

IN THE CROWN COURT IN NORTHERN IRELAND

BELFAST CROWN COURT

THE QUEEN

-v-

THOMAS JAMES FOX, RICHARD THOMAS FOX
ANTHONY MICHAEL FOX, PATRICK JAMES MARKEY,
LEONARD HENRY WARWICK AND KATHLEEN BRIDGET FOX

(RULING No 2-ABUSE OF PROCESS)

HART J

[1] Kathleen Fox, who is the mother of Richard Thomas Fox, is jointly charged with Richard Fox on three counts of obtaining a money transfer by deception, contrary to Section 15A of the Theft Act (Northern Ireland) 1969. Counts 93, 94 and 96 respectively allege that she dishonestly obtained for herself money transfers in the sum of £100,000, £20,000 and £30,000 from HBOS UK Plc by deception. In each case the application was to re-mortgage her house at 70 Orritor Road, Cookstown and the deception in each case was that she represented that she was self-employed with PDMS Property Development, that in 2005 her share of the profits was £38,520, and in 2006, was £51,240, and these representations were known to her be untrue.

[2] Mr Irvine (who appears with Mr Duffy for the defendant) submitted that the court should grant a stay on the grounds of an abuse of process by the prosecution on the basis that the prosecution had “moved the goal posts” by serving additional evidence after committal which, he argued, said that the prosecution were now presenting a different case against Bridget Fox to that which had been originally made upon the committal papers. As a consequence, he continued, the prosecution were guilty of an abuse of process.

- (i) By serving additional evidence and thereby making a new case against the defendant.

- (ii) In doing so attempting to reconstruct the prosecution case against the defendant.
- (iii) Compounding (i) and (ii) by the delay which elapsed before the additional evidence was served.
- (iv) Because of these matters the defendant was prevented from making what he submitted would have been a successful application to dismiss the case, either at committal or before arraignment.

[3] The documents upon which the prosecution rely in support of the charges relating to each of these three misrepresentations are documents which it was admitted by Bridget Fox in interview that she had signed, namely what is described as a Standard Declaration sent to her by Birmingham Midshires (the subsidiary of HBOS to whom the applications were made in each instance) and which contain a statement that, inter alia:

“That if I/we provide any false, inaccurate or misleading information it may constitute a criminal offence on my/our part, which may lead to a criminal prosecution, and imprisonment and/or a fine.”

[4] It is common case that this document was generated by Birmingham Midshires and sent to the defendant after a mortgage application form had been completed. In each instance the mortgages were provided under what is described as a self-certification scheme, and the application forms were generated “on-line” by a Mrs Karen Scullion of Point 2 Mortgages, who is a mortgage advisor. It would appear from the exhibits in this case that in each instance the on-line application form had a number of boxes, and it was necessary to select the appropriate answer for the relevant box. The applications forms were completed to state that in each instance the applicant, Bridget Fox, had been seen “face to face” by Karen Scullion. Karen Scullion had not made a witness statement at the time of the committal, and therefore the case against Bridget Fox was based, in part at least, upon the inferences which understandably were drawn from the on-line application form which purported to state that there had been a face to face meeting between Karen Scullion and Bridget Fox in relation to each of the three mortgage applications.

[5] It is now known that that was not the case because Karen Scullion made a witness statement dated 3 July 2008, and in that statement confirms that what occurred on each occasion was that Richard Fox came to see her. He had been referred to her, and he explained that a re-mortgage was being sought on his mother’s home for £100,000. He produced the necessary documents and details to enable the application form to be completed, and Karen Scullion states that included “copies of his mother’s driving licence, birth certificate and passport and electric bill.” The procedure was for the completed application form to be submitted to Birmingham Midshires on

line, and they then forwarded to Karen Scullion the declaration form to which I have already referred, and which she said she posted to Kathleen Fox in each instance.

[6] When questioned by the police Bridget Fox denied ever having met Karen Scullion and whilst she accepted that she signed the declaration form, denied all knowledge of the manner in which the details were conveyed to Karen Scullion by her son, although she accepted that the details contained as to her income and employment status were untrue. It only emerged after Karen Scullion's statement of additional evidence was served on the defence that the assertion in the on-line application forms in each case that there had been a face to face meeting between Bridget Fox and Karen Scullion was incorrect. Mr Irvine bases his submission upon that change in the prosecution case.

[7] There has undoubtedly been a change in the nature of the evidence upon which the prosecution seek to rely as showing that Bridget Fox was complicit in making these dishonest mortgage applications. Apart from any other evidence there might be, clearly the absence of a face to face meeting between Karen Scullion and Bridget Fox at which Bridget Fox's details were conveyed to Karen Scullion makes it more difficult for the prosecution to invite the tribunal of fact to draw the necessary inference that Richard Fox was misrepresenting his mother's position as the applicant for the mortgage with her knowledge and consent.

[8] Nevertheless, I am quite satisfied that even on the basis that there was no face to face meeting there is sufficient evidence to justify Bridget Fox being put on trial on each of these three charges. By her signature upon the Standard Declaration forms she was expressly representing the details on the mortgage application form submitted on her behalf by her son through Karen Scullion were correct. Whilst Bridget Fox asserts that she did not know what these details were, in my view a tribunal of fact would be perfectly entitled, in the absence of any other information, to infer that there was a prima facie case that Bridget Fox knew perfectly well what applications were being made when she received a total of £150,000 on foot of mortgage applications which she had signed. It is not necessary for me at this stage to go any further than that for reasons which will become apparent later in this judgment when I deal with the nature of Mr Irvine's application in relation to the committal proceedings and a possible No Bill application.

[9] There is however a difference in the evidence presently available between count 93, which relates to the first application which resulted in the payment of £100,000, and count 94, which relates to the second payment of £20,000, and count 96 which relates to the third payment of £30,000. Insofar as the first payment is concerned, the prosecution have also served a notice of additional evidence by Patricia Mary Blaney, solicitor of Blaney and

Diamond, solicitors, Magherafelt. The conveyancing file to which she testifies contains a number of documents relating to an application in respect of which she acted on behalf of Kathleen Fox. At page 76 there is what appears to be a handwritten personal attendance note with Kathleen Fox which states "Went through title and mortgage offer with her". "She'll drop in copy of driving licence." "She wants us to forward balance funds to Cullen McAleer O'Neill (Richard Fox's solicitors) after completion". At page 93 there appears a Birmingham Midshires mortgage offer produced on 2 November 2005 making an offer to Kathleen Fox. It states that her declared income was £38,520. At page 99 paragraph 4 it states:

"If you are in any doubt at all about the information that has been provided on the application form or elsewhere, you must immediately notify us ..."

At paragraph 5 there is a further warning as to the consequences of making a false, misleading or inaccurate declaration.

[10] That these documents appear in the conveyancing file of the solicitor acting for Kathleen Fox provides substantial additional evidence that Kathleen Fox, despite her contrary assertions to the police during interview, was aware of many of the details relating to this application for a re-mortgage of £100,000, and the tribunal of fact could properly infer that she was a party to the provision of misleading information to Birmingham Midshires through her son Richard Fox making untrue assertions on her behalf to Karen Scullion, and producing documents to Karen Scullion to vouch her application which he must have received from her.

[11] Mr Mooney submitted that whilst there was no such evidence in relation to the other two counts, application would be made to the trial judge to permit that information in relation to count 93 to be relied upon in support of counts 94 and 96. That would be a matter for the trial judge to determine, but at this stage I consider it appropriate to view the evidence in this case upon the basis that there is sufficient evidence on those counts to show that, contrary to her denials, Kathleen Fox was complicit in the provision of misleading information through her son to Karen Scullion and hence to Birmingham Midshires.

[12] I have referred to the nature of the evidence, and whether it gives rise to a prima facie case, because part of Mr Irvine's argument is that by not producing this evidence prior to committal the prosecution deprived Kathleen Fox of the ability to argue that there was insufficient evidence to justify her being put on trial, either at the committal or before arraignment. He perfectly justifiably submits that the documents as they were then suggested that there had been a face to face meeting between Kathleen Fox and Karen Scullion. Nevertheless, for the reasons I have already given, any

application to the district judge or at the No Bill stage that there was insufficient evidence that she had made dishonest representations was bound to fail.

[13] A further point which Mr Irvine has advanced is that although he concedes that the prosecution are entitled to serve notices of additional evidence after committal, he argues that by doing so in the present case the prosecution have “moved the goal posts”. I do not agree. The prosecution are entitled to serve a notice of additional evidence and it is common for the strength of the prosecution case to change as it proceeds to trial. When further evidence is forthcoming it almost always strengthens parts of the prosecution case. There is no obligation upon the prosecution to serve each and every piece of evidence upon which they seek to rely at the trial before the committal, although it is desirable that not merely enough evidence to make clear the nature of the allegation against the accused is served, but as much as possible of the evidence which the accused will have to meet is served at that stage so that the defence are properly informed of all of the evidence which they have to meet.

[14] In the present case I do not consider that either the additional evidence itself, or the time at which it was served by the prosecution, can be regarded as being one of those exceptional cases where a stay should be granted on the grounds of an abuse of process. It is unnecessary for me to rehearse the principles upon which a stay on the grounds of an abuse of process should be granted that I set out in my judgment of 3/4/2009 in R v Sandhu. It is sufficient to state that in the present case the course adopted by the prosecution was a proper one and I do not consider that the defendant has established that she cannot receive a fair trial. The nature of the additional evidence is such that the defendant will have ample time to consider her response to this evidence before the trial.

[15] As will be apparent from my ruling on the misjoinder application by Richard Fox I held that the charges against him and against Kathleen Fox have been misjoined in this indictment. There will therefore be an inevitable further delay before Kathleen Fox stands trial on these charges and there will be ample time for her advisors to consider with her how they respond to the evidence of, inter alia, Karen Scullion, and the application for a stay on the grounds for an abuse of process by Kathleen Fox is accordingly dismissed.