IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

BRIAN AGNEW

CARSWELL LCJ

In this application the applicant Brian Agnew seeks leave to appeal against sentences imposed by Higgins J at Belfast Crown Court on 6 June 1997. He had originally pleaded not guilty to a total of 33 counts of conspiracy to defraud, false accounting and providing false information. On 9 May 1997 he changed his plea to guilty on 2 counts of conspiracy to defraud, 11 of false accounting and 8 of providing false information. He was sentenced to 2 years and 6 months' imprisonment on each of the counts of conspiracy to defraud and to 2 years on each of the other counts, all sentences being concurrent. He sought leave to appeal against these sentences, but leave was refused by Kerr J on 7 October 1997.

The larger segment of the offences in financial terms consisted of mortgage frauds. The essence of these was that the applicant obtained money from building societies by putting fictitious arrangements forward as genuine transactions. These purported to be regular applications for mortgage finance, made by co-defendants of Agnew, whom he persuaded to become party to the transactions. They were in reality a means of raising money for Agnew by means of a variety of false representations. He used the money so obtained to bolster up his financial position by paying debts, apparently in the hope that he could redeem his finances by engaging in building development and ultimately restore his solvency.

One of the grounds of appeal relied on by Mr Cinnamond QC for the applicant was that the judge did not attach sufficient weight to the submissions put before him about his personal antecedents and circumstances or to his motive for committing the offences. He placed before us a report from a firm of forensic accountants, which had not been available to the trial judge. This, if accepted as correct in all its details -- which we shall do for the purposes of considering this application -- establishes that the applicant had suffered misfortunes in earlier business transactions, and had been left with a burden of debt. Instead of becoming a bankrupt, he determined to try to recoup his losses by trading in his chosen field of building development, in the hope

of recouping enough from the profits to discharge his liabilities and restore his finances to a stable condition.

His first efforts in this field were unsuccessful, and the overall result of his property transactions during the 1980s was to increase his liabilities. He unwisely decided to enter into two more transactions in order to attempt once more to recoup his losses. In 1989 he purchased a block of flats at The Bay, Ballyholme, Bangor and in 1991 another block of 6 flats at Castle Mews, Leadhill, Ballygowan Road, Belfast. In neither case was he able to dispose of the flats as quickly or as profitably as he had hoped and he was threatened with repossession by the building societies which had financed his purchase of the properties.

He arranged with his co-defendants that they would enter into fictitious mortgage transactions in respect of flats which they had purported to purchase from him. By means of false information provided to building societies about the purported borrowers and their intention to reside in the flats the subject of the transactions the societies were induced to advance monies to the co-defendants. In reality the flats had not been sold and the transactions were merely a device to obtain these advances, which were all taken by Agnew and largely applied towards the payment of his most pressing liabilities. He did not expect or intend to be able to pay off the mortgage instalments as they fell due, although it was represented by counsel on his behalf that he retained the hope that ultimately he would make sufficient profits from the sale of the flats to be able to pay off the advances, in which event the lenders would not have sustained any loss. It cannot be gainsaid, however, that the transactions were fraudulent and designed to obtain money from the lenders which they certainly would not have advanced if they had known the true facts.

The sums involved came to a total in the region of some £386,040, according to the figures contained in the accountants' report furnished to us. Of this the applicant retained just under £10,000, while the rest went to pay off his liabilities.

The applicant entered into another series of transactions in December 1990 and January 1991, which are the subject of the counts of false accounting. He wrote a number of fictitious life and pension policies, knowing that the purported insured persons would not pay the premiums. His object was to obtain the initial commissions payable by the insurance companies on the introduction of the business. By this means he obtained a total of £27,894, which he used to finance development work on the Castle Mews project and to repay sums due to the Ulster Bank. Whatever may have been his hopes of eventually repaying the mortgage advances, it is difficult to see how the same could be said to apply in respect of these commission payments.

The house of cards came tumbling down when the mortgagees repossessed the properties, since no mortgage instalments had been paid, and the situation came to light. We were not furnished with details of the amounts recouped by the building

societies on repossession or the net losses sustained by them, and counsel for the applicant did not refer to this factor in presenting the case before us. It is capable of being an aggravating factor if the mortgagees are left with large net losses after repossession and sale of the properties. Full recoupment of losses, which may occur in some cases, does not nevertheless suffice to reduce a defendant's culpability to an insubstantial level. As Morland J observed in R v Rice [1992] 14 Cr.App.R.(S) 231, 232:

"The gravamen of this type of offence is that a building society lends out money on mortgage to mortgagors, believing them to be genuine in their representations. The loss to the building society at that time is the loss of the security in the genuineness of the mortgagor. It is in many cases entirely fortuitous, depending on property prices, whether at the end of the day a building society recoups its financial loss together with the administrative costs of that recoupment when the losses flow from frauds of this kind."

The applicant was interviewed by the Fraud Squad in May 1992. He was arrested and charged soon afterwards, but the case did not come on for trial until 1997. One of the matters mentioned on his behalf was the strain of having the prosecution hanging over him for 5 years. The judge took this factor into account in favour of the applicant, correctly in light of the views expressed by Leggatt LJ in R v Stevens [1993] 96 Cr.App.R.303, 307.

The applicant has no relevant convictions. It appears from the probation officer's report of 2 June 1997 that when he was interviewed the applicant had difficulty in accepting that his actions were illegal and in viewing himself as having been guilty of criminal conduct. He seems to have entertained the hope, however unrealistic, that his fortunes would improve and that he would be enabled in some fashion to pay off the monies advanced. The grounds of appeal which the applicant put forward in his notice of appeal were as follows:

"(a) The Learned Trial Judge did not attach sufficient or adequate weight to submissions made about the personal antecedents and circumstances of the Defendant.

(b) The Learned Trial Judge did not attach sufficient or adequate weight to mitigatory circumstances surrounding the offences themselves in particular those relating to the Defendant's motive.

(c) The Learned Trial Judge did not attach sufficient or adequate weight to the effect of the sentence on the Defendant a man of hitherto impeccable character who has brought disgrace for himself and hardship for himself and also his family as a consequence of the offences.

(d) The Learned Trial Judge failed to give adequate or sufficient weight to the delay in this case from the time of apprehension by the police until trial thereby placing great strain upon the Defendant and his family.

(e) The Learned Trial Judge failed to give sufficient or adequate weight to the fact that a plea was entered in this complex case thereby saving great waste of public expense and time and further saving consequent potential trauma for Crown witnesses."

Mr Cinnamond did not attempt to place much reliance upon grounds (a), (c), (d) or (e), which the judge had taken into account in passing sentence. The main thrust of his submission was that insufficient allowance was made for the applicant's motive, which was to use the transactions as a device for re-financing his indebtedness rather than simply seeking to make away with the moneys obtained. He suggested that the judge failed to appreciate this factor properly when he said in his sentencing remarks that it was quite clear that "no repayments were ever intended or ever made". The judge did, however, have before him the probation officer's report, in which the applicant's stated intentions are fully set forth. We think it likely that in the passage in question the judge was referring to the fact that the applicant did not intend that the series of regular payments provided for in the mortgage deeds would be made, not to his ultimate intention of reimbursing the lenders if he made sufficient profit from the developments.

We have reviewed the sentences imposed, and had regard to the sentencing considerations in mortgage fraud cases set out in R v Stevens [1992] 96 Cr.App.R.303. We have taken fully into account what counsel has urged upon us about the applicant's desire to use the mortgage monies for the purpose of "trading out" and his misfortune in missing the rise in values in the mortgaged properties which occurred very soon after he lost them. This was a systematic and calculated series of fraudulent transactions, masterminded by the applicant, by means of which he obtained substantial sums from the financial institutions concerned. He may have hoped that he could replace the sums in due course, but his prospects of doing so were, to say the least, uncertain in view of his previous trading history. Persons who obtain money by fraudulent means of this kind cannot expect to escape proper punishment simply because they hoped, whether or not with sound reason, that they would be able to replace it in the course of time.

We have considered whether this is the type of case which can be suitably dealt with by the imposition of a short sentence, on the "clang of the prison gates" principle, as to which see R v Faye (1988, unreported) and R v Blair (1997, unreported). We do not think that it can properly be regarded as falling within this sentencing category. The applicant's fraud was too serious and systematic, and the element of deterrence of others from committing similar offences must in our view prevail over the personal circumstances of the applicant. We have reviewed the sentences imposed in the reported cases, and found a fairly wide range, with some, such as R v Mason [1991]

12 Cr.App.R.(S) 757, R v Luxon [1991] 13 Cr.App.R.(S) 138 and R v Rice [1992] 14 Cr.App.R.(S) 231, not dissimilar to the present case. While there is no uniform pattern of sentencing it could not be said that the sentences in this case were out of line with the general trend, and in our view they represent a proper level of sanction for the applicant's course of conduct.

We accordingly dismiss the application.