

## Spotlight on Fraudulent Debts

The general offence of fraud is defined within the Fraud Act 2006, when previous offences such as “obtaining a pecuniary advantage by deception” were repealed. The aim was to make fraud offences simpler to identify, and three main types are outlined in the [s1 of the Fraud Act 2006](#):

- Fraud by false representation
- Fraud by failing to disclose information
- Fraud by abuse of position

S111A Social Security Administration Act 1992 provides an additional offence of “dishonest representations”, more on this below.

## Fraud and personal insolvency

Debtors remain liable for debts incurred through fraud upon discharge from bankruptcy or the end of the moratorium period for a debt relief order. The debtor need not have been convicted of an offence, the [Insolvency Service Technical Manual](#) states that fraud in the context of these provisions “*has simply to be proved in the common law sense, and is intended to refer to debts tainted by actual dishonesty*”.

## S281(3) Insolvency Act 1986

*“Discharge does not release the bankrupt from any bankruptcy debt which he incurred in respect of, or forbearance in respect of which was secured by means of, any fraud or fraudulent breach of trust to which he was a party.”*

According to Muir Hunter on Personal Insolvency, the Insolvency Service apply the “common law” three step test in *Derry v Peek [1889] UKHL 1*. In this case, which despite its age is still a leading case, a defendant has made a fraudulent statement if s/he:

- Knows the statement to be false, or
- Does not believe in the statement, or
- Is reckless as to the truth.

This may cover debts incurred because a debtor has forged a partner’s signature or given false information about their personal circumstances in order to obtain credit, has put another person’s PIN into a cash machine or is liable for court costs as a result of giving false evidence. An intention to make a gain (or loss to another) must be shown, but the gain or loss does not have to have occurred.

### **Benefit Fraud**

The most common fraudulent debts encountered by debt advisers are benefit overpayments. The DWP issued guidance in March 2009 about how it defines fraud for subsidy purposes, rather than relying on the common law test (although the principles are the same). This can be found in HB/CTB Circular G5/2009 and is summarised below.

Advisers may be confronted with cases where clients have incurred a significant overpayment of benefits, and the relevant agency has issued a notice of a recoverable overpayment. Where the DWP or local authority open an investigation and find insufficient evidence of fraud we can advise confidently about how the overpayment will be treated in formal insolvency. Otherwise, we cannot say for sure that the debtor will be released from liability upon discharge, and in fact the perception may be that bankruptcy could incentivise the DWP to pursue a prosecution.

Where a prosecution is sought for benefit fraud it will usually be because the claim was illegitimate from the start or became so due to a change in circumstances. A domestic partner can also be charged if he or she knew about the fraudulent claim. Strict adherence to the [public interest test](#) should be followed by the prosecuting authority and requires consideration of the seriousness of the crime, the level of culpability as well as the circumstances of the case.

Advisers should be aware of the following:

- A notice of a recoverable overpayment is not a decision in respect of fraud. A benefits agency may take up to a year to commence proceedings, or three months since the evidence was available (whichever is later)
- Acceptance of an administrative penalty section 115A of the Social Security Administration Act (penalty as an alternative to prosecution) and the agreement has not been withdrawn is sufficient evidence of fraud for the purpose of insolvency

- Acceptance of a caution is sufficient evidence of fraud, although the DWP have not used formal cautions since April 2012
- Where a civil penalty has been accepted by a claimant, the agency is barred from pursuing other options unless new evidence comes to light
- S111A Social Security Administration Act 1992 includes a dishonesty offence. [Ives v Genting Casinos \[2017\] UKSC 67](#) overturned the “Ghosh test”, meaning the dishonesty need not be deliberate, it is an objective rather than a subjective test.

There are a number of factors which will increase the likelihood of a prosecution. These include deliberately providing false information and organising the fraud so it will be harder to spot, e.g. opening a separate bank account for benefits to be paid in.

The Specialist Debt Advice Service (SDAS) recommend specialist benefits advice is taken by anyone accused of or worried about a fraudulent overpayment. For fraud offences, a criminal solicitor may be required as the offence can result in a custodial sentence of up to 7 years. SDAS can help you to identify where a debt may be payable after discharge from personal insolvency due to its fraudulent nature.