

The Fraud Act 2006 and University Managers – 10 years in prison?

The Fraud Act 2006 (hereafter FA06) creates several very wide offences, each carrying a maximum term of ten years. Here is how a university's treasured VC and/or Director of Marketing, perhaps even its entire Senior Management Team (SMT), might be easily despatched to the nearest prison...

Let us assume that the University (say, Coketown Met, hereafter CM) refers in its recruitment materials to 'the graduate premium' (GP) in a simplistic way – such as: 'Heck 'Going to Uni' is a no-brainer because you will earn around £100,000 more over your life-time than your mates who went from A-levels straight into work - it's a fantastic financial investment...'. CM does not usefully provide any small-print spelling out that this figure is merely a crude national average based on huge variations according to the specific course, the brand-value of the university, and the socio-economic background as well as cultural capital of the graduates concerned. And CM is also vague as to whether the figure is calculated before or after allowing for the paying-off of student loans now typically approaching £45-50k for an undergraduate degree; the cost of serving such debt then virtually doubles due to the interest levied over the decades of debt. Nor does CM reveal very recent data which it probably now has and which in its case shows many of its grads have a much lower GP, even a negative one - and, seemingly, universities are refusing to release their embarrassing data under Freedom of Information Act (FOIA) enquiries on the basis that it is exempt as commercially sensitive; while data gathered by one agency nationally is apparently available to the specific university but not revealed to a third-party on the basis that to do so would, allegedly, contravene the university's Data Protection Act (DPA) rights.

Under s2 FA06 ('fraud by false representation') it is an offence for CM to make an express or implied representation (including by way of an omission to provide relevant information) that is untrue or

misleading – this is the actus reus, actuality, of the offence. And the mens rea, required state of mind or intention, of the offence requires that CM also: a) knew the representation was false (in that it was untrue or was misleading) or knew that it might be false (including probably by shutting its eyes as to the possibility); and b) acted dishonestly in making this false representation; and c) intended thereby to make a gain (lure in customers and their tuition fees?) or cause a loss (or expose somebody to a risk of loss – not getting the GP the applicant might hope for?). One doubts with respect to this last bit that even the most cynical SMT acting on behalf of its U would plot to defraud students in the sense of knowingly seeking or intending to cause a financial ‘loss’ for them or engender the ‘risk’ of such; but filling places and thereby raking in fees as a ‘gain’ will doubtless be the driver of the marketing strategy.

Unpacking the rest of the above: the representation about the wondrous GP created by the delights of HE is probably express, and it may be implied that it applies to CM as seemingly everywhere else; failing to qualify the broad assertion also probably makes it a representation by omission; referring to the national average GP may not in itself be untrue but it is misleading. The actus reus is complete? As for the mens rea, as for intent: CM could by now know (and hence be fending probing questions by invoking the FOIA or DPA as above) that for it the average GP may well be lower and actual GPs very much lower for some, even many, of its courses; hence it should know it is risking delivering a misleading and hence false representation. And CM is, arguably, being dishonest in that, applying the first limb of the *Ghosh* test re honesty in criminal law, most folk would think it dodgy to be focussing on this national average GP figure if/when detailed CM data is available (the honestly being judged ‘according to the ordinary standards of reasonable and honest people’ – the jury). It is only when applying the second limb that our beloved SMT colleagues might get off: ‘Did the defendant [CM] realise that reasonable and honest people regard what [it] did as dishonest?’ (the jury might just accept that

the group-think and deteriorating integrity of CM's SMT in the context of commodified, commercialised, and competitive modern HE was such that its members did not realise how dodgy their behaviour had become!).

Under s3 FA06 there can also be the offence of fraud by dishonestly failing to disclose information where CM is legally obliged to do so and thereby intends to make a gain or cause/risk a loss. The issue of dishonesty is as above, as is the idea of gain/loss; and the question of whether CM is under a legal duty to disclose depends on whether under the Consumer Protection from Unfair Trading Regulations 2008 (hereafter CPRs; as strengthened in 2014) a U is required to reveal its GP details lest otherwise it commits an offence as a 'trader' by way of 'misleading actions' that can include 'misleading omissions' in not supplying 'material information' that the 'average consumer' should have to be able to take an 'informed transactional decision'. As with the FA06 a criminal offence is committed – with a maximum prison term of two years; and also the student-consumer victims get the right under the CPRs to sue U for damages covering fee refunds, distress/inconvenience, and consequential losses: such a class-action by whole cohorts of aggrieved customers could be costly if CM loses! And CM might also be under a legal obligation to disclose via the FOIA?

Now if CM is guilty under s2 or s3 FA06 it can only be fined since a 'legal person' as an institution can't go to prison; but the 'natural' persons involved can under s12 FA06 since the CM's offence can only have 'been committed with the consent and connivance' of senior managers, meaning they too are guilty and it is they (as also under the CPRs re the two years) who do the ten years porridge. As for evidence, it is no use now deleting all those SMT emails about the newly-emerging GP data if the Police start to show interest or a civil action is launched requiring disclosure – to do so is itself another offence; and obviously the Police under the FA06 but also Trading Standards under the CPRs can get a warrant to enter the Admin Bunker and search for, and seize, evidence.

And, of course, whatever the Law may say, surely the any university has anyway a clear moral duty to share with the young folk about to become its students and to incur getting on for £100k of HE debt (the next biggest lifetime financial decision after eventually buying a home) the detailed data it has on the GP for its degree courses? If, however, sadly the institution lacks a moral compass, it should still be concerned about the reputational damage of a publicised dawn-raid on the VC's executive suite...

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