Neutral Citation Number: [2024] EWHC 1375 (KB)

Case No: KB-2023-004631

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/06/2024

Before :

MRS JUSTICE YIP

- -

Between :

IPE Marble Arch Limited	**Applicant/ Prosecution**
- and -	
Anthony Moran	**Respondent/ Defendant**

- -
- -

Donal Lawler (instructed by **Edmonds Marshall McMahon**) for the **Applicant/Prosecution**
Ivan Krolick (instructed by **Bishop and Light Solicitors**) for the **Respondent/Defendant**

Hearing dates: Wednesday 22 May 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 7th June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE YIP

Mrs Justice Yip :

1. The applicant IPE Marble arch Limited ("the prosecution") seeks leave to prefer a voluntary bill of indictment against the respondent Anthony Moran ("the defendant"). This follows the decision of HHJ Tomlinson sitting in the Crown Court at Southwark on 12 October 2023 to dismiss all charges on which the defendant had been sent for trial and accordingly to quash the indictment. No right of appeal exists against that decision but the prosecution seek to invoke the exceptional jurisdiction of this court on the ground that the judge made a basic and substantive error of law in dismissing the charges.

2. I am grateful to Counsel, Mr Lawler and Mr Krolick, for their assistance in identifying the real issues. There is no dispute as to the basis on which this court's jurisdiction may be exercised. Paragraph 2(6) of Schedule 3 to the Crime and Disorder Act 1998 provides that following dismissal of charges in the Crown Court, no further proceedings may be brought on the dismissed charges except by means of the preferment of a voluntary bill of indictment. Pursuant to section 2(2) of the Administration of Justice (Miscellaneous Provisions) Act 1933, this requires the direction or consent of a judge of the High Court. The authorities make it clear that this is a power to be used only "exceptionally". Helpful guidance is to be found in *Serious Fraud Office v Evans & others* [2014] EWHC 3803 (QB) and *Serious Fraud Office v Barclays Bank PLC & another* [2018] EWHC 3055 (QB).

3. One situation in which it is established that this exceptional procedure may be exercised is when the judge has made a basic and substantive error of law. This is the sole basis relied upon by the prosecution in this case. It has been said that the error of law must be "clear or obvious". In the *Barclays Bank* case, Davis LJ acknowledged that general proposition but doubted it applied in every case. That case was a complex one requiring detailed analysis but Davis LJ concluded that ultimately it led to a binary question: whether taking the facts presented by the prosecution as true, the defendant was criminally culpable as a matter of law. On that basis, he did not shy away from engaging in detailed analysis himself and reaching his own conclusion.

4. The parties were in agreement that it is not sufficient merely to identify an error of law in the judge's reasoning. Plainly, I must also be satisfied that the evidence against the defendant is sufficient for him to be properly convicted (mirroring the test for dismissal laid down in Schedule 5 paragraph 2(2) of the Crime and Disorder Act 1998). This involves taking the prosecution evidence at its highest (looked at as a whole) and applying the criteria commonly applied on a submission of no case to answer (see *R v Thompson & Hanson* [2006] EWCA Crim 2849). The question is not whether the defendant should be convicted on the evidence put forward by the prosecution but whether the evidence is sufficient for proper conviction. I remind myself that it is not appropriate to view any evidence in isolation from its context and other evidence. Where the case depends on inferences or conclusions to be drawn from documentary evidence, I must decide whether a jury could properly draw those inferences or come to those conclusions (*R (Inland Revenue Commrs) v Crown Court at Kingston* [2001] EWHC Admin 581).

5. This does not involve a two-stage approach of first considering whether there was an error of law and then considering the sufficiency of the evidence. The reality is that these things must be considered together. However, the exceptional course of granting

leave for a voluntary bill of indictment cannot be taken merely because a judge of this court takes a different view of the material before the Crown Court, or even because some error of law appears from the judge's reasoning. In *R v Goldstone* [2008] EWHC 976 (QB), Iwin J rejected the notion that the test of exceptionality would be fulfilled if the judge's assessment of the relevant facts had been "*Wednesbury* unreasonable". In this case, it follows that I can grant leave to prefer a voluntary bill of indictment only if I am satisfied that the judge has reached the wrong conclusion on the dismissal application through basic and substantive misapplication of the law.

6. The way in which Mr Krolick has resisted the application on behalf of the defendant differs somewhat to the way in which he advanced the dismissal application in the Crown Court. Insofar as this reflects the conclusions reached by the judge, that is entirely understandable and appropriate. He additionally raised what was acknowledged to be, in effect, a new abuse of process argument. He relied upon this as a reason to exercise judicial discretion to refuse the application, even if I were otherwise satisfied that the test for granting consent for a voluntary bill was established. Since I can only grant the application if I am satisfied that it is in the interests of justice to do so, I would need to consider the abuse of process argument before granting the application. However, that might entail inviting further evidence and/or submissions if I was satisfied that the defendant had raised a prima facie case on abuse. The prosecution invite me to say that the abuse of process point is baseless and wholly unevidenced and to reject it.

7. Having set out the approach I must take, I turn to the facts.

The background facts

8. IPE Marble Arch Limited is part of the IPE group of property development companies. It was formed specifically to develop a residential property known as Marble Arch Apartments. IPE had bought the existing property with planning permission to convert the existing loft space into eight new apartments. There are 125 existing apartments, which are held on long leases. The majority are held by landlords who let the apartments to others. The company worked with other organisations to develop plans for the conversion, including those involved in finance, planning, consultation and construction.

9. Mr Moran is one of the long leaseholders. He is a qualified Civil Engineer. He has strenuously opposed the development. On 13 December 2021, a company (Marble Arch Apartments RTM Co Limited) was formed by the leaseholders to take over management of the building. Mr Moran is one of the five directors of that company. The company has brought proceedings against IPE, including seeking an injunction restraining the continuation of the development until certain conditions were met, resulting in IPE giving an undertaking which remains in force. Mr Moran also formed a residents association through which concerns and objections were raised, not only with IPE but with other bodies including the planning authority, those responsible for building regulations, financiers and others.

10. It is alleged by the prosecution that, in addition to employing these lawful methods, the defendant repeatedly used false identities for the purpose of emails and other communications. The prosecution case is that this was done to give the misleading impression that the objections were coming from multiple people rather than just Mr

Moran. It is contended that this was intended to artificially increase the apparent weight of objection and so raise the level of concern amongst investors and other parties. It is also alleged that Mr Moran intended that the communications would be acted upon in a way that they would not be if known to be from him. The prosecution say that Mr Moran's overarching intention was to stop the development project by making it too troublesome for IPE to continue and/or by causing their financiers or other partners to withdraw. The prosecution contend that the use of false identities in this way amounted to criminal activity in the form of forgery and fraud by false representation.

11. IPE did not report the alleged offending to the police. In a statement provided to the Westminster Magistrates' Court, their solicitors explained that it was their almost invariable experience that offences of this nature are not prioritised for investigation by the police. They therefore decided to bring a private prosecution. An information containing six charges was laid before the Magistrates, pursuant to which the case was sent to the Crown Court at Southwark.

Statutory provisions relating to the charges

12. The offence of forgery is defined in section 1 of the Forgery and Counterfeiting Act 1981:

> "A person is guilty of forgery if he makes a false instrument, with the intention that he or another shall use it to induce somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice."

13. "Instrument" is defined in section 8 of the Act and, so far as material, includes:

> "(a) any document, whether of a formal or informal character; … and (d) any disc, tape, sound track or other device on or in which information is recorded or stored by mechanical, electronic or other means."

14. The meaning of "false" and "making" is defined in section 9, which provides:

> "(1) An instrument is false for the purposes of this Part of this Act—
>
> (a) if it purports to have been made in the form in which it is made by a person who did not in fact make it in that form; or
>
> (b) if it purports to have been made in the form in which it is made on the authority of a person who did not in fact authorise its making in that form; or
>
> (c) if it purports to have been made in the terms in which it is made by a person who did not in fact make it in those terms; or
>
> (d) if it purports to have been made in the terms in which it is made on the authority of a person who did not in fact authorise its making in those terms; or

(e) if it purports to have been altered in any respect by a person who did not in fact alter it in that respect; or

(f) if it purports to have been altered in any respect on the authority of a person who did not in fact authorise the alteration in that respect; or

(g) if it purports to have been made or altered on a date on which, or at a place at which, or otherwise in circumstances in which, it was not in fact made or altered; or

(h) if it purports to have been made or altered by an existing person but he did not in fact exist.

(2) A person is to be treated for the purposes of this Part of this Act as making a false instrument if he alters an instrument so as to make it false in any respect (whether or not it is false in some other respect apart from that alteration).

15. Section 10(1) provides, so far as material to this case, that an act or omission intended to be induced is to a person's prejudice if, it is one which, if it occurs:

"(a) will result –

(i) in his temporary or permanent loss of property; or

(ii) in his being deprived of an opportunity to earn remuneration or greater remuneration; or

(iii) in his being deprived of an opportunity to gain a financial advantage otherwise than by way or remuneration; …"

Section 10(5) confirms that "loss" includes "not getting what one might get as well as parting with what one has".

16. Fraud by false representation is defined in section 2 of the Fraud Act 2006:

"(1) A person is in breach of this section if he— "

(a) dishonestly makes a false representation, and

(b) intends, by making the representation—

(i) to make a gain for himself or another, or

(ii) to cause loss to another or to expose another to a risk of loss.

(2) A representation is false if—

(a) it is untrue or misleading, and

(b) the person making it knows that it is, or might be, untrue or

misleading.

(3) "Representation" means any representation as to fact or law, including a representation as to the state of mind of—

(a) the person making the representation, or

(b) any other person.

(4) A representation may be express or implied.

(5) For the purposes of this section a representation may be regarded as made if it (or anything implying it) is submitted in any form to any system or device designed to receive, convey or respond to communications (with or without human intervention)."

17. For these purposes, "gain" and "loss" are defined in section 5 of the 2006 Act:

"(2) "Gain" and "loss"— "

(a) extend only to gain or loss in money or other property;

(b) include any such gain or loss whether temporary or permanent; and "property" means any property whether real or personal (including things in action and other intangible property).

(3) "Gain" includes a gain by keeping what one has, as well as a gain by getting what one does not have.

(4) "Loss" includes a loss by not getting what one might get, as well as a loss by parting with what one has."

The indictment

18. The indictment before the Crown Court reflected the charges on which the defendant had been sent. For the purpose of this application, the prosecution have provided a revised draft indictment. The revisions do not affect the substance of the charges but merely provide greater particularity of the emails relied upon in relation to the forgery charges. I shall refer to the new draft indictment.

19. Counts 1 to 3 each charge forgery, contrary to section 1 of the Forgery and Counterfeiting Act 1981. Each charge covers the sending of emails from a particular email account. Count 1 relates to the identity Joe Pa and an email address beginning "Nittany.lion". Count 2 covers the identity Eli Gottlieb with an email address beginning "eli.gottliebeli" and Count 3 relates to Nuno Miguel Lopes with a corresponding email address.

20. Each of those counts alleges that the defendant "made an instrument" which was false with the intention that "he should use it to induce somebody … to accept it as genuine and, by reason of so accepting it, to do some act, or not to do some act, to his own or any other person's prejudice." Framed in that way, the counts reflect the statutory language.

21. The falsity alleged in each count relates solely to the use of a false identity. Counts 1 and 2 contend that the identities used were wholly fictitious in that the person from whom the email purported to come from did not exist. Count 3 acknowledges that there was a real Mr Lopes (a leaseholder) but insofar as emails purported to come from him, he did not in fact send them.

22. Each count particularises "the instrument" as multiple emails. The common feature in each count is the identity used by the sender. Each count includes different emails sent on different dates and to different recipients. The "somebody" who was to be induced to act or not to act to his own or any other person's prejudice is defined as including various entities. There has been no attempt to define what act "somebody" was to be induced to do or not to do.

23. Criminal Procedure Rules 2020 rule 10.2(2) provides that:

> "More than one incident of the commission of the offence may be included in a count if those incidents taken together amount to a course of conduct having regard to time, place or purpose of commission."

The prosecution contend that each count represents a series of emails using the same identity and that this amounts to a course of conduct with the common purpose of disrupting the development. For my part, having given consideration to what must be proved and to the contents of the particularised emails, I can foresee real difficulties in directing the jury and formulating a suitable route to verdict given the form of the draft indictment. However, I note that HHJ Tomlinson was satisfied that multiple incident counts could be justified and said:

> "Were the only problem here one of form in the indictment rather than its substance, it would not pose an obstacle to the case being allowed to proceed."

24. Counts 4 to 6 charge fraud, contrary to section 1 of the Fraud Act 2006. Each count corresponds to one of the three false identities particularised in Counts 1 to 3. I canvassed with Mr Lawler whether the same conduct had effectively been charged twice, once as forgery and once as fraud. He acknowledged that there was plainly significant overlap. Having allowed an opportunity for the prosecution to consider whether it was appropriate to proceed on both sets of charges, Mr Lawler indicated that they did seek to proceed on all charges "for the time being", having regard to the somewhat different tests that applied. However, he recognised the need to keep that under close review.

25. The fraud charges are each premised on the basis that the defendant dishonestly represented that he was Joe Pa, Eli Gottlieb or Nuno Miguel Lopes and that the communications were bona fides communications from such person, "intending to

make a gain for himself or to cause loss to another, or to expose another to a risk of loss."

26. Having regard to the statutory definition of "gain" and "loss" in section 5 of the Fraud Act 2006, which extends only to gain or loss in money or other property, Mr Lawler confirmed that it would not be contended that the defendant intended to make a gain for himself. Rather the allegation was that he intended to cause loss to IPE through halting the development.

The application to dismiss

27. The defendant applied in the alternative to quash the indictment or to stay the proceedings as an abuse of process. In relation to the forgery counts, the primary objection taken in the written application was that none of the emails relied upon were instruments within the meaning of section 1 of the Forgery and Counterfeiting Act 1981. It was also contended that insufficient particulars had been provided and that the counts were bad for duplicity. The objections to the fraud counts were essentially ones relating to form. It was also contended that those counts were bad for duplicity.

28. The prosecution response to the application naturally focused upon the points raised in the written application. It followed that the prosecution concentrated on the form of the indictment and the definition of "instrument" for the purpose of Counts 1 to 3. Mr Lawler told me that this guided the way in which the case summary that was before HHJ Tomlinson had been drafted. I have subsequently noted that the case summary was in fact prepared before the defence application was made as a guide to be used in during the preliminary stages of the proceedings. The summary appears comprehensive and to be a useful guide to the prosecution evidence. That evidence was contained in a bundle marked "Case Papers" and comprised witness statements and exhibits, which was available to HHJ Tomlinson and is now available to me. I accept that Mr Lawler's written response may have taken a different form had the issues which were addressed within this application been identified by the defence earlier. However, it was not suggested that the prosecution were prejudiced by that. I note that the parties' submissions were developed orally before HHJ Tomlinson.

The Crown Court ruling

29. The judge provided the parties with a written note to assist in relation to his ruling but said that it was not to be treated as the ruling itself for which a transcript would be required. Having had the opportunity to compare the note to the transcript, I find that the written note covers all points material to this application and is a convenient reference point. The references to paragraph numbers which follow are those taken from the judge's note.

30. Having recited the history leading to the making and listing of the application, the judge indicated that he was treating the hearing as "a straightforward dismissal application". As I have already indicated, he approached the task by concentrating on substance rather than form. He did not accept the defence argument that all counts were bad for duplicity. He said that there was a little more substance in Mr Krolick's submission that CPR 2020 rule 10.2(1) could not be disregarded. That provision sets out what must be contained in a count on an indictment, namely –

"(a) a statement of the offence charged that –

(i) describes the offence in ordinary language, and

(ii) identifies any legislation that creates it; and

(b) such particulars of the conduct constituting the commission of the offence as to make clear what the prosecutor alleges against the defendant."

31. The defence objection, maintained before me, was that there was insufficient particularisation of the alleged criminal conduct. In particular, no particulars are given as to the act or omission that the defendant intended to induce by his false emails or of whom he intended to induce to act or not act. In relation to the fraud counts, it is said that there are no particulars of the date or manner of the alleged representations or as to the asserted gain or loss which was intended.

32. Having noted these procedural objections, the judge conducted a "broad analysis" of the prosecution case. He said (at [29]):

> "The reality as I see this case from the way in which the prosecution intends to present it is that in reality the narrative will chart an undiluted campaign of harassment of the prosecutor IPE by [the defendant] to which his use of this variety of aliases is in my judgment wholly incidental, though it is the use of identities characterised by the prosecution as demonstrably false and intended to be so, that is critical to each count."

33. The judge then said [30]:

> "Admirable though it may be to compose an indictment which reduces each count to a central issue turning on the concept of "false identity", the whole case is predicated on the premise that AM has behaved in an utterly unreasonable way employing vitriolic language and all manner of unprincipled devices and strategies. His motivation is far from clear particularly if he was not himself in residence. Of course affected persons object to planning applications on the grounds of temporary inconvenience. Whether it was 'NIBYism' or a sincerely held belief that IPE was in fact incompetent and hadn't done its sums, AM's ultimate intention seems to me to have been to prevent this development happening. The submission that the use of multiple email identities is in some way a 'game changer' ignores the reality that there are bound to be limitations on an email which states in general terms that the author is a leaseholder or resident without identifying the actual unit out of only 125 apartments that he occupies. People use email addresses all the time which without a real name after the message tell the recipient nothing about the author's actual identity."

34. The judge then considered (at [31]) the argument that the emails were not instruments within the meaning of the 1981 Act. He made it clear that he was not suggesting that

an email could never satisfy the definition of an instrument. However, on the facts, he was not satisfied that the emails sent by the defendant were capable of being false instruments within the statutory definition. The mere fact that the defendant sent emails in false names, or in the name of a neighbour, did not "get the prosecution across the line".

35. The judge said that the fraud counts relied on "the tortuous reasoning that AM's tactics of using multiple identities … could somehow achieve a purpose by an imaginary weight of numbers if the allegations were all unfounded and ludicrous".

36. The judge concluded (at [34]) by saying:

> "I dismiss this indictment on the ground that the prosecution have not established that counts of forgery or fraud reflect the reality of what AM was up to here."

Then (at [35]):

> "I dismiss this indictment because it is in my judgment inherently flawed."

37. In the course of his ruling, the judge rejected the defence argument that the prosecution was an abuse of process. He made it clear that had he been satisfied as to the validity of the indictment, there would have been no basis to stay it.

The parties' positions on the application

38. The prosecution application contended that it was a clear error of law to hold that an email sent in a false name was not a false instrument within the meaning of the 1981 Act. Further, it was an error of law to dismiss the fraud charges on the basis that the defendant would not achieve his intended purpose. It was contended that the judge's ruling did not sufficiently identify why any of the counts on the indictment had been dismissed and did not reveal that the correct evaluative exercise had been carried out. It was also suggested that the judge had taken account of irrelevant matters, including the availability of an alternative civil remedy and the judge's view of the public interest in the prosecution. The prosecution suggested that, rather than the evaluative process required on a dismissal application, the judge had purported to exercise a broad, undefined (and unlawful) discretion.

39. During the hearing, I pressed Mr Lawler to clearly identify the basic and substantive error(s) of law upon which the prosecution relied in support of their application. He helpfully crystallised the prosecution position as follows:

<u>In relation to the forgery counts</u>

The judge correctly found that an email could be an instrument. On his factual analysis, the emails which are the subject of Counts 1 to 3 are false. Although the judge said that the defendant's motivation was far from clear, he found that his ultimate intention seemed to be to prevent the development from happening. On that factual analysis, Mr Lawler contended that the offence of forgery was made out. Therefore, as a matter of law, the judge was wrong to dismiss the charges.

In relation to the fraud counts

Having found that the evidence was capable of establishing falsity and the relevant intention, namely an intention to cause IPE loss or to expose them to a risk of loss, the judge was wrong as a matter of law to conclude that Counts 4 to 6 were inherently flawed.

40. On behalf of the defendant, Mr Krolick did not argue before this court as he had in the Crown Court that an email could not be an "instrument". While not formally conceding the point, he was prepared to accept the judge's conclusion that an email was capable of being a forgery. However, he contended that the judge was right to find (on the evidence) that the particularised emails could not fall within the statutory definition.

41. Mr Krolick contended that the judge's finding that the defendant's "ultimate intention" seemed to be to prevent the development from happening was not sufficient to satisfy the intent required by section 1 of the 1981 Act.

42. In relation to the fraud charges, Mr Krolick contended that all that is alleged is that the defendant made representations that the identities Joe Pa and Eli Gottlieb were genuine and that he was Nuno Miguel Lopes. No particulars were given of the date and manner of the alleged representations. However, they appear to relate to the same emails as those charged in Counts 1 to 3, albeit there is also reference to other forms of communication in Count 5 (the fraud count relating to Eli Gottlieb). It is asserted that the defendant intended to make a gain for himself or to cause loss to another or to expose another to a risk of loss but no details whatsoever are given of the asserted gain or loss or the person or persons alleged intended to suffer such a loss. In the circumstances, Mr Krolick argued that it is very difficult to understand what it is that the prosecution actually allege.

43. Mr Krolick submitted that intention was fundamental to all charges and that the evidence was simply not sufficient to establish the necessary intent. Looked at as a whole, it is clear that the judge's ruling is based upon the insufficiency of evidence of intent. He submitted that the judge's decision was right. Certainly, there was no basic error of law which would justify allowing this application.

The evidence

44. It is apparent from the case summary to which I have referred that in addition to the emails which are particularised in the indictment, IPE and others connected with the development, received a large number of emails from persons purporting to be long leaseholders and/or residents. The case papers contain emails from addresses and identities other than the three which are the subject of the indictment. It may well be suspected by the prosecution that the defendant was also behind the other emails. However, for the purpose of this application, Mr Lawler conceded that there was no sufficient evidential link between the defendant and other identities.

45. There was evidence from which it could be inferred that the defendant sent the emails particularised in the indictment. It is unnecessary to consider the detail of that evidence since a concession was made in the Crown Court that the defendant had sent those emails.

46. The nature of the emails varied. They included allegations that IPE were incompetent or even criminal, that the development was not viable and that it would bring reputational damage to those associated with it. Emails to regulatory bodies complained about the conduct of the development and raised regulatory issues.

47. During the hearing, I was not taken to any evidence of communications other than the emails. I indicated to Mr Lawler that I had not read all the evidence in advance and would need to be directed to any relevant material. I was invited to read the statement of Joshua Rueben dated 21 September 2022, which I have done. This statement does contain evidence relating to phone calls and text messages. The purpose of that evidence appears to be to link the defendant to the Eli Gottlieb identity. Other than identifying himself as Eli or Eli G, there is no evidence of any substantive representations being made in the course of these communications.

48. In making his submissions, Mr Krolick took me through the emails which are particularised in the indictment in some detail. This was helpful. Given the concessions made on both sides and the way the indictment is framed, it is appropriate to focus on the specific emails which it is established were sent by the defendant.

49. The Joe Pa emails consist of one dated 20 January 2021 (not 4 January 2022 as in the draft indictment) and one dated 7 March 2022. In the first, the sender claimed he was resident in the building and suggested he had experience in the construction industry and was interested in working on the project. The second was addressed to the main director of the IPE group and copied to financiers. It raised concerns about the fitting of sprinklers and suggested that residents including Mr Pa and his wife would not allow their fitting. The email concluded "Either IPE will go belly up, or find another way of developing the site, which doesn't involve sprinklers!!!"

50. There are five Eli Gottlieb emails (not six as particularised in the draft indictment). The first is dated 18 July 2021 and addressed to "Local Planning Councillors" at Westminster City Council. The author begins by stating that he is writing with respect to the Marble Arch Apartments building development "where I live". He then details concerns about the development and suggests that the Council and the financiers should be ashamed. Following that email, an agent appointed to deal with communications asked for Mr Gottlieb's address. The defendant responded giving the address "11 Harrowby Street, Marbel Arch Apartments". This is the building address; no apartment number was given. On 12 August 2021 an email was sent to IPE and the financiers referring to "the disaster you are both proceeding with" and questioning whether the project was "responsible business". On 2 September 2021, the defendant wrote from the Eli Gottlieb address "No response from an irresponsible organisation. What a surprise!!! Somebody owes me lunch." On 11 March 2022, an email from the Eli Gottlieb account was sent to Westminster City Council, the Daily Mail and financiers. It provided "a short summary of the development disaster which has been unfolding at Marble Arch Apartments."

51. The three Nuno Miguel Lopes emails consist of one to IPE dated 22 March 2022 complaining about aspects of the project, including the sprinklers and two follow up emails dated 29 March 2022 and 30 March 2022 seeking reassurance and answers to questions raised.

Discussion and conclusions

52. The judge correctly identified the relevant statutory provisions, setting them out in his ruling before his analysis of the evidence. At [15], he said:

> "Though the conceptual mischiefs that each statute was designed to prevent differ in their definitions, each enactment contemplated a material gain to the offender and/or – at least – a material loss to an identifiable victim, whether in terms of money or other realisable property."

53. In its context, I do not read this as suggesting that a material gain or loss must actually have occurred. I believe the judge was highlighting that a central feature of each offence was that the falsity was intended to bring about gain or cause loss in financial or property terms. This did not represent any material misdirection in law. The judge clearly had the relevant statutory provisions in mind, having expressly referred to them.

54. While all evidence has to be assessed in context and against the background of any other evidence in the case rather than taking individual pieces of evidence in isolation, the particularised emails form the crux of the prosecution case. They require close attention with reference to the statutory provisions.

55. The judge accepted that an email was capable of being a forgery. The defence do not now challenge that proposition. However, he did not accept that the evidence could establish that the relevant emails were false instruments. Mr Krolick referred to *R v More* [1987] 1 W.L.R. 1578 in which the House of Lords considered the definition of 'false' in section 9(1) of the 1981 Act. The appellant in that case had stolen a cheque and had then opened an account in the name matching that on the cheque. Having paid the cheque into that account, he signed a withdrawal form using the name with which he had opened the account to obtain the funds. It was common ground that the word "purports" in each of paragraphs (a) to (h) of section 9(1) imports a requirement that for an instrument to be false it must "tell a lie about itself". The House of Lords concluded that the withdrawal form purported to be signed by the person who had opened the account, namely the appellant, and had in that respect been accurate; accordingly it had not told a lie about itself and the appellant had not been guilty of forgery. Giving the only judgment, Lord Ackner said that it was unfortunate that the forgery count was added alongside counts of theft and obtaining property by deception, adding a quite unnecessary complication to a very simple prosecution. Mr Krolick relies on *More* as authority for the proposition that the mere fact that the maker uses a name other than his own does not, in itself, mean the instrument is false.

56. However, even if the emails do come within the statutory definition of "false instruments", that is not sufficient to establish the offence of forgery. The Judge said that he was not persuaded "on these facts" that "any of the emails sent by [the defendant] are capable of satisfying the definition of s.1 of the 1981 Act." Mr Lawler suggested that his reference to section 1 must have been a typographical error because the relevant definitions of making a false instrument are to be found in sections 8 and 9. On the contrary, this submission represents a fundamental misunderstanding of the judge's conclusion. The judge was there looking at the definition of the offence as a whole. That included the mental element.

57. Section 1 requires a double intention. First, the defendant must intend that the false instrument should be used to induce another to accept it as genuine. Secondly, he must intend that by reason of it being accepted somebody should do or not do an act to his own or any other person's prejudice. Potential prejudice is not enough because the words "will result" in section 10 mean that the act or omission must be one that, if it occurs, must result in loss of property or loss of opportunity to earn remuneration or otherwise gain a financial advantage (see *R v Garcia* (1988) 87 Cr.App.R. 175).

58. I agree with Mr Krolick's submission that the judge's conclusion about the defendant's "ultimate intention" was not sufficient to establish the necessary intention. The judge was referring there to what the defendant hoped would happen. It is clear that the defendant wished his concerns to be recognised and acted upon. The judge said that his motivation was far from clear, particularly as he was not himself in residence. To that extent, he would not be personally inconvenienced by the development works. Whether he was concerned that the development would affect the value of his property or whether he had as the judge put it "a sincerely held belief that IPE was incompetent and hadn't done its sums" is immaterial.

59. In the emails, the defendant was not purporting to be someone who had greater rights in relation to the development than he did. He expressed concerns, asked questions and raised complaints. The only falsity relied upon is in relation to the identity of the sender of the emails. Even if the prosecution could overcome the hurdle of establishing that the emails were false instruments, the difficulty they face is that the statutory intention must be linked to the making of the false instrument. To establish the forgery counts, the intention would have to attach to the use of a false identity in sending the particular emails.

60. The prosecution have not even attempted to particularise the act or omission which the defendant was intending to induce by inducing acceptance of emails as genuinely being from the person named. I agree with the judge that there is force in the defence arguments that the prosecution have not complied with the provisions of CPR 2020 rule 10.2(1). The particulars of the forgery counts essentially just recite the statutory language without applying it to the facts of the case. In my view, this is more than a matter of form. Even having revised the indictment for the purposes of this application, they are apparently unable to better particularise the allegations. This goes to the substance of the case. The prosecution have not shown who would have been induced to do what by accepting that the emails in question were genuinely from the named person. There is simply no evidential foundation for the intent that must be proved if charges of forgery are to be made out. Their reliance on the defendant's overarching intention to stop the development is not enough to form the basis of proper convictions on these charges.

61. The fraud charges must also be approached on the basis of the specific allegations. The counts in the indictment relate to the same three false identities. They do not go wider than that. Although parts of the evidence relate to a much wider 'campaign of false emails', it was conceded that there is an insufficient evidential link between the defendant and other identities. There is even less particularisation of these charges than of the forgery charges. However, they appear to rely on the same emails as underpin Counts 1 to 3. No additional email communications were identified by the prosecution as being relevant. As I have indicated, the evidence about phone communications was limited and no substantive representations are said to have been made via phone.

62. Again, I consider that the prosecution have fallen into the trap of regarding it as sufficient to prove falsity and an overarching intention to stop the development without fully engaging with the statutory requirements.

63. The only false representations relied on go to the identity of the sender of the emails. The prosecution must prove that the use of a false identity in sending the emails was intended by the defendant to make a gain for himself or to cause a loss or a risk of loss to another. Again, the prosecution have not fully particularised the counts. They have simply adopted the statutory language. The prosecution have not addressed their submissions by reference to the contents of the emails. The prosecution have not explained how these emails were intended to make a gain or cause a loss or risk of loss. When pushed during the hearing, Mr Lawler conceded that there was no basis for asserting that the defendant intended to make a gain. This is a further illustration that the prosecution have not paid sufficient attention to what the evidence is capable of establishing, and what it cannot.

64. The prosecution have the suspicion that the defendant is behind many more emails than those they have been able to link to him. Their evidence suggests that dealing with such emails has been a significant burden and has resulted in large costs being incurred. However, the case as presented relates to the emails which purported to be from Joe Pa, Eli Gottlieb and Nuno Lopes. The contents of those emails has to be considered. The evidence is not, in my judgment, sufficient to establish the intent necessary to prove fraud.

65. It follows that not only am I unable to identify any basic and substantive error(s) of law in the judge's approach when dismissing the charges but, having independently analysed the evidence by reference to the statutory provisions, I would reach the same conclusion that the defendant could not properly be convicted on any of the charges on the indictment. The application must therefore be dismissed.

The abuse of process argument

66. In those circumstances, the defendant's secondary abuse of process argument does not need to be considered in any detail. For completeness, I note that the defendant sought to argue that the prosecution had failed to disclose all material facts, in particular that the proposed prosecution was intended to obtain a tactical advantage in relation to other matters arising between IPE and their tenants. The abuse argument was dealt with by the defence in an extremely cursory manner, particularly given the seriousness of the allegation. In response, the prosecution have served a "Duty of Candour" statement which was before the Magistrates' Court. That statement referred to the ongoing civil proceedings.

67. I do not consider that the defence have raised any proper basis for maintaining an abuse of process argument. HHJ Tomlinson would have refused to stay the indictment as an abuse had he not dismissed the charges. The new argument advanced would not have persuaded me to a different view. However, this does not arise because I agree with HHJ Tomlinson's decision to dismiss the charges. Accordingly, there is no question of granting leave for a voluntary bill of indictment to be preferred.

Disposal

68. The prosecution application for leave to prefer a voluntary bill of indictment is refused.

69. I invite the parties to attempt to agree any consequential matters, including costs, failing which brief written submissions should be exchanged and filed within 14 days of the handing down of this judgment.