 2018) <<https://www.sfo.gov.uk/2018/06/21/corporate-criminal-liability-ai-and-dpas/>> accessed 25 September 2018; Camilla de Silva, 'The Prosecutor's Priorities: Investigative Techniques, Priorities and Future DPA Use within the SFO' (ABC Minds Financial Services conference on 15 March 2018, 16 March 2018) <<https://www.sfo.gov.uk/2018/03/16/camilla-de-silva-at-abc-minds-financial-services/>> accessed 25 September 2018; Alun Milford, 'Rendering Accountable the Wealth of Criminals' (The Cambridge International Symposium on Economic Crime 2018, Jesus College Cambridge University, 9 May 2018) <<https://www.sfo.gov.uk/2018/09/05/alun-milford-rendering-accountable-the-wealth-of-criminals/>> accessed 25 September 2018.

law is relevant only when fraud has occurred.<sup>260</sup> This is why regulatory law and creating a culture that combats frauds is very important as have been addressed in this thesis. Finally, it is important that no matter what measures are available, religious devotion and application is the only way forward in protecting the consumer.

---

<sup>260</sup> See Daniel F Waters and Martyn Hopper, 'Regulatory Discipline and the European Convention on Human Rights-a Reality Check', *Regulating Financial Services and Markets in the 21st Century* (Hart Publishing 2001).

Candidate Number: 1341103

## **BIBLIOGRAPHY-PRIMARY SOURCES**

### **Cases from other jurisdictions**

*United States v Brown, F Supp 81 (SDNY 1933)*

### **EU Cases**

*Buet and Educational Business Services v Ministere Public [1989] ECR 1235 (ECJ Case C-382/8)*

*C-415/93 Union Royale Belge des Societes de Football Association and others v Bosman and Others [1995] ECR I-4921*

*Case 22/87 Commission v Italy [1989] ECR 143*

*Case 148/78 Pubblico Ministero v Ratti [1979] ECR 1629*

*Case 152/84 Marshall v Southampton Area Health Authority [1986] ECR 723*

*Case 175/73 Union Syndicale Massa and Kortner v Council [1974] ECR 917*

*Case C-62/00 Marks and Spencer plc v Commissioners of Customs and Excise [2002] ECR I-6325*

*Case C-188/89 Foster v British Gas [1990] ECR I-3133*

*Case C-220/98, [2000] ECR I-117 Estee Lauder Cosmetics GmbH & Co OHG v Lancaster Group GmbH*

*Case C-456/98 Centrosteeel Srl v Adipol GmbH [2000] ECR I-6007*

*Francovitch, Bonifaci & Others v Italy ECJ 19 Nov 1991*

*Joined Cases C-46/93 & c-48/93 Brasserie du Pecheur SA Germany and R v Secretary of State for Transport, ex parte Factortame Ltd and others [1996] ECR I-1029*

*Marleasing SA v La Comercial Internacional de Alimentacion SA C-106/89*

### **EU legislations**

Admissions Directive (79/279) [1979] O.J. L45/55

Basel Accord 1998

Commission Delegated Regulation (EU) 2016/522

Commission Implementing Regulation (EU) 2016/1055

Comparative Advertiosing Directive (97/55)

Candidate Number: 1341103

Consumer Credit Directive (2008/48)

Consumer Rights Directive (2011/83)

Council of Europe Convention on Laundering, Tracing, Seizure and Confiscation of Proceeds of Crime 1990

Data Protection Directive (95/46)

Decision on a common framework for the marketing of products (768/2008)

Directive 2001/34 [2001] O.J. L184/1

Directive 2014/57/EU on Criminal Sanctions for Market Abuse (CSMAD)

Directive on Criminal Sanctions for Market Abuse 2014/57/EU (CSMAD)

Distance Marketing of Consumer Financial Services Directive (2002/65)

Distance Marketing of Financial Services (2002/65) O.J. L271/16

Distance Selling Directive (97/7) [1997] O.J. L44/19

Doorstep Selling Directive (85/577)

Draft Market Abuse Directive

Electronic Commerce Directive (2000/31)

Electronic Commerce Directive (2000/31) [2000] O.J. L178/1

Electronic Signatures Directive (1999/93)

EU Market Abuse Directive 2003/6/EC on Insider Dealing and Market Manipulation

European Convention for the Human Rights and Fundamental Freedoms (Rome, November 4, 1950)

European Convention on Mutual Assistance in Criminal Matters 1959

European Convention on Mutual Assistance in Criminal Matters 2000

Final report: Draft technical standards on the Market Abuse Regulation (ESMA/2015/1455)

General Product Safety Directive (2001/31)

Hague Convention on Civil Procedure 1896

Information Society Services Directive (2000/31)

Injunctions Directive 98/27

Candidate Number: 1341103

Insider Dealing Directive (89/592) [1989] O.J. L334/30  
Investment Services Directive (93/22) [1993] O.J. L141/27  
Investor Compensation Directive (97/9)[1997] O.J. L84/22  
Lisbon Treaty  
Listing Particulars Directive (80/390) [1980] O.J. L100/1  
MAR Guidelines: Persons receiving market soundings (ESMA/2016/1477 EN)  
Markets in Financial Instruments ('MiFID') Directive 2004/39/EC  
Markets in Financial Instruments (MiFID II) - Directive 2014/65/EU  
Markets in Financial Instruments (MiFIR) - Regulation (EU) No 600/2014  
Misleading Advertising Directive (84/450) [1984] O.J. L250/17  
Money Laundering Amending Directive (2001/97) [2001] O.J. L344/76  
Money Laundering Directive (91/308) [1991] O.J. L66/77  
Package Holiday Directive (90/314)  
Product Liability Directive (85/374)  
Prospectus to be Published when Transferable Securities are Offered to the Public  
Directive (89/298) [1989] O.J. L124/8  
Prudential Supervision ('post-BCCI') Directive (95/26) [1995] O.J. L126/1  
Regulation establishing a European small claims procedure (861/2007)  
Regulation on Consumer Protection Cooperation (2006/2004)  
Regulation setting out the Requirements for Accreditation and Market Surveillance  
relating to the Marketing of Products (765/2008)  
Sale of Goods and Associated Guarantees Directive (99/44)n  
Second EEC Directive (77/91) [1997] O.J. L26/1  
Seventh Company Directive (83/349) [1983] O.J. L193/1  
The EU Market Abuse Regulation ('EU MAR') Regulation (EU) No 596/2014  
Treaty establishing the European C 325, 24/12/2002 P. 0033-0184 Community  
(Consolidated version 2002)n  
Treaty of Amsterdam

Candidate Number: 1341103

Treaty of Maastricht

Treaty of Rome 1957

UCITS Management Directive (2001/107) [2002] O.J. L41/20

UCITS Product Directive (2001/108) O.J. L41/35

Undertakings for Collective Investment in Transferable Securities Directive (85/611) [1985] O.J. L375/3

Unfair Commercial Practices Directive (2005/29)

Unfair Terms in Consumer Contracts Directive (93/13) [1993] O.J. L95/29

United Nations Convention Against Illicit Traffic in Narcotics Drugs and Psychotropic Substances (the Vienna Convention) 1988

### **UK Cases**

*A Ketley Ltd v Scott* [1981] ICR 241

*A Schroeder Music Publishing Co Ltd v Macauley* [1974] 3 All ER 616

*Abbey National Building Society v Cann* [1991] 1 AC 56

*A-G of Hiong Kong v Humphreys Estate (Queens Gardens) Ltd* [1987] AC 114

*AIB Holdings UK Plc v Mark Redler & Co Solicitors* [2014] UKSC 58

*A&J Bull Containers v Metropolitan Police* [1984] RTR 24

*Allcard v Skinner* [1887] 36 Ch D 145

*Allingham v The Minister of Agriculture and Fisheries* (High Court) 1948

*Arkwright v Newbold* [1881] 17 Ch D 309

*Armstrong v Strain* [1952] 1 All ER 139

*Aylesford (Earl of) v Morris* (1873) L. R. 8 Ch. App. 484

*Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37

*Barnes v Black Horse Ltd* [2011] GCCR 11301

*Bedford v Bagshaw* (1859) 4 Hurlstone and Normans 538, 157 ER 951

*Bell v Lever Brothers Ltd* [1932] AC 161

*Bernasconi and Another v Nicholas Bennett & Co (a firm) and Another* [1999] All ER (D) 1199



Candidate Number: 1341103

- Bisset v Wilkinson* [1927] AC 177
- Blacker v Lake and Elliot* Ld 106 LT 533
- Bolton Engineering Co v Graham* [1957] 1 QB 159
- Boscawen v Baywa*: 1995 4 All ER 769
- Boustany v Pigott* [1994] 69 P & CR 298
- Brighton & Hove City Council v Audus* [2009] EWHC 340 (ch), [2009] 9 EG 192, [2010] 1 All ER (Comm) 343
- Brown v Raphael* [1958] Ch 636
- Bruce v Ailesbury* [1892] AC 356
- Burlow Clowes International Ltd (in Liquidation) v Vaughan* 1992 4 All ER 22
- Burrell v Helical ( Bramshott Place) Ltd* [2015] EWHC 3727 (ch); HLR 18; [2016] CTTL 1; [2016] 1 P & CR DG21
- Burrowes v Lock* [1805] 10 Ves 470, 32 ER 473
- Burton's case* Kings Bench Mich 33 & 34 Eliz
- Cannan and Another v Bryce* (1819) 106 ER 628, 3 Barnewall and Alderson 179
- Caparo Industries Plc v Dickman* [1990] 2 AC 605
- Carpenter v Heriot* (1759) 1 Ed. 338
- Carter v Boehm* (1766) 97 ER 1162
- Cavendish Woodhouse Ltd v Manley* (1984) 148 JP 299, 82 LGR 376, QBD
- Chandler v Lopus* [1603] Cro Jac 4
- Chesterfield (Earl of) v Janssen* [1751] 2 Ves Sen 125
- Chief Constable of Kent ex parte L*
- Clarke v Powell* (1833) 4 Barnewall and Adolphus 846, 110 ER 674
- Clarke v Powell* 4 Bk & Ad 846 ( 24 ECLR)
- Clayton's Case* Common Pleas, Pasch 37 Eliz
- Clef Acquitane SA v Laporte Minerals (Burrow)* [2001] QB 488
- Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374
- Daniel v Drew* [2005] EWCA Civ 507

Candidate Number: 1341103

- Derry and others v Peek* (1886) 1 All ER Rep 1 (House of Lords)
- Destine Estates Ltd v Muir* [2014] EWHC 4191 (ch)
- Devlin v Harsteh Developments Ltd* 2704
- DHN Foods Distributors Ltd v Tower Hamlets London Borough Council* [1976] 1 WLR 852
- Dickinson v UK Acorn Finance Ltd* [2015] EWCA Civ 1194; [2016] HLR 17; [2016] CTL 20
- Dimond v Lovell* [2001] GCCR 2303 CA
- Dimskal Shipping Co SA V International Transport Workers Federation (ITF)* [1992] 2 AC 336
- Director of Public Prosecutions v Gomez* [1993] AC 442, [1993] 1 All ER 1, HL
- Doige's Case* Y B Hill 9 Hy VI
- Donoghue v Stevenson* 1932 UKHL 100
- Dunbar Bank Plc v Nadeem* [1998] 3 All ER 876
- Early v Garrett* 4 M & R 687
- East India Co v Henschman* 1 Ves J 287
- Ebrahimi v Westbourne Galleries Ltd* (1973) AC 360
- Edgington v Fitzmaurice* (1885) 29 Ch D 459
- Edwards v Brooks (Milk Ltd)* [1963] 3 All ER 62
- Elliot v Hall* [1885] 15 QB D 315
- Evans v Bricknell* 6 Ves 174
- Evans v Llewellyn* [1787] 1 Cox 333
- Faikney v Renous* 98 ER 79
- Financial Conduct Authority v Da Vinci Invest Ltd* [2015] EWHC 2401
- Foodco (T/A Muffin Break) UK LLP & Others v Henry Boots Development Ltd, LTL* 9/3/2010: [2010] EWHC 358 (Ch)
- Foss v Harbottle* (1843) 2 Hare 461
- Fowler v Paget* (1798) 7 Term Rep 509; 101 ER 1103
- Francis v Cokrell* LR 5 QB 505

Candidate Number: 1341103

- Francis v Knapper* [2016] EWHC 3053 (QB)
- Fuller v Wilson* 3 QB 58, 68
- George v Skivington* LR 5 Ex 1
- Gibbons v Rule* (1827) 4 Bingham 301, 130 ER 783
- Gilford Motors Company Ltd v Horne* [1933] Ch 935
- Grant v National Board* [1956] AC 649
- Great North of England Railway Case* 1846
- Hall v Smith* 14 Ves 426
- Hamilton v Royse* 2 Sch 326
- Harrison v Black Horse Ltd* [2011] GCCR 11327, [2011] EWCA Civ 1128
- Hartop v Hoare* 2 Stra 1187
- Hasten Development Ltd v Derek William Bleaken* [2012] EWHC 12 (ch)
- Hawkins v Smith* 12 Times LR 532
- Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575, HL
- Helby v Mathews* [1875] AC 471
- Henderson v Lacon* LR 5, Eq 262
- Huggins* 1730 2 Stra at 885
- Hughes v Hall* [1981] RTR 430, QBD
- Ian Charles Hannam v The Financial Conduct Authority* [2014] UKUT 0233 (TCC)
- Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1988] 2 WLR 615, [1988] 1 All ER 348
- Ivey v Genting Casinos (UK) Ltd t/a Crockfords* [2017] UKSC 67
- Ivey v Genting Casinos (UK) Ltd t/a Crockfords* [2017] UKSC 67
- Janssen, Bart Chamberlain of London v Green* (1767) 4 Burrow 2103, 98 ER 97
- JJ Harrison (Properties) Ltd v Harrison* 2000 1 BCLC 162
- Jones v Lipman* [1962] 1 WLR 832
- Jones v Morgan* [2001] EWCA Civ 995

Candidate Number: 1341103

- Kelly v Bakir* [2008] (Unreported) Chancery Division
- Kennedy v Green* 3 M & K 669
- King v Williams* 2 B and C 538
- Kirschner v General Dental Council* [2015] EWHC 1377 (Admin)
- Knightsbridge Estates Trust Ltd v Byrne* 1 CA 441(ch, HL [1940] AC 613, [1940] 2 All ER 401 )
- Krelinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25, 46
- Langridge v Levy* 2 M & W 519; 4 M & w 337
- Lawrence v Metropolitan Police Commissioner* [1972] AC 626, [1972] All ER 1253, HL
- Lee v Lee's Air Farming Ltd* [1961] UKPC 33
- Levi v British Westralian Mine and Share Corporation* [1898] 43 Sol Jo 45
- Lloyds TSB Bank Plc v Markandan 7 Uddin* [2012] EWCA Civ 65
- Lloyds v Browning* [2013] EWCA Civ 1637
- Log Book Loans Ltd v The Office of Fair Trading and Nine Regions Ltd (t/a Log Book Loans) v the Office of Fair Trading* [2010] GCCR 10501; CCA/2009/0010 & CCA/2009/0011
- London v Beiorley* [1848] 10 LT 505 EX
- Longmeid v Holliday* 6 EX 761
- Macklin v Dowsett* [2004] EWCA Civ 904
- Macklin v Dowsett* [2004] EWCA Civ 904
- Maddison v Alderson* [1888] 8 App Cas 467
- Maitland v Backhouse* 17 LJ (121)(ch)
- Markets & Company Ltd v Knight Steamship Co Ltd* [1908-1910] All ER Rep
- Markus Gelll v Daimler AG* C-19/11
- McCullagh v Lane Fox & Partners Ltd* (1995) *The Times*, 22 December CA
- MCI WorldCom International Inc v Primus Telecommunications Inc* [2004] EWCA Civ 957
- Mellish v Motteaux* (1792) 170 ER 113

Candidate Number: 1341103

- Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 PC
- Michael Azuka Otobo v Solicitors Regulatory Authority* [2016] EWHC 2924 (Admin); [2016] WL 06820879
- Mohamad Khodari v Fahad Al Tamimi* [2008] GCCR 8561, [2008] EWHC 3065 (QB)
- Mohamad Khodori v Fayad Al Tamimi* [2008] GCCR 8 561, [2008] EWHC 3065 (QB)
- Moore v I Bressler Ltd* [1944] 2 All ER 515
- Morgan v Pooley* [2010] EWHC 2447 (QB)
- Morley v Loughman* [1893] 1 Ch 736
- Morrell & Another v Stewart & Another* [2015] EWHC 962 (ch)
- Mortgage Corporation v Shaire and Others* [2000] EWHC Ch 452
- Moussell Brothers v London and North Western Railway Company* 1917 2 KB 836
- Mulcahy v Regina* 1868 LR HL 306
- Multiservice Bookbinding Ltd v Marden* [1978] 2 All ER 489, [1979] 84 (ch)
- National Westminster Bank v Skeilton* [1993] 1 WLR 72
- Nationwide Building Society v Dunlop Haywards & Corbetts* [2009] EWHC 254 (Comm)
- Nationwide Building Society v Dunlop Haywards & Corbetts* [2009] EWHC 254 (Comm)
- NCA v Azam & others (No 2)*
- New Brunswick, & Railway v Conybeare* 9HL 711
- Niersmans v Pesticcio* [2004] EWCA Civ 372
- Nocton v Lord Ashburton* [1914] AC 932 (HL)
- Norris v Government of USA* 2008 UKHL 16
- Occidental Worldwide Investment Corporation v Skibs A/S Avanti* [1976] 1 Lloyd's Rep 293
- Office of Fair Trading v Lloyds TSB Bank Plc* [2007] UKHL 48
- OFT v Purely Creative Industries* (2011) EWHC 106
- Okpabi and others (on behalf of themselves and the people of Ogale Community) v Royal Dutch Shell Plc and another* [2018] EWCA Civ 191

Candidate Number: 1341103

- Ord v Belhaven Pubs Ltd* [1998] 2 BCLC 447
- Owen v Homan* 14 HL 997
- P & P Property Ltd v Owen White and Catlin* [2018] EWCA Civ 1082 (CA)
- P & P Property Ltd v Owen White and Catlin LLP* [2016] EWHC 2276 (Ch)
- Pao On v Lau Yiu Long* [1980] AC 614
- Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400
- Paragon Mortgages Ltd v McEwan-Peters* [2011] GCCR 11367, [2011] EWHC 2491 (Comm)
- Pasley v Freeman* 3 TR 51
- Pearks Gunston & Tee Ltd v Ward* [1902] 2 KBI
- Petrie and Another, Executors of Page Keeble v Hannay, Baronet* (1789) 3 Term Reports 418, 100 ER 652
- Pillmore v Hood* 5 Bing NC9
- Portman Building Society v Dusangh* [2000] EWCA Civ 142
- Project Blue Ltd (formerly Project Blue (Guensey Ltd) ) v Revenue and Customs Commissioners* [2016] EWCA Civ 485; [2016] STC 2168; [2016] BTC 22; [2016] STI 1795
- Prosser v Rice* 28 Bear 68
- Purrusing v A'Court (a firm) Anor & Co House Owners Conveyancers Ltd*
- Queens v Adams* [1995] 1 WLR 52
- R (on the application of Gujra) v CPS* [2012] UKSC 52
- R (on the application of Kelly) v Warley Magistrates Court* [2007] EWHC
- R v Afzal Suleman* [2006] EWCA Crim 2187
- R v Andrews Weatherfoil* 56 C App R 31 CA
- R v Atakpu* [1994] QB 69, 4 All ER 215, CA
- R v Ayres* 1984 AC 447
- R v Barrick* [1985] 7 Cr App Rep (S) 142
- R v Bazeley* [1799] 2 Leach 835
- R v Bloxam* [1983] 1 AC 109, [1982] 1 All ER 582, HL

Candidate Number: 1341103

- R v British Steel plc* [1995] 1 WLR 1356  
*R v Butt* [2006] EWCA Crim 137, [2006] 2 Cr App Rep (S) 44  
*R v Cawood* 92 ER 386  
*R v Central Criminal Court, ex parte Guney* [1996] AC 616, HL  
*R v Christopher Killick* [2011] EWCA Crim 1608  
*R v Clark* [1998] 2 Cr App R (S) 95  
*R v Clowes* [1992] 3 All ER 440  
*R v Cohen* [1992] 142 NLJ 1267  
*R v Cooke* 1986 AC 909  
*R v Corbetts* [1993] 14 Cr App R (S)  
*R v Corbetts* [1993] 14 Cr App R (S) 101  
*R v Cornelius* [2012] EWCA Crim 500  
*R v de Berenger* [1814] 105 Eng Rep 536 (KB)  
*R v Delmayne* [1969] 2 All ER 980  
*R v Dickson and Wright* 94 Cr App 7  
*R v Dodd* 93 ER 136  
*R v DPP ex parte B* [1993] 1 All ER 756  
*R v Ghosh* [1982] QB 1053  
*R v Goldshield* 2008 UKHL 16  
*R v Gomez* 1 All ER, 1  
*R v Goodman* (1993)  
*R v Hall* [1973] QB 126, [1972] 2 All ER 1009, CA  
*R v Hallam* [1994] The Times  
*R v Hayes* [2015] EWCA Crim 1944 (Court of Appeal)  
*R v Hayes* [2015] EWCA Crim 1944  
*R v Hircock* [1978] 67 Cr App Rep 278, CA  
*R v K* [2006] EWCA Crim 724

Candidate Number: 1341103

- R v Kallakis and Williams [2013] EWCA Crim 709*
- R v Kempson 1893 28 L Jo 477*
- R v Kettering Magistrates Court, ex parte MRB Insurance Brokers Ltd [2000] GCCR 2701*
- R v Kierman (Gabriel) [2008] EWCA Crim 972*
- R v King and Stockwell*
- R v Kyslant [1932] 1 KB 442*
- R v Lockwood (1986) 2 BCC 99333*
- R v McQuoid [2009] EWCA Crim 1301*
- R v National Westminster Investment Bank (23 January 1991, unreported) The Sentencing remarks were made on 14 February 1992*
- R v Nelson Group Securities [1998] 4 All ER 331*
- R v Panel for Takeovers and Mergers Ex P Datafin [1987] 1 QB 815*
- R v Preddy [1996] UKHL 13 1996*
- R v Rimmington 2005 UKHL 63*
- R v Ronald Price (1990) 90 Crim App R*
- R v Seager [2009] EWCA Crim 1303*
- R v Silverman*
- R v Southwark Crown Court, ex parte Customs and Excise Commissioners [1993] 1 WLR 764*
- R v Suanders, Ronson & Parnes [1991] The Independent*
- R v Thompson Holidays Ltd*
- R v Thompson Holidays Ltd*
- R v Tom Alexander William Hayes [2015] EWCA Crim 1944*
- R v Treeve 1796 2 East PC 821*
- R v Young [1789] 3 Term Rep 98*
- R (Virgin Media Ltd) Ltd v Zinga [2014] EWCA Crim 52*
- Rahim v Arch Insurance Co ( Europe) Ltd [2016] EWHC 2967*



Candidate Number: 1341103

- Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc* [2010] EWHC 1392
- Re a Debtor* [1995] Ch 66
- Re City Equitable Fire Insurance Co* [1925] Ch 407
- Re Darby, ex parte Broughman* [1911] 1 KB 95
- Re D'Jan of London Ltd* [1994] 1 BCLC 561
- Re FG Firms Ltd* [1953] 1 WLR 483
- Re Lo-Line Electric Motors Ltd* [1988] Ch 477
- Re Patrick & Lyon Ltd* [1933] Ch 786
- Re Sevenoaks Stationers (Retail) Ltd* [1991] Ch 164 [1991] Ch
- Reddaway v Banham* [1896] AC 199, 221
- Roswell v Vaughan* [1607] Cro Jac 196
- Royal Bank of Scotland Plc v Chandra and Another* [2011] EWCA Civ 192
- Royal Bank of Scotland v Etridge No 2* [2002] 1 AC 773
- Royal Mail Steam Packet Co v Braham* 1877
- Rubery v Grant* [1872] XIII LR 443
- Salomon v A Salomon & Co Ltd* [1897] AC 22
- Samuel v Jarrah Timber & Wood Painting Corporation* [1904] AC 323, 325
- Santley v Wilde* [1899] 474 2 (ch)
- Saunders v United Kingdom* [1997] 23 EHRR 313
- Scott v Brown, Doering, McNab & Co* [1892] 2 QB 724
- Scott v Metropolitan Police Commissioner* [1975] AC 819
- Scott v North* (1866-67) LR 2 CP 270
- Scott v Southern Pacific Mortgages* [2014] UKSC 52
- Scottish Railway Co, Thornton v Shoe Lane Parking* [1971] 2 QB 163
- Scroggs v Scroggs* [1755] Ambler 272 (Court of Chancery)
- Secretary of State for Trade and Industry v McTighe (no 2)* [1996] 2 BCLC 477

Candidate Number: 1341103

- Shafik Rahman v HSBC Bank [2012] EWHC 11 (Ch)*
- Sharp v Avery and Kerwood [1938] 4 All ER 85*
- Sheldon v Cox 2 Eden 224*
- Shillito v Thompson 1875 1 QBD 12*
- SIB v Vanderssteen Associates NV [1991]*
- SIB v Pantell SA No2 [1993] ch 256*
- Singleton v Bolton [1783] 3 Douglas 293*
- Slade v Dare 20 Bear 284*
- Slim v Croucher [1860] 1 De G F & J 518, 45 ER 462*
- Smith, Stone and Knight Ltd v Birmingham [1939] 4 All ER 116*
- Smith v Chadwick [1884] 9 App Cas 187*
- Smith v Hughes [1960] 1 WLR 830*
- Somerton's case [1433] YB 11 Hen 6 Hil pl 1*
- Staines v The United Kingdom No 41552/98, ECtHR (Third Section), Decision (Final) of 16052000, Reports of judgments and Decisions 2000-V*
- Stonemets v Head [1913] Missouri Supreme Court Reports 243; Southwestern Reporter 108, 114*
- Sullivan v Greaves Park Insur 8*
- Swift 1st Ltd v Chief Land Registrar [2015] EWCA Civ 330; [2015] Ch 602; [2015] 3 WLR 239*
- Sydenham v Keilway Cro Jac 7*
- Taylor v Stibbert 2 Ves Jr 437*
- Tesco Supermarkets Ltd v Nattras 1972 AC 153*
- Thacker v Northern Rock Plc [2014] EWHC 2107 (QB)*
- The Carrier's case [1474] 13 Edwa 4, p9, No 5*
- The King v Pear [1779] (1779) 1 Leach 212 (Old Bailey)*
- The Mogul Steamship Company, Ltd v McGregor, Gow, & Co & Others (1889) 23 QBD 589*
- The NCA v Azam & others (No 2)*

Candidate Number: 1341103

- The Queen v Aspinall and Others* (1876) 1 QBD 730 (Divisional Court)  
*Thompson v London Midland* [1930] 1 KB 41  
*Thorner v Magor* [2009] UKHL 18  
*Trebanog Working Men's Club and Institute Ltd v MacDonald* [1940] 1 KB 576  
*Tufton v Spermi* [1952] 2 TLR 516  
*Turkey v Awadh & Turki* [2005] EWCA Civ 382  
*Twyne's case*, 3 Coke, 80  
*Vernon Bethell* [1761] 2 Eden 113  
*Westpac v Cockerill* [1998] 152 ALR 267 FCA  
*Wheeler v Sargeant* [1893] 69 LT 180  
*Williamson v Allison* [1802] 2 East 446  
*Wilson v First Country Trust Ltd* [2003] GCCR 4931  
*Wilton & Co v Osborne* [1901] 2 KB 110 (KBD)  
*Winterbottom v Wright* 10 M & W 109  
*Yeoman's Row Management Ltd v Cobbe* [2008] UKHL 55  
*Young v Clerk* [1720] 24 ER 241 (Court of Chancery)

## **Bills**

Chope C, Criminal Fraud (Private Prosecutions) Bill 2017-19 2017

## **Statutes**

(34,35 Henry VIII c. 4. Coke. Fourth Institute. 2777, 278 Vol. i)

Act Against Brokers 1603

Act Against Regrators, Forestallers and Ingrossers (5 & 6 Edward VI c 12)

Administration of Justice Act (AJA 1970) 1970

Advertisements (Hire Purchase) Act, 1967

An Act for the further Amendment of the Law, and the better Advancement of Justice 3 & 4 WILL. 4, c. 42.

Candidate Number: 1341103

An Act to amend an Act of the Third and Fourth Years of his late Majesty, for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto 1 Vict. c. 28.

Arbitration Act 1996

Bank of England Act 1998 (c.11)

Bankruptcy Act 1705

Bankruptcy Act 1883

Bankruptcy Amendments Act 1897

Betting and Infacts Act 1892

Bills of Sale Act 1878

Bills of Sale Act 1882

Bribery Act 2010

Business Protection from Misleading Marketing Regulations 2008

Chancery Amendment 1852 15 ^ 16 Vict. c. 80

Civil Courts Order 2014

Civil Evidence Act 1968

Civil Evidence Act 1968 (c.64)

Civil Jurisdiction and Judgments Act 1982

Civil Procedure Act 1833 3 & 4 Will. IV, c. 42

Civil Procedure Act 1997

Civil Procedure Rules 1998

CLSA 1990

Common Law Procedure Act 1852 15 & 16 Vict. c. 76

Common Law Proecure Act 1854 15 & 16 Vict. c. 73

Common Law Proecure Act of 1860 23 & 24 Vict. c. 126

Communications Act 2003

Companies Act 1928

Companies Act 1929 (19 & 20 Geo.5, c.23)

Candidate Number: 1341103

Companies Act 1947 (10 & 11 Geo.6, c.47)

Companies Act 1948

Companies Act 1980 (c.22)

Companies Act 1981 (c.62)

Companies Act 1985

Companies Act 1989

Companies Act 2006

Company Directors Disqualifications Act 1986

Company Securities (Insider Dealing) Act 1985 (c.8)

Competition Act 1980

Competition Act 1998

Constitutional Reform Act 2005

Consumer Contracts (Information, Cancellation, and Additional Charges) Regulations 2013

Consumer Credit 1974

Consumer Credit 2006

Consumer Credit (Advertisements) Regulations 2004

Consumer Credit (Advertisements) Regulations 2010

Consumer Protection Act 1987

Consumer Protection Distance Selling Regulation 2000

Consumer Protection from Unfair Trading Regulations 2008

Consumer Rights Act 2015

Consumers, Estate Agents and Redress Act 2007

County Court Rules 1981

County Courts Acts 1984

Court of Chancery Act 1852 15 & 16 Vict. c. 80

Courts Act 1971

Candidate Number: 1341103

Courts and Legal Services Act 1990

Crime and Courts Act 2013

Crime and Disorder Act 1998

Criminal Damage Act 1971

Criminal Justice Act 1972 (c.71)

Criminal Justice Act 1987

Criminal Justice Act 1988

Criminal Justice Act 1993

Criminal Justice Act 2003

Criminal Justice and Public Order Act (c.33)

Criminal Justice (international Co-operation) Act 1990 (c.5)

Criminal Law Act 1827

Criminal Law Act 1977

Criminal Procedure and Investigations Act 1996

Criminal Procedure Rules 2005

Data Protection Act 1998

Data Protection Act 2018

Debtors Act 1869

Domestic Violence, Crime and Victims Act 2004

Drug Trafficking Offences Act 1986 (c.32)

Electronic Communications Act 2000 (c.7)

Enterprise Act 2002 2002

Enterprise and Regulatory Reform Act 2013

Estate Agents Act 1979

European Communities Act 1972

European Union (Notification of Withdrawal) Act 2017

Evidence (Proceedings in Other Jurisdictions) Act 1975

Candidate Number: 1341103

Fair Trading Act 1973

Fair Trading Act 1973

Finance Act 1921

Financial Services Act 1986

Financial Services Act 2010

Financial Services Act 2012

Financial Services and Markets Act 2000

Financial Services Market Act 2000 (Disclosure of Confidential Information)  
Regulations 2001

Forfeiture Act 1870

Forgery Act 1913 (3 & 4 Geo. 5, c.27)

Forgery and Counterfeiting Act 1981 (c.45)

Fraud Act 2006

Fraudulent Conveyancers Act 1542

General Data Protection Regulation 2018

Great Reform Act 1832

Hen II Circa 1187

High Court and County Courts Jurisdiction Order 1991

Housing Act 1980

Human Rights Act 1998 (c.42)

Insolvency Act 1986

Insolvency Act 2000 (c.39)

Insolvent Debtors Act 1813

Intepretation Act 1889

Joint Stock Companies Act 1856 (19 & 20 Vict. c. 47)

Judicature Act of 1873 36 & 37 Vict. c. 66

Justices of the Peace Act 1361

Candidate Number: 1341103

Justices of the Peace Act 1997  
Land Registration Act  
Land Transfer Act 1875  
Larceny Act 1916  
Law of Property Act 1925  
Law Reform (Contributory Negligence) Act 1945  
Legal Services Act 2007  
Limitation Act 1980  
Limited Liability Act 1862  
Limited Liability Partnerships Act 2000 (c.12)  
Magistrates Courts Act 1980  
Magna Carta  
Merchandise Marks Act  
Misrepresentation Act 1967  
Money Laundering Regulations 2003  
Money Laundering Regulations 2007  
Money Laundering, Terrorist Financing and Transfer of Funds Regulations 2017  
Moneylenders Act 1900  
Monopolies and Restrictive Practices Act (Inquiry and Control) Act 1948  
Official Secrets Act 1989 (c.6)  
Ordnance of Conspirators  
Patent Acts 1977  
Pawnbrokers Act 1872  
Pensions Act 1995 (c.26)  
People Act 1918  
Pharmacy Act 1868  
Police and Criminal Evidence Act 1980



Candidate Number: 1341103

Policyholders Protection Act 1975 (c.75)  
Powers of Criminal Courts Act 1973  
Powers of Criminal Courts (Sentencing) Act 2000  
Preferential  
Prescription Act 1832 (1832 Chapter 71 2 and 3 Will 4  
Prevention of Fraud (Investments) Act 1939  
Prevention of Fraud (Investments) Act 1944  
Prevention of Fraud (Investments) Act 1958  
Prevention of Terrorism (Temporary Provisions) Act 1989 (c.4)  
Proceeds of Crime Act 2002  
Property Misdescriptions Act 1991  
Prosecutions of Offences Act 1985  
Prosecutions of Offences Act 1985  
Protection of Depositors Act 1963 (c.16)  
Public Interest Disclosure Act 1998 (c.23)  
Real Property Limitation Act 1833 ( 3 & 4 WILL. 4, c. 27)  
Real Property Limitation Act 1874 (37 & 38 Vict. c. 57)  
Restrictive Trade Practices Act 1956  
Restrictive Trade Practices Act 1976  
Rules of the Supreme Court 1965/1776  
Rules of The Supreme Court Order 70  
Sale of Goods Acts 1893  
Sales of Goods Act 1979  
Sales of Goods and Services Act 1982  
Serious Organised Crime and Police Act 2005  
Solicitors Act 1974  
SRA Disciplinary Procedure Rules 2011

Candidate Number: 1341103

Stamp Act 1784

Statute Law (Repeals) Act 1993 (c.50)

Statute of Frauds 29 Car. II, c.3

Statute of Monopolies

Suitors Funds Act 15 & 16 Vict. c.87 (unofficial title)

Supreme Court Act 1981

Supreme Court of Judicature Act 1873

Terrorism Act 2000

The Prevention of Corruption Act 1906

The Resale Prices Act 1976

Theft Act 1968

Theft Act 1978 (c.31)

Theft Act Forgery and Counterfeiting Acts 1981

Theft (Amendment) Act 1996 (c.62)

Torts (interference with Goods) Act 1977 (c.32)

Town and Country Planning (Control of Advertisements) (England) Regulations 1992

Town and Country Planning (Control of Advertisements) (England) Regulations 2007

Trade Descriptions Act 1968

Trustee Act

Trustee Act 1925

Trusts of Land and Appointments of Trustees Act

Unfair Contract Terms Act 1977

Unfair Terms in Consumer Contracts Regulations 1999

Unfair Terms in Consumer Contracts Regulations 2001

Unfair Terms in Consumer Contracts Regulations (UTCCR) 1999

Unfair Trading Regulations 2008

Uniformity of Process Act 1832 2 Will IV, c. 39

Candidate Number: 1341103

Weights and Measures Act 1985

- 1 Jac I 21
- 1 James I c 21 (1604)
- 3 Car I C.4
- 3 Edw. I
- 3 Hen 7, c.4
- 3 Hen. VII
- 3 Hen VIII C.6
- 5 & 6 Edw. VI. c. 14
- 5 & 6 Edw VI C.20
- 5 & 6 Edward VI c.12
- 5 Elizabeth I, c 12
- 6 & 7 Will. 4, c. 37
- 6 Geo I. C.18, s.12
- 7 & 8 Geo 4, C 29
- 7 George II C.8. and 1736 (10 Geo.2) Chapter 8. Stockjobbing. r. 23-4. V. c. 28
- 8 Elizabeth c 4
- 9 Henry 3, c. 25
- 11 Hen VII
- 12 Anne St 2, C.16
- 12 Car II C.13
- 13 Car II St 1, C.14
- 13 Eliz. c.5
- 14 Geo. III C.79
- 15 Edw. III
- 17 Edw. IV c. 1
- 18 Elizabeth C.8

Candidate Number: 1341103

20 Hen C.5

21 Hen 8 C.11

21 Jac I C.17

27 Edw. 3, c. 9

27 Eliz. C.4

27 Elizabeth C.11

27 Hen. 8, c.10 (1535)

28 Edw. I c.20

34, 35 Henry VIII c. 4 1542

35 Elizabeth C.7

37 Edw. III c.7

37 Hen VIII C.9

37 Hen VIII C.9

39 Elizabeth C.18

51 Hen 3 Stat 1

58 Geo III C.93

1825 6 Geo IV c.91

### **UK secondary legislation**

Civil Courts Order 1983

Civil Procedure Rules 1998 SI 1998/3132

Companies Act 1985 (Electronic Communications) Order 2000 (Regulated Activities) Order 2001 (SI 2001/544)

Companies (Fair Dealing by Directors) (Increase in Financial Limits) Order 1990 (SI 1990/1393)

Companies (Forms) Regulations 1985 (SI 1985/854)

Companies (Unfair Prejudice Application) Proceedings Rules 1986 (SI 1986/2000)

Consumer Credit (Agreements) Regulations (SI 1983/1553)

Candidate Number: 1341103

- Consumer Credit (Cancellation Notices and Copies of Documents) Regulations (SI 1983/1557)
- Consumer Credit (Exempt Agreements) Order 1989 (SI 1989/869)
- Consumer Credit (Total Charge for Credit) Regulations (SI 1980/51)
- Consumer Protection (Distance Selling) Regulations 2000 (SI 2000/2334)
- Control of Misleading Advertisements Regulations 1986 (SI 1988/915)
- Crown Court Rules (SI 1982/1109)
- Financial Services and Markets Act (Threshold Conditions) Regulations 2013 SI 2013/555
- Financial Services Act 1986 (Single Property Schemes) (Exemption) Regulations 1989 (SI 1989/28)
- Financial Services and Markets Act 2000 (Collective Investment Schemes) (Designated Countries and Territories) Order (SI 2003/1181)
- Financial Services and Markets Act 2000 (Financial Promotion) (Amendment) (Electronic Commerce Directive) Order (SI 2002/2157)
- Financial Services and Markets Act 2000 (Commencement of Mortgage Regulation) (Amendment) Order (SI 2002/1777)
- Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements of Applicants) Regulations 2001 (SI 2001/3650)
- Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 (SI 2001/2188)
- Financial Services and Markets Act 2000 (Exemption) (Amendment) Order 2001 (SI 2001/3623)
- Financial Services and Markets Act 2000 (Financial Promotion and Miscellaneous Amendments) Order (SI 2002/1310)
- Financial Services and Markets Act 2000 (Miscellaneous Provisions) Order (SI 2001/3650)
- Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order (SI 2002/1776)
- Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order (SI 2002/682)
- Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001 (SI 2001/2256)
- Insider Dealing (Securities and Regulated Markets) (amendment) Order 2000 (SI

Candidate Number: 1341103

2000/1923)

Insider Dealing (Securities and Regulated Markets) Order 1984 (SI 1994/187)

Insider Dealing (Securities and Regulated Markets Order 1995 (SI 1996/1561)

Insolvency Rules 1986 (SI 1986/1925)

Magistrates' Courts (Criminal Justice (International Co-operation)) Rules 1991 (SI 1991/1074)

Money Laundering Regulations 2003

Money Laundering Regulations 2007

Public Interest Disclosure (Compensation) Regulations 1999 (SI 1999/1548)

Public Interest Disclosure (Prescribed Persons) Order 1999 (SI 1999/1549)

Public Offers of Securities Regulations 1995 (SI 1995/1537)

Unfair Terms in Consumer Contracts Regulations 1994 (1994/3159)

Unfair Terms in Consumer Contracts Regulations (SI 1999/2083)

## **BIBLIOGRAPHY - SECONDARY SOURCES**

### **Books**

Abbey R and Richards M, *A Practical Approach to Conveyancing*: (18th edn, Oxford University Press 2016)

Aldohni AK, *The Legal and Regulatory Aspects of Islamic Banking: A Comparative Look at the United Kingdom and Malaysia* (Routledge Taylor & Francis Group 2011)

Arlidge A and Parry J, *Arlidge and Parry on Fraud* (5th edn, Sweet and Maxwell 2016)

Arlidge QC A, Milne QC A and Parry J, *Arlidge and Parry on Fraud* (4th edn, Sweet and Maxwell 2013)

Arnold G, *The Financial Times Guide to Investing* (Pearson Education Ltd 2004)

Ashworth A, *Principles of Criminal Law* (6th Edition, Oxford University Press 2009)

Atbani F, *The Prevention of Financial Crime within an Islamic Framework* (Institute of Economic Affairs, Blackwell Publishing 2007)

Atiyah PS, *The Rise and Fall of Freedom of Contract* (Oxford University Press 1979)

Atwood B, Thompson K and Willett C, *Food Law* (3rd edn, Bloomsbury Publishing

Candidate Number: 1341103

2009)

- Baker JH, *An Introduction to English Law* (4th edn, Butterworths Lexis Nexis 2002)
- Baker JH and Milsom SFC, *Sources of English Legal History: Private Law to 1750* (Butterworths & Co (Publishers) Ltd 1986)
- Balala M-H, *Islamic Finance and Law: Theory and Practice in a Globalised World* (IB Taurus Co Ltd 2011)
- Baldwin J, *Small Claims in the County Courts in England and Wales* (Oxford University Press 1997)
- Baldwin R, Cave M and Lodge M, *The Oxford Handbook on Regulation* (Oxford University Press 2010)
- Barbour WT, *The History of Contract in Early English Equity*
- Beattie JM, *Crime and the Courts in England 1660-1800* (Clarendon Press 1986)
- Benjamin J, Yates M and Montagu G, *The Law of Global Custody* (2nd edn, LexisNexis Butterworths 2002)
- Benston GJ, *Regulating Financial Markets: A Critique and Some Proposals* (The AEI Press 1999)
- Bernasconi P, *Money Laundering and Banking Secrecy* (Kluwer Law International 1996)
- Bigelow MM, *A Treatise on the Law of Fraud; on Its Civil Side*, vol Volume 2 (Little Brown, and Company 1890)
- Blake S, *A Practical Approach to Effective Litigation* (6th edn, Oxford University Press 2004)
- Blunden B, *The Money Launderers: How They Do It and How to Catch Them At ...* (2nd edn, Management Books 2000 Ltd 2009)
- Bologna J, *Corporate Fraud. The Basics of Prevention and Detection* (Butterworths 1984)
- Boon A, *The Ethics and Conduct of Lawyers in England and Wales* (3rd, Hart Publishing 2014)
- Borrie SG, *The Development of Consumer Law and Policy-Bold Spirits and Timorous Souls* (Stevens & Sons Limited 1984)
- Bower GS and Hundley KR, *Actionable Misrepresentation* (Butterworths 2000)
- Brobeck S, *Encyclopaedia of the Consumer Movement* (ABC-CLIO 1997)
- Brown CN, *Corbyn on Contracts*, vols 412.1-23.11 (Lexis Publishing 1997)

Candidate Number: 1341103

- Buckland T late WWB, McNair AD and Lawson FH, *Roman Law and Common Law: A Comparison in Outline* (2nd edn, Cambridge University Press 1965)
- Burrows A, *Principles of English Law of Obligations* (Oxford University Press 2015)
- Byles SJB, *A Treatise of the Law of Bills of Exchange, Promissory Notes, Bank-Notes and Checks* (5th American, T & J W Johnson & Company 1867)
- Camp P, *Solicitors and Money Laundering: Compliance Handbook* (The Law Society of England and Wales 2004)
- Card R, *Card, Cross & Jones Criminal Law* (19th edn, University of Oxford 2010)
- Cartwright J, *Misrepresentation, Mistake, and Non-Disclosure* (3rd edn, Sweet and Maxwell 2012)
- Cartwright P, *Consumer Protection in Financial Services* (Kluwer Law International 1999)
- , *Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK* (Cambridge University Press 2001)
- Chromatic, *Extreme Programming Pocket Guide* (1st edn, O'Reilly Media Inc 2003)
- Clarke M, *Regulating the City Competition Scandal and Reform* (Open University Press 1986)
- Clarke M, *Business Crime. Its Nature and Control* (St Martin's Press 1990)
- Clements RE, *The World of Ancient Israel: Sociological, Anthropological and Political Perspectives* (Cambridge University Press 1989)
- Cobbett JP, *The Law of Pawns or Pledges: And the Rights and Liabilities of Pawnbrokers*: (Crofts and Blenkarn, Law Boksellers 1841)
- Coke SE, *Institutes of the Laws of England: The First Part*, vol 2 (J & W T Clarke; R Pheney; and S Brooke 1823)
- Collins Concise Thesaurus* (2nd edn, HarperCollins Publishers 2003)
- Cornish W. and Clark T late G de N, *Law and Society in England 1750-1950* (Sweet and Maxwell 1989) <Available from the University of Cambridge website>
- Cracknell D. and Wilson C., *Roman Law. Origins and Influence* (HLT Publications 1990)
- Creswell JW, *Research Design: Qualitative, Quantitative and Mixed Methods Approaches* (3rd edn, SAGE Publications, Inc 2009)
- Croall H, *White Collar Crime. Criminal Justice and Criminology, Buckinghamshire*, (Reprinted in 1994, Open University Press 1992)
- Crowther Committee, *Consumer Credit-Report of the Crowther Committee*, vol 1 (Her



Candidate Number: 1341103

- Majesty's Stationery Office 1971)
- Curran BA, *Trends in Consumer Credit Legislation* (The University of Chicago Press 1965)
- Darwin CR, *The Descent of Man, and Selection in Relation to Sex* (Murray and New York: Hill 1871)
- Davies EW, *Prophecy and Ethics Isaiah and the Ethical Tradition* (JSHOT Press 1981)
- Davies PL, *Gower and Davies' Principles of Modern Company Law* (7th edn, Sweet and Maxwell 2003)
- Digby KE, *An Introduction to the History of the Law of Real Property with Original Authorities* (4th Edition, University of Oxford 1892)
- Eggers PM, *Deceit: The Lie of the Law* (Informa Law from Routledge 2009)
- Einzig P, *A Dynamic Theory of Forward Exchange* (Macmillan 1961)
- Enonchong N, *Duress, Undue Influence and Unconscionable Dealing* (Sweet and Maxwell 2006)
- Faculty of Law, University of Oxford, *Oxford University Standard for the Citation of Legal Authorities* (4th edn, Faculty of Law, University of Oxford 2005)  
<[https://www.law.ox.ac.uk/sites/files/oxlaw/oscola\\_4th\\_edn\\_hart\\_2012.pdf](https://www.law.ox.ac.uk/sites/files/oxlaw/oscola_4th_edn_hart_2012.pdf)> accessed 26 June 2018
- Farrell QC S, Yeo N and Ladenberg G, *Blackstone's Guide to The Fraud Act 2006* (Oxford University Press 2007)
- Financial Institutions and Markets*
- Finch E and Fafinski S, *Legal Skills* (4th edn, Oxford University Press 2013)
- Fisher J and others, *The Law of Investor Protection* (2nd edn, Sweet and Maxwell 2003)
- Fisher J and Bewsey J, *The Law of Investor Protection* (Sweet and Maxwell 1997)
- Flynn EP, *Ethical Lessons of The Financial Crisis* (Routledge Taylor & Francis Group 2012)
- G R-M and Julien-Labruyere F, *The History of Consumer Credit: Doctrines and Practices* (Macmillan Press Ltd 2000)
- Galbraith JK, *The Affluent Society* (Penguin Books Ltd 1958)
- Gale M, Gale S and Scanlan G, *Fraud and the Plc* (LexisNexis UK 1999)
- Geis G, *White-Collar Criminal-The Offender in Business and the Professions* (Atherton Press 1968)
- Gentle S and Hodges L, *Kingsley Napley Serious Fraud: Investigation & Trial* (4th edn,

Candidate Number: 1341103

LexisNexis Butterworths 1998)

Gobert J, *Rethinking Corporate Crime* (LexisNexis Butterworths 2003)

Goode R., *Consumer Credit Law and Practice* (LexisNexis Butterworths)

Gyekye K, *Tradition and Modernity: Philosophical Reflections on the African Experience* (Oxford University Press 1997)

Hardaker A, *A Brief History of Pawnbroking with Full Narrative of How the Act of 1872 Was Fought for and Obtained the Stolen Goods Bill Opposed and Defeated* (Jackson Ruston and Keelson 1892)

Harrison K and Ryder N, *The Law Relating to Financial Crime in the United Kingdom* (Ashgate Publishing Limited 2013)

Harvey BW, *The Law of Consumer Protection and Fair Trading* (2nd edn, Butterworths & Co (Publishers) Ltd 1982)

Harvey BW and Parry DL, *The Law of Consumer Protection and Fair Trading* (6th edn, Butterworths & Co (Publishers) Ltd 2000)

Hayes W, *An Introduction to Conveyancing and the New Statutes Concerning Real Property with Precedents and Practical Notes*, vols 1 & 2 (5th Edition, SSweet 1840)

Haynes A, *Financial Services Law Guide* (4th edn, Bloomsbury Professional Ltd 2014)

Henderson EG, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventh Century* (Harvard University Press 1963) <HathiTrust Digital Library>

Holdsworth SWS, *A History of English Law*, vol 2 (Methuen & Co Ltd 1922)

——, *A History of English Law*, vol 3 (3rd edn, Methuen & Co Ltd 1922)

——, *Sources and Literature of English Law* (Oxford University Press 1925)

——, *Some Makers of English Law* (Cambridge University Press 1938)

Holdsworth WS, *A History of English Law*, vol 1 (3rd edn, Methuen & Co Ltd 1922)

Hostettler J, *The Politics of Punishment* (Barry Rose (Publishers) Ltd 1992)

——, *A History of Criminal Justice in England and Wales* (Waterside Press 2009)

Hovenden JE, *A General Treatise on Principles and Practice by Which Courts of Equity Are Guided As to the Prevention Or Remedial Correction of Fraud: With Numerous Incident Notices of Collateral Points, Both of Law and Equity*, vol 1 (Primary Source, Lightning Source UK Ltd)

Howells G and others, *Handbook Research on International Consumer Law* (Edward Elgar Publishing Ltd 2010)

Howells G and Weatherill S, *Consumer Protection Law* (2nd edn, Ashgate Publishing

Candidate Number: 1341103

Limited 2005)

Hudson A, *Securities Law* (2nd edn, Sweet and Maxwell 2013)

Hudson J, *Land Law, and Lordship in Anglo-Norman England* (Oxford University Press 1994)

International Criminality Unit, *Requests for Mutual Legal Assistance in Criminal Matters Guidelines for Authorities Outside of the United Kingdom-2015* (12th edn, Home Office 2015)

Ison TG, *Credit Marketing and Consumer Protection* (Croom Helm Ltd 1979)

Jacob SJH, *The Fabric of English Civil Justice* (Stevens & Sons Limited 1987)

Jenks E, *A Short History of English Law from the Earliest Times to End of the Year 1911* (Little, Brown and Company 1913)

Jones N, *God and the Moneylenders; Usury and Law in Early Modern England* (Basil Blackwell Ltd 1989)

Jones WJ, *The Elizabethan Court of Chancery* (Oxford University Press 1967)

Katz SN, *The Oxford International Encyclopaedia of Legal History*, vol III (VI, Oxford University Press 2009)

Kerr WW, *A Treatise on the Law of Fraud and Mistake as Administered in Courts of Equity* (Bradbury, Evans, and Co 1923)

Kirk H, *A Portrait of a Profession-A History of the Solicitor's Profession, 1100 to the Present Day* (Oyez Publishing Limited 1976)

Large A, *Financial Services Regulation-Making the Two Tier System Work* (Securities and Investments Board 1993)

Lawson FH and Teff H, *Remedies of English Law* (2nd edn, Butterworths & Co (Publishers) Ltd 1980)

Levi M, *Regulating Fraud: White-Collar Crime and the Criminal Process* (Cambridge University Press 1987)

Levine A, *Free Enterprise and Jewish Law: Aspects of Jewish Business Ethics* (Ktav Publishing House, Inc 1980)

Lewis M, *Flashboys: Cracking the Money Code* (Allen Lane 2014)

Lippman M, McConville S and Yerushalmi M, *Islamic Criminal Law and Procedure An Introduction* (Praeger 1988)

Maine SHS, *Early Law and Custom* (John Murray 1890)

<<https://archive.org/stream/onearlylawandcu00maingoog#page/n8/mode/2up>> accessed 1 July 2018

Candidate Number: 1341103

- Martin JE, *Modern Equity* (16th edn, Sweet and Maxwell 2001)
- Matthews JB, *The Law of Moneylending, Past and Present: Being a Short History of the Usury Laws in England, Followed by a Treatise upon the Moneylenders Act, 1900* (Sweet and Maxwell 1906)
- Maugham R, *Treatise on the Law of Attorneys and Solicitors and Agents* (J & W T Clarke 1825)
- McConville M and Chui WH, *Research Methods for Law* (Edinburgh University Press Ltd 2007)
- McGrath P, *Commercial Fraud in Civil Practice* (Oxford University Press 2014)
- McLeod I, *Legal Method* (4th edn, Palgrave Macmillan 2002)
- Mills A, *Essential Strategies for Financial Services Compliance* (John Wiley & Sons 2008)
- Milsom SFC, *Historical Foundations of the Common Law* (2nd edn, Butterworths & Co (Publishers) Ltd 1981)
- Ministry of Justice, 'The Bribery Act 2010-Guidance'
- Mitchell C and Mitchell P, *Landmark Cases in Equity* (Hart Publishing 2012)
- Morgan EV and Thomas WA, *The Stock Exchange: Its History and Functions* (ELEK Books Ltd 1962)
- Niamh M, *How to Protect Investors-Lessons from the EC and UK* (Cambridge University Press 2010)
- O'Keefe JA, *On the Law of Weights and Measures* (Butterworths & Co (Publishers) Ltd 1966)
- , *The Law of Weights and Measures Fourth Cumulative Supplement* (Butterworths & Co (Publishers) Ltd 1972)
- Ormerod D and Perry D, *Blackstone's Criminal Practice 2018* (Oxford University Press 2017) <Westlaw> accessed 5 July 2017
- Padfield N, *Archibold Magistrates' Courts Criminal Practice* (Sweet and Maxwell 2005)
- Palfreyman D, *London Livery Companies* (Oracle Publishing UK Ltd 2010)
- Parry SDH, *The Sanctity of Contracts in English Law* (Stevens & Sons Limited 1959)
- Passamaneck SM, *Insurance in Rabbinic Law* (Edinburgh University Press & Aldine Publishing 1974)
- Pennington RR, *The Investor and the Law* (Macgibbon & Kee Ltd 1968)

Candidate Number: 1341103

Plucknett TFT, *A Concise History of the Common Law* (Liberty Fund Inc 1956)

——, *A Concise History of the Common Law* (5th edn, The Law Book Exchange Ltd 2001)

Pollock SFSF and Maitland FW, *The History of English Law Before the Time of Edward I* (2nd edn, Cambridge University Press 1898)

——, *The History of English Law Before the Time of Edward I*, vol 1 (2nd edn, Cambridge University Press 1898)

——, *The History of English Law before the Time of Edward I*, vol 2 (Cambridge University Press 1923)

——, *The History of English Law before the Time of Edward I*, vol 1 (Cambridge University Press 1923)

Potter H, *An Introduction to the History of Equity and Its Courts* (Sweet and Maxwell 1931)

### *Qu'ran*

Radzinowicz L, *A History of English Criminal Law and Its Administration from 1750*, vol 1 (Stevens & Sons Limited 1948)

——, *A History of English Criminal Law and Its Administration from 1750*, vol 2 (Stevens & Sons Limited 1956)

Ramsay I, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (3rd edn, Hart Publishing 2012)

Rawls J, *Justice as Fairness: A Restatement* (Harvard University Press 2003)

Redlich J and Hirst FW, *The History of Local Government in England* (2nd edn, Augustus M Kelley Publishers 1970)

Rider B, *Research Handbook on International Financial Crime*

——, *Market Abuse and Insider Dealing* (2nd edn, Tottel Publishing 2009)

——, *Market Abuse and Insider Dealing* (Bloomsbury Professional Ltd 2016)

Rider B, Abrams C and Ashe M, *Guide to Financial Services Regulation* (3rd Edition, CCH Editions Ltd 1997)

Rider B and Ashe M, *The Fiduciary, the Insider and the Conflict* (Brehon and Sweet & Maxwell 1995)

Rider BA., 'Self Regulation: The British Approach to Policing Conduct in the Securities Business, with Particular Reference to the Role of the the City Panel on Take-Overs and Mergers in the Regulation of Insider Trading' (1978) 1 *Journal of Comparative Law and Securities Regulation* 319

Candidate Number: 1341103

- Robb G, *White Collar Crime in Modern England: Financial Fraud and Business Morality, 1845-1929* (Cambridge University Press 1992)
- Roberts W, *A Treatise on the Construction of the Statutes: 13 Eliz. C.5, and 27 Eliz. C.4, Relatin to Vountary Conveyances, and on the Nature and Force of Different Considerations of Support of Deeds and Other Legal Instruments, in the Courts of Law* (1800)
- Robertson AJ, *Anglo-Saxon Charters* (Cambridge University Press 1939)
- Robson R, *The Attorney in Eighteenth-Century England* (Cambridge University Press 1959)
- Rosenthal D, *Financial Advertising and Marketing Law* (First, Sweet and Maxwell 1997)
- , *Consumer Credit Law and Practice: A Guide* (4th edn, Bloomsbury Professional Ltd 2013)
- Russell on Crime* (12th Edition, 1964)
- Russen J, *Financial Services: Authorisation, Supervision, and Enforcement: A Litigator's Guide* (Oxford University Press 2006)
- Saleh NA, *Unlawful Gain and Legitimate Profit in Islamic Law: Riba, Gharar and Islamic Banking* (2nd edn, Graham & Trotman 1992)
- Samuel A, *Consumer Complaints and Compensation: A Guide for Financial Services Market* (1st edn, City and Financial Planning 2005)
- , *A Practitioner's Guide to Consumer Financial Services Complaints and Compensation* (2nd edn, Sweet and Maxwell 2017)
- Select Committee on Pawnbrokers, *Report from the Select Committee on Pawnbrokers; with the Proceedings of the Committee (1870)* (House of Commons 1871)
- Seneviratne M, *The Legal Profession: Regulation and the Consumer* (Sweet and Maxwell 1999)
- Seton HW, *Early Records in Equity* (Unpublished)
- Sheridan LA, *Fraud in Equity-A Study in English and Irish Law* (1st Edition, Sir Isaac Pitman and Sons Ltd 1957)
- Sherr A, *Client Care for Lawyers* (Sweet and Maxwell 1999)
- Silver M, *Prophets and Markets The Political Economy of Ancient Israel* (Kluwer-Nijhoff Publishing 1983)
- Sime S, *Civil Procedure* (6th edn, Oxford University Press 2003)
- Simpson AWBS, *A History of the Common Law of Contract The Rise of the Action of*

Candidate Number: 1341103

*Assumpit* (Oxford University Press 1975)

—, *A History of the Land Law* (Second Edition, Oxford University Press 1986)

Sir Blackstone W, *Commentaries on the Laws of England (1765-1769)* <Accessed from the Lonang Institute> accessed 11 April 2018

Smith P and Swann D, *Protecting the Consumer-An Economic and Legal Analysis* (Martin Robertson & Company Ltd 1979)

Spicer R, *Conspiracy: Law, Class and Society*, vol 23 (1981)

Sprack J, *A Practical Approach to Criminal Procedure* (10th edn, Oxford University Press 2004)

Stephen SJF, *A History of the Criminal Law of England*, vol 1 (MacMillan and Co 1883)

—, *A History of the Criminal Law of England*, vol II (MacMillan and Co 1883)

—, *A History of the Criminal Law of England*, vol III (MacMillan and Co 1883)

Stephenson G, *The Criminal Law and Consumer Protection* (Barry Rose (Publishers) Ltd 1983)

Strunk WJ and White EB, *The Elements of Style* (4th edn, Allyn & Bacon 2000)

Stuckey M, *The High Court of Star Chamber* (Gaunt Inc 1998)

Sugden EB, *A Practical Treatise of the Law of Vendors and Purchasers of Estates* (5th Edition, Butterworths 1818)

—, *A Concise and Practical View of the Law of Vendors and Purchasers of Estates* (SSweet 1851)

Sutherland EH, *White Collar Criminality* (Holt, Reinhart & Winston 1949)

Swift D, *Proceedings before the Solicitors Disciplinary Tribunal* (The Law Society of England and Wales 1996)

Taylor J, *The Boardroom Scandal: The Criminalisation of Company Fraud in Nineteenth-Century Britain* (Oxford University Press 2013)

Tebbutt M, *Making Ends Meet: Pawnbroking and Working Class Credit* (Leicester University Press 1983)

*The Amplified Bible* (The Lockman Foundation 1954) <[www.Lockman.org](http://www.Lockman.org)>

The Committee on Consumer Policy, *Consumer Protection in the Field of Consumer Credit* (Organisation for Economic Co-operation and Development (OECD) 1977)

The Law Society, *Conveyancing Handbook* (11th edn, The Law Society of England and Wales 2004)

Candidate Number: 1341103

—, *The Civil Litigation Handbook* (2nd edn, The Law Society of England and Wales 2007)

Todd P, *Textbook on Trusts* (4th edn, Blackstone Press Ltd 1991)

Tridimas T, *The General Principles of EC Law* (Oxford University Press 1999)

Ulph J, Tugendhat SM and Glister J, *Commercial Fraud: Civil Liability, Human Rights and Money Laundering* (Oxford University Press 2006)

Walker G, Purves R and Blair M, *Financial Services Law* (4th edn, Oxford University Press 2018)

Waters DWM, *The Constructive Trust: The Case for a New Approach* (The Athlone Press, University of London 1964)

Wells C, *Corporations and Criminal Responsibility* (2nd edn, Oxford University Press 2001)

Wells C and Quick O, *Lacey, Wells and Quick: Reconstructing Criminal Law* (4th edn, Cambridge University Press 2010)

Will S, Handelman S and Brotherton D, *How They Got Away With It: White Collar Criminals and the Financial Meltdown* (Columbia University Press 2013)

Williams V, *Civil Procedure Handbook 2005* (Oxford University Press 2005)

Wilson R, *Legal and Regulatory Governance Issues in Islamic Finance* (Edinburgh University Press Ltd 2012)

Winfield PH, *The History of Conspiracy and Abuse of Legal Abuse* (Fred B Rothman & Co 1982)

Worthington SW, *A Treatise on the Statutes of Elizabeth against Fraudulent Conveyances; the Bills of Sale Acts, 1878 and 1882; and the Law of Voluntary Dispositions of Property* (Stevens and Haynes 1887)

Xanthaki H, *Drafting Legislation Art and Technology of Rules for Regulation* (Hart Publishing 2014)

## **Command Papers**

Edmonds T, 'Financial Markets: Supervisory and Structural Reform—the Draft Financial Services Bill-SN/BT/5934'

'Fair Clear and Competitive: The Consumer Credit Market in the 21st Century'  
<[www.gov.uk/government/publications/fair-clear-and-competitive-the-consumer-credit-market-in-the-21st-century](http://www.gov.uk/government/publications/fair-clear-and-competitive-the-consumer-credit-market-in-the-21st-century)> accessed 18 March 2003

'Financial Services in the United Kingdom-A New Framework for Investor Protection'



Candidate Number: 1341103

(Department of Trade and Industry 1985) White Paper Cmnd. 9432

Gower LCB, 'Review of Investor Protection' (Her Majesty's Stationery Office 1982) Discussion Document

——, 'Review of Investor Protection' (Her Majesty's Stationery Office 1984) Part 1

——, 'Review of Investor Protection': (Her Majesty's Stationery Office 1985) Part 2

HM Treasury, 'A New Approach to Financial Regulation: Building a Stronger System' (HM Treasury 2011) Cm 8012 <<https://www.gov.uk/government/consultations/a-new-approach-to-financial-regulation-building-a-stronger-system>> accessed 11 July 2018

'Home Office Circular 18/1994'

'Home Office Circular 30/2005'

'Modern Markets: Confident Consumers-The Government's Consumer White Paper (Command Paper)' (Department of Trade and Industry 1999)

'The Fraud Trials Committee Report (Roskill Committee Report)' (The Home Office and the Lord Chancellor's Department 1986) <<https://www.sfo.org.uk/download/the-roskill-report-fraud-trials-committee-/?wpdmdl=6885>>

The Molony Committee, 'Final Report of the Committee on Consumer Protection' (Her Majesty's Stationery Office 1962) Cmnd 1781

### **Contributions to edited books**

Alexander R, 'The Pursuit of Criminal Property', *Research Handbook on International Financial Crime* (Edward Elgar Publishing Ltd 2015)

Bazley S, 'Compliance-the Risks and Obligations', *Research Handbook on International Financial Crime* (Edward Elgar Publishing Ltd 2015)

Caldwell RG, 'A Re-Examination of the Concept of White-Collar Crime', *White-collar Criminal-The Offender in Business and the Professions* (First Edition, Therton Press Incorporated 1968)

Capper D, 'Protection of the Vulnerable in Financial Transactions-What the Common Law Vitiating Factors Can Do for You', *Unconscionability in European Private Financial Transactions-Protecting the Vulnerable* (Cambridge University Press) <<http://ebooks.cambridge.org/>> accessed 25 January 2014

Cartwright P, 'Consumers, Investors and Citizens', *Consumer Protection in Financial Services* (Kluwer Law International 1999)

——, 'Conceptualising and Understanding Fairness: Lessons from and for Financial Services', *Unconscionability in European Private Financial Transactions-Protecting the Vulnerable* (Cambridge University Press 2010)

Candidate Number: 1341103

- Cheung R, 'A New Era of Sentencing Insider Crimes', *Research Handbook on International Financial Crime* (2015)
- Ciacchi AC, 'Freedom of Contract as Freedom from Unconscionable Contracts', *Unconscionability in European Private Financial Transactions-Protecting the Vulnerable* (Cambridge University Press 2010)
- Crentsil G, 'Fraud-A Comparative Analysis', *Research Handbook on International Financial Crime* (Edward Elgar Publishing 2015)
- Edelman J, 'Nocton v. Lord Ashburton (1914)', *Landmark Cases in Equity* (Hart Publishing 2012)
- Fisher J, 'Fraud in Civil and Criminal Law', *Research Handbook on International Financial Crime* (Edward Elgar Publishing Ltd 2015)
- Fitzpatrick D, 'The Traditional Criminal Justice System: Its Efficacy in Dealing with Financial and Economically Motivated Crime', *Research Handbook on International Financial Crime* (Edward Elgar Publishing Ltd 2015)
- Hayton D, 'Fraud and Restitution', *Research Handbook on International Financial Crime* (Edward Elgar Publishing Ltd 2015)
- Hensler DR, 'Using Class Actions to Enforce Consumer Protection Law', *Handbook Research on International Consumer Law* (Edward Elgar Publishing Ltd 2010)
- Howells G, Ramsay I and Wilhelmsson T, 'Consumer Law in Its International Dimension', *Handbook Research on International Consumer Law* (Edward Elgar Publishing Ltd 2010)
- Jayasuriya D, 'Compliance Issues in the Financial Sector', *Research Handbook on International Financial Crime* (Edward Elgar Publishing Ltd 2015)
- Kaufman G and Bliss R, *Financial Institutions and Markets-2007-2008-The Year of the Crisis* (Palgrave Macmillan US 2009)
- Kirk D, 'The Management of Complex Fraud Cases', *Research Handbook on International Financial Crime* (Edward Elgar Publishing Ltd 2015)
- Lobban M, 'Consumer Credit and Debt', *The Oxford history of the laws of England: Volume XII 1820-1914 Private Law*, vol XII (Oxford University Press 2010)
- Maitland FW, 'The Forms of Action at Common Law', *The Forms of Action at Common Law* (Cambridge University Press 1910)
- McPherson MS, 'Limits on Self-Seeking-The Role of Morality in Economic Life'
- Morner A, 'The European Union, Financial Services and the Consumer', *Consumer Protection in Financial Services* (Kluwer Law International 1999)
- Murray K, 'Confiscation and Forfeiture', *Research Handbook on International Financial Crime* (Edward Elgar Publishing Ltd 2015)

Candidate Number: 1341103

- Nield S, 'Borrowers as Consumers: New Notions of Unconscionability for Domestic Borrowers', *Unconscionability in European Private Financial Transactions-Protecting the Vulnerable* (Cambridge University Press 2010)
- Parlour R, 'Practicalities of Financial Crime Deterrence', *Research Handbook on International Financial Crime* (Edward Elgar Publishing Ltd 2015)
- Quirk P and Rothchild JA, 'Consumer Protection and the Internet', *Handbook Research on International Consumer Law* (Edward Elgar Publishing Ltd 2010)
- Ramsay I, 'Regulation of Consumer Credit', *Handbook Research on International Consumer Law* (Edward Elgar Publishing 2010)
- Scott C, 'Enforcing Consumer Protection Laws', *Handbook of Research on International Consumer Law* (Edward Elgar Publishing 2010)
- Smith DK, 'Financial Services Regulation and the Investor as Consumer', *Handbook of Research on International Consumer Law* (Edward Elgar Publishing 2010)
- Spiller P and Tokeley K, 'Individual Consumer Redress', *Handbook of Research on International Consumer Law* (Edward Elgar Publishing 2010)
- Stears C, 'Control Liability and Compliance: Tools for Controlling Financial Crime', *Research Handbook on International Financial Crime* (Edward Elgar Publishing 2015)
- Sutherland EH, 'White-Collar Criminality', *White-collar Criminal-The Offender in Business and the Professions* (First Edition, Atherton Press 1968)
- Sutherland EH and Ghelke CE, 'Crime and Punishment', *Recent Social Trends in the United States* (1933)
- Swain W and Faiweather K, 'Usury and the Judicial Regulation of Financial Transactions in Seventeenth-and Eighteenth-Century England', *Unconscionability in European Private Financial Transactions-Protecting the Vulnerable* (Cambridge University Press 2010)
- Tjio H, 'The Misuse and Abuse of the Corporate Form', *Research Handbook on International Financial Crime* (Edward Elgar Publishing Ltd 2015)
- Tombs S and Whyte D, 'Reappraising Regulation: The Politics of "Regulatory Retreat" in the United Kingdom', *How They Got Away With It: White Collar Criminals and the Financial Meltdown* (Columbia University Press 2013)
- Waddams S, 'Protection of Weaker Parties in English Law', *Unconscionability in European Private Financial Transactions-Protecting the Vulnerable* (Cambridge University Press) <<http://ebooks.cambridge.org/>> accessed 25 January 2014
- Waters DF and Hopper M, 'Regulatory Discipline and the European Convention on Human Rights-a Reality Check', *Regulating Financial Services and Markets in the 21st Century* (Hart Publishing 2001)
- Will S, Handelman S and Brotherton D, *How They Got Away With It: White Collar*

Candidate Number: 1341103

*Criminals and the Financial Meltdown* (Columbia University Press 2013)

Williams T, 'Open the Box: An Exploration of the Financial Services Authority's Model of Fairness in Consumer Financial Contracts', *Unconscionability in European Private Financial Transactions-Protecting the Vulnerable* (Cambridge University Press 2010)

Rules of the Supreme Court

## **Encyclopaedias**

'Background to Financial Services Legislation', *Encyclopaedia of Financial Services Law* (Sweet and Maxwell 2018)

'Equity', *Halsbury's Law of England* (2nd edn, Butterworths Lexis Nexis)

Freeman S, 'Original Position' (The Stanford Encyclopedia of Philosophy 2016)  
<<https://plato.stanford.edu/archives/win2016/entries/original-position/>>>

'Mortgage', *Halsbury's Law of England* (5th edn, Butterworths Lexis Nexis 2010)

Nadel M, 'Congress and Consumer Protection', *Encyclopedia of the Consumer Movement* (ABC-CLIO 1997) 127

'Nader, Ralph', *Encyclopedia of the Consumer Movement* (ABC-CLIO 1997)

Waterman RW and Garman ET, 'Presidents and the Consumer Movement', *Encyclopedia of the Consumer Movement* (ABC-CLIO 1997) 433

## **Journal Articles**

Atbani F, 'The Prevention of Financial Crime within an Islamic Framework' [2007] Institute of Economic Affairs, Blackwell Publishing

Cheyney EP, 'The Court of Star Chamber' (1913) 18 *The American Historical Review* 727

Fooks G, 'Contrast in Tolerance: The Peculiar of Financial Regulation'

Kreander N, McPhail K and Molyneaux D, 'God's Fund Managers: A Critical Study of Stock Market Investment Practices of the Church of England and UK Methodists' (2004) 17 *Accounting, Auditing & Accountability Journal* 408

Rider B, 'The Enemy Within' [2010] *Quantum Finance in Perspective* 25

Candidate Number: 1341103

Schwartz MS, Tamari M and Schwab D, 'Ethical Investment from a Jewish Perspective' 112:1 *Business and Society Review* 137

Smith P, 'Embezzlement and the Disobedient Servant' (1956) 19 *Modern Law Review*

## Law Commission Reports

Conveyancing Standing Committee, 'Let the Buyer Be Well Informed Recommendations of the Conveyancing Standing Committee' (The Law Commission 1989)

—, 'Caveat Emptor in Sales of Land' (Law Commission) A Consultation Paper

'Criminal Law: Conspiracy to Defraud' (1965) 228 Item 5 of the 4th Programme of Law Reform Criminal Law

<[www.lawcom.gov.uk/wp\\_content/uploads/2015/lc228.pdf](http://www.lawcom.gov.uk/wp_content/uploads/2015/lc228.pdf)>

'Fraud: Report on a Reference under Section 3(1)(e) of the Law Commissions Act 1965' (2002) LAW COM No 276, Cm 5560 <<http://www.lawcom.gov.uk>>

'Legislating the Criminal Code: Fraud and Deception' (Law Commission 1999) Law Commission Consultation Paper No 155

Peck M, 'The Fraud Trials Without a Jury Bill 2006-07' (Home Affairs Section House of Commons 2006) Research Paper 06/07

The Law Commission and the Scottish Law Commission, 'Legislating the Criminal Code: Offences of Dishonesty: Money Transfers' (Law Commission 1996)

<<https://www.lawcom.gov.uk/project/offences-of-dishonesty-money-transfers/>> accessed 24 July 2018

—, 'Consumer Redress for Misleading and Aggressive Practices' (The Law Commission and The Scottish Law Commission 2012) LAW COM No 332, SCOT LAW COM No 226

## Newspapers and blogs

Collinson P and Jones R, 'The Ethical Bank That Offers Salvation?' *The Guardian News and Media Limited* (London, 26 October 2013)

<[www.theguardian.com/money/2013/oct/26/ethical-bank-reliance-coop-salvation-army](http://www.theguardian.com/money/2013/oct/26/ethical-bank-reliance-coop-salvation-army)> accessed 23 May 2016

'Danny Alexander: Tax Avoidance Is Moral Equivalent of Benefit Fraud' *Telegraph Media Group* (London, 20 June 2012)

<<http://www.telegraph.co.uk/news/politics/9344265/Danny-Alexander-tax-avoidance-is-moral-equivalent-of-benefit-fraud.html>>

Candidate Number: 1341103

Dickinson C, 'FCA Says Focus on Top Managers in Not Enough to Drive Cultural Change' *Financial News* (London, 12 March 2018) <<https://www.fnlondon.com/articles/fca-says-focus-on-top-managers-is-not-enough-to-drive-cultural-change-20180312>> accessed 27 June 2018

Jill T, 'Bob Diamond Stands Firm against MPs' Calls to Forgo His Bonus' *The Guardian News and Media Limited* (London, 11 January 2011) <<https://www.theguardian.com/business/2011/jan/11/bob-diamond-stands-firm-mp-bonus>> accessed 7 July 2018

Milton F, 'The Social Responsibility of Business Is to Increase Its Profits' *New York Times Magazine* (New York, 13 September 1970) <<https://www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html>> accessed 21 July 2018

Peachy P, 'Two-Tier Justice: Private Prosecution Revolution' *Independent* (United Kingdom, 16 August 2014) <<https://www.independent.co.uk/news/uk/crime/two-tier-justice-private-prosecution-revolution-9672543.html>> accessed 28 May 2018

Preston A, 'God's Bankers: How Evangelical Christianity Is Taking a Hold of the City of London's Financial Institutions' *The Independent* (London, 23 April 2011) <[www.independent.co.uk](http://www.independent.co.uk)> accessed 23 May 2016

Wolff R, 'Lehman Brothers: Financially and Morally Bankrupt' *The Guardian News and Media Limited* (London, 12 December 2011)

### **Online Journals**

Alborn TL, 'The Moral of the Failed Bank: Professional Plots in the Victorian Money Market' (1995) 38 *Victorian Studies* 199

Al-Kashif AE-RM, 'Shari'ah's Normative Framework as to Financial and Abuse' (2009) 86 *Journal of Financial Crime* <Westlaw> accessed 18 December 2013

Al-Rimawi LM, 'Arab Regulations of Fraud, Insider Dealing, Market Manipulation and Possible Contractual Remedies' (1999) 303 *Journal of Financial Crime* <Westlaw> accessed 18 December 2013

Anas E and mounira BA, 'Ethical Investment and the Social Responsibilities of Teh Islamic Banks' (2009) Vol. 2 *International Business Research* <[www.ccsenet.org/journal.html](http://www.ccsenet.org/journal.html)>

Berg A, 'Clogs on the Equity of Redemption-or Chaining an Unruly Dog' [2002] *Journal of Business Law* 335

Berman MN, 'On the Moral Structure of White Collar Crime' (2007) 5 *Ohio State Journal of criminal law* 301

Borrie G, 'Law and Morality in the Market Place' [1987] *Journal of Business Law* 433

Bosworth -Davies R, 'The Influence of Christian Model Ideology in the Development

Candidate Number: 1341103

- of Anti-Money Laundering Compliance in the West and Its Impact, Post 9-11, upon the South Asian Market: An Independent Evaluation of a Modern Phenomenon' (2008) 11 *Journal of Money Laundering Control* 179
- Braithwaite J, 'White Collar Crime' (1985) 11 *Annual Review Sociology* 1
- Burke S, 'Justifications for Patents as Applied to Human-Animal Chimeras' (2012) 34 *European Intellectual Property Review* 237
- Burrows A, 'We Do This at Common Law but That in Equity' (2002) 22 *Oxford Journal of Legal Studies* 1
- Cane P, 'Morality, Law and Conflicting Reasons for Action' (2012) 71 *Cambridge Law Journal* 59
- Cartwright P, 'Understanding and Protecting Vulnerable Financial Consumers' (2015) 38 *Journal of Consumer Policy* 119
- , 'Redress Compliance and Choice: Enhanced Consumer Measures and the Retreat from Punishment in the Consumer Rights Act 2015' (2016) 75 *Cambridge Law Journal* 271
- Child JW, 'Can Libertarianism Sustain a Fraud Standard?' (1994) 104 *Ethics* 722
- Chitimira H, 'A Historical Overview of Market Abuse Prohibition in the United Kingdom' (2014) 5 *Meditarranean Journal of Social Sciences* 49
- , 'Of the Enforcement of the Market Abuse Prohibition in the United Kingdom' (2014) 5 *Meditarranean Journal of Social Sciences* 272
- Currie C, 'Civil Enforcement as a Regulatory Device-an Analysis of Adnistrative and Civil Enforcement under the Financial Services Act 1986' (1996) 3 *Journal of Financial Crime* 319
- Davies C, 'A Scandalous Affair: The Disparity in the Application of Morality to Trade Marks, Patents and Copyright' (2005) 12 *European Intellectual Property Review* 274
- Dine JM, 'The Disqualification of Company Directors' (1988) 9 *Company Lawyer* 213
- Dixon M and Harpum C, 'Fraud, Undue Influence and Mortgahges of Registered Land: A Reply to Professor Thompson' [1994] *Conveyancer and Property Lawyer* 421
- Dobosek B, Lamberger I and Slak B, 'Advance Fee Frauds Messages-Non-Declining Trend' (2013) 16 *Journal of Money Laundering Control* 209
- Ellickson RC, 'Ancient Land Law: Mesopotamia, Egypt, Israel' [1995] *Faculty Scholarship Series* <[http://digitalcommons.law.yale.edu/fss\\_papers/410](http://digitalcommons.law.yale.edu/fss_papers/410)>
- Faure MG and Leger C, 'The Directive on Criminal Sanctions for Market Abuse: A Move towards Harmonizing inside Trading Criminal Law at the EU Level?' (2015) 9 *Brooklyn Journal of Corporate, Financial & Commercial Law* 387

Candidate Number: 1341103

Ferran E, 'The Break-up of the Financial Services Authority' (2011) 31 *Oxford Journal of Legal Studies* 455

Fishman JJ, 'Enforcement of Securities Laws Violations in the United Kingdom' (1991) 9 *International Tax & Business Lawyer* 131

Fordham University of Law, 'Religious Values and Corporate Decision Making: An Interdisciplinary Interfaith Conference for Corporate Executives and Legal Counsel' (2006) XI *Fordham Journal of Corporate & Financial Law* 543

'Former RBS LIBOR Submitter Banned for False Rate Setting' (2016) 8 *Company Lawyer*

Fraud Advisory Panel, 'Private Prosecutions for Fraud Offences' [2013] *FRAUD FACTS* <[www.fraudadvisorypanel.org](http://www.fraudadvisorypanel.org)>

Friedman HH and Adler WD, 'Moral Capitalism: A Biblical Perspective' (2011) 70 *American Journal of Economics and Sociology* 1014

Fuller RC, 'Morals and the Criminal Law' (1941) 32 *Journal of Criminal Law and Criminology* 624

Galanos C, 'Universal Human Rights in the Face of Cultural Relativism and Moral Objectivity: Preaching or Teaching' (2010) 16 *UCL Jurisprudence Review* 29

Gardner J, 'Law and Morality'

Geis G, 'From Deuteronomy to Deniability: A Historical Perustration on White-Collar Crime' (1988) 5 *Justice Quarterly* 7

Gerber DA, 'Cutting Out Shylock: Anti-Semitism and the Quest for Moral Order in the Mid-Nineteenth-Century American Market Place' (1982) 69 *The Journal of American History* 615

Gilligan GP, 'The Origins of UK Financial Services Regulation' [1997] *Company Lawyer*

——, 'Historical Touchstones in the Regulation of the Financial Services Sector' <<http://ssrn.com/abstract=2213254>>

——, 'Regulating against White Collar Crime in the Financial Services Sector' <<http://ssrn.com>>

Goode R., 'Usury in English Law' (1982) 1 *Arizona Journal of International and Comparative Law* <Heinonline> accessed 30 January 2016

Green SP, 'Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements' (2001) 53 *Hastings Law Journal* 157

——, 'Moral Ambiguity in White Collar Criminal Law' (2004) 18 *Notre Dame Journal of Law, Ethics & Public Policy* 501



Candidate Number: 1341103

- Griffith P, 'Christianity, Liberalism and the Separation of Law and Morals' (2001) 8 UCL Jurisprudence Review 12
- Hamilton WH, 'The Ancient Maxim Caveat Emptor' 40 Yale Law Journal 1133
- Henham R, 'Criminal Justice and the Trial and Sentencing of White Collar Offenders' (1995) 59 Journal of Criminal Law 83
- Henning JJ and Du Toit S, 'South Africa: High Pressure Selling of Securities: From Rigging the Market to False Trading, Market Manipulation and Insider Dealing' (2000) 21 Company Lawyer 257
- Herbruck W, 'Forestalling, Regrating and Engrossing' (1929) 27 Michigan Law Review 365
- Hodgson GM, 'The Evolution of Morality and the Economic Man' [2011] Journal of Evolutionary Economics 1
- Holdsworth SWS, 'The Relation of the Equity Administered by the Common Law Judges to the Equity Administered by the Chancellor' (1916) XXVI Yale Law Journal <Heinonline> accessed 2 May 2014
- Hwang M and Lai A, 'Do Egregious Errors Amount to a Breach of Public Policy?' (2005) 71 Arbitration 1
- Ibbetson DJ, 'Sale of Goods in the Fourteenth Century' (1991) 107 Law Quarterly Review 480
- Ibrahim SS, Man N and Noor AHM, 'Fraud: An Islamic Perspective' The 5th International Conference on Financial Criminology (ICFC) 2013
- Inge J, 'Theological Reflections on the Place of the Sacred in Society' (2004) 7 Ecclesiastical Law Journal 380
- Jackall R, 'Moral Mazes: The World of Corporate Managers' (1988) 1 Politics, Culture and Society
- Johnstone P, 'Serious White Collar Fraud: Historical and Contemporary Perspectives' (1999) 30 Crime, Law and Social Change 107
- Kaveny MC, 'Between Example and Doctrine: Contract Law and Common Morality' (2005) 33 The Journal of Religious Ethics 669
- Kawan K, 'Fraud in Documentary Credit Transaction: Confusion or Cohesion?' (1991) 6 International Business Law Journal 797
- Keischner J, 'Divine Justice: Religion and the Development of Chinese Legal Culture' (2011) 13 Ecclesiastical Law Journal 109
- Kirk D, 'Frauding Sentencing: The Tom Hayes Effect'
- Koutsias M and Willett C, 'The Unfair Commercial Practices Directive in the UK'

Candidate Number: 1341103

(2012) 5 *Erasmus Law Review* 237

Leigh L, 'The Control of Business Crimes' (1987) 8 *Company Lawyer* 110

Lemoine B, 'Interpreting Fairness: A Critique of Free Market Fairness'

Levi M, 'White-Collar Crimes, Folk Devils and Moral Panics: Not with a Bang but a Whimper' (2011) *Social on Moral Panics British Journal of Criminology* 1

——, 'Social Reactions to White Collar Crimes and Their Relationship to Economic Crises'

Lewis C and others, 'Evaluating the Case for Greater Use of Private Prosecutions in England and Wales for Fraud Offences' (2013) 42 *International Journal of Law, Crime and Justice*

Lobban M, 'Nineteenth Century Frauds in Company Formation: *Derry v Peek* in Contest' (1996) 112 *Law Quarterly Review* 287

——, 'Contractual Fraud in Law and Equity, C1750-C1850' (1997) 17 *Oxford Journal of Legal Studies* 441

MacCullough A, 'Honesty, Morality and the Cartel Offence' (2007) 28 *European Competition Law Review* 355

Mann K, 'White Collar Crime and the Poverty of the Criminal Law' (1992) 17 *Law and Social Inquiry* 561

Masters JL, 'Fraud and Money Laundering: The Evolving Criminalization of Corporate Non-Compliance' (2008) 11 *Journal of Money Laundering Control* 103

McKeever G, 'Balancing Rights and Responsibilities: The Case of Social Security Fraud' (2009) 16 *Journal of Social Security Law* 139

McMurty L, 'Consumer Credit Act Mortgages: Unfair Terms, Time Orders and Judicial Discretion' (2010) 2 *Journal of Business Law* 107

Mee J, 'Resulting Trusts and Voluntary Conveyances of Land' (2012) 4 *Conveyancer and Property Lawyer* 307

Micklitz H-W, 'On the Intellectual History of Freedom of Contract and Regulation' (2005) 4 *Penn State Journal of Law & International Affairs*

Miles L and Goulding S, 'Corporate Governance in Western (Anglo-American) and Islamic Communities: Prospects for Convergence' (2010) 2 *Journal of Business Law* 126

Mommsenn T and Krueger P, 'The Digest of the Justinian' (1985) IV

Monaghan C, 'To Prosecute or Not to Prosecute? A Reconsideration of the Overzealous Prosecution of Parents under the Fraud Act 2006' (2010) 74 *Journal of Criminal Law* 259

Candidate Number: 1341103

- Nathan KVS., 'Who Is Afraid of Sharia?-Islamic Law and International Commercial Arbitration' (1993) 59 *Arbitration* 125
- Novak R, Bond R and Henty P, 'Looking to the next 12 Months: 10 Issues for UK Compliance Officers' [2015] *Compliance & Risk*
- Page F, 'Defining Fraud: An Argument in Favour of a General Offence of Fraud' (1997) 4 *Journal of Financial Crime* 287
- Paternoster R and Simpson S, 'Sanction Threats and Appeals to Morality: Testing a Rational Choice Model of Corporate Crime' (1996) 30 *Law and Society Review* 549
- Perri FS and Brody RG, 'The Optics of Fraud: Affiliations That Enhance Offender Credibility' (2012) 19 *Journal of Financial Crime* 355
- Perry MJ, 'The Morality of Human Rights: A Nonreligious Ground?' (2005) 27 *Dublin University Law Journal* 28
- Pettersson T, 'Religion and Criminality: Structural Relationships between Church Involvement and Crime Rates in Contemporary' (1991) 30 *Journal for the Scientific Study of Religion* 279
- Pimlott GF, 'Reform of Investor Protection in the U.K.-an Examination of the Proposals of the Gower Report and the U.K's Government's White Paper of January 1985' (1985) 7 *Journal of Comparative Business and Capital Market Law* 141
- Plunkett JC, 'Historical Foundations of the Duty of Care' Vol 41 *Monash University Law Review*
- Postema GJ, 'Politics Is about the Grievance: Feinberg on the Legal Enforcement of Morals' (2005) 11 *Legal Theory* 293
- Prabowo HY, 'Better, Faster, Smarter: Developing a Blueprint for Creating Forensic Accountants' (2013) 16 *Journal of Money Laundering Control* 358
- Price S, 'Improving Conveyancing Efficiency by Redrafting Section 16' [2005] *Conveyancer and Property Lawyer* 140
- Raack DW, 'History of Injunctions in England before 1700' (1986) 61 *Indiana Law Journal* <<http://www.repository.law.indiana.edu/ilj/vol61/iss4/1>>
- Ramsay I, 'Consumer Credit Law, Distributive Justice and the Welfare State' (1995) 15 *Oxford Journal of Legal Studies* 177
- , 'Comparative Consumer Bankruptcy' (2007) 1 *University of Illinois Law Review* 241
- , 'Regulation and the Constitution of the EU Single Market: The Contribution of Consumer Law' (2010) 50 *Canadian Business Law Journal* 322
- Rasor PB, 'Biblical Roots of Modern Consumer Credit Law' (1993) 10 *Journal of Law and Religion* 157

Candidate Number: 1341103

- Rider B, 'The Virtue of Certainty' (2009) 30 *Company Lawyer* 225
- Rider BA., 'Self Regulation: The British Approach to Policing Conduct in the Securities Business, with Particular Reference to the Role of the City Panel on Take-Overs and Mergers in the Regulation of Insider Trading' (1978) 1 *Journal of Comparative Law and Securities Regulation* 319
- , 'Amiable Lunatics and the Rule in *Foss v Harbottle*' (1978) 37 *Cambridge Law Journal* 270
- , 'Policing the International Financial Markets: An English Perspective' (1990) 16 *Brooklyn Journal of International Law* 179
- , 'Civilising the Law- The Use of Civil and Administrative Proceedings to Enforce Financial Services Law' (1995) 3 *Journal of Financial Crime* 11
- , 'Control of Insider Trading-Smoke and Mirrors' (2000) 19 *Dickinson Journal of International Law* <Heinonline> accessed 20 January 2018
- , 'Policing Corruption and Economic Crime-How Can We Do It Better' (2015) 10 *Frontiers of Law in China* 626
- Rodl F, 'Contractual Freedom, Contractual Justice and Contract Law' (2013) 76 *Law and Contemporary Problems* 57
- Rosenfield B-Z and Menirav J, 'Fraud: From the Biblical Basis to General Commercial Law in Roman Palestine' (2006) XXXVII *Journal for the Study of Judaism* 594
- Rothschild DP and Throne BC, 'Criminal Consumer Fraud: A Victim-Oriented Analysis' (1976) 74 *Michigan Law Review* 661
- Ryder DN, 'The Financial Crisis and Financial Crime in the UK: A Critical Analysis of the Response by Financial Regulatory Agencies' (2017) 38 *Company Lawyer* 4
- Ryder N and Broomfield K, 'Predatory Lending and White Collar Crime: A Critical Reflection' (2014) 25 *International Company and Commercial Law Review* 287
- Sandler M and others, 'Market Abuse' (2014) 118 *Compliance Officer Bulletin* 1
- Sayre F, 'Criminal Conspiracy' (1922) 393 *Harvard Law Review*
- Schaefer AG and Bickel B, 'Morality in the Marketplace: Consumer Protection, Regulatory Policy and Jewish Law' (1994) 17 *Loyola of Los Angeles International Internaional & Comparative Law Journal* 85
- Shavell S, 'Law versus Morality as Regulators of Conduct' (2002) 4 *American Law and Economics Association* 227
- Shears P, 'Food Fraud-a Current Issue but an Old Problem' (2008) 1 *Plymouth Law Review* 118
- Singh D, 'Northern Rock, Depositors and Deposit Insurance Coverage: Some Critical

Candidate Number: 1341103

Reflections' (2010) 2 Journal of Business Law 55

Starnes RA, 'Consumer Fraud and the Elderly: The Needs for Uniform System of Enforcement and Increased Civil and Criminal Penalties' (1996) 4 Elder Law Journal <Heinonline>

Stenson T, 'Inchoate Crimes and Criminal Responsibility under International Law' (2006) V Journal of International Law <[HTTP://www.law.upenn.edu/journals/jil/jilp/](http://www.law.upenn.edu/journals/jil/jilp/)> accessed 16 February 2014

Stuart R, 'Law Reform and the Reform of the Law of Theft' (1967) 30 The Modern Law Review 609

Stuckey M, 'A Consideration of the Emergence and Exercise of Judicial Authority in the Star Chamber' (1993) 19 Monash University Law Review

Taylor J, 'Commercial Fraud and Public Men in Victorian Britain' (2005) 78 Historical Research 230

Televantos A and Maniscalco L, 'Proprietary Estoppel and Vendor Purchaser Constructive Trusts' (2015) 74 Cambridge Law Journal 27

Thompson MP, 'Illegal Transactions' [1999] Conveyancer and Property Lawyer 242

Travers Smith Regulatory Investigations Group, 'FCA and PRA Enforcement Action: Themes and Trends' [2016] Compliance Officer Bulletin 1

Trindale FA, 'Commercial Morality and the Tort of Negligence' (1989) 105 Law Quarterly Review 191

Waddams S, 'Equity in English Contract Law: The Impact of the Judicature Acts (1873-75)' (2012) 33 Journal of Legal History 185

Waiz A, 'Mortgage Fraud: Breach of Trust' [2016] Westlaw

Wardhuagh B, 'Unveiling Fairness for the Consumer: The Law, Economics and Justice of Expanded Arbitration' (2014) 26 Loyola Consumer Law Review 101

Wheelis A, 'In the Reign of the King of Whirl: The Conditions of Morality' (1972) 32 The Antioch Review 529

Wibier R and Salah O, 'The Credit Crunch and Islamic Finance: Sharia-Compliant Finance against the Backdrop of the Credit Crises' (2011) 509 Journal of International Banking Law and Regulation <Westlaw> accessed 19 December 2013

Williston S, 'Liability for Honest Misrepresentation' (1911) 24 Harvard Law Review Association 415

Wilson G and Wilson S, 'Can the General Fraud Offence "Get the Law Right"?: Some Perspectives on the "problem" of Financial Crime' Journal of Criminal Law 36

Wilson S, "'Collaring" the Crime and the Criminal? "Jury Psychology" and Some

Candidate Number: 1341103

Criminological Perspectives on Fraud and the Criminal' (2006) 70 *Journal of Criminal Law* 75

Withey C, 'The Fraud Act 2006-Some Early Observations and Comparisons with the Former Law' *Journal of Criminal Law* 220

Wright R, 'Market Abuse and Market Manipulation: The Criminal, Civil and Regulatory Interface' (2001) 3 *Journal of International Financial Markets* 19

Zajac G, 'Beyond Hammurabi: A Public Service Definition of Ethics Failure' (1996) 6 *Journal of Public Administration Research and Theory* 145

## **Theses**

Agee S, 'The Court of Star Chamber, 1593-1603' (Student Honors Theses, University of Richmond 1969) <<http://scholarship.richmond.edu/honors-theses>>

Bazley S, 'The Financial Services and Markets Tribunal and Its Role in the Accountability of the Market Abuse Regime' (PhD Dissertation, Institute of Advanced Legal Studies, School of Advanced Study, University of London 2010)

Brown SE, 'Consumer Credit and Over-Indebtedness: The Parliamentary Response: Past, Present and Future' (University of Leeds School of Law 2006)

Bunbury JC, 'A History of the Action of Deceit on the Case and Related Developments in Contract Law' (Doctorate Thesis, The University of Auckland 2005)

Cadwallader FJJ, 'In Pursuit of the Merchant Debtor and Bankrupt: 1066-1732' (Thesis submitted for the Degree of Doctor of Philosophy in the Faculty of Laws, University of London 1965)

Gananopoulou VA, 'The Financial Services Authority (FSA) as an Institutional Model for the Emergence of a Single European Financial Services Regulator' (PhD Dissertation, University of London, Kings College London 2001)

Gilligan GP, 'White Collar Criminology and the Regulation of Financial Services' (PhD Dissertation, University of Cambridge 1995)

Hadden TB, 'The Development and Administration of the English Law of Criminal Fraud' (PhD, University of Cambridge 1967)

Jabbar SF, 'Investor Protection in the Islamic Financial Services Industry' (Thesis submitted for the Degree of Doctor of Philosophy, Institute of Advanced Legal Studies, School of Advanced Study, University of London 2010)

Lemoine B, 'Interpreting Justice: A Critique of Free Market Fairness' (Honors Thesis Collection, Wellesley College 2015) <<http://repository.wellesley.edu/thesiscollection>>

Lopes CIM de A, 'From Description to Explanation in Cross-National Research The Case of Economic Morality' (PhD Dissertation, London School of Economics 2011)

Candidate Number: 1341103

Mcmanus JJ, 'Law and Power: A Study of the Social and Economic Development of the Law Relating to Consumer Credit' (University of Dundee 1985)

Rider BA., 'The Regulation of Insider Trading in Corporate Securities' (PhD Dissertation, University of London, Queen Mary 1977)

## Websites and blogs

Action Fraud, 'ActionFraud Is the UK's National Fraud and Cyber Crime Reporting Centre' <<https://www.actionfraud.police.uk/>> accessed 15 September 2018

Adoboli K, *Kweku Adoboli: Lessons from Financial Catastrophe* (Liverpool John Moores University 2017) <<https://www.youtube.com/watch?v=ORQAPYR-W7I>> accessed 27 June 2018

—, *Putting Humanity before Profit* (Liverpool John Moores University 2017) <[https://www.youtube.com/watch?v=67Q7A\\_oC\\_6c](https://www.youtube.com/watch?v=67Q7A_oC_6c)> accessed 27 June 2018

Alcester Court, 'Alcester Court Leet-History' <[www.alcestercourtleet.co.uk/history/court-leet-history/](http://www.alcestercourtleet.co.uk/history/court-leet-history/)> accessed 8 August 2017

Ambler T and Saltiel M, 'Bank Regulation: Can We Trust the Vickers Report?' (Adam Smith Institute 2011) <<https://www.adamsmith.org/research/bank-regulation-can-we-trust-the-vickers-report>> accessed 24 July 2018

Bailey A, 'Culture in Financial Services-a Regulator's Perspective' (Bank of England 9 ay 2016M) <<https://www.bankofengland.co.uk/-/media/boe/files/speech/2016/culture-in-financial-services-a-regulators-perspective.pdf?la=en&hash=088A4BBDA75375CCD822EE715A35BC662FCD8A6D>> accessed 26 June 2018

'Banking Supervision and Regulation' (House of Lords Select Committee on Economic Affairs 2009) 2nd Report of Session 2008-09

'Barclays Accused of "dark Pool" Fraud' (The British Broadcasting Corporation (BBC) 2014) <[www.bbc.co.uk/news/28030351](http://www.bbc.co.uk/news/28030351)> accessed 26 June 2014

Barry One-off, 'The Livery Companies of the Square Mile' <<http://www.barryoneoff.co.uk/livery.html>> accessed 23 September 2018

Bingham TRHLJ, 'Inquiry into the Supervision of The Bank of Credit and Commerce International'

Black WK, 'The Link between Moral and Market Values' <<http://www.scu.edu/ethics/publications/ethicalperspectives/accountingethics.html>> accessed 15 February 2014

British Bankers Association, Building Societies Association and The UK Cards Association, 'The Lending Code'

Candidate Number: 1341103

Broyde MJ and Resnicoff SH, 'Jewish Law and Modern Business Structures: The Corporate Paradigm'

Cartwright P, 'The Vulnerable Consumer of Financial Services: Law, Policy and Regulation'

Chene M, 'Islamic Approches to to Corruption' [2007] U4 Anti-Corruption Resources Centre <[www.U4.no](http://www.U4.no)>

Citizens Advice Bureau, 'History of the Citizens Advice Service' <<https://www.citizensadvice.org.uk/about-us/how-citizens-advice-works/who-we-are-and-what-we-do/history-of-the-citizens-advice-service/>> accessed 16 September 2018

Clayton M and others, 'Consumer Responsibility-Identifying and Closing the Gaps' <[https://www.fca-pp.org.uk/sites/default/files/fca\\_practitioner\\_panel\\_consumer\\_responsibility\\_report\\_september\\_2013.pdf](https://www.fca-pp.org.uk/sites/default/files/fca_practitioner_panel_consumer_responsibility_report_september_2013.pdf)>

'CML Lenders Handbook for Conveyancers' <[www.cml.org.uk/lenders-handbook/](http://www.cml.org.uk/lenders-handbook/)> accessed 24 March 2017

'Code of Practice for Victims of Crime' <[www.gov.uk/government/publications/the-code-of-practice-for-victims-of-crime](http://www.gov.uk/government/publications/the-code-of-practice-for-victims-of-crime)>

Competition and Markets Authority (CMA), 'Competitions Act 1998: Guidance on the CMA's Investigation Procedures in Competition Act 1998 Cases' <[www.gov.uk/cma](http://www.gov.uk/cma)>

—, 'How the CMA Investigates Competition and Consumer Issues' (25 September 2014) <<https://www.gov.uk/government/collections/how-the-cma-investigates-competition-and-consumer-issues>>

—, 'CMA Annual Report and Accounts 2016/17' (Competition and Markets Authority 2017) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/628985/cma-annual-report-accounts-16-17-print-ready.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/628985/cma-annual-report-accounts-16-17-print-ready.pdf)> accessed 11 July 2018

—, 'Competition and Markets Authority Cases' (14 September 2017) <<https://www.gov.uk/cma-cases>> accessed 18 February 2018

—, 'CMA Lifts the Lid on Estate Agents' Cartel' (18 September 2017)

'Competition Commission' <<https://www.gov.uk/government/organisations/competition-commission>> accessed 18 February 2018

Consumer Affairs Victoria, 'What Do We Mean by "vulnerable" and "Disadvantaged" Consumers?-Discussion Paper' <[www.consumer.vic.gov.au](http://www.consumer.vic.gov.au)> accessed 11 July 2018

'Consumer Protection Regulations' <[www.naea.co.uk/lobbying/consumer-protection-regulations/](http://www.naea.co.uk/lobbying/consumer-protection-regulations/)>



Candidate Number: 1341103

Consumers International (CI), 'A Guide to Developing Consumer Protection Law' <[www.consumersinternational.org](http://www.consumersinternational.org)>

'Conveyancing Quality Scheme Accreditation' <[www.lawsociety.org.uk/supportservices/accreditation/conveyancing-quality-scheme](http://www.lawsociety.org.uk/supportservices/accreditation/conveyancing-quality-scheme)> accessed 24 March 2017

'Criminal Enforcement of the Consumer Protection from Unfair Trading Regulations 2008-OFT Policy OFT1273'

Crown Prosecutions Service, 'Kweku Adoboli Convicted of Two Counts of Fraud' (*The Blog of the Crown Prosecution Service*, 20 November 2012) <<http://blog.cps.gov.uk/2012/11/kweku-adoboli-convicted-of-two-counts-of-fraud.html>> accessed 27 June 2018

—, 'Private Prosecution (Legal Guidance)' <<https://www.cps.gov.uk/legal-guidance/private-prosecutions>> accessed 17 February 2018

de Silva C, 'The Prosecutor's Priorities: Investigative Techniques, Priorities and Future DPA Use within the SFO' (ABC Minds Financial Services conference on 15 March 2018, 16 March 2018) <<https://www.sfo.gov.uk/2018/03/16/camilla-de-silva-at-abc-minds-financial-services/>> accessed 25 September 2018

—, 'Corporate Criminal Liability, AI and DPAs' (Herbert Smith Freehills Corporate Crime Conference 2018, 21 June 2018) <<https://www.sfo.gov.uk/2018/06/21/corporate-criminal-liability-ai-and-dpas/>> accessed 25 September 2018

Faculty of Law, University of Oxford, 'Oxford University Standard for the Citation of Legal Authorities' <[https://www.law.ox.ac.uk/sites/files/oxlaw/oscola\\_4th\\_edn\\_hart\\_2012.pdf](https://www.law.ox.ac.uk/sites/files/oxlaw/oscola_4th_edn_hart_2012.pdf)> accessed 24 July 2018

Feddon L and Prasad J, 'UK Property Fraud What You Need to Know' <[blog.landregistry.gov.uk/property-fraud-all-you-need-to-know](http://blog.landregistry.gov.uk/property-fraud-all-you-need-to-know)> accessed 25 March 2017

'Finance Industry, Police and Trading Standards Unite to Tackle Fraud' (13 December 2017) <<https://www.ukfinance.org.uk/finance-industry-police-and-trading-standards-unite-to-tackle-fraud>> accessed 10 February 2018

Financial Action Task Force, 'Who We Are' <[www.fatf-gafi.org.uk/about/historyofthefatf/](http://www.fatf-gafi.org.uk/about/historyofthefatf/)> accessed 24 March 2017

Financial Conduct Authority, 'Detailed Rules for the Price Cap on High-Cost Short Term Credit-Including Feedback on CP14/10 and Final Rules' <<https://www.fca.org.uk/publication/policy/ps14-16.pdf>> accessed 28 May 2018

—, 'FCA Confirms Price Cap Rules for Payday Lenders' (11 November 2014) <<https://www.fca.org.uk/node/19396>> accessed 21 April 2018

—, 'Consumer Vulnerability Occasional Paper' <[www.fca.org.uk/publication/ocasional-papers/ocasional-paper-8.pdf](http://www.fca.org.uk/publication/ocasional-papers/ocasional-paper-8.pdf)> accessed 5

Candidate Number: 1341103

February 2018

- , ‘Guide for Consumer Credit Firms’ <[www.fca.org.uk/consumer-credit](http://www.fca.org.uk/consumer-credit)>
- , ‘Consumer Credit Regulation: The Journey so Far’ (4 August 2016)  
<<https://www.fca.org.uk/news/speeches/consumer-credit-regulation-journey-so-far>>  
accessed 21 February 2018
- , ‘FCA Cancels Payday Lender’s Interim Permission, Bans Director and Refuses Application to Conduct Regulated Business’ (13 October 2016)  
<<https://www.fca.org.uk/news/press-releases/fca-cancels-payday-lenders-interim-permission-bans-director-and-refuses>> accessed 21 February 2018
- , ‘FCA Enforcement Annual Performance Account Annual Report 2016/17’ (Financial Conduct Authority 2017) <<https://www.fca.org.uk/publication/annual-reports/enforcement-annual-performance-account-2016-17.pdf>> accessed 11 July 2017
- , ‘FCA Mission: Our Future Approach to Consumers’  
<<https://www.fca.org.uk/publication/corporate/our-future-approach-consumers.pdf>>  
accessed 26 June 2018
- , ‘Our Mission 2017-How We Regulate Financial Services’  
<<https://www.fca.org.uk/publication/corporate/our-mission-2017.pdf>> accessed 26 June 2018
- , ‘FCA Takes First Criminal Action against an Individual Acting as Unlicensed Consumer Credit Lender’ (17 January 2017) <<https://www.fca.org.uk/news/press-releases/fca-takes-first-criminal-action-against-individual-acting-unlicensed-consumer>>  
accessed 21 February 2018
- , ‘Ageing Population and Financial Services’  
<<https://www.fca.org.uk/publication/occasional-papers/occasional-paper-31.pdf>>  
accessed 26 June 2018
- , ‘Reader’s Guide: An Introduction to the Handbook’  
<<https://www.fca.org.uk/publication/handbook/readers-guide.pdf>> accessed 26 June 2018
- , ‘FCA Mission-Our Approach to Competition’  
<<https://www.fca.org.uk/publication/corporate/our-approach-competition.pdf>> accessed 26 June 2018
- , ‘Money Laundering and Terrorist Financing’ (16 February 2018)  
<<https://www.fca.org.uk/firms/financial-crime/money-laundering-terrorist-financing>>  
accessed 9 July 2018
- , ‘Transforming Culture in Financial Services Discussion Paper DP18/2’  
<<https://www.fca.org.uk/publications/discussion-papers/dp18-2-transforming-culture-financial-services>> accessed 26 June 2018
- , *FCA Handbook* (Financial Conduct Authority) <[www.fca.org.uk](http://www.fca.org.uk)>

Candidate Number: 1341103

Financial Ombudsman Service, 'Financial Ombudsman Service Response to FSA Discussion Paper (DP08/5) on "Consumer Responsibility"' <<http://www.financial-ombudsman.org.uk/publications/policy-statements/response-to-FSA-DP08-5.html>> accessed 26 June 2018

Financial Services Authority, 'Product Intervention FS/3-Feedback on DP11/1' <[https://www.fca.org.uk/publication/feedback/fs11\\_03.pdf](https://www.fca.org.uk/publication/feedback/fs11_03.pdf)> accessed 26 June 2018

Financial Services Consumer Panel, 'Financial Services Consumer Panel-Response to DP/11: Product Intervention'

Fisher J, 'Who Should Prosecute Fraud, Corruption and Financial Markets' (2013) <<http://www.lse.ac.uk/law/Assets/Documents/law-and-financial-markets-project/fisher-who-should-prosecute.pdf>> accessed 17 February 2018

Fraud Advisory Panel, 'An Overview of Parallel Sanctions' <<https://www.fraudadvisorypanel.org/wp-content/uploads/2015/04/Fraud-Facts-10B-Parallel-Sanctions-Aug10.pdf>> accessed 28 May 2018

— <[www.fraudadvisorypanel.org](http://www.fraudadvisorypanel.org)>

—, 'The Criminal and Civil Justice Systems in England and Wales' <<https://www.fraudadvisorypanel.org/wp-content/uploads/2015/06/The-criminal-and-civil-justice-systems-in-England-and-Wales-June15.pdf>> accessed 28 May 2018

Friedman HH, 'Placing a Stumbling before the Blind Person: An in-Depth Analysis' (2002) <<http://www.jlaw.com/Articles/placingstumbling.html>> accessed 3 April 2018

Friedman HH and Friedman LW, 'The Financial Meltdown of 2008: The Perspectives of Jewish Law'

Gardner J, 'Law and Morality' <[users.ox.ac.uk/~lawf0081/pdfs/lawandmoralityedited.pdf](http://users.ox.ac.uk/~lawf0081/pdfs/lawandmoralityedited.pdf)>

Grace D, 'A Summary of Robert Jackall's Moral Mazes' 2005

Grant Thornton UK LLP, 'Measurement of Cultures in Financial Services Firms-How Can You Manage What You Do Not Measure?' <<https://www.grantthornton.co.uk/globalassets/1.-member-firms/united-kingdom/pdf/publication/2016/measuring-culture-in-financial-services.pdf>> accessed 26 June 2018

Green J and Perry J, 'OFT to FCA: Two Years of FCA Regulation of the Consumer Credit Industry' (4 January 2016) <<https://www.ashurst.com/en/news-and-insights/legal-updates/oft-to-fca-two-years-of-fca-regulation-of-the-consumer-credit-industry/>> accessed 21 February 2018

Hausman DM, 'Are Markets Morally Free Zones' University of Wisconsin Madison <<http://philosophy.wisc.edu/hausman/papers/gauthier.htm>> accessed 30 December 2013

Heeks M and others, 'The Economic and Social Costs of Crime Second Edition' (Home Office 2018) 99 <<https://www.gov.uk/government/publications/the-economic-and->

Candidate Number: 1341103

social-costs-of-crime?utm\_source=f750e4fd-a260-434a-a2d9-05181bd7d838&utm\_medium=email&utm\_campaign=govuk-notifications&utm\_content=immediate> accessed 20 September 2018

HM Treasury, 'Consultation Outcome-Amendments to the UCITS Directive (UCITS V)' (31 October 2018) <<https://www.gov.uk/government/consultations/consultation-on-amendments-to-the-ucits-directive-ucits-v/amendments-to-the-ucits-directive-ucits-v>> accessed 30 July 2018

International Financial Consumer Protection Organisation, 'FinCoNet Report on Responsible Lending-Review of Supervisory Tools for Suitable Consumer Lending Practices' (July 2014) <<http://www.finconet.org/FinCoNet-Responsible-Lending-2014.pdf>> accessed 13 September 2018

—, 'Report on the Digitilisation of Short-Term, High-Cost Consumer Credit' (November 2017) <<http://www.finconet.org/Digitalisation-Short-term-High-cost-Consumer-Credit.pdf>> accessed 13 September 2018

Joint Money Laundering Steering Group, 'Prevention of Money Laundering/Combating Terrorist Financing' <<http://www.jmlsg.org.uk/>> accessed 7 September 2018

JUSTICE, 'The Protection of the Small Investor' (JUSTICE Educational and Research Trust 1992)

Kummer S and Pauletto C, 'The History of Derivatives: A Few Milestones' (EFTA Seminar on Regulation of Derivatives Markets 2012)

'Lawyer Check' <[www.lawyerchecker.co.uk](http://www.lawyerchecker.co.uk)>

'Legal Ombudsman' <<http://www.legalombudsman.org.uk>> accessed 22 February 2018

Legal Sector Afinity Group, 'Anti Money Laundering Guidance for the Legal Sector' <<http://www.lawsociety.org.uk/policy-campaigns/articles/anti-money-laundering-guidance/>> accessed 27 June 2018

Levi M and others, 'The Economic, Financial and Social Impacts of Organised Crime in the European Union' (European Parliament's Special Committee on Organised Crime, Corruption and Money Laundering (CRIM) 2013) <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493018/IPOL-JOIN\\_ET%282013%29493018\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493018/IPOL-JOIN_ET%282013%29493018_EN.pdf)> accessed 20 September 2018

Levi M, Burrows J and Hopkins M, 'The Nature, Extent and Economic Impact of Fraud in the UK' (Association of Chief Police Officers' Economic Crime Portfolio 2007) <<http://orca.cf.ac.uk/48242/>> accessed 20 September 2018

Linux Information Project, 'Source Code Definition' (23 May 2004) <[http://www.linfo.org/source\\_code.html](http://www.linfo.org/source_code.html)> accessed 27 June 2018

Machado P, 'Regulating Conduct and Culture in the Financial Industry', *Conduct and culture: what priorities in the financial services industry* (Harvard Law School Forum on Corporate Governance and Financial Regulation 2016) <<https://corpgov.law.harvard.edu/2016/08/06/regulating-conduct-culture-in-the->

Candidate Number: 1341103

financial-industry/> accessed 15 June 2018

Maitland FW, 'Forms of Action at Common Law, 1909'  
<<https://sourcebooks.fordham.edu/basis/maitland-formsofaction.asp>> accessed 1 July 2018

McAuslan P, 'Whose Mortgage Is It Anyway? Producers, Consumers and the Law in the UK Mortgage Market.'

McNulty L, 'Kweku Adoboli: Senior Manager Rules "Just Not Going to Work"'  
*Financial News* (London, 8 February 2018)  
<<https://www.fnlondon.com/articles/kweku-adoboli-senior-manager-rules-just-not-going-to-work-20180205>> accessed 26 June 2018

Milford A, 'Rendering Accountable the Wealth of Criminals' (The Cambridge International Symposium on Economic Crime 2018, Jesus College Cambridge University, 9 May 2018) <<https://www.sfo.gov.uk/2018/09/05/alun-milford-rendering-accountable-the-wealth-of-criminals/>> accessed 25 September 2018

'Money May Corrupt, but Thinking about Time Can Strengthen Morality'  
<<https://www.psychologicalscience.org/index.php/news/releases/money-may-corrupt-but-thinking-about-time-can-strengthen-morality.html>> accessed 14 February 2014

'Mortgages and Home Finance: Conduct of Business Sourcebook (MCOB)'  
<[www.handbook.fca.org.uk/handbook/MCOB/](http://www.handbook.fca.org.uk/handbook/MCOB/)> accessed 28 March 2017

Murphy F and others, 'Class/Collective Actions in the UK (England and Wales): Overview' (7 January 2018) <[https://uk.practicallaw.thomsonreuters.com/6-618-0351?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](https://uk.practicallaw.thomsonreuters.com/6-618-0351?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1)> accessed 15 September 2018

National Fraud Authority, 'Working Together to Stop Mortgage Fraud-Progress Report 2010' (National Fraud Authority 2010)  
<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/118467/mortgage-fraud-report2010.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/118467/mortgage-fraud-report2010.pdf)> accessed 24 July 2018

'National Trading Standards Estate Agency Team'  
<<http://www.powys.gov.uk/en/licensing-trading-standards/national-trading-standards-estate-agency-team/>> accessed 18 February 2018

'National Trading Standards Estate Agency Team (NTSEAT) Confirm Prohibition and Warning Orders under the Estate Agents Act 1979 Have Taken Effect and Confiscation Action Taken by the CMA against Former Estate Agent and His Wife'  
<<http://www.powys.gov.uk/en/communications/view-council-news/news-article/article/2136-national-trading-standards-estate-agency-team-ntseat-confirm-prohibition-and-warning-orders-u/>> accessed 18 February 1979

Office of Fair Trading, 'Unfair Relationships: Enforcement Action under Part 8 of the Enterprise Act 2002'  
<<https://uk.practicallaw.thomsonreuters.com/Link/Document/Blob/I42aaa5640c5511e498db8b09b4f043e0.pdf?targetType=PLC-multimedia&originationContext=document&transitionType=DocumentImage&uniqueI>

Candidate Number: 1341103

d=4705d643-52be-4ead-bb45-29587e52d627&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1> accessed 24 July 2018

—, ‘Consumer Protection from Unfair Trading’  
<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284442/oft1008.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284442/oft1008.pdf)> accessed 24 July 2018

—, ‘Irresponsible Lending-OFT Guidance for Creditors’  
<[http://webarchive.nationalarchives.gov.uk/20140402162813/http://www.oft.gov.uk/OFTwork/publications/publication-categories/guidance/consumer\\_credit\\_act/oft1107](http://webarchive.nationalarchives.gov.uk/20140402162813/http://www.oft.gov.uk/OFTwork/publications/publication-categories/guidance/consumer_credit_act/oft1107)> accessed 24 July 2018

‘Office of Fair Trading Press Release 60/97 16.12.97’

Office of National Statistics (ONS), ‘Overview of Fraud Statistics: Year Ending Mar 2016’ (Office of National Statistics (ONS))  
<<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/overviewoffraudstatistics/yearendingmarch2016#which-groups-in-society-are-most-likely-to-be-victims-of-fraud>> accessed 20 September 2018

Osofsky L, ‘Ensuring Our Country Is a High Risk Place for the World’s Most Sophisticated Criminals to Operate’ (The Cambridge International Symposium on Economic Crime 2018, Jesus College Cambridge University, 9 March 2018)  
<<https://www.sfo.gov.uk/2018/09/03/lisa-osofsky-making-the-uk-a-high-risk-country-for-fraud-bribery-and-corruption/>> accessed 25 September 2018

‘Property and Title Fraud-Joint Law Society and HM Land Registry Note’  
<[www.lawsociety.org.uk/policy-campaigns/articles/property-and-title-fraud-advice-note](http://www.lawsociety.org.uk/policy-campaigns/articles/property-and-title-fraud-advice-note)> accessed 10 February 2018

‘Protecting Consumers’ <[www.fca.org.uk/about/protecting-consumers](http://www.fca.org.uk/about/protecting-consumers)> accessed 24 March 2017

‘Recognising and Responding to Consumer Vulnerability: A Guide for Legal Services Regulators’

‘Recognising and Responding to Consumer Vulnerability-A Guide for Legal Services Regulators’ [2014] Legal Services Consumer Panel

‘Regulation’ <[www.rics.org.uk/regulation/](http://www.rics.org.uk/regulation/)> accessed 24 March 2017

Richards L, ‘Why Does Fraud Occur and What Can Deter or Prevent It?’, *32nd Southwest Securities Enforcement Conference* (Securities and Exchange Commission 2008) <<https://www.sec.gov/news/speech/2008/spch090908lar.htm>> accessed 26 June 2018

Rider B, ‘Dealing with the Dark Side of Business-the Way Ahead!’  
<[www.fiumalta.org/library/PDF/Prof%20Barry%20Rider%20\(1\).pdf](http://www.fiumalta.org/library/PDF/Prof%20Barry%20Rider%20(1).pdf)> accessed 20 June 2013

Royce D and others, ‘Class Actions’ (December 2017)

Candidate Number: 1341103

<<https://gettingthedealthrough.com/area/82/jurisdiction/65/class-actions-2018-england-wales/>> accessed 15 September 2018

Sentencing Council, 'Fraud, Bribery and Money Laundering Definitive Guideline' <[https://www.sentencingcouncil.org.uk/wp-content/uploads/Fraud\\_bribery\\_and\\_money\\_laundering\\_offences\\_-\\_Definitive\\_guideline.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Fraud_bribery_and_money_laundering_offences_-_Definitive_guideline.pdf)>

'Sentencing Remarks of Mr Justice Keith R V Kweku Adoboli' <<https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Judgments/kweku-adoboli-sentencing-remarks-20112012.pdf>> accessed 6 July 2018

Serious Fraud Office, 'Operational Handbook on Conspiracy'

—, 'Deferred Prosecution Agreements' <<https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/>> accessed 7 November 2018

—, 'SFO Historical Background and Powers' <<https://www.sfo.gov.uk/publications/corporate-information/sfo-historical-background-powers/>> accessed 17 February 2018

Severn D, 'The Implications of Brexit for UK Consumers of Financial Services: A Think-Piece' <[https://www.fs-cp.org.uk/sites/default/files/consumer\\_panel\\_brexit\\_research\\_october\\_2016.pdf](https://www.fs-cp.org.uk/sites/default/files/consumer_panel_brexit_research_october_2016.pdf)> accessed 7 July 2018

Slaughter and May, 'Civil Liability for Money Laundering' <[https://www.slaughterandmay.com/media/790597/civil\\_liability\\_for\\_money\\_laundering.pdf](https://www.slaughterandmay.com/media/790597/civil_liability_for_money_laundering.pdf)> accessed 24 July 2018

—, 'An Overview of the UK Competition Rules' <<https://www.slaughterandmay.com/media/1515647/an-overview-of-the-uk-competition-rules.pdf>> accessed 26 June 2018

Solicitors Regulatory Authority, 'Solicitors Regulatory Authority Disciplinary Procedure Rules and Guidance' <<http://www.sra.org.uk/solicitors/handbook/discproc/content.page> and <http://www.sra.org.uk/consumers/solicitor-check/publications/disciplinary-guidance.page>>

Steward M, 'Practical Issues in Financial Services and Securities Law Enforcement: A UK Perspective' <[https://wp.nyu.edu/compliance\\_enforcement/2017/04/14/practical-issues-in-financial-services-and-securities-law-enforcement-a-uk-perspective/](https://wp.nyu.edu/compliance_enforcement/2017/04/14/practical-issues-in-financial-services-and-securities-law-enforcement-a-uk-perspective/)> accessed 29 January 2018

Suffrin SC, 'How Moral Can a Business Be?' <<http://www.religion-online.org/showarticle.asp?title=1688>> accessed 25 February 2014

Telegraph Media Group Ltd, 'Judge' Criticises Trading Standards Boss for Bringing "flawed" Case against Kitchen Salesman' *The Telegraph* (United Kingdom, 13 January 2010) <[www.telegraph.co.uk](http://www.telegraph.co.uk)>

Candidate Number: 1341103

The Cambridge International Symposium on Economic Crime, 'Economic Crime-Where Does the Buck Stop? Who Is Responsible-Facilitators, Controllers and or Their Advisors?' (4 September 2016)  
<<http://www.crimesymposium.org/PDFfiles/2016%20Programme.pdf>> accessed 27 June 2018

The Law Society, 'CQS Core Practice Management Standards'

—, 'The Law Society Criminal Procedure Rules'

The Law Society of England and Wales, 'Anti-Money Laundering Practice Note'

The London Stock Exchange, 'Rules of the London Stock Exchange'

The Lord Chief Justice of England and Wales, 'Control and Management of Heavy Fraud and Other Complex Cases Protocol-Criminal Procedural Rules (The Protocol)'  
<[http://www.justice.gov.uk/courts/procedure-rules/criminal/pd-protocol/pd\\_protocol](http://www.justice.gov.uk/courts/procedure-rules/criminal/pd-protocol/pd_protocol)> accessed 25 February 2018

The National Trading Standards, 'The National Trading Standards'  
<<http://www.nationaltradingstandards.uk/>> accessed 18 February 2018

The Panel on Takeovers and Mergers, 'About the Panel'  
<[www.thetakeoverpanel.org.uk](http://www.thetakeoverpanel.org.uk)>

The Panel on Takeovers and Mergers, 'The Takeover Code 12th Edition'  
<[www.thetakeoverpanel.org.uk](http://www.thetakeoverpanel.org.uk)>

The Property Ombudsman, 'Complaints Handling Guidance for Complainants'  
<[www.tpos.co.uk](http://www.tpos.co.uk)>

The Report of the Director General's Inquiry, 'Vulnerable Consumers and Financial Services'

Tremblay LJ and Bevacqua MF, 'Back to the Future with the Consumer Fraud Act: New Jersey Sets the Standard for Consumer Protection'

University of Oxford-Faculty Law, 'Informality and the Media in Consumer Protection in Emerging Economies' <<https://www.law.ox.ac.uk/research-and-subject-groups/informality-and-media-consumer-protection-emerging-economies>> accessed 15 September 2018

Valant J, 'Consumer Protection in the EU-Policy Overview' [2015] European Parliamentary Research Service

Which?, '60 Years of Which?' <<https://www.which.co.uk/about-which/who-we-are/timeline>> accessed 15 September 2018

Worshipful Company of Educators, 'Worshipful Company of Educators'  
<<https://educatorscompany.org/>> accessed 23 September 2018

Worshipful Company of International Bankers, 'Worshipful Company of International



Candidate Number: 1341103

Bankers' <<http://internationalbankers.org.uk/>> accessed 23 September 2018

Worshipful Company of Pattenmakers in the City of London, 'Worshipful Company of Pattenmakers in the City of London' <<http://www.pattenmakers.co.uk/>> accessed 23 September 2018