

Conspiracy

This section deals with:

- Conspiracy to commit an offence under s1 Criminal Law Act 1977 (“CLA 77”); [\[link\]](#) and
- Conspiracy to defraud under the common law [\[link\]](#).

Statutory conspiracy

The offence of conspiracy to commit an offence under s1 CLA 77 is established if a person agrees with another person[s] that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either:

- (a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement; or
- (b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible.

Penalty for statutory conspiracy

The penalties for conspiracy to commit an offence mirror the sentence of the statutory offence which was the object of the conspiracy.

Conspiracy to defraud

The offence of conspiracy to defraud was preserved as a common law offence by s5(2) CLA 77 [\[link\]](#).

Definition of Conspiracy to Defraud

‘...“to defraud” ordinarily means....to deprive a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud be entitled’, *Scott v Metropolitan Commissioner* [1975] AC 819.

“with intent to defraud” means “with intent to practice a fraud” on someone or other....If anyone may be prejudiced in any way by the fraud, that is enough’, *Welham v DPP* [1961] AC 103.

Penalty for conspiracy to defraud

S12(3) Criminal Justice Act 1987 (“CJA 87”) provides that a person found guilty of conspiracy to defraud is liable on conviction on indictment to imprisonment for a term not exceeding 10 years or a fine or both.

Elements of Conspiracy

Conspiracy is an “inchoate” offence which means that the offence lies in the agreement **[link]** that is reached, rather than what is actually done to carry out the agreement itself.

Agreement

A conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act by unlawful means. When the parties to the conspiracy enter into the agreement the offence of conspiracy is complete. It is not necessary for any action to be performed in pursuance of it, *Mulcahy v R* (1868) LR 3 HL 306.

If no agreement is reached then a charge of conspiracy will fail. Once the agreement is made it is no defence to a charge of conspiracy that the agreement was never carried out, *R v Thomson* (1966) 50 Cr.App.R 1. Even withdrawal from the agreement will only count towards mitigation, *R v Gortat and Pirog* [1973] Crim.L.R. 648.

There is no need to show that co-conspirators know the identity of the other conspirators, only that they knew there were other parties to the agreement.

The agreement may extend to more than one objective:

- If the allegation involves an agreement to commit two or more specific offences, it will be necessary to prove that the agreement extended to all the offences alleged, as each offence will be an essential element of the conspiracy, *R. v. Roberts* [1998] 1 Cr.App.R. 441;
- Where a conspiracy to defraud alleges an agreement to achieve two or more particular objectives, it will be necessary to prove each objective as an essential element of the offence, *R. v. Bennett (Sharon)*, unreported, May 6, 1999, CA (9802782 Z3).

Intent

The prosecution must prove an intention by the parties to enter into the agreement to do an unlawful act, with an intention by the parties “*of playing some part in the agreed course of conduct in furtherance of the criminal purpose which the agreed course of conduct was intended to achieve. Nothing less will suffice; nothing more is required*” per Lord Bridge in *R v Anderson (William Ronald)* [1986] AC 27.

In *Anderson* it was stated that for a statutory conspiracy it is unnecessary to prove that a conspirator intended that the criminal offence or offences that will necessarily be committed if the agreed course of conduct is fully carried out, should in fact be committed. Thus, for a statutory conspiracy, a conspirator need not know that the outcome of what is intended will be a crime.

Conspiracy to do the impossible

A statutory conspiracy under s1 CLA 77 can be committed even if facts not known to the parties render the commission of the offence impossible.

An agreement to do the impossible is a defence to conspiracy at common law, *DPP v Nock* [1978] AC 979.

Deception

Deceit is not a necessary ingredient to a charge of conspiracy, *Scott v Metropolitan Police Commissioner* [1975] AC 815.

Dishonesty

In *R v Ghosh* 1982 QB 1053 the Court of Appeal considered that the test to determine whether the prosecution has proved that the defendant was acting dishonestly had two stages:

1. A jury must first decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, dishonesty cannot be established and the prosecution must fail.
2. If it is dishonest by the ordinary standards of reasonable and honest people the jury must then consider whether the defendant himself must have realised that what he was doing was by those standards dishonest.

It is dishonest for the defendant to act in a way which he knows ordinary people consider dishonest, even if he believes that that it was not dishonest or he was morally justified in acting as he did.

Parties to a conspiracy

Different verdicts for participants

It is possible for a jury to reach different verdicts for two defendants charged with a conspiracy even where the defendants were the only two parties to the conspiracy, although identical verdicts should be reached if there is no real

difference in the admissible evidence against the two. If there is and the evidence is critical, it must be explained to the jury how different verdicts can be reached. *R v Testouri* [2004] 2 Cr.App.R 4.

Company as conspirator

A company can be convicted of a conspiracy (See *R v I.C.R Haulage & Co Ltd* [1944] K.B. 551) although the company cannot conspire with a sole person responsible in the company and acting for the company for the offence charged, as they are treated as the same person.

Husband & Wife

A husband and wife cannot be guilty of a conspiracy if they are the only two parties to the agreement.

Children

A person cannot conspire with a person under the age of criminal responsibility if they are the only other party to the agreement, s2.2(b) CLA 77 [\[link\]](#).

Victims

A person cannot conspire with the intended victim of the offence if the only other party to the conspiracy is the victim of the offence, s2.2(c) CLA 77 [\[link\]](#).

Jurisdiction

A conspiracy between a person in England and a person abroad to commit an offence in the England can be prosecuted in England.

At common law, a conspiracy to commit a crime abroad cannot be prosecuted in England if the purpose of the conspiracy is to defraud abroad, even if there would be, for example, incidental loss or damage to a company or individual in England as a result of the damage abroad, *AG's Reference (No.1 of 1982)* [1983] QB 751.

For statutory conspiracy, jurisdiction relating to a conspiracy to commit a crime abroad is governed by s1A CLA 77.

A conspiracy abroad to commit an offence in England or Wales is within the jurisdiction, even if nothing is done to further the conspiracy.

Charging Practice

Conspiracy to defraud is wider than statutory conspiracy under the CLA 77. It catches behaviour that might not be an offence if done by one person but which becomes an offence if two or more people agree to do it.

The Law Commission Report on Fraud [2002] at www.lawcom.gov.uk considered that the circumstances where conspiracy to defraud only can be charged fall within two categories:

- conduct which involves deception but is not covered by existing deception offences;
- conduct which does not involve deception but involves a view to gain or an intent to cause loss.

Examples of conduct amounting to conspiracy to defraud but not statutory conspiracy under the CLA 77 identified by the Law Commission include:

- Deception which obtains a benefit which does not count as property, services or any of the other benefits defined in the Theft Acts;
- Deception which does not obtain a gain, or cause a loss, but which prejudices another's financial interests;
- Deception which causes a loss and obtains a directly corresponding gain, where the two are not the same property (other than a transfer of funds between bank accounts);
- Deception which causes a loss and obtains a gain where the two are neither the same property nor directly correspondent;
- Deception for a non financial purpose;
- Deception to gain a temporary benefit;
- Deceptions which do not cause the obtaining of a benefit;
- Making a secret gain or causing a loss by abusing a position of trust or fiduciary duty;
- Obtaining a service by giving false information to a machine;
- "Fixing" an event on which bets have been placed;
- Dishonestly failing to fulfil a contractual obligation;
- Dishonestly infringing another's legal right.

Which conspiracy to charge

There is some overlap between the common law conspiracy to defraud and conspiracy to commit a substantive offence.

There is also overlap between the conspiracy offences and the commission of a substantive offence or offences. S12 CJA 87 provides that a conspiracy to defraud may be charged even if the conduct agreed upon will involve the commission of a substantive offence.

In choosing the appropriate charge, the prosecutor must consider:

- whether any substantive offences have been committed; and, if so;
- whether they accurately reflect the gravity of the conspiracy as a whole.

Conspiracy to commit a substantive offence should be charged if the agreement satisfies the definition under s1 CLA 77, [\[link\]](#) provided there is no wider dishonest objective that would be important to the presentation of the prosecution case in reflecting the justice of the case.

Conspiracy to defraud will commonly be charged:

- if there is doubt that a substantive offence would be committed if the dishonest agreement were to be carried out in accordance with the parties' intentions;
- if there is doubt that a substantive offence has occurred as a result of a dishonest agreement between the parties;
- when any substantive offences are no more than steps in the achievement of a wider dishonest objective and a single count of conspiracy to defraud will allow the prosecution to concentrate on that objective;
- where the object of the conspiracy was to swindle a large number of people and a conspiracy to commit a substantive offence does not meet the justice of the case;
- where there is a course of conduct which involves the conspirators undertaking different and distinct aspects of the fraud which renders the use of a statutory conspiracy charge impractical.

Practice Direction

The Practice Direction dated 9th May 1977 (1977) 2 AER 540 states that where an indictment contains counts alleging substantive offences and a related conspiracy count, the prosecution must justify the joinder or be required to elect to proceed on the substantive or conspiracy counts. Failing justification the Crown should be required to elect whether to proceed on the substantive counts or the conspiracy counts. A joinder is justified for this purpose if the judge considers that the interests of justice demand it.

Where substantive counts meet the justice of the case, representing the overall criminality, a conspiracy count will rarely need to be added.

Before a prosecutor lays an additional conspiracy count he should give consideration to the risk of the trial being lengthy and complicated or otherwise causing unfairness to the defence.