THE LAW COMMISSION

OFFENCES OF DISHONESTY: MONEY TRANSFERS

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THE LAW COMMISSION

Item 11 of the Sixth Programme of Law Reform: Criminal Law

OFFENCES OF DISHONESTY: MONEY TRANSFERS

To the Right Honourable the Lord Mackay of Clashfern, Lord High Chancellor of Great Britain

PART I
INTRODUCTION

1.1 In this report, we are looking at the problem of prosecuting those who commit mortgage fraud[1] or otherwise obtain a transfer of funds dishonestly and by deception. As we shall show, the very recent decision of the House of Lords in *Preddy*[2] has radically changed the law, creating important lacunae in the law.

1.2 As we have previously announced,[3] we are just starting a major review of the law of dishonesty. However, we have decided to report on the problems caused by *Preddy* as a matter of urgency, although logically we would have proposed to look at it as part of our co-ordinated revision of the law. On account of the urgency of this project we have limited it to the more immediate problems raised by *Preddy* and have not looked at other complaints about the Theft Acts.

THE PROBLEM

1.3 Prosecutors have traditionally charged those who commit mortgage frauds with dishonestly obtaining property by deception, contrary to section 15(1) of the Theft Act 1968; this provides that

> A person who by deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, shall on conviction on indictment be liable to imprisonment for a term not exceeding ten years.

1.4 On 10 July 1996, the House of Lords unanimously allowed the appeals of Preddy and others. They were alleged to have committed mortgage fraud and had been charged under section 15(1) of the Theft Act 1968. The basis of the House of Lords' decision was that the borrowers, the alleged mortgage fraudsters, had not obtained "property belonging to another" as required by section 15.[4]

1.5 Essentially, the House of Lords did not accept that when the bank accounts of the appellants or their solicitors were credited they had obtained any property belonging to the lending institution. According to the House of Lords, the proper

[1] That is, the obtaining of mortgage advances on properties by making fraudulent statements.

[2] [1996] 3 WLR 255.

[3] *Conspiracy to Defraud* (1994) Law Com No 228, paras 1.16 – 1.19.

[4] For full details of this case, see paras 2.3 – 2.12 below.

analysis was that the lending institution's credit balance was a chose in action (the debt owed to the institution by the bank) which was *extinguished* and subsequently the defendant obtained something different, namely the chose in action constituted by the debt owed to him by his bank as represented by a credit in his own bank account. This asset was created for him and had therefore *never* belonged to anybody else. Thus the prosecution could not show that the borrower defendant had obtained property "belonging to another".

1.6 Prosecutors had felt compelled to use section 15 to prosecute mortgage frauds because the Court of Appeal had previously held in *Halai*[5] that it was not possible to prosecute mortgage fraudsters for obtaining or attempting to obtain *services* by deception[6] because no service had been obtained. In that case, the services which the defendant was alleged to have obtained, or to have attempted to obtain, were the opening of a savings account, a mortgage advance, and the increase of an apparent credit balance in a savings account. The decision in *Halai* has been heavily criticised.[7] This Commission has recommended its reversal and put forward a draft Bill which would achieve that purpose:[8] this recommendation has been accepted by Government but has not yet been implemented.

1.7 As a result of the decision in *Preddy*,[9] it is now difficult to prosecute an individual[10] who obtains by deception any form of payment by any form of banking transfer. Banking and other institutions were justifiably deeply concerned about this.[11] There are possible alternative offences.[12] As we shall show, such alternative offences include theft contrary to section 1 of the 1968 Act,[13] false accounting contrary to section 17 of the Theft Act 1968,[14] procuring the execution of valuable securities by deception contrary to section 20(2) of the Theft Act 1968[15] and evasion of liability by deception contrary to section 2 of the Theft Act 1978;[16] in the case of each offence we explain the difficulties in pursuing a successful

5 [1983] Crim LR 624.

6 Contrary to the Theft Act 1978, s 1.

7 See Law Com No 228, para 4.31.

8 Law Com No 228, paras 4.30 – 4.33 and Appendix A.

9 [1996] 3 WLR 255; see paras 2.3 – 2.12 below.

10 A defendant who acts in concert with another can be prosecuted for conspiracy to defraud: see paras 3.38 – 3.40 below.

11 See J Mason, "Lords ruling 'may hinder fight against fraud'", *Financial Times* 25 July 1996; R Newton, "Bank vaults wide open to fraudsters", *Sunday Telegraph* 4 August 1996; F Gibb, "Fraud loophole worries officials", *The Times* 10 September 1996.

12 In a case indistinguishable from *Preddy*, the Lord Chief Justice observed that the submission that the applicant could have been convicted of alternative offences was argued: *Hawkins*, 31 July 1996, CA No 96/0255/X2. See Part III below.

13 See paras 3.12 – 3.23 below.

14 See paras 3.24 – 3.27 below.

15 See paras 3.28 – 3.34 below.

16 See paras 3.35 – 3.37 below.

prosecution. Of course, if there is an agreement by two or more conspirators, the mortgage fraudsters could be prosecuted for conspiracy to defraud.[17]

1.8 We are also very aware that our recommendation to reverse *Halai*[18] would not deal with many problems caused by *Preddy,* which go wider than mortgage fraud and cover any transaction involving the transfer of funds between accounts.[19]

1.9 We also appreciate that *Preddy* would present serious difficulties when prosecuting people who had dishonestly received funds which had originally been dishonestly obtained or had been stolen.[20]

1.10 This Commission is given the statutory task of keeping the law under review and making recommendations for its reform.[21] We believe that we would be failing in our duty if we did not review this topic as a matter of great urgency and we decided to do so on 31 July. In light of the urgency of this project we felt obliged to adopt slightly different procedures from our usual ones. We now turn to consider those.

THE PROCEDURE ADOPTED BY US FOR THIS PROJECT

1.11 As is widely known, the Commission invariably carries out some form of preliminary consultation in order to decide the full extent of the problem; thereafter it issues a consultation paper giving a lengthy consultation period and decides on its policy in the light of the responses to this. Such procedures require a great deal of time. We were very conscious from the initial responses to the decision in *Preddy*[22] that there was a unanimous demand for urgent legislation to ensure that it would be possible to prosecute in cases of fraud involving the transfer of funds between accounts (whether electronically or by way of cheque).[23] We therefore decided to endeavour to produce proposals for such an offence without a consultation paper and relying instead on informal consultation carried out over a period of only one month.

1.12 Our difficulties were increased by the fact that this entailed consultation during the month of August. We were and are very conscious of the limitations of this consultation process. Views were being sought at great speed and policy decisions would have to be reached much more quickly than we would have wished. For example, if this were a project conducted in the conventional way, we would have wanted to examine in detail all the different ways in which funds could be transferred electronically so as to ensure that we were covering all of them.

[17] See paras 3.38 – 3.40 below.

[18] See paras 1.6 above and 3.47 below.

[19] See paras 2.13 – 2.15 below.

[20] Under the Theft Act 1968, s 22, which is set out in Appendix B below.

[21] See the Law Commissions Act 1965, s 3 (1).

[22] See para 1.2 above and Part II below.

[23] See n 11 above.

1.13 We regret that it has not been possible to carry out such work on this project but we believe that our recommendations, if implemented, would restore the pre-*Preddy* position even though there might be certain forms of transfer which might fall outside our proposed new offence. As we have said, we are about to undertake a major review of the law of dishonesty and if it becomes clear that our proposed new offence does not encompass all the types of transfer, we will reconsider it.

THE CONSULTATION PROCESS

1.14 In early August, we circulated a consultation letter together with a draft Bill which we hoped would overcome the problems caused by *Preddy*.[24] We received a large number of very helpful responses and we are grateful to those who took the time and trouble to respond especially during August. A list of those who responded appears in Appendix C below. We are particularly grateful to the continuing assistance that we received from Professor Edward Griew, Mr Justice Mitchell, Judge Geoffrey Rivlin QC and Professor Sir John Smith QC, FBA. Mr William Blair QC has also helped on various banking matters.

OUR RECOMMENDATIONS

1.15 As we have said, we were very conscious that we should produce a simple but comprehensive offence that can be easily understood and applied. We soon came to the conclusion that it would be desirable to create a new offence and this is what we have done.

1.16 Our recommendations are as follows:

(1) We recommend the insertion into the Theft Act 1968 of a new section 15A, creating an offence of dishonestly obtaining a money transfer by deception.[25]

(2) We recommend that, for the purposes of the new offence, it should be immaterial whether either of the accounts is overdrawn before or after the money transfer is effected.[26]

(3) We recommend that the new offence should extend to payments made by cheque as well as those made electronically.[27]

(4) We recommend that the offence of obtaining a money transfer by deception should be included among the Group A offences listed in Part I of the Criminal Justice Act 1993.[28]

[24] See Part V below for details of the offence we recommend.

[25] Para 4.11 below.

[26] Para 5.11 below.

[27] Para 5.14 below.

[28] Para 5.19 below.

(5) We recommend that nothing done before the new section 15A comes into force, which would not have been an offence had that section not been enacted, should amount to an offence by virtue of that section.[29]

(6) We recommend the insertion into the Theft Act 1968 of a new section 24A, creating an offence of retaining a credit from a dishonest source, which would be committed where a credit made to an account

(a) is the credit side of a money transfer obtained by deception, contrary to the new section 15A, or

(b) derives from theft, blackmail or an offence under the new section 15A, or from stolen goods,

and the keeper of the account, knowing or believing that the credit is wrongful, dishonestly fails to take reasonable steps to cancel it.[30]

(7) We recommend that any money dishonestly withdrawn from an account to which a wrongful credit has been made should, to the extent that it derives from that credit, be regarded as stolen goods.[31]

(8) We recommend that the offence under section 24A should be included among the Group A offences listed in Part I of the Criminal Justice Act 1993.[32]

(9) We recommend that the new section 24A should apply only to wrongful credits made after it comes into force.[33]

[29] Para 5.36 below.

[30] Para 6.18 below.

[31] Para 6.19 below.

[32] Para 6.21 below.

[33] Para 6.23 below.

PART II
THE LACUNA IN THE LAW OF DECEPTION EXPOSED BY *PREDDY*

SECTION 15 OF THE THEFT ACT 1968

2.1 Section 15 of the Theft Act 1968 provides in part:

> (1) A person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, shall on conviction on indictment be liable to imprisonment for a term not exceeding ten years.
>
> (2) For purposes of this section a person is to be treated as obtaining property if he obtains ownership, possession or control of it, and "obtain" includes obtaining for another or enabling another to obtain or to retain.

2.2 Section 4(1) of the 1968 Act (applied to section 15(1) by section 34(1) of the Act) provides that property "includes money and all other property, real or personal, including things in action and other intangible property".

PREDDY AND SLADE; DHILLON[1]

The facts

2.3 Lord Goff of Chieveley, in his speech in *Preddy*, set out the facts of the case.[2]

> [Preddy and Slade] applied to building societies or other lending institutions for advances which were to be secured by mortgages on properties to be purchased by the applicant. In relation to each count, the mortgage application or accompanying documents contained one or more false statements, the applicant knowing the statements to be false. The statements related to, for example, the name of the applicant; his employment and/or income; the intended use of the property; or the purchase price. Some of the counts related to mortgage applications which were refused, in which event the applicant was charged with an attempt to obtain property by deception. The remaining counts related to successful applications, the applicant then being charged with the full offence. …
>
> Both appellants accepted that the applications were supported by false representations. But they were confident that the advances would be repaid because, in the economic climate at that time, the houses could and would be resold at a price higher than the purchase price and, even if there were a shortfall, this would be covered by an endowment

[1] *Preddy and Slade* (consolidated appeals) and *Dhillon* (conjoined appeal) [1996] 3 WLR 255. Lord Goff of Chieveley made the main speech; the other members of the Appellate Committe (the Lord Chancellor, Lord Jauncey of Tullichettle, Lord Slynn of Hadley and Lord Hoffmann) agreed with him.

[2] [1996] 3 WLR 255, 257H-258B; 258C-D; 258E-F.

> policy taken out at the time of the advance. Indeed the lenders appear to have been more interested in the value of the property in question than in the personal details of the applicant. …
>
> In [Dhillon's] case, the misrepresentations related to the intended occupancy of the properties in question …; failure to declare the existence of other mortgage commitments; or particulars of employment. This appellant's case also was that he intended to honour his obligations. Again the lending institutions were not really concerned with his personal details, but rather with the value of the property in question which in each case was more than enough to cover the debt if the property were sold.

2.4 The mortgage advances were paid by the lenders to the appellants in various ways: by cheque, by telegraphic transfer and by the Clearing House Automated Payment System ("CHAPS").[3]

The certified questions

2.5 Having dismissed the appeals in *Preddy and Slade*[4] and *Dhillon*,[5] the Court of Appeal (Criminal Division) certified the following questions as points of law of general public importance:

> (1) Whether the debiting of a bank account and the corresponding credit of another's bank account brought about by dishonest misrepresentation amounts to the obtaining of property within section 15 of the Theft Act 1968?
>
> (2) Is the answer to (1) above different if the account in credit is that of a solicitor acting in a mortgage transaction?
>
> (3) Where a defendant is charged with obtaining intangible property by deception, namely an advance by way of a mortgage, is his intention to redeem the mortgage in full relevant to the question of permanent intention to deprive or only to dishonesty?

2.6 Although all three questions fell to be considered by the House of Lords, the first was regarded by Lord Goff to be the most important.[6]

[3] [1996] 3 WLR 255. At p 263E Lord Goff describes the CHAPS system by reference to the "useful description" found in Law Com No 228, para 4.29, n 83, which states:

> The System is operated by a company owned by the major clearing banks. It can be used only for "irrevocable guaranteed unconditional sterling payment for the same day settlement". A bank or customer who wishes to make payments through CHAPS makes its payments through its electronic terminal (a "gateway") to the recipient's gateway or, if the recipient member is not itself a CHAPS settlement member, the recipient's settlement bank. Settlement is effected by each settlement bank transmitting to the Bank of England's CHAPS gateway the details of its end-of-day net position with every other settlement bank. The Bank of England then makes the appropriate payments across the settlement banks' accounts with it.

[4] [1995] Crim LR 564.

[5] Unreported.

The decision

The first question: whether the debiting of a bank account and the corresponding credit of another's bank account brought about by dishonest misrepresentation amounts to the obtaining of property within section 15 of the Theft Act 1968?

2.7 Lord Goff was not troubled by the notion that a credit entry in a bank account should be construed as property for the purposes of the 1968 Act. Unlike the Court of Appeal, however, which had taken the view that a sum of money represented by a figure in an account constituted "other intangible property" under section 4(1) of the Act,[7] Lord Goff was of the opinion that such a credit entry fell within a different part of the section 4(1) definition of property, namely a chose in action – belonging to an account-holder and exercisable against the institution where the account had been placed.[8]

2.8 In Lord Goff's view, the appeal turned on whether the appellants could be said to have obtained (or attempted to obtain) property *belonging to another*. In short, he concluded that they could not; that what they had, in fact, obtained was property (namely a chose in action) which had come into existence *at the time of* the dishonest transaction and which could not, therefore, have belonged to anyone prior to that time.[9]

2.9 The kernel of each appellant's dishonest conduct was that he had, dishonestly, induced a lending institution by deception to make a mortgage advance in his favour: in effect, therefore, on Lord Goff's analysis, the lending institution's chose in action represented by the credit balance[10] standing in its account had been extinguished (to the extent of the sum of the advance) when the advance was made, and a corresponding chose in action created in favour of the appellant and represented by the credit balance standing in the account of the appellant (or his solicitor), when the advance was received. Lord Goff describes the difficulty in

6 [1996] 3 WLR 255, 260D.

7 See para 2.2 above.

8 [1996] 3 WLR 255, 264B-D. Professor Sir John Smith, in his commentary on the Court of Appeal's decision in *Preddy* [1995] Crim LR 564, at p 565, is critical of that court's description of the credit balance as "other intangible property":

> … the property belonging to the lender at the beginning of the transaction was the credit balance in his bank account, or his right to overdraw, both of which are things in action, and the question was whether that property was obtained from him by deception. If property was "obtained" by the appellant, it too was a credit balance in a bank account, another thing in action. References to "other intangible property" are puzzling and surely unnecessary.

9 [1996] 3 WLR 255, 264C-H. At p 270G Lord Jauncey of Tullichettle gave a short speech in which he concurred with Lord Goff as to the crux of the case:

> These cases turn upon the words "belonging to another" … . In applying these words to circumstances such as the present there falls to be drawn a crucial distinction between the creation and extinction of rights on the one hand and the transfer of rights on the other.

10 In setting out the problem, Lord Goff assumed that the lending institution's account is in credit: see p 264H.

applying section 15 of the 1968 Act in these circumstances and, in particular, in satisfying the requirement that the property should have *belonged to another*:

> … when the bank account of the defendant (or his solicitor) is credited, he does not obtain the lending institution's chose in action. On the contrary that chose in action is extinguished or reduced pro tanto, and a chose in action is brought into existence representing a debt in an equivalent sum owed by a different bank to the defendant or his solicitor. …
>
> In truth the property which the defendant has obtained is the new chose in action constituted by the debt now owed to him by his bank, and represented by the credit entry in his own bank account. This did not come into existence until the debt so created was owed to him by his bank, and *so never belonged to anyone else.*[11]

2.10 On that vital reasoning, the House of Lords answered the first certified question in the negative.[12]

The second question: is the answer to (1) above different if the account in credit is that of a solicitor acting in a mortgage transaction?

2.11 Some criticism was levelled at the broad way in which the second question had been framed, and certain assumptions were made by Lord Goff as to the part played by the solicitor in the mortgage transaction. He cast doubt on the applicability of section 15 to the circumstance in which a solicitor receives a mortgage advance in the capacity of an agent of the lending institution, where that institution retains control over the money while it is in the solicitor's hands. In any event, he said,

> the same difficulties arise … as they do where the money has been paid direct to the mortgagor by electronic transfer, or by cheque. … [A]ny chose in action which comes into existence by the crediting of the solicitor's bank account (simultaneously with the debiting of the lending institution's bank account), or by the receipt by the solicitors of a cheque from the lending institution, can never have belonged to the lending institution or its bank and so can never have belonged to another as required by section 15(1).[13]

The third question: where a defendant is charged with obtaining intangible property by deception, namely an advance by way of mortgage, is his intention to redeem the mortgage in full relevant to the question of permanent intention to deprive or only to dishonesty?

2.12 The law lords did not address this question.[14]

[11] [1996] 3 WLR 255, 264E, G-H. (Emphasis added)

[12] [1996] 3 WLR 255, 265B.

[13] [1996] 3 WLR 255, 268A-B.

[14] [1996] 3 WLR 255, 268H-269B.

The lacuna in the applicability of section 15 exposed by *Preddy* and the relationship between *Preddy* and *Halai*[15]

2.13 Although *Preddy* was concerned only with what are usually called mortgage frauds, the decision of the House of Lords is relevant to all circumstances in which the effect of the dishonest deception by the fraudster (D) is to cause the victim (V) to authorise the debiting of his or her account (thereby extinguishing V's chose in action, in whole or in part) and bring about a corresponding credit to D's (or another's) account (thereby creating in D's, or another's, favour a new chose in action). *Preddy* has therefore exposed a very substantial lacuna in the applicability of section 15. Professor Edward Griew expresses the impact of *Preddy* as follows:

> It clearly demonstrates that section 15(1) is inapt for any case of obtaining a thing in action, other than a rare case in which what is induced by deception is the transfer or assignment of an existing thing. Neither a movement of funds between bank accounts nor the issuing of a cheque involves such a transfer or assignment.[16]

2.14 The lacuna exposed by *Preddy* overlaps the lacuna created by *Halai* in the following way:

(1) *Non-cash loans*, obtained dishonestly and by deception, cannot be the subject of either a section 15 charge (*Preddy*: the property obtained has not belonged to another) or a charge under section 1 of the 1978 Act (*Halai*: loans are not included in the meaning of "services").

(2) *Non-cash payments other than loans*, obtained dishonestly and by deception, also cannot be the subject of a section 15 charge or a charge under section 1 of the 1978 Act; but, whereas the reason for the former is the same as that in subparagraph (1) above (namely *Preddy*), the reason for the latter is not *Halai* but the requirement under section 1 of the 1978 Act that the service be understood to be *paid for*. Apart from loans, one does not normally pay money on the understanding that that payment is itself to be paid for.

2.15 Therefore, although the reversal of *Halai* would close part of the *Preddy* lacuna, by ensuring that the offence under section 1 of the 1978 Act would again cover the obtaining by deception of non-cash *loans*, it would not address the problem of the obtaining by deception of non-cash payments *other than loans*.

[15] See paras 1.6 – 1.8 above.

[16] *Archbold News* Issue 7, 15 August 1996, p 1.

PART III
THE DIFFICULTY IN FILLING THE LACUNA UNDER THE PRESENT LAW

3.1 Subsequent to the House of Lords decision in *Preddy*, the Court of Appeal (Criminal Division) considered a similar case[1] in which the applicant, Hawkins, submitted inter alia that, in view of Lord Goff's reasoning in *Preddy*, he had pleaded guilty to offences under section 15 of the Theft Act 1968 under a misapprehension of law. An application by Hawkins for an extension of time (in which to seek leave to appeal), based on the change in the law represented by *Preddy*, was refused by the court because of the delay. As a result, it was unnecessary for the court to decide the substantive issue of whether he could have been convicted of alternative offences. Lord Bingham of Cornhill,[2] giving the judgment of the Court of Appeal, observed, however, that the Crown's submission that the applicant *could* have been convicted of the alternative offences was arguable.[3]

3.2 In this Part we consider whether the lacuna in the law of criminal deception exposed by *Preddy* can be filled under the present law. We review the options available under section 15, other offences under the Theft Acts of 1968 and 1978 and the common law offence of conspiracy to defraud.

3.3 We conclude that, although some of the offences considered provide partial assistance, none of them provides an alternative that is sufficiently comprehensive or sufficiently reflects the gravamen of the defendant's dishonest conduct.

ALTERNATIVE OFFENCES UNDER SECTION 15 OF THE 1968 ACT

Obtaining "other intangible property"

3.4 As we have seen,[4] the Court of Appeal took the view in *Preddy* that the property obtained by the defendants fell within the phrase "other intangible property" in the definition of "property" in section 4(1) of the 1968 Act.[5] Farquharson LJ,[6] giving the judgment of the court, said:

> The CHAPS system cannot be said to be transferring money in the sense of cash, neither is it transferring a chose in action, such as a cheque, but the terms of [section 4(1)] are very wide, referring as it does to "all other property … including … other intangible property".

1 *Hawkins*, 31 July 1996, CA No 96/0255/X2.

2 The Lord Chief Justice, sitting with Owen and Connell JJ.

3 Counsel for the Crown submitted that Hawkins could either have been charged with alternative offences or convicted of alternative offences by virtue of s 6(3) of the Criminal Law Act 1967. The Lord Chief Justice suggested that both propositions were arguable.

4 See para 2.7 above.

5 Following *Williams and Crick*, 30 July 1993, CA No 91/3265/W3.

6 Sitting with Ebsworth and Steel JJ.

> In the judgment of this Court, those words are apt to include the type of transfers which were used in this case.

Following the House of Lords' analysis of the transaction in *Preddy*, we believe that regarding transfers between accounts as "other intangible property" is unsustainable.[7] In any event, that "other intangible property" would still have to belong to somebody else prior to being obtained by the defendant in order for section 15 to apply.

Obtaining a cheque *qua* chose in action

3.5 As for the argument that, where the movement of funds between accounts has been effected by way of a cheque, a defendant who dishonestly obtains the cheque by deception can be said to have obtained "property belonging to another" in the form of the cheque *qua* chose in action, we believe that this also founders on the reasoning in *Preddy*.[8] If a defendant (D) obtains by deception a cheque from his or her victim (V) and that cheque is made payable to D, then the cheque represents a *newly created* chose in action in D's favour. D, therefore, cannot be said to have obtained any property which had formerly belonged to V.

Obtaining a cheque *qua* cheque form

3.6 A stronger argument can be made in favour of charging D with obtaining the piece of paper that constitutes the cheque form.

3.7 Whether this argument succeeds turns essentially on whether D can be said to have satisfied the requirement of section 15 that he or she had *an intention permanently to deprive* V of the cheque form, the difficulty being that the cheque form would eventually be returned to V via V's bank.

3.8 In *Duru*,[9] a case involving mortgage frauds, the defendants were charged with obtaining cheques by deception. It was decided by the Court of Appeal that there was an intention permanently to deprive because the cheque was "a piece of paper which changes its character completely once it is paid".[10] The decision is confused in that it is not the piece of paper – the cheque form – that changes its character as a result of the payment, but the cheque *qua* chose in action. And, as we have already seen,[11] regarding the cheque as a chose in action for the purposes of section 15 provides no assistance in filling the *Preddy* lacuna.

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7 See also para 2.7, n 8.

8 At [1996] 3 WLR 255, 265H, Lord Goff referred specifically to payment by cheque:

> … if the payee himself obtained the cheque from the drawer by deception … there was no chose in action belonging to the drawer which could be the subject of a charge of obtaining property by deception. This was decided long ago in *Reg v Danger* (1857) 7 Cox CC 303.

9 [1974] 1 WLR 2. *Duru* was said by Lord Goff in *Preddy* [1996] 3 WLR 255, 266H, to be wrongly decided.

10 [1974] 1 WLR 2, 8E, *per* Megaw LJ.

11 See para 3.5 above.

3.9 Not surprisingly, Lord Goff in his speech in *Preddy* was critical of *Duru*, holding that on this issue it, and the case of *Mitchell*[12] which followed it, were wrongly decided.[13]

3.10 Section 6(1) of the 1968 Act,[14] which allows a defendant to be regarded as having an intention of permanently depriving in circumstances where he or she does not mean the owner "permanently to lose the thing itself", might offer some solution to the problem of proving an intention permanently to deprive.

> There is … an available argument, which can be elaborated in a number of ways, that when D obtains a payment by cheque from V he is to be treated as having the intention of permanently depriving V of the cheque form, because, although he does not mean V "permanently to lose the thing itself", he intends "to treat the thing as his own to dispose of regardless of [V's] rights": Theft Act 1968, s 6(1).[15]

3.11 Nonetheless, we believe that a charge framed in terms of obtaining a cheque *qua* cheque form provides an unsatisfactory and partial solution only, for the following reasons.

(1) It is limited to circumstances in which the debiting and crediting of accounts has been effected by way of *cheque* (and not by way of telegraphic or electronic transfer).

(2) Formulating a charge in terms of obtaining by deception a piece of paper which is worthless in itself fails to reflect the extent of the defendant's dishonest conduct.

POSSIBLE ALTERNATIVE OFFENCES UNDER OTHER PROVISIONS OF THE THEFT ACTS

Theft

3.12 Section 1(1) of the Theft Act 1968 provides:

> A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it …

Theft by extinction of the victim's chose in action

3.13 The most obvious basis of a charge under section 1, in circumstances where D has dishonestly and by deception caused the debiting of one account and the crediting

[12] [1993] Crim LR 788.

[13] [1996] 3 WLR 255, 266.

[14] This subsection provides in part:

> A person appropriating property belonging to another without meaning the other permanently to lose the thing itself is nevertheless to be regarded as having the intention of permanently depriving the other of it if his intention is to treat the thing as his own to dispose of regardless of the other's rights …

[15] E Griew, *Archbold News* Issue 7, 15 August 1996, p 2.

of another, would be that by dishonestly causing V to extinguish V's own property (viz V's chose in action against the bank), D has appropriated that property. It is immaterial (since *Gomez*)[16] that V consented to the extinction.

3.14 There may be some doubt as to whether D can be said to have *appropriated* V's property when D has deceived V into destroying his or her own property, and in no sense has D "got" the property. Professor Griew draws a distinction between transactions effected by cheque and those effected by telegraphic or electronic transfer. He suggests[17] that, although it is strongly arguable that D's causing a diminution in V's account by presenting a *cheque* for payment would amount to an appropriation by D of V's chose in action, the argument is more doubtful where the diminution is as a result of telegraphic or electronic transfer. In that case, although D's deception has led V to transfer the funds, the diminution of the account is independently caused by V's actions.[18]

3.15 In addition to the doubts raised above, there is also the limitation that a charge under section 1 would be available only if V's account were either in credit or within an agreed overdraft limit. V would not have a chose in action capable of being stolen by D in circumstances where V had exceeded an agreed overdraft limit.[19]

Theft of the funds obtained

3.16 Alternatively, a charge of theft might focus on D's conduct in relation to the funds *after* the initial obtaining, on the basis that even at that stage they are still property belonging to V. D's subsequent dealings with them might amount to an appropriation of them, since section 3(1) provides that

> Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner.

The effect of *Preddy* is that, by obtaining the funds, D has not stolen them;[20] therefore D can appropriate them by a later assumption of a right to them.

[16] [1993] AC 442.

[17] E Griew, *Archbold News* Issue 7, 15 August 1996, p 2.

[18] See also A J Turner (1996) 160 JPN 724, 726.

[19] *Kohn* (1979) 69 Cr App R 395, 407, *per* Geoffrey Lane LJ:

> If the account is in credit, as we have seen, there is an obligation to honour the cheque. If the account is within the agreed limits of the overdraft facilities, there is an obligation to meet the cheque. In either case it is an obligation which can only be enforced by action. … It is a right of property which can properly be described as a thing in action and therefore potentially a subject of theft under the provisions of the 1968 Act.

[20] D may have stolen the *victim's* funds (see paras 3.13 – 3.15 above), but *Preddy* decides that those funds are *different* funds from the ones that D obtains.

3.17 The first question is whether the funds obtained by D, once obtained, can be regarded as property "belonging to another". It is arguable that they may fall within section 5(1) of the 1968 Act, which provides:

> Property shall be regarded as belonging to any person … having in it any proprietary right or interest …

3.18 If D obtains from V, dishonestly and by deception, an inter-account transfer of funds, it is arguable that V has property, in the form of a proprietary right or interest, in any resulting credit balance in D's account, traceable in equity.[21] In *Westdeutsche Bank v Islington LBC*[22] Lord Browne-Wilkinson accepted that a recipient of money transferred under a mistake of fact might hold that money on a constructive trust if he or she then learned of the mistake.[23] In the same case, he also said "Although it is difficult to find clear authority for the proposition, when property is obtained by fraud equity imposes a constructive trust on the fraudulent recipient".[24] In *Shadrokh-Cigari*[25] money was paid by a bank by mistake into the account of a boy whose guardian (D) suggested to him that he authorise a number of banker's drafts in D's favour. The Court of Appeal dismissed D's appeal against conviction for theft, holding that the bank had retained an equitable proprietary interest in the drafts and that the drafts were therefore property "belonging to another" under section 5(1).

3.19 As a result of the decision in *Attorney-General's Reference (No 1 of 1985),*[26] doubts have been expressed as to whether, where a person holds funds on a constructive trust for another, he or she can be guilty of theft if those funds are then dishonestly applied otherwise than for the benefit of the person for whom they are held.[27] In that case, an employee had made secret profits and was charged with the theft of those profits. The Court of Appeal took the view that the making of a secret profit did not impose a constructive trust (relying on the case of *Lister & Co v Stubbs*,[28] in which it was held that a bribe taken by a fiduciary was not held on trust). However, the court took pains to make clear that it was not ruling out the possibility of a theft charge based on *any* constructive trust:

> There is a clear and important difference between on the one hand a person misappropriating specific property with which he has been entrusted, and on the other hand a person in a fiduciary position who uses that position to make a secret profit for which he will be held

[21] *Agip (Africa) Ltd v Jackson* [1990] Ch 265, 289H-290A.

[22] [1996] 2 WLR 802.

[23] *Ibid*, at p 838A.

[24] *Ibid*.

[25] [1988] Crim LR 465.

[26] [1986] QB 491.

[27] A J Turner, "Theft Act Prosecutions after *R v Preddy*" (1996) 160 JPN 724.

[28] (1890) 45 Ch D 1.

> accountable. Whether the former is within section 5, we do not have to decide.[29]

Property obtained by deception would seem to be closer to the former case than the latter. Furthermore, the restrictive approach taken in *Attorney-General's Reference (No 1 of 1985)* may not be adopted in future, given the Privy Council's decision in *Attorney-General of Hong Kong v Reid*[30] that, contrary to *Lister v Stubbs*, bribes *are* held on trust.

3.20 Professor Griew suggests[31] an alternative means by which a charge might be brought under section 1 in relation to dealings with the funds after they are dishonestly obtained, namely by reference to section 5(4) of the 1968 Act. Section 5(4) provides:

> Where a person gets property by another's mistake, and is under an obligation to make restoration (in whole or in part) of the property or its proceeds or of the value thereof, then to the extent of that obligation the property or proceeds shall be regarded (as against him) as belonging to the person entitled to the restoration, and an intention not to make restoration shall be regarded accordingly as an intention to deprive that person of the property or proceeds.

3.21 If D's account is credited as a result of V's being deceived into arranging a transfer of funds into D's account, then, arguably, that credit in D's account should be regarded, under section 5(4), as belonging to V. If D uses the credit, or otherwise demonstrates an intention not to make restoration, it is arguable that D has stolen property which is *deemed* to belong to V. However, although this argument has merit, Professor Griew has reservations as to its effectiveness: "it is debatable whether D does have 'an obligation to make restoration' before V disaffirms the transaction."[32]

3.22 Even if funds which have been obtained by deception can be regarded as property belonging to another, either on the basis of a constructive trust or by virtue of section 5(4), a charge of theft on the basis of dealings subsequent to the initial obtaining would be artificial and confusing. It should not be necessary for the prosecution to put its case in such a tortuous manner when the essence of the case is an obtaining by deception.

3.23 We believe that although theft might provide some solution to filling the *Preddy* lacuna, it is unsatisfactory. A charge of theft does not require proof of deception,

[29] [1986] QB 491, 503, *per* Lord Lane CJ. See also *Arlidge and Parry on Fraud* (2nd ed 1996) para 3-065.

[30] [1994] 1 AC 324.

[31] *Archbold News,* Issue 7, 15 August 1996, p 2.

[32] *Ibid.*

and therefore would not properly reflect the nature of the defendant's dishonest conduct.[33]

False accounting

3.24 Section 17 of the Theft Act 1968 provides:

> (1) Where a person dishonestly, with a view to gain for himself or another or with intent to cause loss to another, –
>
> (a) destroys, defaces, conceals or falsifies any account or any record or document made or required for any accounting purpose; or
>
> (b) in furnishing information for any purpose produces or makes use of any account, or any such record or document as aforesaid, which to his knowledge is or may be misleading, false or deceptive in a material particular;
>
> he shall, on conviction on indictment, be liable to imprisonment for a term not exceeding seven years.
>
> (2) For purposes of this section a person who makes or concurs in making in an account or other document an entry which is or may be misleading, false or deceptive in a material particular, or who omits or concurs in omitting a material particular from an account or other document, is to be treated as falsifying the account or document.

3.25 Recourse may be made to section 17 in circumstances where the defendant has, in the course of, say, obtaining a mortgage advance, entered false information on a mortgage application form.

3.26 The scope of the offence is reasonably broad, in that

(1) the document in issue need not be *primarily* "made or required" for any accounting purpose, it being enough that it is required for an accounting purpose "as a subsidiary consideration";[34] and

(2) the maker of the document need not make it with an accounting purpose in mind, as long as it is "required" by the *lender* for an accounting purpose.[35]

3.27 Nonetheless, we believe that the usefulness of section 17 as an alternative to section 15, in circumstances where before *Preddy* section 15 would have been charged, is limited, since

(1) it can be used only where there is an account, record or document which meets with the requirements of the section;[36] and

[33] The maximum sentence for theft is seven years: Theft Act 1968, s 7, as amended by the Criminal Justice Act 1991, s 26(1). The maximum for obtaining property by deception is ten years: Theft Act, s 15(1).

[34] *A-G's Ref (No 1 of 1980)* (1981) 72 Cr App R 60, 63.

[35] *Ibid*; see also E Griew, *The Theft Acts* (7th ed 1995) para 12-02.

(2) in any event, a charge of false accounting will often fail to reflect the gravamen and nature of a defendant's dishonest conduct.[37]

Procuring the execution of a valuable security by deception

3.28 Section 20(2) of the Theft Act 1968 provides:

> A person who dishonestly, with a view to gain for himself or another or with intent to cause loss to another, by any deception procures the execution of a valuable security shall on conviction on indictment be liable to imprisonment for a term not exceeding seven years; and this subsection shall apply in relation to the making, acceptance, indorsement, alteration, cancellation or destruction in whole or in part of a valuable security, and in relation to the signing or sealing of any paper or other material in order that it may be made or converted into, or used or dealt with as, a valuable security, as if that were the execution of a valuable security.

3.29 "Valuable security" is defined in section 20(3) as

> any document creating, transferring, surrendering or releasing any right to, in or over property, or authorising the payment of money or delivery of any property, or evidencing the creation, transfer, surrender or release of any such right, or the payment of money or delivery of any property, or the satisfaction of any obligation.

3.30 As to the usefulness of applying section 20(2) to circumstances involving inter-account transfers of funds, in Law Com No 228 we expressed the following reservation:

> … there are a number of ways in which funds can now be transferred from one account to another without the need for a cheque, and it is far from clear whether all of them involve the "execution" of a "valuable security" within the meaning of the Act. In *King*[38] it was held that a CHAPS order was a valuable security; but in *Manjdadria*[39] it was held that a telegraphic transfer was not, and *King* was described as a case "in which perhaps the extreme boundaries of a valuable security were canvassed".[40]

3.31 Not only is section 20(2) of limited value, as an alternative to section 15, in that it is applicable only where a valuable security can be identified: there may be

[36] This difficulty might be less great if the Act incorporated the definition of a "document" in s 13 of the Civil Evidence Act 1995, namely "anything in which information of any description is recorded".

[37] The maximum sentence for false accounting is seven years: s 17(1).

[38] [1992] 1 QB 20.

[39] [1993] Crim LR 73.

[40] Para 4.29. See also *Arlidge and Parry on Fraud* (2nd ed 1996) para 4-172. Professor Griew, in his commentary on *Preddy* in *Archbold News*, Issue 7, 15 August 1996, p 2, suggests that *King* might not survive *Preddy*: "[the decision in *King*] was always a doubtful one … Apart from anything else, it rested on the notion that a right over property of the lender is transferred to the borrower. This is inconsistent with the reasoning in [*Preddy*]".

technical problems in bringing a charge under that section, particularly in cases where the charge is framed in terms of an inchoate offence. In the recent case of *Mensah Lartey and Relevy*,[41] a case involving mortgage fraud and charges of *conspiring* and *attempting* to procure the execution of a valuable security by deception, Hirst LJ commented on these problems:[42]

> This is the latest of a line of very troublesome cases concerning the framing and proof of charges in cases involving mortgage frauds, and the point at issue relates to a very technical problem posed by modern methods of the transmission of funds. The crux of the problem is whether the prosecution, at the close of their case, had successfully established the test which it is common ground they had to make good, namely that the appellant in each case intended to procure a mortgage advance in the form of the valuable security specified in the indictment and also that she or he foresaw that the course of conduct embarked upon would necessarily lead to the execution of such a security.

3.32 If, on the other hand, a charge is brought under section 20(2) itself, the problem is substantially reduced. Professor Griew suggests that it would be sufficient to show

> that its signing was "procured" if the fraudster (i) desired the advance to be made by cheque (an unlikely case), or (ii) believed or assumed that it would be, or (iii) (it being now widely known in the property field that advances are commonly made by telegraphic or electronic transfer) did not know or care how the advance would be made but realised that it might be done by cheque.[43]

3.33 *Mensah Lartey and Relevy* was decided before the House of Lords' decision in *Preddy*. Ironically, in the light of that decision, Hirst LJ remarked at the end of his judgment that the Crown had accepted that in cases such as *Mensah Lartey and Relevy* "the proper route" would be to frame a charge under section 15(1), "thus getting away … from the technicalities and artificialities of the valuable security route".

3.34 Although a charge under section 20(2) has the advantage of reflecting to a reasonable extent the nature of the defendant's dishonest conduct,[44] we believe that it does not significantly assist in closing the *Preddy* lacuna for the reasons set out above.

Evasion of liability by deception

3.35 Section 2(1) of the Theft Act 1978 provides, in part:

> … where a person by any deception –

[41] 3 July 1995, CA Nos 93/2627/W5, 93/2791/W5; see also [1996] Crim LR 203.

[42] See also *Arlidge and Parry, op cit*, para 4-185.

[43] *Archbold News*, Issue 7, 15 August 1996, p 2.

[44] But the maximum sentence for an offence under s 20(2) is seven years, compared with ten for an offence under s 15.

> (a) dishonestly secures the remission of the whole or part of any existing liability to make a payment, whether his own liability or another's; …
>
> he shall be guilty of an offence.[45]

3.36 The basis of a charge under section 2(1)(a) in the context of inter-account transfers would be as follows: if D dishonestly and by deception obtains funds from V's account, then, by causing a reduction in V's credit balance, D has dishonestly secured the remission of the whole or part of V's bankers' liability to make payment to V.

3.37 Although section 2(1)(a) arguably provides a means of resolving the *Preddy* lacuna under the law as it presently stands, we do not believe that it is a satisfactory solution. The section is primarily directed at the misconduct of debtors,[46] rather than that of a third party in securing the remission of an innocent party's debt to another innocent party; applying it on the basis suggested above appears unduly artificial. Furthermore, it would not be available if V had gone into unauthorised overdraft: in that case, V's bankers have no liability to make payment to V.

CONSPIRACY TO DEFRAUD

3.38 The scope of the common law offence of conspiracy to defraud is set out in Part II of Law Com No 228.

3.39 It is clear, subject to proof of conspiracy, that the conduct of a person who dishonestly and by deception causes an account to be debited and another account to be credited falls within the definition of the offence in the leading case of *Scott*,[47] namely

> an agreement by two or more by dishonesty to deprive a person of something which is his or to which he is or would be or might be entitled and an agreement by two or more by dishonesty to injure some proprietary right [of the victim's].[48]

3.40 The obvious limitation in applying the common law offence of conspiracy to defraud is, of course, that it requires proof of an *agreement* by two or more conspirators.

[45] The maximum sentence is five years' imprisonment: Theft Act 1978, s 4(2)(a).

[46] During the Second Reading of the Theft Bill in the House of Lords, Lord Harris of Greenwich, speaking for the Government, explained s 2(1)(a) by way of the following example: "a man has ordered goods for his business and after their arrival, disputes ever having received them and by lies persuades the seller to cancel the invoice". *Hansard* 17 January 1978, vol 388, col 25.

[47] *Scott v MPC* [1975] AC 819.

[48] *Scott v MPC* [1975] AC 819, 840F, *per* Viscount Dilhorne (with whom the other law lords agreed).

OTHER OFFENCES UNDER THE THEFT ACTS

Obtaining a pecuniary advantage by deception

3.41 Section 16 (1) of the 1968 Act provides:

> A person who by any deception dishonestly obtains for himself or another any pecuniary advantage shall on conviction on indictment be liable to imprisonment for a term not exceeding five years.

3.42 Section 16(2) sets out the cases "in which a pecuniary advantage within the meaning of this section is to be regarded as obtained". These are where

> (b) [a person] is allowed to borrow by way of overdraft, or to take out any policy of insurance or annuity contract, or obtains an improvement of the terms on which he is allowed to do so; or
>
> (c) he is given the opportunity to earn remuneration or greater remuneration in an office or employment, or to win money by betting.

3.43 Paragraph (a) of subsection (2) – concerning those who by deception dishonestly obtained a reduction, or total or partial evasion or deferment of a debt or charge for which they had made themselves liable or were or might become liable – was repealed by section 5(5) of the Theft Act 1978 (following a review of section 16[49] by the Criminal Law Revision Committee)[50] and replaced by the offences set out in the 1978 Act.

3.44 Lord Goff, in his speech in *Preddy*, sets out a comprehensive legislative history of sections 15 and 16 of the 1968 Act. He concludes:

> The combined result of this extraordinary legislative history was that (i) the offence of obtaining credit by fraud, originally intended to be section 15(2) of the Act of 1968, has disappeared; (ii) section 16 of that Act, intended to take the place of section 15(2) and (3) as proposed, is now left … in a truncated form, limiting the offence of obtaining a pecuniary advantage by deception to the *two unimportant examples* in the remaining paragraphs (b) and (c); and (iii) section 1 of the Act of 1978, providing for obtaining services by deception, now appears as a separate offence, defined in wide terms.[51]

3.45 As it is presently drafted, section 16 applies only to the "two unimportant examples" set out in paragraphs (b) and (c), and provides no avenue for rescue from the *Preddy* quagmire.

Obtaining services by deception

3.46 Section 1 of the Theft Act 1978 provides:

[49] Described by Edmund Davies LJ as a "judicial nightmare": *Royle* (1972) 56 Cr App R 131, 136.

[50] *Thirteenth Report: Section 16 of the Theft Act 1968* (1977) Cmnd 6733.

[51] [1996] 3 WLR 255, 262-263. (Emphasis added)

(1) A person who by any deception dishonestly obtains services from another shall be guilty of an offence.

(2) It is an obtaining of services where the other is induced to confer a benefit by doing some act, or causing or permitting some act to be done, on the understanding that the benefit has been or will be paid for.

3.47 As we remarked in Law Com No 228,[52] when a financial institution is induced to advance money by way of loan it confers a benefit for which it certainly expects to be paid (normally in the form of interest charges, an arrangement fee or both) and it would therefore seem that there is an obtaining of services within the meaning of the section. It was held in the case of *Halai*,[53] however, that "a mortgage advance cannot be described as a service".[54] We recommended in Law Com No 228 that section 1 of the 1978 Act should be amended so as to make it clear that that section extends to the dishonest obtaining by deception of loans of money.[55] Until that amendment is enacted, however, section 1 of the 1978 Act cannot be charged in mortgage frauds or other cases involving the dishonest obtaining of loans by deception.

3.48 In this report we recommend the creation of a new offence of obtaining a money transfer by deception,[56] which would inevitably be committed in the course of a mortgage fraud (as well as many other kinds of fraud). If this latter recommendation were implemented, the need to reverse the decision in *Halai* would become less pressing: if those who commit mortgage fraud can be charged with obtaining a money transfer by deception, it will not matter so much that they cannot be charged with obtaining services. However, we still believe that *Halai* should be reversed, for two reasons.

3.49 First, the new offence will be confined to the obtaining of a transfer of money from one account to another – the sort of case which until *Preddy* was thought to fall within section 15. It may be possible to obtain a loan by deception without such a transfer being made – for example, by inducing a lender simply to open a loan account in one's favour. This would probably amount to an offence of obtaining a pecuniary advantage by deception, namely being allowed to borrow by way of overdraft;[57] but there seems no reason why it should not be charged as an obtaining of services. Indeed, if *Halai* is taken to its logical conclusion it presumably excludes from section 1 of the 1978 Act the obtaining of *any* loan, even one paid in cash.[58]

[52] Paras 4.30 – 4.33.

[53] [1983] Crim LR 624.

[54] *Per* O'Connor LJ.

[55] Law Com No 228, para 4.33.

[56] Para 4.11 below.

[57] Theft Act 1968, s 16(2)(b): see para 3.42 above.

[58] But the dishonest obtaining of a cash loan would be an offence under s 15: the requirement of intention permanently to deprive would inevitably be satisfied because there would be no question of repaying the *same* cash.

3.50 Secondly, we have misgivings about the decision in *Halai* because the court appears to have overlooked the width of the statutory definition of an obtaining of services. In our view the offence was clearly intended to extend to any case where the victim is induced by deception to provide the defendant with a benefit for which the defendant is expected to pay. It is clearly committed by a person who obtains by deception the temporary use of another's chattel, on the understanding that that use is to be paid for; we cannot see why it should be thought to make a difference that the defendant obtains the use of the victim's money rather than (for example) the victim's car. Whether or not there is a lacuna in the criminal law, we think that this is a matter that should be rectified if it can conveniently be done. The draft Bill annexed to this report therefore includes the substance of the Bill that was annexed to Law Com No 228 and would have the effect of reversing *Halai*.

3.51 For completeness it should be added that, even if section 1 were to be explicitly extended to loans, it would continue to be limited to benefits which are conferred on the understanding that they have been or will be *paid for*.[59] It therefore cannot apply to payments other than loans, and *Preddy* will continue to present problems in respect of non-cash payments other than loans.[60]

CONCLUSION

3.52 The present law includes some offences which arguably could be used as alternatives to section 15 in circumstances where, prior to *Preddy*, an offence would have been charged under section 15. In our view, however, for the reasons set out in this Part, none of the offences considered provides a *satisfactory* alternative.

[59] Theft Act 1978, s 1(2).

[60] See para 2.14 above.

PART IV
FILLING THE LACUNA BY EXTENDING THE EXISTING OFFENCES

4.1 We originally envisaged that the *Preddy* lacuna would be filled by extending the offence of obtaining property by deception, contrary to section 15 of the 1968 Act. This seemed the most natural approach, since most people would regard the obtaining of funds transferred from another's account as an obtaining of another's property. It would also return the law to what it was generally assumed to be, and had been held by the Court of Appeal to be,[1] before *Preddy*. The draft Bill circulated for comment therefore adopted this approach, and provided (in effect) that, where funds are transferred from one account to another, the holder of the second account should for the purposes of section 15 be deemed to have obtained a sum of money from the holder of the first.

"PROPERTY"

4.2 Some of those we consulted[2] suggested that this approach did not go to the heart of the matter, and that the fundamental problem (of which *Preddy* was only one symptom) lay in the difficulty of applying the concept of *property* to intangible property such as choses in action. It was argued that the cleanest solution to the problem would be to extend not section 15 of the Act but section 4(1), which defines "property" for the purposes of both section 15[3] and the offence of theft:[4]

> "Property" includes money and all other property, real or personal, including things in action and other intangible property.

4.3 Although section 4 expressly includes things in action and other intangible property, it was suggested to us that there is in practice great difficulty in establishing whether funds moving between accounts can be described as property; and that it would greatly simplify the law if section 4 were amended so as to make it clear that they can. Such an amendment would apply for the purposes both of the offence of obtaining property by deception and of theft.

4.4 But, as we understand *Preddy*, it did not involve any narrowing of the concept of *property*: it merely decided that the transfer of funds from one account to another cannot be described as an obtaining, by the holder of the account credited, of the *same* property as that lost by the holder of the account debited. This appears to us to be a problem arising from the requirements of section 15(1), not from the concept of property.

4.5 We are of course very much concerned with the practical problems of applying the Theft Act to intangible property, and we hope to address these problems in our

[1] *Williams and Crick*, 30 July 1993, CA No 91/3265/W3.

[2] Eg Mr Justice Mitchell, Judge Rivlin QC and the Criminal Bar Association.

[3] See s 34(1).

[4] See s 1(3).

forthcoming consultation paper; but they have been well known for some time, and cannot be attributed to the decision in *Preddy*. We have concluded that it would be wrong, in the present exercise and without full consultation,[5] to recommend such a radical change to the conceptual framework of the Act.

EXTENSION OF THE SECTION 15 OFFENCE

4.6 Our consultation also revealed a number of difficulties in bringing the obtaining of funds by deception within the offence created by section 15. These difficulties arise from the structure of that offence. In addition to the elements of deception and dishonesty, it requires

(1) that certain *property* should exist,

(2) that that property should *belong to another*,

(3) that the defendant should *obtain* it, and

(4) that the defendant should act with the *intention of permanently depriving the other* of it.

4.7 The approach adopted in the draft Bill circulated for comment was, in effect, to *deem* the first three requirements to be satisfied in certain circumstances: the holder of the account to which the funds are transferred was to be regarded as having obtained a sum of money from the holder of the account from which they are transferred. This "sum of money" was purely notional: as *Preddy* makes clear, the transferee does not *in fact* obtain any money from the transferor at all. Some of those consulted[6] were troubled by the artificiality of this approach. The Serious Fraud Office, for example, wrote:

> In the end, … we have to agree that the use of deeming provisions and the references to a sum of money cause intractable difficulties.

4.8 We share these reservations. This Commission's objective in this exercise was to recommend legislation which is easy to understand and to apply.

4.9 As for the requirement of intention permanently to deprive, the consultation process convinced us that it would be wrong for the legislation to remain silent on the point, since there would be room for argument as to what the requirement was intended to mean in this context. In the ordinary case of theft, or the obtaining of tangible property by deception, it means only that the defendant must have intended not to return the very property that is appropriated or obtained: it is not a defence in itself (though it may of course be relevant to the issue of dishonesty) that the defendant intended to replace that property with *other* property of the same value. In the *Preddy* situation, where the victim's chose in action is actually extinguished, it is hard to see how the requirement of intention permanently to deprive might *not* be satisfied. As Sir John Smith put it in his response,

[5] See paras 1.11 – 1.14 above.

[6] Eg Professor Edward Griew.

> [the victim's] thing in action is necessarily destroyed in whole or in part by the fraud so he cannot but be permanently deprived of it. … [T]here is necessarily an intention permanently to deprive, as in every case of intention to destroy the property of another. All the King's horses and all the King's men cannot put the thing in action together again. They might give [the victim] a new one, but that one is lost for ever.

4.10 Even so, on reflection it seemed to us undesirable to create a special form of the offence under section 15 in which the requirement of intention permanently to deprive either does not apply or is somehow deemed to be satisfied, which comes to the same thing. As the Serious Fraud Office put it,

> such a solution would … create strange anomalies, however "technical", between the situation of a defendant charged under [the extended version of section 15] and the situation of another defendant charged with a straightforward section 15 or theft. We would expect resistance to a complete abandonment of the requirement, even during the passage of the Bill.[7]

4.11 For these reasons we concluded that the approach of extending the offence under section 15 was not appropriate. Having identified a kind of conduct which at present may not be criminal but which clearly should be, we can most simply remedy the position by recommending a completely new offence which such conduct would constitute. Such an offence can be defined in whatever terms most simply describe the conduct in question. There is no need for the artificiality that is involved in deeming what has happened to fall within the requirements of section 15 when in fact it does not. **We recommend the insertion into the Theft Act 1968 of a new section 15A, creating an offence of dishonestly obtaining a money transfer by deception. (Recommendation 1)**

[7] The SFO nevertheless saw this as "the most practicable way forward". The option of a new offence had not at this stage been canvassed.

PART V
THE NEW OFFENCE OF OBTAINING A MONEY TRANSFER BY DECEPTION

5.1 In the previous Part we explained our reasons for concluding that the lacuna exposed by *Preddy* in the law of deception should be filled by the creation of a new offence. In this Part we consider the form that that offence should take.

THE ELEMENTS OF THE NEW OFFENCE

5.2 All the existing deception offences require that the defendant should dishonestly procure a specified result by deception, and the new offence should clearly take the same form: the main issue to be resolved is what the specified result should be. The draft Bill describes that result as the obtaining by the defendant, for himself or another, of a "money transfer" – a phrase which seems to us to convey in simple terms the essence of the offence – and defines the circumstances in which a money transfer occurs.

The accounts debited and credited

5.3 The essence of a money transfer is the debiting of one account and the making of an associated credit to another. The draft Bill circulated for comment required that both the account debited and the account credited should be held at a bank or other financial institution. Some of our consultees suggested that this is too narrow, since

(1) there are ways of recording one person's indebtedness to another which are arguably not "accounts", and

(2) there are accounts which are not held at a financial institution.

5.4 The Commissioner of the City of London Police, for example,[1] pointed out that

> in addition to money, the City of London and other major financial centres are daily electronically transferring value from accounts within and between financial institutions in the form of shares, derivatives and other negotiable instruments. For example, shares are often electronically transferred from one account to another as collateral for bank loans or to adjust the level of security applied to a loan facility.

5.5 He added that the Bill

> would not provide a remedy where the same circumstances as in *Preddy* occur, but where the parties to the fraud hold accounts at neither banks nor financial institutions. For example, if the deception involved loans made from one entity to another within a large corporation or group of companies by means of inter-company accounting, then the terms of the Bill would be insufficient.

[1] William Taylor QPM.

5.6 Similarly the Chief Executive of the Financial Law Panel[2] wrote:

> In wholesale markets there are many situations where payments are made through a clearing system of some sort, and which do not directly involve the debit of a bank account and the credit of another. For example, the system operated by Lloyds under which payments between market participants are settled involves an informal netting of sums due between the participants, and the delivery of one bank payment to settle the net amount.

And the Bank of England queried whether the draft Bill would cover frauds involving stored-value payment cards such as a "Mondex" card, or Internet banking.

5.7 We are only too aware that the law of dishonesty has failed to keep up with the ever-increasing complexity of modern commercial life and with the technological developments of the last 30 years: indeed, it is this awareness that prompted our decision to review the whole of the law of dishonesty.[3] We fully intend to address these issues in our forthcoming consultation paper. However, the urgency of the problem posed by *Preddy* is such that, for the purposes of the present report, we have been unable to carry out the extensive formal consultation[4] which usually precedes our reports; and in the absence of such consultation we have thought it right to confine the new offence to the particular situation where the lacuna revealed by *Preddy* appears to be most specifically and urgently in need of attention, namely the transfer of funds between bank accounts, or other accounts of a conventional nature.[5]

5.8 However, the requirement that the account should be held with a "financial institution" was thought to be both insufficiently precise and potentially too restrictive; and the draft Bill now refers, in effect, to an account kept with a bank or with a person carrying on a deposit-taking business for the purposes of the Banking Act 1987:[6] this approach seems to capture more precisely the kind of situation with which we are concerned.

[2] Colin Bamford.

[3] See para 1.2 above.

[4] See para 1.11 – 1.14 above.

[5] For this reason the draft Bill defines a "credit" and a "debit" as a credit or a debit of *an amount of money*.

[6] Strictly speaking the effect of the new s 15B(3)–(6) is to include an account kept with a person carrying on a business which *would* be a deposit-taking business, by virtue of s 6(1) and (3) of the Banking Act 1987, were it not for the fact that s 6(2) of that Act excludes a business carried on by a person who does not hold himself out as accepting deposits on a day-to-day basis and which accepts deposits "only on particular occasions". We understand from the Bank of England that this latter phrase causes much difficulty in practice. The word "deposit" is defined by the new s 15B(4) as having the same meaning as in s 35 of the Banking Act (the offence of fraudulent inducement to make a deposit), which refers to the definition of a deposit in s 5 of that Act but includes any sum that would otherwise be excluded by s 5(3): s 35(4).

The connection between the debit and the credit

5.9 Our intention was to require that the debit and the credit should be, in effect, no more than two sides of the same coin – two aspects of what a lay person would regard as a simple movement of money from one account to another. The draft Bill circulated for comment required that the debit and the credit should "correspond" to one another and should be made "as part of the same transaction". Some of those we consulted[7] thought that these requirements were unduly restrictive and might give rise to difficulty, for example where the amount of the credit is for some reason different from the amount of the debit; or where there has been some delay between the making of the debit and that of the credit (or vice versa); or where an administrative error has resulted in the wrong account being debited or credited, and the error is subsequently discovered and the debit or credit is made to the correct account. We therefore decided to relax these restrictions, and the draft Bill now requires only that the credit should result from the debit, or vice versa. This wording would seem wide enough to cover all the examples above. It also makes it clear that it is immaterial whether the debit precedes the credit or succeeds it.

5.10 Similarly, for the avoidance of doubt, subsection (4) of the new section 15A provides that it is immaterial whether the amount credited is the same as the amount debited, or whether any delay occurs in the process by which the money transfer is effected, or (to take account of variations in the relevant banking procedures) whether any intermediate credits or debits are made in the course of the money transfer.

Overdrafts

5.11 Even under the law as it was understood to be before *Preddy*, a major practical difficulty in the prosecution of fraud was the need to prove that the account from which the funds were transferred was, at the time of the transfer, either in credit or overdrawn to an extent less than the amount of an overdraft facility to which the holder was legally entitled (and, arguably, that this was also the state of the account to which the funds were transferred *after* the transfer). If the relevant account is overdrawn, and its holder has no right to overdraw further, it does not represent any chose in action belonging to its holder. There seems little or no moral difference between the obtaining by deception of funds transferred from (or to) an account which is in credit, on the one hand, and from (or to) an account which is overdrawn on the other. We believe that this difficulty, though not strictly attributable to the decision in *Preddy*, should nevertheless be removed; and **we recommend that, for the purposes of the new offence, it should be immaterial whether either of the accounts is overdrawn before or after the money transfer is effected. (Recommendation 2)**

Cheque payments

5.12 Deceiving another person into drawing a *cheque* amounts to the offence of procuring the execution of a valuable security by deception, contrary to section 20(2) of the 1968 Act; so there is no lacuna in this case. However, Lord Goff said

[7] Eg the Legal Unit of the Bank of England.

in *Preddy* that this conduct does not amount to an obtaining of *property* by deception, whether that property be regarded as the funds obtained or the cheque form.[8] Where funds are obtained by deception we think that it should be possible to frame a charge which refers to the funds obtained, rather than merely the *document* by which they are obtained, and that it would be illogical to exclude cheque payments from the new offence merely because another offence is available in this case. This suggestion met with widespread agreement.

5.13 A second argument[9] in support of including cheque payments within the new offence rests on the complexity of founding a charge under section 20(2) of the 1968 Act when it is framed in terms of either a conspiracy or an attempt. As we noted in Part III,[10] an inchoate offence under section 20(2) requires proof that a defendant had intended the advances to be paid by one method rather than another. Since it is unlikely that a defendant will have given any thought whatsoever to whether an advance will be by way of valuable security (by cheque or CHAPS order) or otherwise (by electronic or telegraphic transfer), a charge of attempting or conspiring to procure the execution of a valuable security is at risk of foundering on what Hirst LJ in *Mensah Lartey and Relevy*[11] described as the "very technical problem posed by modern methods of the transmission of funds".[12] If the new substantive offence consists in the obtaining of funds by deception, irrespective of the *means* by which those funds are transferred, a charge of conspiring or attempting to commit it will require proof of an intention to obtain funds, but will not require proof of an intention that the funds should be transferred in any particular way.

5.14 **We recommend that the new offence should extend to payments made by cheque as well as those made electronically. (Recommendation 3)**

5.15 It was suggested to us[13] that we should take the opportunity to recommend an amendment which would make it clear that the obtaining of a cheque by deception can be charged as the obtaining of property, contrary to section 15. We make no such recommendation, for two reasons. First, there is no lacuna; indeed, under our recommendations such conduct could be charged either under section 20(2) or under the new section 15A. Secondly, we are not convinced that it *should* be possible to charge, under section 15, the obtaining of a piece of paper whose value lies only in the funds to which it gives access, and which can be recovered by its owner after it has been processed by the banking system. Such a charge seems artificial, and outside the mischief at which section 15 is directed. We think that the new offence will be far more appropriate.

[8] Lord Goff thought that in the latter case, though the defendant does obtain property belonging to another, there is no intention to deprive the other of that property: [1996] 3 WLR 255, 266. His Lordship did not expressly deal with the argument that the necessary intention may be deemed to exist by virtue of s 6(1) of the 1968 Act.

[9] We are grateful to Mr Justice Jowitt for drawing our attention to this point.

[10] See para 3.31 above.

[11] [1996] Crim LR 203.

[12] See para 3.31 above.

[13] Eg by the Department of Social Security.

TERRITORIAL JURISDICTION

5.16 Under the present law, a person cannot be convicted in England and Wales of an offence of securing a particular result by deception unless that result is secured in England and Wales. For example, it is not an offence under English law to obtain property abroad by means of a deception in England.[14] Under this principle, a person would commit the offence of obtaining a money transfer by deception only if the money transfer were obtained in England and Wales.

5.17 Howver, Part I of the Criminal Justice Act 1993,[15] when it is brought into force, will greatly extend the territorial jurisdiction of the English courts over a number of offences of dishonesty (referred to in the Act as "Group A offences"), including all the deception offences under the Theft Acts 1968 and 1978. Under section 2(3) of the Act,

> A person may be guilty of a Group A offence if any of the events which are relevant events in relation to the offence occurred within the jurisdiction.

Section 2(1) defines a "relevant event" as

> any act or omission or other event (including any result of one or more acts or omissions) proof of which is required for conviction of the offence.

5.18 For example, the offence of obtaining property by deception requires proof of a deception and an obtaining. Both the deception and the obtaining are therefore relevant events, and it is sufficient not only if the obtaining occurs within the jurisdiction (as at present) but also if the *deception* does.

5.19 We see no reason why the new offence of obtaining a money transfer by deception should not be included among the list of Group A offences together with all the other deception offences. The consequence would be that it would be immaterial that the money transfer occurred abroad, if the deception occurred in England and Wales. **We recommend that the offence of obtaining a money transfer by deception should be included among the Group A offences listed in Part I of the Criminal Justice Act 1993. (Recommendation 4)**

SENTENCE

5.20 The new offence is in essence comparable to the existing offence of obtaining property by deception, which carries a maximum sentence of ten years. It is true that that offence requires an intention permanently to deprive, which is not an element of the new offence,[16] and this might be thought to justify a lower maximum. However, under the law as it was assumed to be before *Preddy* it was

[14] *Harden* [1963] 1 QB 8; *Tirado* (1974) 59 Cr App R 80.

[15] Based on this Commission's report *Criminal Law: Jurisdiction over Offences of Fraud and Dishonesty with a Foreign Element* (1989) Law Com No 180.

[16] Indeed, the difficulty of incorporating this requirement was one of our main reasons for abandoning the idea of extending s 15 rather than creating a new offence: see paras 4.9 – 4.10 above.

virtually inconceivable that this requirement might *not* be satisfied in the case of a transfer of funds between bank accounts, because the transferor's chose in action was inevitably extinguished in whole or part. The transferee might intend to replace the funds transferred with other funds, but this would go only to the issue of dishonesty. There could be no question of restoring the very same chose in action of which the transferor was deprived.[17] Therefore the new offence is not in reality a less serious offence than that under section 15.

5.21 What maximum is appropriate is a matter on which others are better qualified to pronounce than we, and **we make no recommendation on the subject**.

RETROSPECTIVE EFFECT

5.22 We are conscious of the lacuna present in the law and we have, therefore, considered whether our draft Bill should have retrospective effect.

The presumption of legislative intention

5.23 It is a primary canon of construction that Parliament does not intend statutory provisions to apply retrospectively. This is not to say that Parliament cannot legislate retrospectively provided that it does so in clear terms. The War Damage Act 1965, for example, was introduced with the purpose of retrospectively altering the law in the wake of the House of Lords decision in *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate.*[18] The then Financial Secretary to the Treasury,[19] introducing the Bill for the Government at second reading, stated that its object was "to restore the common law of England and the law of Scotland to the position which was generally thought to exist before the decision of the House of Lords … [in the *Burmah Oil Co* case] and to provide that about 12 cases now pending … before the court are disposed of on the basis of the law as it has always been thought to be."[20]

"Technical" changes to the law

5.24 While, in the words of Professor Sir John Smith, "[i]t would clearly be objectionable if legislation operated to render criminal any act which was not a crime when it was done",[21] a change in the law which is merely of a "procedural", or technical, nature may escape the censure of the courts.

5.25 *Redmond*,[22] a case of fraudulent trading,[23] provides an example. It was submitted on appeal that one of the counts should have been withdrawn from the jury on the ground that a condition precedent to the offence (namely, that at the time of fraudulent trading, the company should be in the course of winding up) had not

[17] See para 4.9 above.

[18] *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75.

[19] Mr Niall MacDermot QC MP.

[20] *Hansard* (HC) 3 February 1965, vol 705, col 1091.

[21] See commentary to *Redmond* [1984] Crim LR 292.

[22] *Ibid.*

[23] Companies Act 1985, s 458.

been satisfied. It was argued that although subsequent legislation had removed the condition, conduct prior to that legislation coming into effect could not be the subject of a prosecution unless the condition were satisfied. The Court of Appeal rejected the submission, stating that a change to the rules in respect of a condition precedent for the offence was a merely *procedural* change, and did not render criminal something which had not previously been criminal.

The European Convention on Human Rights

5.26 The United Kingdom is a party to the European Convention on Human Rights ("ECHR") and, as such, is subject to the general obligation contained in Article 1, which provides:

> The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.

5.27 Section 1 of the ECHR contains Article 7, which provides a right of protection against the retroactivity of the criminal law. It states:

> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

5.28 Although the ECHR is not directly binding on the United Kingdom, the United Kingdom is subject to the well-established principle that "a State which is party to a treaty is under an obligation to ensure that its national law conforms to its international obligations".[24]

5.29 Article 7 is one of the more important provisions in the Convention, and is not subject to derogation under Article 15, which provides for the possibility of derogation in times of emergency. It does not, however, prohibit retrospective legislation in general, and applies only to the retrospective creation of criminal offences. Article 7 generally applies to legislation, but can also apply to judicial decisions if the effect of such a decision is so far-reaching that it constitutes the creation of an entirely new criminal offence. In addition, Article 7 will not prevent the courts from *clarifying* the law when this is felt to be necessary.[25]

[24] A H Robertson and J G Merrills, *Human Rights in Europe: a study of the European Convention on Human Rights* (3rd ed 1993) p 26.

[25] Application 6689/74, 3 D & R, p 95: a case involving the common law offence of blasphemous libel, where the Commission concluded that while the domestic courts had been required to resolve a point of principle relating to the scope of the crime, their decision did not create a new offence and was, therefore, unobjectionable.

5.30 Recently, the Strasbourg Court had occasion to consider Article 7 in *SW v United Kingdom* and *CR v United Kingdom*.[26] These appeals concerned defendants who were convicted of, or pleaded guilty to, raping their wives, and subsequently argued that there had, in relation to their cases, been violations of Article 7(1). They pointed out that, at the time when the incidents giving rise to liability had occurred, husbands were immune from prosecution for marital rape in England, and that it was only *after* the incidents had occurred that the English common law had removed this immunity; their liability being attributable to this change in the law.[27] The Court, holding that there had been no violation of Article 7(1), observed that, however clearly drafted a legal provision may be, there will always be a need for judicial interpretation, "for elucidation of doubtful points and for adaptation to changing circumstances".[28] The Court went on to state:

> in the United Kingdom … the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article 7 cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.[29]

5.31 It will be noted that the comments of the Court are expressly limited to *judicial* "clarification" of the common law. It is, perhaps, less likely that the Court would take the same line if the change emanated from statute, rather than from the courts.

5.32 Furthermore, in reaching its decision in the marital rape appeals the Strasbourg Court took the same line as the Court of Appeal in *Redmond*: the applicants had, but for the fact that the victims were their wives, done everything necessary to satisfy the elements of rape. The Court therefore viewed the immunity as a peripheral matter which could be severed from the "core" elements of the offence. It is unclear whether the same could be said in relation to the *Preddy* question.

5.33 The Court also held that a series of cases, which had whittled down the marital immunity in rape, gave fair warning to the applicants and satisfied the requirement of foreseeability.[30] Any legislative reversal of *Preddy* would be unlikely to satisfy this foreseeability requirement.

5.34 Article 7(2) of the Convention was inserted in order to make it clear that the trial of war criminals for acts which were criminal according to international law would be consistent with the Convention. It is most unlikely that this saving clause could be invoked in any other cases.[31]

[26] *SW v United Kingdom* [1996] 21 EHRR 363. These appeals were heard together.

[27] *R* [1992] 1 AC 599.

[28] *SW v United Kingdom* [1996] 21 EHRR 363, 399 (para 36/34).

[29] *Ibid*.

[30] See, inter alia, *Steele* (1977) 65 Cr App R 22 and *Roberts* [1986] Crim LR 188.

[31] A H Robertson and J G Merrills, *op cit*, at p 127.

Conclusion

5.35 We take the view that, although the offence contained in the new section 15A could arguably be regarded as a technical regularising of the law (so as to make it an offence to do what was *thought* to be an offence before the House of Lords' decision in *Preddy*), no good reasons can be found to justify a departure from the principle against retrospective effect. In any event, if an attempt were made to give the new law retrospective effect, it is likely that it would be found to be in breach of the ECHR.

5.36 **We recommend that nothing done before the new section 15A comes into force, which would not have been an offence had that section not been enacted, should amount to an offence by virtue of that section. (Recommendation 5)**

PART VI
PREDDY AND THE LAW OF HANDLING STOLEN GOODS

THE NATURE OF THE PROBLEM

6.1 Under the law as it was generally assumed to be before *Preddy*, a credit balance obtained from another account by deception would have been "stolen goods"[1] for the purposes of those provisions of the Theft Act 1968 that refer to such goods, and in particular the offence of handling stolen goods contrary to section 22(1), which provides:

> A person handles stolen goods if (otherwise than in the course of the stealing) 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.

6.2 Section 24(4) provides that goods are "stolen" if they are obtained, in England or Wales or elsewhere, by blackmail or in the circumstances described in section 15(1). Before *Preddy* it would have been generally assumed that a credit balance resulting from an inter-account transfer procured by deception was stolen goods, because it was obtained in the circumstances described in section 15(1). On this assumption, the offence of handling would be committed if, knowing or believing the funds to be stolen goods, a person dishonestly receives them or deals with them in any of the other ways set out in section 22(1).[2] According to *Preddy*, however, the funds are not obtained in the circumstances described in section 15(1); therefore they are probably[3] not stolen goods, and subsequent dealings with them fall outside section 22(1).[4]

6.3 Moreover, even if the funds in question *were* stolen goods, there would be a further difficulty in applying section 22(1) to them where they are transferred to another account. Before *Preddy* it had been held by the Court of Appeal in *Attorney-General's Reference (No 4 of 1979)*[5] that a person who dishonestly accepts a transfer of stolen funds from another's account into his or her own account is "receiving"

[1] "Goods" includes money and every other description of property except land: Theft Act 1968, s 34(2)(b).

[2] It would also be committed if cash representing those funds were withdrawn from the account by the person who had dishonestly obtained them, and received by a person who knew or believed it to represent the proceeds of stolen funds: see s 24(2), para 6.4 below.

[3] It is arguable that they are obtained by theft (see paras 3.13 – 3.15 above); but if this is on the basis that the transferor's chose in action is extinguished, it would seem to be *that* chose in action that is stolen (though it cannot be stolen *goods* because, once stolen, it no longer exists), not the chose in action acquired by the transferee.

[4] It is possible that subsequent dealings with them might amount to *theft*, on the basis that even if they have not already been stolen they still belong to another: see paras 3.16 – 3.22 above.

[5] [1981] 1 WLR 667.

stolen goods within the meaning of section 22(1). But it is hard to see how this reasoning can survive *Preddy*. It assumes that the funds received by the transferee are the *same* funds as those that, before the transfer, were in the transferor's account; and according to *Preddy* this is not so.

6.4 It might be argued that the funds received are "stolen" by virtue of section 24(2) of the 1968 Act, which provides:

> For purposes of [the provisions of this Act relating to goods which have been stolen] references to stolen goods shall include, in addition to the goods originally stolen and parts of them (whether in their original state or not), –
>
> (a) any other goods which directly or indirectly represent or have at any time represented the stolen goods in the hands of the thief as being the proceeds of any disposal or realisation of the whole or part of the goods stolen or of goods so representing the stolen goods; and
>
> (b) any other goods which directly or indirectly represent or have at any time represented the stolen goods in the hands of a handler of the stolen goods or any part of them as being the proceeds of any disposal or realisation of the whole or part of the stolen goods handled by him or of goods so representing them.

6.5 But this rule applies only to goods which represent (or have represented) the stolen goods *in the hands of the thief or of a handler*; and in the case of stolen funds which are transferred to another account, this requirement is not satisfied. According to *Preddy*, the funds obtained by the transferee have never been in the hands of the thief at all; and the transferee, in whose hands they are, cannot be regarded as a handler until it has first been determined that the funds received are stolen goods. It would obviously be circular to argue (a) that those funds are stolen goods, (b) that the transferee is therefore a handler of stolen goods, (c) that the requirements of section 24(2)(b) are therefore satisfied, and (d) that the funds received are therefore stolen goods.

6.6 Moreover, even if the funds obtained by the transferee could somehow be brought within the terms of section 24(2), so that they were stolen goods once the transferee had received them, it would still be hard to see how the transferee could be said to have *received stolen goods*: that expression would seem to mean that the goods received must have been stolen goods *before* the transferee received them, not that it is sufficient if they *became* stolen goods once the transferee *had* received them.

6.7 It is true that this problem existed even before *Preddy*: it appears to extend to any case where stolen goods in the hands of the thief are converted into other goods in the hands of another, for example where the thief pays stolen cash into another's bank account.[6] However, before *Preddy* it appeared not to extend to the case where a stolen credit balance is moved from one account to another, because the

[6] See A T H Smith, *Property Offences* (1994) para 30-15.

Attorney-General's Reference[7] assumed the property to be the same property throughout. If this is not the case, as *Preddy* makes clear it is not, the lacuna is now a great deal more serious than was previously thought.

THE NEED FOR A NEW OFFENCE

6.8 In order to ensure that the transferee of stolen funds (including funds obtained by deception) can be charged with handling them, additional provisions appear to be needed. We considered attempting simply to return the law of handling to what it was generally believed to be before *Preddy*, without treating anything as stolen goods that would not previously have been so treated. However, just as we encountered difficulties in reversing the decision in *Preddy* through the extension of existing offences, and eventually decided that there should be a completely new offence, so we discovered that there were intractable technical problems involved in filling this second lacuna solely by extending the existing provisions relating to stolen goods. Most of these problems seemed to derive from the requirements

(1) that the thing handled must be *goods* – that is, property – which includes a credit *balance* of an account, but not a credit which reduces the extent to which the account is overdrawn (unless, perhaps, the account-holder has a legal right to overdraw to an extent greater than that to which the overdraft is reduced);[8] and

(2) that if that thing is not the goods originally "stolen" (which includes goods obtained by blackmail or contrary to section 15) then it must at some point have represented those goods *either*

(a) *in the hands of the thief*, as being the proceeds of a disposal or realisation of those goods or of goods so representing them, *or*

(b) *in the hands of a handler of the stolen goods*, as being the proceeds of a disposal or realisation of the stolen goods handled by that person or of goods so representing them.

6.9 We therefore decided that the simpler course was to recommend the creation of a new offence which, though analogous to handling, would not include these requirements. The result is that, under our recommendations, certain conduct would be criminal which would not have been criminal even before *Preddy*. Although our main objective is to restore the pre-*Preddy* position, we believe that it must be right to go further than this if the alternative would produce anomalous and confusing results. In particular, we see no convincing reason to insist that it should be possible to identify specific *property* as stolen – a requirement which may involve proof that each of a number of bank accounts was in credit at the material time.

[7] *A-G's Reference (No 4 of 1979)* [1981] 1 WLR 667.

[8] See *Kohn* (1979) 69 Cr App R 395; para 3.15, n 19 above.

THE DEFINITION OF THE NEW OFFENCE

Receipt and retention

6.10 We considered the possibility of a new offence which would be committed only on the willing *receipt* of funds into an account (as a result of a transfer of stolen funds from another account) by a person who knows or believes the funds to represent the proceeds of stolen funds. However, we rejected this idea in favour of an offence of failing to take reasonable steps to cancel a credit *already made*. We adopted this approach for two reasons.

6.11 First, it would often be difficult or impossible to prove that the account-holder knew or believed the funds to be stolen, and consented to their being paid into the account, at the time of the transfer; whereas it may well be possible to prove that he or she knew or believed this at some later stage, but did nothing about it.

6.12 Secondly, the new offence is intended to correspond broadly to the existing offence of handling stolen goods. Under the present law a person who discovers that stolen funds have been paid into his or her account can be guilty of handling those funds by dishonestly allowing them to remain there.[9] We think that such conduct ought to be criminal, and that a similar principle should apply where a person discovers that a credit has been made to his or her account and knows (or correctly believes) that it was obtained by deception, contrary to the new section 15A, or that it derives from a previous offence under section 15A, from stolen goods, or from theft or blackmail.[10] We are reinforced in this view by section 52(1) of the Drug Trafficking Act 1994, under which a person who discovers, in the course of his trade, profession, business or employment, that another person is engaged in drug money laundering is guilty of an offence if "he does not disclose the information … to a constable as soon as is reasonably practicable". We agree that liability for omission is justified in such circumstances.

The initial dishonest credit

6.13 The existing offence of handling requires that the offence be committed "otherwise than in the course of the stealing": a person who assists in the theft itself (or the obtaining of property by deception or blackmail) is not thereby guilty of handling. We considered the possibility of an analogous rule under which a person who accepts a wrongful credit to an account is not guilty of the new

[9] *Pitchley* (1972) 57 Cr App R 30.

[10] Although goods obtained through theft or blackmail are normally stolen goods, the draft Bill refers expressly to a credit deriving from blackmail because it is possible that a money transfer might be procured by blackmail without there being any goods which can be described as stolen goods – eg where both accounts are overdrawn in excess of any agreed overdraft facility. In the case of a credit which is the immediate result of a *theft* it is arguable that there must inevitably be stolen goods from which the credit will derive, namely the victim's chose in action. However, we think it might also be arguable that a credit cannot be said to derive from stolen goods unless it derives from goods which, *at some previous time*, fell within the definition of stolen goods. If this were right, it would follow that a credit does not "derive from stolen goods" where it is the credit side of a money transfer whose debit side is a theft of a chose in action: the victim's chose in action never qualifies as "stolen goods" because as soon as it is stolen it ceases to exist. But even if the credit does not derive from stolen goods, it does derive from theft, and the Bill therefore includes the latter alternative as well as the former.

"handling" offence if the credit is made in the course of the theft, the offence under section 15A or the blackmail (as the case may be). It would follow that, where A dishonestly secures the transfer of funds into B's account, B might (depending on the nature of her involvement) be guilty of aiding and abetting A's offence; but she would not, without more, be guilty of the new "handling" offence. However, we decided against such a rule, for two reasons.

6.14 First, the new "handling" offence would catch not only the case where B knows or believes that dishonestly obtained funds are *going* to be transferred to her account, and consents to the transfer, but also the case where B does not find out about the transfer until after it has been made, and dishonestly does nothing to cancel it. In the former case B would inevitably be guilty of aiding and abetting A's offence, and it is therefore unnecessary that she should be guilty of the new "handling" offence too. In the latter case, however, B would not be guilty of aiding and abetting A's offence, because that offence would have been committed before B became dishonestly involved. If the new "handling" offence did not extend to the credit initially obtained by dishonest means, B would escape liability altogether.

6.15 Secondly, we suspect that most people would think it odd that, for example, a solicitor who dishonestly accepts the payment of a mortgage advance obtained by deception should be guilty only on the basis that he has aided and abetted the obtaining, whereas an accomplice who dishonestly accepts part of the proceeds from the solicitor is guilty, in effect, of handling stolen funds. In terms of culpability there seems little or no difference between the two.

6.16 It is true that if the new "handling" offence extends to the receipt of the credit initially obtained by deception, theft or blackmail there is a substantial overlap with those offences: for example, a person who by deception dishonestly obtains a credit to his or her *own* account would be guilty not only of the offence under section 15A but also of the new "handling" offence. It would be difficult, if not impossible, to devise a simple way of excluding the case where A dishonestly secures a credit to his own account, while including the case where A dishonestly secures a credit to B's.

6.17 We do not see this as a major difficulty. There is already an enormous degree of overlap between many of the existing offences under the Theft Acts. Nearly every offence of obtaining property by deception, for example, and nearly every offence of handling, is also theft. It is the task of the prosecutor to select the offence that is most appropriate to the case. It seems most unlikely that any prosecutor would choose to charge the new "handling" offence, which would require proof not only of deception, theft or blackmail but also of an unreasonable failure to cancel the credit thus obtained, when the case could more conveniently and comprehensibly be put on the basis of the obtaining itself.

6.18 **We recommend the insertion into the Theft Act 1968 of a new section 24A, creating an offence of retaining a credit from a dishonest source, which would be committed where a credit made to an account**

(1) is the credit side of a money transfer obtained by deception, contrary to the new section 15A, or

(2) derives from theft, blackmail or an offence under the new section 15A, or from stolen goods,

and the keeper of the account, knowing or believing that the credit is wrongful, dishonestly fails to take reasonable steps to cancel it. (Recommendation 6)

Stolen goods

6.19 The new offence of retaining a credit from a dishonest source would be committed only where a credit is made to an account: it would not in itself catch those who dishonestly handle cash withdrawn from the account credited. Such conduct is, we believe, best left to the existing offence of handling stolen goods. In order to enable that offence to bite, **we recommend that any money dishonestly withdrawn from an account to which a wrongful credit has been made should, to the extent that it derives from that credit, be regarded as stolen goods. (Recommendation 7)**

Examples

6.20 It may be helpful to give some examples of how the rules we recommend would work.

(1) A, by deception, dishonestly obtains a transfer of funds from V's account into his own. A is guilty of obtaining a money transfer by deception, and also (unless he has an immediate change of heart and returns the money) of retaining a credit from a dishonest source – though we doubt that any sensible prosecutor would charge the latter, because it would be harder to prove[11] and would confuse a jury.

(2) A steals funds from V's account by transferring them into his own. (He may, for example, be authorised to draw on V's account.) A is guilty of theft[12] and also (unless he returns the money) of retaining a credit from a dishonest source.

(3) A blackmails V into transferring funds from V's account into his own. A is guilty of blackmail and also (unless he returns the money) of retaining a credit from a dishonest source.

(4) A, by deception, theft or blackmail, obtains a transfer of funds from V's account into B's. A is guilty of obtaining a money transfer by deception or of theft or blackmail (as the case may be). The credit to B's account is therefore wrongful. B is guilty of retaining a credit from a dishonest source if, knowing or believing the credit to be wrongful, she dishonestly fails to take reasonable steps to cancel it.

[11] It would require proof not only that A dishonestly obtained the funds by deception but also that he dishonestly failed to take reasonable steps to return them.

[12] Provided that V's account was in credit or, if it was overdrawn, V was entitled to make further withdrawals.

(5) A, by deception, theft or blackmail, obtains a transfer of funds from V's account into his own, and transfers the proceeds to B's. B's position is the same as in example (4). If B transfers the proceeds to C's account, the same rules apply in respect of C's liability; and so on, ad infinitum.

(6) A steals banknotes (or obtains them by deception or blackmail) and pays them into B's account. B, if she knows the circumstances but does not take steps to cancel the credit, is guilty of retaining a credit from a dishonest source.

(7) A obtains a money transfer by deception, theft or blackmail, withdraws the proceeds from his account and hands the cash to B. The cash is stolen goods. If B knows or believes this, she is guilty of handling.

(8) A obtains a money transfer by deception, theft or blackmail and transfers the proceeds to B's account. B dishonestly withdraws the proceeds and hands the cash to C. The cash is stolen goods, and C is guilty of handling if he knows or believes this. If he pays the cash into D's account, the credit is wrongful, and D is guilty of retaining a credit from a dishonest source if she knows or believes this but takes no steps to cancel it.

TERRITORIAL JURISDICTION

6.21 Handling stolen goods is one of the "Group A offences" under Part I of the Criminal Justice Act 1993, which extends the territorial jurisdiction of the English courts over a number of offences of dishonesty. We think that the same rules should apply to the new offence. **We recommend that the offence under section 24A should be included among the Group A offences listed in Part I of the Criminal Justice Act 1993. (Recommendation 8)**

SENTENCE

6.22 **We make no recommendation as to the maximum sentence** for the new offence of retaining a credit from a dishonest source.

RETROSPECTIVE EFFECT

6.23 We have already recommended that nothing done before the new section 15A comes into force, which would not have been an offence had that section not been enacted, should amount to an offence by virtue of that section;[13] and exactly the same considerations apply to the new offence of retaining a credit from a dishonest source. **We recommend that the new section 24A should apply only to wrongful credits made after it comes into force. (Recommendation 9)**

6.24 Since the obtaining of a money transfer by deception will not be an offence under the new section 15A if it is effected before the date on which the legislation comes into force, even a credit made *after* that date will not give rise to liability under the new section 24A, on the ground that it derives from a transfer obtained by deception, if that transfer took place *before* that date. If A dishonestly obtains a money transfer by deception on 31 March, the legislation comes into force on 1

[13] See para 5.36 above.

April, and B accepts a transfer of the funds on 2 April, B would not be guilty of an offence under section 24A because the transfer obtained by A was not an offence contrary to section 15A. B would, however, be guilty of an offence if the first transfer had been obtained by theft or blackmail, because the obtaining of a transfer in either of those ways is already an offence.

PART VII
SUMMARY OF RECOMMENDATIONS

OBTAINING A MONEY TRANSFER BY DECEPTION

A new offence

1. We recommend the insertion into the Theft Act 1968 of a new section 15A, creating an offence of dishonestly obtaining a money transfer by deception.

(paragraph 4.11)

Overdrafts

2. We recommend that, for the purposes of the new offence, it should be immaterial whether either of the accounts is overdrawn before or after the money transfer is effected.

(paragraph 5.11)

Payments by cheque

3. We recommend that the new offence should extend to payments made by cheque as well as those made electronically.

(paragraph 5.14)

Territorial jurisdiction

4. We recommend that the offence of obtaining a money transfer by deception should be included among the Group A offences listed in Part I of the Criminal Justice Act 1993.

(paragraph 5.19)

Retrospective effect

5. We recommend that nothing done before the new section 15A comes into force, which would not have been an offence had that section not been enacted, should amount to an offence by virtue of that section.

(paragraph 5.36)

HANDLING STOLEN GOODS

Retaining credits from dishonest sources

6. We recommend the insertion into the Theft Act 1968 of a new section 24A, creating an offence of retaining a credit from a dishonest source, which would be committed where a credit made to an account

   (1) is the credit side of a money transfer obtained by deception, contrary to the new section 15A, or

(2) derives from theft, blackmail or an offence under the new section 15A, or from stolen goods,

and the keeper of the account, knowing or believing that the credit is wrongful, dishonestly fails to take reasonable steps to cancel it.

(paragraph 6.18)

Stolen goods

7. We recommend that any money dishonestly withdrawn from an account to which a wrongful credit has been made should, to the extent that it derives from that credit, be regarded as stolen goods.

(paragraph 6.19)

Territorial jurisdiction

8. We recommend that the offence under section 24A should be included among the Group A offences listed in Part I of the Criminal Justice Act 1993.

(paragraph 6.21)

Retrospective effect

9. We recommend that the new section 24A should apply only to wrongful credits made after it comes into force.

(paragraph 6.23)

(Signed) MARY ARDEN, *Chairman*
ANDREW BURROWS
DIANA FABER
CHARLES HARPUM
STEPHEN SILBER

MICHAEL SAYERS, *Secretary*
18 September 1996

APPENDIX A
DRAFT THEFT (AMENDMENT) BILL

INDEX

This index shows where in the report each provision of the draft Bill, and of the sections that it would insert into the Theft Act 1968, is discussed.

Clause 1

Clause 1(1) inserts two new sections, 15A and 15B, in the Theft Act 1968. The discussion of sections 15A and 15B can be found as follows:

Clause 2

Clause 2(1) inserts a new section, 24A, in the Theft Act 1968. The discussion of section 24A can be found as follows:

Clause 3

Clause 4

See paras 1.6, 2.13 – 2.15, 3.47 – 3.50; Law Com No 228, paras 4.30 – 4.33 and Appendix A.

Clause 5

This clause deals with the short title and extent of the Bill. It is not discussed in the report.

DRAFT

OF A

B I L L

TO

Amend the Theft Act 1968 and the Theft Act 1978, and for connected purposes. A.D. 1997.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1.—(1) After section 15 of the Theft Act 1968 insert— Obtaining a money transfer by deception. 1968 c. 60.

"Obtaining a money transfer by deception.

15A.—(1) A person is guilty of an offence if by any deception he dishonestly obtains a money transfer for himself or another.

(2) A money transfer occurs when—

(a) a debit is made to one account,

(b) a credit is made to another, and

(c) the credit results from the debit or the debit results from the credit.

(3) References to a credit and to a debit are to a credit of an amount of money and to a debit of an amount of money.

(4) It is immaterial—

(a) whether the amount credited is the same as the amount debited;

(b) whether the money transfer is effected on presentment of a cheque or by another method;

(c) whether any delay occurs in the process by which the money transfer is effected;

(d) whether any intermediate credits or debits are made in the course of the money transfer;

(e) whether either of the accounts is overdrawn before or after the money transfer is effected.

(5) A person guilty of an offence under this section shall be liable on conviction on indictment to imprisonment for a term not exceeding [. . .] years.

Section 15A: supplementary.

15B.—(1) The following provisions have effect for the interpretation of section 15A of this Act.

(2) "Deception" has the same meaning as in section 15 of this Act.

(3) "Account" means an account kept with—

(a) a bank; or

(b) a person carrying on a business which falls within subsection (4) below.

(4) A business falls within this subsection if—

(a) in the course of the business money received by way of deposit is lent to others; or

(b) any other activity of the business is financed, wholly or to any material extent, out of the capital of or the interest on money received by way of deposit;

and "deposit" here has the same meaning as in section 35 of the Banking Act 1987 (fraudulent inducement to make a deposit).

1987 c. 22.

(5) For the purposes of subsection (4) above—

(a) all the activities which a person carries on by way of business shall be regarded as a single business carried on by him; and

(b) "money" includes money expressed in a currency other than sterling or in the European currency unit (as defined in Council Regulation No. 3320/94/EC or any Community instrument replacing it)."

(2) Nothing in this section has effect in relation to anything done before the day on which this Act is passed.

Retaining credits from dishonest sources, etc.

2.—(1) After section 24 of the Theft Act 1968 insert—

"Retaining credits from dishonest sources, etc.

24A.—(1) A person is guilty of an offence if—

(a) a wrongful credit has been made to an account kept by him or in respect of which he has any right or interest;

(b) he knows or believes that the credit is wrongful; and

(c) he dishonestly fails to take such steps as are reasonable in the circumstances to secure that the credit is cancelled.

(2) References to a credit are to a credit of an amount of money.

(3) A credit to an account is wrongful if it is the credit side of a money transfer obtained contrary to section 15A of this Act.

(4) A credit to an account is also wrongful to the extent that it derives from—

(a) theft;

(b) an offence under section 15A of this Act;

(c) blackmail; or

(d) stolen goods.

(5) In determining whether a credit to an account is wrongful, it is immaterial whether the account is overdrawn before or after the credit is made.

(6) A person guilty of an offence under this section shall be liable on conviction on indictment to imprisonment for a term not exceeding [. . .] years.

(7) Subsection (8) below applies for purposes of provisions of this Act relating to stolen goods (including subsection (4) above).

(8) References to stolen goods include money which is dishonestly withdrawn from an account to which a wrongful credit has been made, but only to the extent that the money derives from the credit.

(9) In this section "account" and "money" shall be construed in accordance with section 15B of this Act."

(2) This section applies to wrongful credits made on or after the day on which this Act is passed.

The new offences: jurisdiction.

3.—(1) In section 1(2) of the Criminal Justice Act 1993 (Group A offences for the purposes of the jurisdictional provisions) paragraph (a) (list of offences under the Theft Act 1968) shall be amended as follows.

1993 c. 36.

(2) After the entry relating to section 15 insert—

"section 15A (obtaining a money transfer by deception);".

(3) After the entry relating to section 22 insert—

"section 24A (retaining credits from dishonest sources, etc.);".

Application to loans of offence of obtaining services by deception.

4.—(1) In section 1 of the Theft Act 1978 (obtaining services by deception) after subsection (2) (circumstances where there is an obtaining of services) insert—

1978 c. 31.

"(3) Without prejudice to the generality of subsection (2) above, it is an obtaining of services where the other is induced to make a loan, or to cause or permit a loan to be made, on the understanding that any payment (whether by way of interest or otherwise) will be or has been made in respect of the loan."

(2) Nothing in this section has effect in relation to anything done before the day on which this Act is passed.

Short title and extent.

5.—(1) This Act may be cited as the Theft (Amendment) Act 1996.

(2) This Act extends to England and Wales only.

APPENDIX B
EXTRACTS FROM THE THEFT ACTS 1968 AND 1978

THEFT ACT 1968

Section 1: Basic definition of "theft"

(1) A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and "thief" and "steal" shall be construed accordingly …

(3) The five following sections of this Act shall have effect as regards the interpretation and operation of this section (and, except as otherwise provided by this Act, shall apply only for purposes of this section).

Section 3: "Appropriates"

(1) Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner …

Section 4: "Property"

(1) "Property" includes money and all other property, real or personal, including things in action and other intangible property …

Section 5: "Belonging to another"

(1) Property shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest) …

Section 6: "With the intention of permanently depriving the other of it"

(1) A person appropriating property belonging to another without meaning the other permanently to lose the thing itself is nevertheless to be regarded as having the intention of permanently depriving the other of it if his intention is to treat the thing as his own to dispose of regardless of the other's rights …

Section 15: Obtaining property by deception

(1) A person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, shall on conviction on indictment be liable to imprisonment for a term not exceeding ten years.

(2) For purposes of this section a person is to be treated as obtaining property if he obtains ownership, possession or control of it, and "obtain" includes obtaining for another or enabling another to obtain or to retain.

(3) Section 6 above shall apply for purposes of this section, with the necessary adaptation of the reference to appropriating, as it applies for purposes of section 1.

(4) For purposes of this section "deception" means any deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or any other person.

Section 16: Obtaining a pecuniary advantage by deception

(1) A person who by any deception dishonestly obtains for himself or another any pecuniary advantage shall on conviction on indictment be liable to imprisonment for a term not exceeding five years.

(2) The cases in which a pecuniary advantage within the meaning of this section is to be regarded as obtained for a person are cases where –

(a) *[Repealed]*

(b) he is allowed to borrow by way of overdraft, or to take out any policy of insurance or annuity contract, or obtains an improvement of the terms on which he is allowed to do so; or

(c) he is given the opportunity to earn remuneration or greater remuneration in an office or employment, or to win money by betting.

(3) For purposes of this section "deception" has the same meaning as in section 15 of this Act.

Section 17: False accounting

(1) Where a person dishonestly, with a view to gain for himself or another or with intent to cause loss to another, –

(a) destroys, defaces, conceals or falsifies any account or any record or document made or required for any accounting purpose; or

(b) in furnishing information for any purpose produces or makes use of any account, or any such record or document as aforesaid, which to his knowledge is or may be misleading, false or deceptive in a material particular;

he shall, on conviction on indictment, be liable to imprisonment for a term not exceeding seven years.

(2) For purposes of this section a person who makes or concurs in making in an account or other document an entry which is or may be misleading, false or deceptive in a material particular, or who omits or concurs in omitting a material particular from an account or other document, is to be treated as falsifying the account or document.

Section 20: Suppression etc of documents

(2) A person who dishonestly, with a view to gain for himself or another or with intent to cause loss to another, by any deception procures the execution of a valuable security shall on conviction on indictment be liable to imprisonment for a term not exceeding seven years; and this subsection shall apply in relation to the making, acceptance, indorsement, alteration, cancellation or destruction in whole or in part of a valuable security, and in relation to the signing or sealing of any paper or other material in order that it may be made or converted into, or used or dealt with as, a valuable security, as if that were the execution of a valuable security.

(3) For purposes of this section "deception" has the same meaning as in section 15 of this Act, and "valuable security" means any document creating, transferring, surrendering or releasing any right to, in or over property, or authorising the payment of money or delivery of any property, or evidencing the creation, transfer, surrender or release of any such right, or the payment of money or delivery of any property, or the satisfaction of any obligation.

Section 21: Blackmail

(1) A person is guilty of blackmail if, with a view to gain for himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces; and for this purpose a demand with menaces is unwarranted unless the person making it does so in the belief –

(a) that he has reasonable grounds for making the demand; and

(b) that the use of the menaces is a proper means of reinforcing the demand. …

Section 22: Handling stolen goods

(1) A person handles stolen goods if (otherwise than in the course of the stealing) 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.

(2) A person guilty of handling stolen goods shall on conviction on indictment be liable to imprisonment for a term not exceeding fourteen years.

Section 24: Scope of offences relating to stolen goods

(1) The provisions of this Act relating to goods which have been stolen shall apply whether the stealing occurred in England or Wales or elsewhere, and whether it occurred before or after the commencement of this Act, provided that the stealing (if not an offence under this Act) amounted to an offence where and at the time when the goods were stolen; and references to stolen goods shall be construed accordingly.

(2) For purposes of those provisions reference to stolen goods shall include, in addition to the goods originally stolen and parts of them (whether in their original state or not), –

(a) any other goods which directly or indirectly represent or have at any time represented the stolen goods in the hands of the thief as being the proceeds of any disposal or realisation of the whole or part of the goods stolen or of goods so representing the stolen goods; and

(b) any other goods which directly or indirectly represent or have at any time represented the stolen goods in the hands of a handler of the stolen goods or any part of them as being the proceeds of any disposal or realisation of the whole or part of the stolen goods handled by him or of goods so representing them.

(3) But no goods shall be regarded as having continued to be stolen goods after they have been restored to the person from whom they were stolen or to other lawful possession or custody, or after that person and any other person claiming through him have otherwise ceased as regards those goods to have any right to restitution in respect of the theft.

(4) For purposes of the provisions of this Act relating to goods which have been stolen (including subsections (1) to (3) above) goods obtained in England or Wales or elsewhere either by blackmail or in the circumstances described in section 15(1) of this Act shall be regarded as stolen; and "steal", "theft" and "thief" shall be construed accordingly.

Section 34: Interpretation

(1) Sections 4(1) and 5(1) of this Act shall apply generally for purposes of this Act as they apply for purposes of section 1.

(2) For purposes of this Act –

…

(b) "goods", except in so far as the context otherwise requires, includes money and every other description of property except land …

THEFT ACT 1978

Section 1: Obtaining services by deception

(1) A person who by any deception dishonestly obtains services from another shall be guilty of an offence.

(2) It is an obtaining of services where the other is induced to confer a benefit by doing some act, or causing or permitting some act to be done, on the understanding that the benefit has been or will be paid for.

Section 2: Evasion of liability by deception

(1) Subject to subsection (2) below, where a person by any deception-

(a) dishonestly secures the remission of the whole or part of any existing liability to make a payment, whether his own or another's; or

(b) with intent to make permanent default in whole or in part on any existing liability to make a payment, or with intent to let another do so, dishonestly induces the creditor or any person claiming payment on behalf of the creditor to wait for payment (whether or not the due date for payment is deferred) or to forgo payment; or

(c) dishonestly obtains any exemption from or abatement of liability to make a payment;

he shall be guilty of an offence.

(2) For purposes of this section "liability" means legally enforceable liability; and subsection (1) shall not apply in relation to a liability that has not been accepted or established to pay compensation for a wrongful act or omission.

(3) For purposes of subsection (1) (b) a person induced to take in payment a cheque or other security for money by way of conditional satisfaction of a pre-existing liability is to be treated not as being paid but as being induced to wait for payment.

(4) For purposes of subsection (1) (c) "obtains" includes obtaining for another or enabling another to obtain.

APPENDIX C
LIST OF INDIVIDUALS AND ORGANISATIONS WHO COMMENTED DIRECTLY OR INDIRECTLY ON OUR PROVISIONAL PROPOSALS

Lord Alexander of Weedon QC

Mr Anthony Arlidge QC

Professor Andrew Ashworth FBA

Association for Payment Clearing Services

Bank of England, Legal Unit

Barclays Bank PLC

Lord Bingham of Cornhill, the Lord Chief Justice

Mr William Blair QC

British Bankers' Association

Lord Justice Brooke

Building Societies Commission

Mr Justice Buxton

Mr David Calvert-Smith

City of London Police

Council of Mortgage Lenders

Criminal Bar Association

Crown Prosecution Service

Judge Rhys Davies QC, Recorder of Manchester

Judge Neil Dennison QC, Common Serjeant of London

Department of Health and Social Security, Office of the Solicitor

Department of Trade and Industry, Investigations and Enforcement Directorate

Lord Donaldson of Lymington

Mr Anthony Edwards

Judge Fawcus, President of HM Council of Circuit Judges

Financial Law Panel

Lord Goff of Chieveley

Professor Edward Griew

Lord Hoffmann

Mr Bruce Houlder QC

Home Office

Inland Revenue, Solicitor's Office

Lord Irvine of Lairg QC

Mr Justice Jowitt

Lloyd's TSB Group PLC

Lord Chancellor's Department

Ministry of Agriculture, Fisheries and Food, Legal Department

Mr Justice Mitchell

National Westminster Bank PLC

Office of Fair Trading

Judge Christopher Pitchers

Judge Rivlin QC

Mr Jeremy Roberts QC

Lord Justice Rose

Securities and Investment Board

Serious Fraud Office

Mr Kuldip Singh QC

Professor A T H Smith

Professor Sir John Smith CBE QC FBA

Her Majesty's Treasury

Judge Sir Laurence Verney TD DL, Recorder of London

Professor Martin Wasik