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Judgment: approved by the Court for handing down | *Delivered:* **24/4/2009**

*(subject to editorial corrections)**

IN THE CROWN COURT IN NORTHERN IRELAND

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BELFAST CROWN COURT

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THE QUEEN

-v-

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

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(RULING No 3-THIRD PARTY DISCLOSURE)

HART J

[1] As I have already outlined in an earlier ruling in this case Richard Thomas Fox is charged with a number of offences of obtaining payments from various banks and financial institutions, or obtaining credit card facilities, by making false representations as to his employment status and income. He now has applied for leave grant of witness summonses for third party disclosure relating to four banks or financial institutions in respect of whom he allegedly made false representations. The applications came on for hearing together and Mr McMahon QC (who appears for Richard Fox with Mr McAleer) moved the applications. The respondents are:

- BOS plc, for whom Mr McGleenan appears.
- First Trust Bank for whom Mr O'Hare appears.
- Bradford and Bingley plc.
- MBNA Europe Bank Ltd.

Neither Bradford and Bingley nor MBNA Europe Bank Limited appeared, although it is apparent from the correspondence placed before the court by the defendant that in the case of Bradford and Bingley a substantial quantity of material has been disclosed from Mortgage Express, a subsidiary of Bradford and Bingley, to the defendant's solicitors. However, Mr McMahon seeks some further information. So far as MBNA is concerned, it indicated to the defendant's solicitors by an email of 23 June 2008 that it "would require a Production Order before releasing the information you requested."

[2] I have earlier ruled that the counts against Richard Fox (and Kathleen Fox) have been misjoined in this indictment, and it has yet to be decided whether and if so how, these proceedings will proceed. Therefore, at this moment, there are not properly constituted proceedings in existence against Richard Fox, and so these applications are inchoate at best, and may fall unless the proceedings against Richard Fox resume. However, as the applications have been fully argued, the importance of the issues to the parties, and the possibility that the proceedings against Richard Fox may be reconstituted by the prosecution, in which case these third party disclosure applications may have to be revisited, I consider that it may be helpful if I give some guidance to the parties.

[3] The charges against Richard Fox are that he committed various offences against each notice party under Section 15A of the Theft Act (Northern Ireland) 1969 in that he obtained either mortgage advances or the provision of a credit card account by way of false representations, express or implied, as to his employment status and income. Thus the material parts of the particulars of offence of count 88 state that he –

> "… dishonestly obtained for himself a money transfer in the sum of £70,000 from HBOS UK plc by deception, namely by false representations express or implied in connection with documents in support of a mortgage application number A/32097616-3 in respect of 38 Burn Road, Cookstown, that he was self-employed as a painter and decorator for 5 years and that he had an annual income of £30,000, whereas in truth and in fact his employment status and income was not as represented by him."

[4] The material parts of the particulars of offence of count 89 which alleges that he obtained services by deception, contrary to Section 3(1) of the Theft Act (Northern Ireland) Order 1978, are that he-

> "… dishonestly obtained certain services from MBNA Europe Bank Ltd, namely the provision of a Credit Card Account, No 8776158019, by deception, namely by a false representation, express or implied, that he was self-employed, that he was a partner in the business of A M Fox Building Contracts, that he had been so employed for 6 years and that his gross annual income was £24,000, whereas in truth and in fact his employment status and income was not as represented by him."

[5] Mr McMahon QC pointed to the contents of Archbold 2006 at 21-196 and following where in relation to Section 15 of the Theft Act 1968 the following principles could be extracted which apply to the charges against the present defendant.

(1) The deception must operate on the mind of the person deceived. R v. Laverty 54 Cr. App. R. 495.

(2) The deception was the effective cause of the payment or the granting of a credit card account. R v. Clucas 33 Cr. App. R. 136.

[6] In R v. King and Stockwell 84 Cr. App. R. 357 it was said that the question in each case is whether the deception was an operative cause of obtaining the property, and not the operative cause as stated in Archbold at 21-197. So far as King and Stockwell is concerned, if information about two matters is required before a decision is taken by a lender, for example (a) status and (b) income, then it must be arguable that a deception as to one only of these could still be an operative cause because the transaction should be regarded in its entirety. See the comments of Lord MacDermott to that effect in DPP v. Ray 58 Cr. App. R. 130 which were adopted in R v. Miller (S.H.) 95 Cr. App. R. 424. In that case the court held that the jury were entitled to conclude that various false assertions were the effective cause of the transfer of the money. Be that as it may, it is clear that at the very least the false representation must be a material contribution to the decision by the person deceived to either advance the mortgage money, or grant a credit card account, as alleged in the present cases.

[7] Mr McMahon further explained that one matter the defendant will seek to explore in these cases is that (a) the defendant did not in any event make any false representations (which is obviously a matter for the trial), but even if he did (b) the banks and credit card companies would have made the mortgage payments or given him a credit card anyway. On the face of it this seems to be, to say the least, a surprising proposition. However, he explained that the mortgage advances were made in respect of "buy to let" properties, and went on to argue that what appears to have happened is that the lenders were not concerned with the defendant's employment status and income, but solely with the ability of the property to generate sufficient rental income in order to enable the mortgage advance to be repaid.

[8] As an example he pointed to the exhibit to be found at page 1859. This is described as a lending case handling sheet and appears to have emanated from Mortgage Express, which was then a subsidiary of Bradford and Bingley as is apparent from the letter of 18 September 2008 from Mortgage Express to Richard Fox's solicitors. This document shows that various documents such as payslips, or references from employers, that could confirm the applicant's employment status and income, were not required by the lender concerned.

However, other details of the form relating to income show that the income Richard Fox declared, which can be found at page 1810, was entered on the form. One of the reasons printed on the form is "Income not sufficient". This would tend to undermine the assertion made by Mr McMahon that the lender was not concerned with the income of the defendant in so far as this application was concerned.

[9] Nevertheless, Mr McMahon stated that Miss Malcolmson of BDO Stoy Hayward, the forensic accountant retained by the defence on behalf of Richard Fox, wished to see the material sought from each respondent in order to see whether the bank or financial institution concerned could say that misrepresentations as to status or income would have deceived it, or whether, as I understand it, these were irrelevant matters because the internal lending criteria operated by each institution did not in fact take such matters into account. If that was, or might be the case, then the defendant would argue that any false representation as to his employment or status that he may have made could not have operated on the decision making process of the institution when it made the advance, or granted a credit card account, and therefore the decision was not affected by any misrepresentation that might have occurred.

[10] In considering an application for third party disclosure then, as I pointed out in R v. Hume and Hume [2005] NICC 30, [2006] NIJB 147, it is essential to remember that in a criminal trial a defendant does not have an untrammelled right to seek the production of documents from a third party. Disclosure sought by the defendant from third parties is governed by the provisions of Section 51A and following of the Judicature (Northern Ireland) Act 1978. Section 51A(1) provides-

> "This Section applies where the Crown Court is satisfied that-
>
> (a) a person is likely to be able to give evidence likely to be material evidence, or produce any document or thing likely to be material evidence, for the purpose of any criminal proceedings before the Crown Court, and
>
> (b) the person will not voluntarily attend as a witness or will not voluntarily produce the document or thing."

[11] In Hume and Hume I identified a number of principles, of which the following are relevant to the circumstances of the present case .

(1) "Material evidence" is evidence which might assist the defendant by undermining the prosecution case or strengthening the defence case.

(2) Material is disclosable by a third party (unless it is otherwise excused from production) if it is (a) relevant, and (b) could potentially assist the defendant in the defence of the charge in accordance with (1) above even if (c) it could lead to a line of enquiry, but would not be admissible.

(3) In order to decide whether the material sought is likely to come within (2) above requires the court to examine the nature of the charge and its factual content and context.

[12] Mr McGleenan pointed out that it is incorrect to refer to his client as HBOS as that is merely a holding company, and I will therefore amend the application so that it is directed against the Bank of Scotland (BOS). In the present application it is apparent that BOS has made substantial disclosure, but it advances a number of arguments as to the remaining information which is sought and which it argues it is entitled to withhold. In the course of the hearing Mr McGleenan stated that, having taken his clients instructions, BOS were confining their objections to disclosure to a more limited category of information to which I shall refer in due course. He submitted that such was the commercial significance of the material, that whatever was disclosed should only be disclosed under very strict conditions, but it is appropriate that I consider the general issues raised by the application against BOS in particular before turning to other issues in the application.

[13] The first question is whether the information for which BOS resists disclosure is in fact subject to commercial confidentiality? The material which it now seeks to withhold is limited to two categories. The first is part of what is described as "affordability calculation" at various parts of the documents. In the unredacted documents which had been placed before me by BOS the "affordability calculation" is described as an assessment of whether the mortgage is affordable taking into account other commitments of the applicant. The matters that are to be taken into account have been redacted in the documents produced to the defendant.

[14] The second category of material is described as the "Affordability Model", and is described by Mr Blackburn of BOS at paragraph 11 of his affidavit of 18 December 2008 in the following way.

> "The third set of documents disclosed in redacted form is the "Affordability Model".
>
> Every mortgage lender will have such a document which contains the fine detail which allows accurate pricing for mortgage risk. The document I refer to is very commercially sensitive. It contains information which allows our organisation to run a highly

> automated pricing system for mortgage approvals. Most of our competitors are unable to operate such a sophisticated affordability model and consequently their processing costs and lending risks are higher. I have redacted this document in order to preserve the commercial secrets which are contained within it. This document is considered to be commercially sensitive *within* our organisation and only a small cadre of senior officials have access to it I have made significant redactions in this document . . ."

[15] Mr McGleenan expanded upon this explanation by saying that because the affordability model was regarded as being of the utmost commercial sensitivity a very few senior managers have seen it, as it is an actuarial tool with a great deal of technical data within it. He stated that BOS regard this as a key differentiating factor distinguishing it from its competitors because in essence it contains the formula determining the whole commercial approach by BOS to the mortgage market and BOS was therefore seeking to preserve material which was commercially sensitive.

[16] As is apparent from Mr Blackburn's affidavit, a good deal of the Affordability Model has been disclosed in unredacted form and therefore its general format and many of its principles are apparent from the documents. The following extract from the unredacted introduction to the Affordability Model to be found at pages 293 and 294 explains its purpose and composition in some detail.

> "This model is now used in all lending decisions for mortgage applications, further advances, and product transfers to Flexible schemes across the five brands, although BM don't use the AM in any transfers onto Flexible schemes. The primary exception to this is for Buy To Let applications, where the rental income is used to calculate whether the loan can be treated as self financing. Other variations are included in Section 4.6.
>
> This document explains, in detail, all components used in the model, and provides background to the rationales agreed for using them, and how the calculations are carried out. It will be updated whenever any changes are made, and as a minimum, the model will be reviewed annually to ascertain whether the components used remain fit-for-purpose. This will analyse the current economic climate, including assessing the impact of updating the "hygiene" factors, such as tax NI and expenditure rates,

> and also any regulatory impacts that have to be considered."

[17] I have considered all the redacted material produced by BOS, and I am satisfied that the redacted material is of the utmost commercial sensitivity as BOS asserts, and that were it to be made known to others outside the bank this could cause BOS very considerable financial damage as it would expose to its competitors calculations on which it bases its mortgage business.

[18] Mr McGleenan submitted that this information has impressed upon it the character of confidence, and that the relevant test to determine whether the redacted material has that character is that stated by the Court of Appeal in Douglas v. Hello (No 3) [2006] EWCA Civ 595 at [55] –

> "It seems to us that information will be confidential if it is available to one person (or a group of people) and not generally available to others, provided that the person (or group) who possesses the information does not intend that it should become available to others."

[19] In the present application Mr Blackburn's uncontradicted assertion that this information is so sensitive that only a handful of senior banking officials within BOS had access to it is particularly relevant and plainly satisfies the test set out by the Court of Appeal above. Given the nature of the material and that only a small number of very senior managers have access to it I accept that it should be regarded as confidential.

[20] However, as Mr McGleenan recognised, whilst there is a public interest in preserving and protecting confidences by law this may be outweighed by another public interest which favours disclosure. As Lord Goff stated in AG v. Guardian Newspapers [No 2] [1990] AC 109 –

> ". . . nevertheless that public interest may be outweighed by some other counter bidding public interest which favours disclosure. This limitation may apply, as the learned judge pointed out, to all types of confidential information. It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a counter failing public interest favouring disclosure."

[21] As this is a criminal case, provided that the documents or information sought are material to the issues in the trial, then that material must be disclosed in order to prevent an innocent defendant being wrongly convicted, even if the material is otherwise protected from disclosure because of the

public interest to be accorded to protecting matters of commercial sensitivity. In R v Alibhari and others [2004] EWCA Crim 681 at [33] the Court of Appeal commented that the trial judge "recognised, and emphasised, that commercial confidence could not be the basis for a claim of public interest immunity". Therefore the key question is whether the redacted information is "material" within Section 51A in the sense I have earlier sought to define, and this requires the court to consider how the information could be material to the defence as described by Mr McMahon.

[22] In any BOS mortgage applications it appears that the lending criteria adopted could have been applied in either of two quite distinct situations. The first is that a decision would be made by an individual of appropriate rank in the lending institution, although no doubt that rank may vary within or between institutions depending upon the approach of the institution and/or its subsidiaries. Nevertheless, as I understand the argument advanced by BOS, the common feature of such situations is that an authorised individual makes the decision, and in doing so applies the lending criteria of the institution. In performing that task, the individual decision maker is not concerned with policy decisions, and the financial calculations underlying those decisions, that led to the adoption of the criteria, merely with their implementation. The second situation is that the entirety, or at least a very substantial part, of the process of applying the criteria to the application is performed by computers programmed to apply the criteria. Thus at paragraph 12(iv) of his affidavit of 19/12/2008 Mr Blackburn says –

> "Two BOS brands are relevant to this part of the summons namely, Birmingham Midshires and TMB. In the Birmingham Midshires brand the level of automated pricing means that there is no discretion invested in staff at branch level in assessing, approving or rejecting applications. The TMB brand has ceased trading. Prior to 2005 all cases processed by TMB were referred to a central underwriting team who could approve or decline a mortgage proposal. This was a more subjective approach than that which is now in place. In May 2005 TMB changed to the automated processing approach applied by Birmingham Midshires."

[23] There may be an issue as to whether or not any misrepresentation in an application processed by the automated system could have affected the mind of the decision maker because the prevailing opinion is that it is not possible to "deceive a machine" in the words of the Divisional Court in Re Holmes [2005] 1 All ER at 495 [12]. It may therefore be necessary to decide whether that is correct in respect of a deception which brings about a result in favour of the person making the misrepresentation because of the effect upon the results of

the computer programme designed to approve applications if certain criteria are met, and a dishonest representation is made in respect of one or more of those criteria. I can see considerable strength in the argument that there can be a deception in such circumstances. Whilst I have not heard argument and so do not propose to express a concluded view on this issue, nevertheless for the purposes of the present application I shall assume that a misrepresentation can amount to a deception of a computer designed to make lending or similar decisions in accordance with a programme which performs the evaluation process otherwise performed by a human being, and makes decisions in accordance with the criteria programmed into it. Just as the human decision maker is not concerned with the rationale behind the adoption of the criteria, nor is the computer program. In either situation I accept that what is relevant to the question of materiality is not whether the lending criteria were prudent or imprudent, but whether the alleged deception operated upon the decision maker, be it an individual or an automated process.

[24] On that basis the redacted material is not, in my opinion, relevant in any way to the question of the effect of any alleged misrepresentation. There is nothing to show that the redacted material was known to any decision maker in relation to any of the charges against Richard Fox, and therefore that material could not have played any part in the effect upon the decision maker, whether human or automated, in respect of any application made by the defendant, because the decision maker was not drawing up the criteria, but applying criteria devised by others. The defendant has therefore failed to show that the BOS redacted information is material to the application and the application for disclosure of the remaining material that is in dispute is refused.

[25] Mr McGleenan raised concerns about safeguarding the confidentiality of the information that BOS is prepared to disclose. This is a legitimate concern on the part of BOS, and it is already the practice of the court to include a statement on all third party disclosure orders that the evidence is confidential and must not be disclosed to unauthorised persons. In the present case there is nothing to suggest that, as at present advised, the defendant personally has any need to see any of this information. Given that the defendant is alleged to have committed a criminal offence against BOS it appears to me objectionable in principle that he can therefore claim to see confidential material unless it is material which he can show has a bearing upon any evidence he might give. In the present case there is nothing to show that the defendant could give any relevant evidence that would be affected by the calculations upon which BOS drew up its criteria and which are the subject of voluntary disclosure by BOS. I therefore propose to direct that any information disclosed by BOS to the defendant may only be considered by the defendant's legal advisers and any expert witnesses whom they retain, but is not to be disclosed to the defendant or any other person without further order of the court.

[26] Given the complexity of the application I have prepared a draft order adopting the headings in the applicant's notice and if an order is required the order will be given to the defendant and BOS and each will have 14 days to make any further representations if they consider the material is wrongly identified in the order. If no representations are made and an order is necessary then the order will issue without further notice.

[27] I have so far been dealing with the application against BOS, but Mr O'Hare for First Trust Bank submitted that as count 92 relates to a credit card application he felt that he had to take further instructions from his client regarding the "materiality" of the information sought in the light of the explanation which Mr McMahon gave for its relevance to which I have already referred. I accept that that is a proper course and I will hear counsel for the defendant and First Trust Bank if that is necessary.

[28] Although Mr McMahon explained during the hearing the reasons underlying the application, this should have been fully explained in the grounding affidavit filed on behalf of the defendant. Whilst the notice, and the grounding affidavit, requested very detailed information from each respondent, common to each application was a bald assertion that "I verily believe that the said document (sic), referred to above, are important to my client in the proper preparation of his defence and submit that it is in the interests of justice that same are produced."

[29] In any case where third party disclosure is sought, particularly one such as the present where complex financial details are being requested, it is essential for the applicant to properly explain in the grounding affidavit how it is thought that the material requested may be relevant to the defendant's defence, and the nature and extent of the detailed reasons must obviously be related to the nature of the charges themselves. Although in the present case the respondents provided information which grounds the prosecution, in many, if not the majority of instances, the respondent to a third party disclosure application cannot be expected to identify how the material sought may be relevant to the case if it wishes to resist disclosure, because it will not have access to the committal papers or be familiar with the nature of the allegations against the accused, or the nature of his defence. In the present case the proper course would have been for Ms Malcolmson of BDO Stoy Hayward to file an affidavit explaining how the information sought was believed to be material to the issues in the trial.

[30] As already stated there has been no appearance on behalf of Bradford and Bingley or MNBA Europe Bank. The defendant must provide them with a copy of this judgement and if the proceedings continue against Richard Fox the defendant must notify each notice party of that, whereupon each notice party will have 14 days to make any further representations they wish about the form

of the orders. Failing any representations within 14 days of the issue of the judgment the order will issue without further notice.

[31] In the course of his submissions against BOS Mr McMahon expressly abandoned a number of headings relating to information sought. If an order is required it will therefore refer to the outstanding headings identified at paragraph 2(ii) of the notice together with those parts of the unredacted documents that are still in dispute.