Mortgage fraud and the law of theft.

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The House of Lords decision in Preddy [1] held that defendants involved in mortgage fraud and charged with obtaining property by deception[2] could not be guilty of that offence because there was no obtaining of property by the defendants.This article will critically examine the various offences which have been used to charge defendants involved in mortgage fraud.The effect of the Theft(Amendment)Act 1996 Act on the Theft Act 1968 and the Theft Act 1978 will also be examined.

What is mortgage fraud?

Mortgage fraud occurs when a mortgage application to a building society or other lending institution and/or accompanying documents contain false statements, the applicant knowing the statements to be false.Examples of such statements are the giving of a false name,false details of employment and/or income,stating the property is to be owner occupied when in fact it is to be let to tenants,giving false details as to the purchase price or stating there is no prior mortgages when there are[3].The purpose of these false statements(misrepresentations or

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[1] [1996]2 Cr.App.R.524.

[2] Section 15(1) Theft Act 1968.

[3] If a solicitor suspects that a mortgage application contains false statements he or she should investigate the matter fully and if not satisfied cease to act further for the client.A solicitor remains bound by his duty of confidentiality to his client and,therefore, is prevented from disclosing the suspected fraud unless the solicitor is satisfied that there is a strong prima facie case that the client was using the solicitor to further a fraud or other criminal purpose.The Law Society`s Conveyancing Handbook 1994 p 50& p649.

deceptions) is to persuade the lender to agree to the mortgage advance.[4]

Obtaining property by deception.[5]

An examination of the history of the legislation which resulted in the Theft Acts 1968 and 1978[6] shows why obtaining property by deception has been used to charge mortgage fraud a use it was not designed for.

The *mens rea* for this offence consists of a deliberate or reckless deception[7]recklessness.by the defendant whereby he dishonesty[8]obtained the property with the intention to permanently deprive the other of that property obtained.The *actus reus* consists of obtaining of property belonging to another and when considering cases of mortgage fraud "[t]he crucial question,as I see it,is whether the defendant obtained (or attempted to obtain)property *belonging to another"*[9]

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[4]"[The]lenders appear to have been more interested in the value of the property in question than in the personal details of the applicant" Lord Goff in Preddy[1996] 2 Cr.App.R.525 at 527.This raises the question as to whether there was an operative deception for the purposes of s15(1)?However in Lambie[1982]AC 449 an operative deception was held to have occurred where the victim would not had concluded the transaction had the truth been known.

[5]Above no 2.

[6]Above no 1 at 530-533.

[7]Section 15(4)Theft Act1968."Reckless"here means *Cunningham*

[8]The negative definition of dishonesty in section 2 of the Theft Act 1968 does not apply to deception offences.The *Ghosh* direction should only be given where there is evidence that the defendant has "confessed and avoided".See Card,Cross and Jones Criminal Law Richard Card 13 th ed pp 282-283.

[9]Above no 1 at 534 per Lord Goff.The definitions of "property" in section 4(1)Theft Act 1968 and "belonging to another" in section 5(1)Theft Act 1968 apply generally to other offences(section 34(1)Theft Act 1968).

This is the crucial question to consider as obtaining property by deception is a result crime i.e.property belonging to another must be obtained for the substantive offence to be made out.When considering this question a distinction has to be made between mortgage advances that are paid by cheque and those paid electronically by telegraphic transfer or CHAPS[10].The Court of Appeal,when dealing with mortgage fraud involving cheques obtained from the Greater London Council ,defined the property as "...that thing in action,that cheque;that piece of paper,in the sense of a piece of paper carrying with it the right to receive payment of the sum of £6,002.50"[11].This distinction between a cheque creating a chose(or thing)in action[12] and that cheque as piece of paper needs to be made,but the point is that the chose in action(a debt)created by a mortgage advance cheque belongs to the defendant(or the defendant`s solicitors as in the great majority of cases the mortgage advance cheque will be payable to the solicitors).Thus the chose in action so created is a debt owed by the drawer(the lender) to the payee(the defendant or his solicitor)[13].

The mortgage advance cheque as a piece of paper does belong to the lender[14]and ,if as a result of the defendant`s deception, the defendant or the defendant`s solicitors[15] obtained the

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[10]Clearing House Automated Payment System.

[11]Duru[1974]Cr App Rep 151 at 160.

[12]"It is important to notice that not all cheques do create things in action.An action on the cheque will lie only if it is given for valuable consideration,i.e.any consideration sufficient to support a simple contract or an antecedent liability" J C Smith in "Obtaining Cheques by Deception or Theft" [1997]Crim.L.R.396 at 400.This was not considered by Lord Goff in Preddy but it is submitted that if there is an intention to repay the mortgage advance with interest then the cheque paying the advance would create a chose in action.

[13]Above no 1 per Lord Goff(obiter)at 536 applying Danger (1857) Dears & B 307;(1857)7Cox C.C.303."For these reasons I am satisfied that *Duru* and *Mitchell* are to this extent wrongly decided" Lord Goff at 537.

[14]By virtue of section 5(1) Theft Act 1968.

[15]Section 15(4) Theft Act 1968 provides "For purposes of this section

cheque then this will form the basis of an obtaining property by deception charge.The difficulty is that the cheque having completed the clearance procedure will be returned to the lender or more usually the lender`s bank.This begs the question as to whether the defendant has an intention permanently to deprive the lender of the cheque form.There are two possible answers to this question and both involve consideration of section 6(1) Theft Act 1968[16]. First section 6(1):Part2 applies where there is a borrowing of property for a period and in circumstances making it equivalent to an outright taking, so that the property when returned to the victim has changed in "that all its goodness or virtue has gone"[17].So the mortgage advance cheque when obtained by deception has value or goodness but having cleared is returned to the lender`s bank as a worthless piece of paper. This means that such a borrowing is the equivalent to an outright taking, and in such circumstances the defendant is deemed to intend to permanently deprive the lender of the cheque.Secondly section 6(1)Part1 deems there to be an intention permanently deprive where the defendant intends to treat the property as his own regardless of the rights of the other(the victim).This can be applied to a mortgage advance cheque as the defendant intends that the lender will only get the cheque back if value is given for it[18].Despite these two possibilities it cannot be right to proceed with a mortgage

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a person is to be treated as obtaining property if he obtains ownership,possession or control of it,and "obtain" includes obtaining for another or enabling another to obtain or to retain".See Duru [1974] above no 11 at 158.

[16] Section 6(1)Theft Act 1968 provides "A person appropriating property belonging to another without meaning the other permanently to lose the thing itself is nevertheless to be regarded as having the intention of permanently depriving the other of it if his intention is to treat the thing as his own to dispose of regardless of the other`s rights[Part1]:and a borrowing or lending of it may amount to so treating it if,but only if the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal[Part2].

[17]Lloyd [1985]2All ER 662 at 667 following Duru above no 11.

[18]Mitchell[1993]Crim.L.R.788.In the commentary to this case JC Smith maintains that the Court of Appeal inferred that the defendant had a conditional intent to deprive"if he had known that the cheque would not be honoured because,for example,it had been stopped,he would not have presented it.He would have probably have destroyed

fraud prosecution which charges the serious offence of obtaining property by deception, for which a defendant could face a maximum of ten years in prison,where the property obtained was a piece of paper.

There is a third possibility suggested by Professor Smith that a cheque is a valuable security.[19]Smith agrues that a cheque has a special property which makes it different from a mere piece of paper"It is not any old piece of paper which will cause ,say, a bank clerk to hand over £1,000;but a cheque will do that"[20] and it is this special property which makes it a valuable security contemplated by the Larceny Act 1916 and the Theft Act 1968 has done nothing to change this position.This means that a valuable security is property that can be stolen or obtained by deception "[w]hen D gets his hands on [a cheque],he has a valuable ,tangible thing in his possession"[21].

These difficult points of law will have to be considered in the future ,because the new offence of dishonestly obtaining a money transfer by deception[22] will only apply to mortgage fraud involving cheques where a credit is made in the payee`s account[23].If the defendant(or more likely the defendant`s solicitor) presents the cheque that will be enough for an attempt to commit that offence but there will be cases where the defendant(or the defendant`s solicitor) was before that stage and, therefore not beyond preparation which is not enough to charge an attempt[24].

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it and would certainly not have returned it" at 791.In such circumstances it would not be necessary to invoke section 6(1).

[19] In"Obtaining Cheques by Deception or Theft" above no 12.

[20] Above no 12 at 400.

[21] Above no 12 at 400.

[22] Section 15A Theft Act 1968 inserted by section 1 Theft(Amendment)Act 1996.

[23]Section 15A (2)(b)Theft Act 1968.

[24]Section 1(1)Criminal Attempts Act 1981.

Mortgage advances are also paid electronically by telegraphic transfer or CHAPS and indeed that is how the defendants in Preddy[25],when successful in their mortgage applications,were sometimes paid[26].The three points of law before the House of Lords were to be considered on the basis that the advances had been paid electronically[27] and for the defendants to be guilty of obtaining property by deception the crucial question was,as with cheques, whether property belonging to another had been obtained.

Identifying the property in such cases has caused the Court of Appeal some difficulty[28].However Lord Goff in Preddy,starting with the assumption that a lending institution held a bank account which was in credit[29],identified that credit balance as a chose in action belonging to the lender.[30]The next question is whether that property is obtained when a mortgage advance is paid electronically.Lord Goff makes it clear that it is not

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[25]Above no 1.

[26]Some advances were paid by cheque although a number of applications were refused in which event the defendants were charged with attempting to obtain property by deception.

[27]Above no 1 at 529 and 535.

[28]See Williams(Jacqueline),The Times August 18 1993,Preddy [1995] Crim.L.R.565.

[29]It is submitted that this assumption does not always represent the reality.It is true that building societies `bank` with banks.Also the established banks when dealing with mortgage finance use separate companies incorporated for that purpose e.g.National Westminister Home Loans Limited.But some of the larger building societies have converted into banks and these banks make use of suspense accounts and not separate lending companies to make mortgage advances.It would be difficult to apply Lord Goff`s reasoning to suspense accounts as such accounts are probably part of the bank`s property.

[30]Above no1 at 534.The chose in action is the debt(represented by the credit balance) owed by the bank to the lending institution.This is intangible property any right in which can only be enforced by action.Contrast a chose in possession which is a movable chattel(i.e.tangible property-goods)the right in which can be enforced by taking physical possession.

”[W]hen the bank account of the defendant(or his solicitor) is credited,he does not obtain the lending institution`s chose in action.On the contrary that chose in action is extinguished or reduced *pro tanto,*and a chose in action is brought into existence representing a debt in an equivalent sum owed by a different bank to the defendant or his solicitor.”[31].

It appears that it makes no difference that the bank account of defendant`s solicitor is credited rather than the defendant`s own bank account.Later in his judgment Lord Goff considers this point where the solicitor acts for both the defendant and the lender and the mortgage advance,when released by the lender, is paid to the vendor`s solicitor in the form of the banker`s draft[32].When the advance is paid(via CHAPS or by cheque to the defendant`s solicitor )”...the solicitor, when he receives the money,does so as agent of the lending institution and holds it as bare trustee for the lending institution..”[33].It is submitted that Lord Goff uses the word *money* to mean the chose in action created in favour of the defendant`s solicitor and that chose is held in trust.This seems to mean that the chose when created would belong to both the lender and the solicitor because of the trust.Therefore it could be argued that this new chose in action was obtained by deception because, as a result of the defendant`s false representations,his solicitor had obtained control over it.However Lord Goff impliedly rejects this possibility when he makes following *obiter* point that the chose in action created by the receipt of a cheque by a solicitor or by the crediting of the solictor`s bank account ”...can never have belonged to the lending institution or its bank and so can never have belonged to another as required by section 15(1)”[34]

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[31]Above no 1 at 534.

[32]Above no 1 at 538-539 *obiter.*

[33]Above no 1 at 538 applying Target Holdings Ltd v.Redferns(a firm)[1996]1 A.C.421,436 per Lord Browne- Wilkinson.

[34]Above no 1 at 539.

To fill the gap in the law of theft created by Preddy section 15A Theft Act 1968[35] creates a new offence of dishonestly obtaining a money transfer by deception.

The offence reverses the effect of Preddy and covers all money transfers regardless of whether the transfer is effected electronically or by cheque[36].The offence is a result crime in that it is only committed when,as a result of the defendant`s dishonest deception,the defendant`s account or the account of another is credited.So as previously outlined the offence is not committed when the defendant by deception obtains a cheque but does not present it[37].The mens rea for the offence is dishonesty[38] and there is no need to prove an intention to permanently deprive. ”Account” includes accounts held with banks and those held with “a person carrying on a business” such a building societies and insurance companies[39].The offence covers the obtaining of loans including mortgage advances but it also covers non-cash payment other than loans.

Before the decision in Preddy a mortgage advance obtained by deception would be stolen goods for the purposes of the offence of handling stolen goods[40].This would apply if the advance was paid electronically or by cheque or in cash to a dishonest third party who knew or believed the advance to be stolen.That person would be guilty of handling if he received the funds or dealt with them in one of the other ways set out in section 22(1)Theft Act 1968.However since Preddy mortgage fraud cannot constitute an offence under s15(1) which means that such funds obtained by deception are probably not stolen goods[41].This hindrance

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[35]Above no 22.

[36]Above no 22 section (4).

[37]Above no 23.

[38]Above no 8.

[39]Above no 22 section (3)&(4).

[40]Section 22(1) Theft Act 1968.

[41]Unless those involved in mortgage fraud are guilty of theft which is considered below.

to prosecution is resolved by a new section 24A Theft Act 1968[42]

This new offence is similar to handling and a defendant, who is guilty of obtaining a money transfer by deception to his own account, will also be guilty of retaining a wrongful credit if he dishonestly fails to take reasonable steps to cancel the credit[43](by ,for example,arranging for the money to be repaid to the victim).But the offence also applies if the money transfer is to the account of another[44] or where the defendant(having obtained a money transfer by deception) makes a further money transfer from his account to a third party`s account.The third party will commit the 24A(1) offence if he knows or believes the credit is wrongful and dishonestly fails to take reasonable steps to cancel it[45].

Obtaining services by deception.

The obstacle to charging those involved in mortgage fraud with obtaining services by deception[46] has been the decision of the Court of Appeal in Halai[47]which held that a completed mortgage advance was not a service for the purposes of section 1 Theft Act 1978.The decision has been heavily criticised by Professor Smith[48] and by Lord Lane in

[42]Inserted into the Theft Act 1968 by section 2 Theft (Amendment)Act 1996.

[43]Section 24A(3).

[44]Section 24A(3).If that other knows or believes the credit to be wrongful and he dishonestly fails to take reasonable steps to cancel it.

[45]Section 24A(4).If the third party makes money transfers to others with knowledge the offence is committed again and so on.The offence is also committed if the origin of the wrongful credit is theft, blackmail or stolen goods but not when the origin is obtaining services by deception which appears to be an oversight in view of the amendments to that offence.

[46]Section 1(1) Theft Act 1978.

[47][1983]Crim.L.R.624.

[48] No 47 above at 626.

Teong Sun Chuah[49]as being a decision *per incuriam*.The criticisms are based on subsection (2) of section 1 which provides:

"It is an obtaining of services where the other is induced to confer a benefit by doing some act,or causing or permitting some act to be done,on the understanding that the benefit has been or will be paid for."

It would appear clear that a mortgage advance falls within this definition as the act conferring a benefit is the paying of the advance and it is to be paid for because interest is charged.The Court in Halai disagreed " A mortgage advance is not a service:it was the lending of money for property"[50]. However in Graham[51]Lord Bingham comments "The time has in our judgment come when the ruling in Halai...should no longer be regarded as good authority,and it should no longer be followed"[52]

This comment by the Lord Chief Justice was obiter and so did not formally overule Halai.However it was a very persuasive precedent and followed by the Court of Appeal in Cooke[53].This was a mortgage fraud case where the Crown conceded that a section 15(1) conviction could not be sustained as a result of Preddy but argued,inter alia,that an obtaining services conviction should be substituted.The Court accepted this argument and was able to as part of the *ratio decidendi* substitute a conviction of this alternative offence[54]and overule

[49][1991]Crim.L.R.463.

[50] No 47 above at 625.

[51] [1997]1 Cr.App.R.302.

[52] No 51 above at 317.

[53] [1997]Crim.L.R.436.

[54]As the conditions in section 3 Criminal Appeal Act 1968 were fulfilled namely that (i)the jury could on the indictment have found the defendant guilty of some other offence and(ii)the Court is certain that the jury must have been satified of facts which proved him guilty of the alternative offence.

Halai.The Theft(Amendment)Act 1996 section 4 inserts into the Theft Act 1978 a new subsection (3)which states that the making of a loan for interest is a service.However this amendment will only apply to defendants involved in mortgage fraud(and other loan fraud) committed on or after 18 December 1996 and that is why the decision in Cooke is important as it means that mortgage fraud (and other loan fraud)committed prior to that date can be charged as obtaining services.

Procuring the execution of a valuable security by deception.[55]

To succeed on an indictment for mortgage fraud under the Theft Act 1968 s20(2) the prosecution must prove that there is a document which amounts to a valuable security[56]and(as a result of a dishonest deception by the defendant)the valuable security been executed so that "any right to,in or over property"[57] is created,transferred,surrendered or released.In King[58] the Court of Appeal held that a CHAPS order(paying a mortgage advance) was a document amounting to a valuable security that it had been executed when the bank officals had carried out the order by keying its details into a computer so that the advance was paid.The words "any right to,in or over property" imply that there is existing property a right to which has been created and Lord Lane dealt with this by stating:

"...here there was property in existence.The £81,000 standing to the credit of Cunningham,although by way of loan,was undoubtedly a chose in action,which by vitue of s 4 of the 1968 Act is within the definition of "property" "[59].

[55]Section 20(2)Theft Act 1968.

[56]As defined by section 20(3)Theft Act 1968.Contrast a "valuable security" contemplated by the Larceny Act 1916 which is considered above.

[57]Above no 56.

[58][1991]3 All ER 705.A case involving dishonest applications for mortgage facilities.

[59]Above no 58 at 710.

Whilst it is true there is property in existence it was not *existing* property before the valuable security was executed.It is difficult to see how a prosecution for mortgage fraud under s20(2) can proceed as there is no existing property which continues to exist after the valuable security is executed[60].There is also still some doubt as to whether a CHAPS order is a valuable security as in Manjdadria[61] the Court of Appeal held that telegraphic transfer was not such a security and that the decision in King is "going to the extreme limits of what amounts to a valuable security"[62]

Theft

The House of Lords in Preddy did not consider whether the defendants were guilty of theft.However in view of the limitation of the new offence of dishonestly obtaining a money transfer outlined above prosecuting authorities will still need to consider the possibility of charging those involved in mortgage fraud with theft[63]

The *mens rea* for this offence is "dishonesty"[64] and an"intention to permanently deprive" the other of his property.The *actus reus* consists of an "appropriation" of "property""belonging to another".As with section 15(1) a distinction has to be made between mortgage advances paid by cheque and those paid electronically.

A defendant will be guilty of theft if,in consequence of the defendant`s dishonest mortgage

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[60]Contrast Benstead(1982)75 Cr App R 276.

[61][1993]Crim L R 73.

[62]Above no 61 at 74.

[63]Section 1(1) Theft Act 1968.

[64]The negative definition of dishonesty in section 2 Theft Act1968 does apply to theft.Above no 8.

application,the lender sends to the defendant`s solicitor an advance cheque and to complete a purchase transaction the solicitor presents the cheque. The defendant`s solicitor presents the cheque as the defendant`s agent and ,at presentation, an appropriation of property belonging to another occurs i.e. the lender`s chose in action (the debt owed by the lender`s bank to the lender).[65]If the mortgage advance is paid electronically it is submitted that the appropriation occurs when the defendant`s solicitor as agent for the defendant requests that the lender pay the advance to solicitor`s client bank account.

Having decided that mortgage fraud could not be subject to a charge under section 15(1)Theft Act 1968 Lord Goff in Preddy reasonably declined to consider whether an intent to repay the advance negates the intention to permanently deprive.However, when giving his reasons for so declining, Lord Goff makes the *obiter* point that such a question would involve consideration of section 6(1)Theft Act 1968[66].It is submitted that with reference to theft(where the advance is paid electronically) this *obiter dictum* should not be followed as it has been accepted that an intention to permanently deprive money(here meaning coins and bank notes)appropriated is not negated by an intent to repay[67].This is because the intent to repay relates to different coins and bank notes from those stolen and the same principle can be applied to choses in action.

Conclusion.

The Theft Acts 1968 and 1978 now have three offences which can be used to charge those

[65]There is an assumption of the rights of an owner i.e.the right of the lender to the debt:section 3(1)Theft Act 1968.The fact that the lender consents does not prevent the appropriation occurring:Gomez[1992]3 WLR 1061.The lender`s account does not have to be debited for there to be an appropriation as actual deprivation is not a necessary element of theft:Governor of Pentonville Prison,ex p Osman [1989]1 All ER 108.

[66]Above no 1 at 539-540.

[67]Velumyl[1989] Crim.L.R.299.

involved in mortgage fraud although it does appear the offence under section 24A(1) Theft Act is not committed if the origin of a credit to account is obtaining services by deception and this is an oversight in view of the amendments to that offence.In addition the three offences are result crimes and the substantive offences are only made out when an account is credited.There may cases where this has not happened and attempt charges for the three offences are not possible because the defendant has not gone beyond preparation.In such cases prosecutors will still need to consider obtaining property by deception and theft charges.However conspiracy to defraud may be the preferred charge(assuming there is an agreement by two or more) because it probably still remains the only charge which is unlikely to be defeated by technical arguments which have no relevance to the reality of the fraud alleged.

Postscript.

Since this article was first written the Law Commission has published a consultation paper on fraud and deception.[68] The Commission proposes that difficulties with fraud be dealt with by extending the law of deception without resorting to a general deception offence.[69]In particular it is proposed that the offence obtaining property by deception be redefined to cover a situation where the person to whom the property belongs is deprived of it.Thus the offence would cover not only the obtaining of property but also the parting or destroying of it[70].The Commission however, acknowledges that even this extended offence will not cover a situation where there is no property,for example, where the victim is deceived by the defendant to draw further on an unauthorised overdraft[71].The Commisson believes that this

[68] *Legislating the Criminal Code: Fraud and Deception* (1999)Consultation Paper 155.

[69]Para 6.30.

[70]Para 8.15.There is also the proposal that the elements of intention to permanently deprive and dishonesty be dropped from the definition of the offence:paras 7.23-7.30;paras 7.39-7.53.

[71]Para 8.15.

case would be covered by its proposed new offence of imposing liability on another. There could be liability for this offence without the need for an operative deception as its primary purpose is to avoid the fictional or constructive deceptions found by the House of Lords in the payment card fraud cases of *Charles*[72] and *Lambie*.[73]The Commission also believes that these proposed changes would fill the gap in the law of theft caused by *Preddy* with the consequence that the money transfer offence would become superfluous and should not be retained.[74]

[72][1977]AC 177.

[73][1982]AC 449.

[74]Paras 8.15-8.16.