

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEAL NO: 4/06

**BEFORE: THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A.**

VINCENT CHEN v R

R. N. A. Henriques, Q.C., Delano Harrison, Q.C., Leonard Green, Seyon Hanson for the appellant

Gayle Nelson, on fiat for the Crown, Ms. Tanya Spence & Ms. Natalie Ebanks, Crown Counsel (Ag.) for the Crown

28th, 29th, 30th May 2007 & 27th June, 2008

PANTON, P.

1. The appellant, another individual and two companies were tried jointly in the Corporate Area Resident Magistrate's Court, Half-Way-Tree, before Her Honour Miss Jennifer Straw (as she then was) on an indictment which contained fifteen counts alleging fraudulent conduct. The appellant was named in seven of those counts (Counts 5, 6, 7, 8, 11, 14 and 15) but was convicted on three of them only, namely, Counts 11, 14 and 15. The trial commenced on March 7, 2000, but did not end until more than three years later, with the verdicts being recorded on April 25, 2003. The lengthy trial process seems to have resulted from the late service and production of some documents, the unavailability of

others, the manner of adducing the documentary evidence, and the absence of witnesses. Indeed, on one occasion a witness was examined in chief on November 16, 2001. Two months later when he should have returned for cross-examination, he was absent on the pretext that he was in an urgent meeting with a Minister of Government. The learned Resident Magistrate then indulged counsel by allowing them to use the time to make lengthy oral submissions as to the medical condition of another witness. Indeed, throughout the trial, the learned Resident Magistrate demonstrated that she has been blessed with extraordinary patience.

The charges

2. The particulars of the counts on which the appellant was convicted read thus:

Count 11: "Conspiracy to defraud"

"Vincent Chen and Caribbean Trust Finance Investment Limited on divers days between the months of January 1997 and August, 1998, in the parish of Kingston, conspired together and with other persons unknown to defraud Ronald Sasso of Ten Million Dollars (\$10,000,000.00) by taking from him Ten Million Dollars (\$10,000,000.00) in Treasury Bills and issuing to him an undertaking to the effect that Caribbean Trust Finance Investment Limited would hold Ten Million Dollars (\$10,000,000.00) in Treasury Bills at all times to secure his investment of Ten Million Dollars (\$10,000,000.00) well knowing that Caribbean Trust Finance Investment Limited had no available Treasury Bills to hold for Ronald Sasso and that the cash position of Caribbean Trust Finance Investment Limited did not allow it to make such an investment."

Count 14: "Causing Money to be Paid by False Pretence"

"Vincent Chen on the 27th day of March 1997 in the parishes of Kingston and Saint Andrew with intent to defraud caused Ten Million Five Hundred and Eighteen Thousand Dollars (\$10,518,000.00) the property of Capstan Investment Ltd. To be paid to JHG Mapp Successors Ltd. By falsely pretending that JHG Mapp Successors Ltd. was in good financial standing and a safe institution with which to invest the said sum".

Count 15: "Causing Money to be Paid by False Pretence"

"Vincent Chen on the 1st day of April 1997 in the parishes of Kingston and St. Andrew with intent to defraud caused the sum of Fifty Thousand United States Dollars (\$US50,000.00) property of Capstan Investment Limited to be paid to JHG Mapp Successors Limited by falsely pretending that JHG Mapp Successors Limited was in good financial standing and a safe institution with which to entrust the said sum".

The appellant

3. The appellant at the relevant time was the senior partner in the law firm, Clinton Hart and Co., and a shareholder in Caribbean Trust Finance & Investment Limited (hereinafter referred to as Caribbean Trust). In respect of his practice of law, he was regarded as the major commercial practitioner in his firm. He was not involved in the day to day running of the firm, which had Mr. Phillip Forrest as its managing partner. As such, Mr. Forrest had responsibility for overseeing the operations of the firm, whether financial, accounting or administrative. Mr. Michael Matthews, who was not an attorney, but was a property owning partner,

was responsible for keeping partners abreast of the firm's financial status. From time to time, monies would be moved from the firm, with clients' authorization, to Caribbean Trust as the latter offered interest rates that were higher than those offered by commercial banks.

Caribbean Trust

4. So far as Caribbean Trust was concerned, it was registered under the Industrial and Provident Societies Act on October 30, 1989, its registration number being 827. The first members of this society were listed and named thus:

- (i) Caribbean Trust Limited a Limited Liability Company (per Peter Millingen)
- (ii) Charles Vendryes
- (iii) Vincent Chen
- (iv) Peter Millingen
- (v) Michael Matthews
- (vi) Howard S. Mitchell
- (vii) Hugh C. Hart

With the exception of Mr. Matthews, all these individuals were attorneys, and partners in the law firm, Clinton Hart & Co., save for Mr. Hart who was a former partner. They were all committee members of Caribbean Trust up to August, 1998, with the exception of Mr. Milligen. Among the society's (that is Caribbean Trust's) objects were:

- (a) the carrying on of the business of an investment society;
- (b) the carrying on of the business of merchant and investment banking;
- (c) the provision of services as investment counsel, investment agent, and as manager of funds;
- (d) the borrowing or raising or securing of the payment of money and in particular by the issue of debentures, bonds or other securities of all kinds; and
- (e) the investment, re-investment and dealing with the moneys of the society or moneys held by the society in such manner as may from time to time be determined.

5. The committee of management of the society had a duty to keep a copy of the last balance sheet of the society together with the report of the auditor always displayed in a conspicuous place at the registered office of the society, no. 58 Duke St., Kingston.

An examination of the audited financial reports of Caribbean Trust done by Jackson, Burnett, Parkinson and Jackson (chartered accountants) revealed that Caribbean Trust was profitable up to 1993. It became insolvent in 1994 and remained thus in 1995 and 1996. In 1994, the deficit was nearly \$14,000,000.00; by April 30, 1996, this figure had climbed to over \$99,000,000.00.

6. Mr. John Jackson of the firm of accountants, Jackson, Burnett, Parkinson and Jackson, gave evidence. During cross-examination by Mr. Richard Small for the appellant, he said:

"There are situations where companies may find themselves in a position where liabilities exceed assets over a period of time. Eventually they work themselves out of it. I think I did give advice to CFTI about how they could work themselves out of the situation." (p. 197 of transcript)

In re-examination, Mr. Jackson, who has been a chartered accountant since 1974, but has been engaged in the accounting world since 1968, said that he had discussions with the principals of Caribbean Trust for some while, after which he gave them advice. However, "a couple days after, the company closed down".

The evidence in respect of count 11

7. Mr. Ronald Sasso, a retired banker, the complainant in count 11, made his initial investment with Caribbean Trust in about 1994. At the time, he was manager of a commercial bank. He was drawn to Caribbean Trust as a result of the high interest rates, and the fact that he was acquainted with "almost all the members of management" of Caribbean Trust. At page 67 of the transcript of the evidence, he said:

"Apart from Chen, knew Charlie Vendryes all my life, also Hugh Hart. Knew also Peter Milligen. I trusted Charlie Vendryes so that influenced me in putting my money in CTFI".

He regarded Caribbean Trust "as safe a place to deposit money as any commercial bank" (page 74 transcript). At the beginning of 1997, he had sums totalling over ten million dollars deposited with Caribbean Trust. Miss Karen Henney, financial controller of Caribbean Trust, requested him to allow release of the securities they were holding for the protection of the deposits. Mr. Sasso was reluctant to do this and told Miss Henney that he was not prepared to release the securities unless there was something provided as substitute. He had become "concerned for the safety of (his) investments in early or mid 1996". After conversing with the appellant on the telephone, Mr. Sasso agreed to accept a letter of undertaking signed by the appellant who, according to Mr. Sasso, said that the letter would keep him (Sasso) protected at all times during the life of the deposit, and that government securities would be held by Caribbean Trust for this purpose. The letter, dated 15th January, 1997, was admitted in evidence as exhibit no. 28. It was penned under the letter-head of the firm of attorneys-at-law, Clinton Hart & Co. It reads thus:

"Dear Mr. Sasso

Re: Your investment of \$10.5M with
Caribbean Trust Finance & Investment Ltd

This is to confirm that you have our professional undertaking that Caribbean Trust Finance & Investment Limited will at all times hold at least \$10.5M in Government securities which will be held for your account.

We trust that the foregoing is satisfactory.

Yours very truly

CLINTON HART & CO.

Per.....
VINCENT A. CHEN"

8. As a result of this letter, according to Mr. Sasso, he allowed his funds to remain (p. 65 transcript). Interest was paid monthly, but it was not taken; instead it was used to increase the capital sum. However, on August 13, 1998, Caribbean Trust advised Mr. Sasso that it was unable to pay the interest due. This was surprising to him as he had investigated Caribbean Trust, using his "own way" and his "own methods", and apparently had been impressed. Prior to the receipt of the letter exhibit 28 (above), Mr. Sasso had received a letter dated November 28, 1996, also under the letter-head of Clinton Hart & Co. That letter reads:

"Dear Mr. Sasso

Re: Promissory Note -\$10,325,866.41
Caribbean Trust Finance & Investment Limited

We hereby confirm that we hold on your behalf Government of Jamaica Treasury Bills (listed below) as security for your Promissory Note with our investment company, Caribbean Trust Finance & Investment Limited.

We hereby undertake to secure these instruments or any replacements thereof on your behalf until maturity on January 10, 1997.

The security is as below:-

<u>Certificate No.</u>	<u>Face value amount</u>
II 46129-30	\$1,000,000.00 each
JR10810	\$5,000,000.00
II 45884	\$1,000,000.00
II 45877-78	\$1,000,000.00 each
HA 22725-28	\$500,000.00 each

Yours very truly
CLINTON HART & CO

PER:
VINCENT A. CHEN"

9. After Caribbean Trust had indicated an inability to pay the interest that was due, Mr. Sasso demanded his returns. Thereafter, the appellant, according to Mr. Sasso, informed him that in his capacity as senior partner, he would repay him at the rate of \$150,000.00 per month. Up to the time of the trial that gave rise to this appeal, Mr. Sasso said he had not received any of this money. As a result, he filed a civil suit, and summary judgment was entered against Caribbean Trust.

10. The appellant's response to the prosecution's allegation on Count 11 was that he did not have a personal professional relationship with Mr. Sasso, as Mr. Charles Vendryes, one of the partners in Clinton Hart & Co., was Mr. Sasso's attorney-at-law. Mr. Sasso's financial affairs were dealt with by Ms. Henney and Mr. Vendryes. The appellant said that towards the end of 1996 he became aware of Mr. Sasso's concern about the fallout in the financial sector, and the safety of money owed to him by Caribbean Trust. Ms. Henney, he said, told him that Mr.

Sasso wanted security for his money, and she had agreed to give him certain specific Government of Jamaica treasury bills owned by Caribbean Trust. He, the appellant, as senior partner of Clinton Hart & Co., was requested to hold these specific bills at Clinton Hart & Co., on behalf of Mr. Sasso. These bills were held in a vault at Clinton Hart & Co. Accordingly he issued a letter recording the bills (Exhibit (Ex.) 27). He regarded the letter as a binding undertaking to secure the bills until the date of maturity, January, 1997. The undertaking, he said, was one that was given by the firm of Clinton Hart & Co.

11. The appellant, in his sworn testimony, said that subsequent to his letter, Ms. Henney told him that she had agreed with Mr. Sasso to trade in the treasury bills, and that Mr. Sasso wanted instead a letter of undertaking from Clinton Hart & Co., that the firm would be liable to him for \$10, 500, 000.00 in the event he failed to recover same from Caribbean Trust, that is, if there were not sufficient bills to send to pay him. The appellant said that he telephoned Mr. Sasso to confirm that that was his wish. Mr. Sasso, he said, confirmed it and said that he would be looking at the undertaking from Clinton Hart & Co., for payment, and so he could release the treasury bills. This gave rise to the letter numbered exhibit 28. The appellant saw nothing unusual about the undertaking, and gave the opinion that its validity has not been affected by the passage of time. He never, he said, conspired with anyone to defraud Mr. Sasso of the sums charged in the indictment.

The findings of the Resident Magistrate on count 11

12. The learned Resident Magistrate found that whether or not the appellant was involved in the day to day activities of Caribbean Trust, from 1996 he and Matthews were literally in charge. Karen Henney was answerable to them both, but she had the authority to make her acts the acts of Caribbean Trust. The Resident Magistrate accepted that Mr. Sasso inquired of Miss Henney as to his investments and the balance sheet. Miss Henney responded that audits were taking place, and so the information was not available. It is at that point, the Resident Magistrate found, that Mr. Sasso became concerned and requested security in the form of Government registered stocks or Treasury Bills. The request was honoured, but later Miss Henney asked for the release of the Government registered stock back to Caribbean Trust. The Resident Magistrate further found that Mr. Sasso spoke to the appellant who agreed that the securities would be replaced with Treasury Bills that would be held in safe keeping for his account. Although Sasso was reluctant, he agreed to accept a letter of undertaking signed by the appellant as a substitution for the Treasury Bills. The Resident Magistrate found that the appellant had told Mr. Sasso that the letter would keep him protected at all times during the life of his deposit and that Government securities would be held at all times by Caribbean Trust for this purpose. The fact that the letter was on the letter head of Clinton Hart & Co., confirmed this, the Resident Magistrate found. A professional undertaking was

given, she found. Mr. Sasso acted on the undertaking and thereby allowed the money charged in the indictment to remain with Caribbean Trust.

12A. The Resident Magistrate found that Caribbean Trust obtained the Treasury Bills stated in exhibit 28 from Mr. Sasso by falsely pretending that the company was in a position to hold Treasury Bills. Although she said that she was making "no findings in relation to the issue of the licence to deal in treasury bills", she found that the officers of the company must have realized they were unable to do so. She then said:

"This was clearly the doing of an unlawful act in a lawful manner and resulted in Mr. Sasso being induced to act in a way he would not otherwise have done. The Court infers a clear intention to defraud".

The challenge to the findings on count 11

13. The notice of appeal filed on May 6, 2003, contained a single ground of appeal, that is, that the verdict was unsafe and unreasonable. On May 18, 2007, twelve supplemental grounds of appeal were filed. It is necessary to set out in full Grounds 11 and 12 which are in respect of the conviction on count 11.

Ground 11 reads:

"The learned Resident Magistrate wrongly convicted on count 11 and clearly misconstrued the evidence before the court in coming to the conclusion that CTFI had no available Treasury Bills and omitted to give consideration to the evidence adduced at the trial as exhibit 29 (n.b. which is the same as exhibit 25)

which clearly shows CTFI was holding Treasury Bills in the amount of \$12,477,394.00."

Ground 12 reads:

"In finding the Appellant guilty on count 11, the learned Resident Magistrate failed to give any or any sufficient consideration to the following critical facts in the case:

- i. Ronald Sasso was at all times a retired banker with 51 years experience in banking;
- ii. Ronald Sasso on the evidence was never induced by anyone to invest moneys with CTFI but did so voluntarily from as far back as 1994;
- iii. Ronald Sasso did not at any one time deposit \$10,500,00.00 with CTFI, but did so periodically from time to time, which sum includes accrued interest from 1994. There were no primary facts on which the judge could draw any reasonable inference that the Appellant conspired with anyone to defraud Ronald Sasso of \$10,500,000.00;
- iv. The learned Resident Magistrate erred in finding the Appellant guilty of conspiracy to defraud thereby disregarding the evidence from Sasso himself and the Exhibit 29 (same as Exhibit 25) that CTFI would retain at least \$10,000,000.00 in treasury bills in respect of which his own evidence was that he could not say whether it was his or not. [see p.91 Record]

- v. Ronald Sasso entered into a commercial transaction when he requested and accepted a professional legal undertaking as security for the investments held on his behalf with CTFI;
- vi. Ronald Sasso commenced civil proceedings in the Supreme Court of Judicature of Jamaica to recover monies due on his investment against CTFI and the Appellant for breach of the professional legal undertaking;
- vii. In the civil suit Ronald Sasso made no allegation of being induced to invest his money by any fraudulent representation by the Appellant or anyone else;
- viii. The learned Resident Magistrate failed to give any or any sufficient consideration to the fact that Ronald Sasso commenced civil proceedings in the Supreme Court of Judicature against CTFI and the Appellant for breach of contract claiming the amount referred to in count 11 of this indictment and entered a judgment on the suit against CTFI without asserting or alleging any fraud on the part of CTFI or the Appellant.

Accordingly, the verdict in relation to count 11 is unreasonable or cannot be supported having regard to the evidence cited above."

14. Mr. Gayle Nelson, for the Crown, in written submissions, posed the following question:

"... why not produce the treasury bills if in fact you are holding them? Or alternatively, why not sell the treasury bills and pay the money to Mr. Sasso..."

He continued:

"The obvious answer is that they were not holding them, or not holding any bills specific to Mr. Sasso. In other words, they were indulging in double leveraging; that is to say holding one set of bills for several different persons which simply could not cover the investments for all those persons if they could cover even one. That in itself is fraudulent".

Mr. Nelson further submitted that notwithstanding Mr. Sasso's fifty-one years of experience, he was "outmanoeuvred"; in any event, what happened in 1994 (the year the investment was first made) was irrelevant. He said that it was untrue that Mr. Sasso had requested a professional undertaking.

15. Mr. Nelson's submissions as well as the recorded findings of the learned Resident Magistrate have, in the case of Mr. Nelson, ignored, and in the case of the Resident Magistrate, downplayed the importance and significance of the role of Ms. Henney in this matter. Miss Henney did not give evidence so any evidence in relation to what was said or done involving her was one-dimensional and in a situation that required proof beyond reasonable doubt as to the guilt of the appellant, the prosecution's burden was made more difficult to discharge by the lack of evidence from her. It should not be forgotten that she was the financial controller of the company, and was the person who was in direct contact with Mr. Sasso in relation to his investment and the security. In the

absence of evidence that she was acting on the instruction of the appellant, it cannot be just to pin the appellant with criminal responsibility for her actions.

16. The learned Resident Magistrate, as indicated in para.12B (*supra*), found that Caribbean Trust had obtained the Treasury Bills from Mr. Sasso by a false pretence. She concluded that the officers of the company must have realized their inability to hold Treasury Bills lawfully. Hence, she found, they had done an unlawful act in a lawful manner resulting in Mr. Sasso being induced to act in a way he would not have otherwise done. From this, she inferred "a clear intention to defraud". The evidence before the learned Resident Magistrate was, however, of a nature that could not, or ought not to, have led her to these conclusions. Mr. Sasso was not induced by anyone who was before the Court. At page 67 of the record, he said that he trusted Mr. Vendryes and that trust influenced him to invest his money in Caribbean Trust. Mr. Sasso proclaimed knowledge of the requirements that a financial institution had to meet in taking depositors' money. And well he might have so known, given his long experience in the world of banking. At page 68, he dispelled whatever doubts the Court may have had as he said that he was "mindful of all this" (the requirements) when he placed his money in Caribbean Trust. Such statements are not indicative of one who has been induced.

17. Mr. Sasso became concerned for the safety of his investments in early or mid 1996. The evidence does not show him expressing his concern to Mr.

Vendryes or the appellant. As a result of his concern, he said, he asked for security in the form of government registered stocks or treasury bills. He first spoke to Miss Henney, (not Mr. Vendryes or the appellant, it should be noted). Miss Henney said she would refer the matter to the appellant. He did not speak to the appellant at that time, he said. He further said that he was given to keep in his possession treasury bills in an amount that was equivalent to his deposits. Exhibit 33, a letter signed by Miss Henney as financial controller and dated 1st October, 1996, confirms this. After that, according to Mr. Sasso (p. 69 of the transcript), Miss Henney telephoned him asking for the government registered stocks (referred to in Ex. 33) to be released "back to them". This request was confirmed in a letter dated 22nd November, 1996 (Ex. 34). The letter refers to their "recent telephone conversation Sasso/Henney", and is on the Caribbean Trust's letter-head. It states in part: "We undertake to replace the abovementioned security with a similar instrument on Monday November 25, 1996. It is in order for you to deliver the above documents to our bearer hereof". He said that it was after this that he spoke to the appellant in an informal way, and that the appellant "agreed" with him that the securities he had given up "would be replaced with treasury bills that they would hold in safekeeping". It was then that the letter dated 28th November, 1996, signed by the appellant for Clinton Hart & Co. (Ex. 27) was issued (see para.12B above).

18. At pages 74 and 75 of the record, Mr. Sasso, the experienced banker, said that at the time financial institutions such as Caribbean Trust started operations

(in Jamaica), they were not obliged to keep the same legal liquidity reserves, and this gave them an advantage in respect of operating costs. He was well aware of this fact when he invested in Caribbean Trust. He regarded Caribbean Trust as being as safe a place as any commercial bank to deposit his money, otherwise he would not have invested therein. He said that in the conduct of his own personal affairs, he applies a prudent approach, and that he had investigated the institution in his own way, using his own methods. "In the normal course", he said, "my communications were with Miss Henney".

19. As mentioned in paragraph 12B (above), the learned Resident Magistrate in inferring "a clear intention to defraud" based the inference on her finding that the officers of Caribbean Trust must have realized that the company was unable to hold treasury bills. It is clear, that notwithstanding that finding, she had doubts as to the situation of the company in respect of licensing. Were it not so, why would she have failed to make a finding on that issue? The fact of the matter, however, is that at some stage Caribbean Trust did have treasury bills which it, through Miss Henney, actually placed in Mr. Sasso's hands. Mr. Sasso chose to return them to Caribbean Trust at Miss Henney's request, and then proceeded to make a request for an undertaking from Clinton Hart & Co., and the latter, through the appellant, obliged. It seems that in drawing the inference of an intention to defraud, the learned Resident Magistrate may have been

unwittingly misled by this quotation from paragraph 4073 of the 36th edition of Archbold's Criminal Pleading Evidence And Practice:

"Proof of the existence of a conspiracy is generally a "matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them:" *R. v. Brisac*, 4 East 164, 171, cited with approval in *Mulcahy v. R.*, L.R. 3 H.L. 306, 317."

The circumstances in respect of this count do not disclose any criminal act on the part of the appellant, certainly not in respect of an intention to defraud. Caribbean Trust was not a sham company. It was a genuine institution which had been providing returns to investors as agreed, but which clearly encountered difficulties in its operations and was not allowed to correct the problems. It is not without much significance that Mr. Sasso, the complainant in this count, has not only recognized the viability of the professional undertaking he received but also he has not made any allegation of fraud against the appellant. In the circumstances, the conviction on this count cannot stand.

Counts 14 and 15- the evidence presented by the prosecution

20. The complainant, and main witness, in respect of these counts was Mrs. Fay Tortello, a Justice of the Peace. On June 12, 2000, in examination-in-chief, she described herself as an ex-civil servant. However, on April 10, 2001, while being cross-examined, she could not recall giving herself that description. In re-examination on October 10, 2001, she attempted to clarify the matter by saying

she was "a civil servant of Italy", apparently referring to her former position of "Consul General for Italy in Jamaica". She gave evidence that her late husband, Orlando Tortello, had "provided" her and their children "with a trust fund in the Cayman Islands". She was entitled to a monthly interest for the rest of her life. That interest is paid abroad into an account. The Trust, she said, was Capstan Trust, which owned Capstan Investments Ltd. She said that Ansbacher, Cayman Ltd. was the trustee, and her brother-in-law Hugh Hart was the chairman of Ansbacher. Mr. Mark Richford, she said, was head of the Trust at Ansbacher, and Ballena Investment Ltd. was a subsidiary of Capstan.

21. Mrs. Tortello and the appellant were close friends. She said she told him and Miss Henney about the Trust. This is how she described the situation:

"CTFI had a Financial Controller. Karen Henney. She also knew all about the trust from me. Just as much as Mr. Chen. Spoke to her on several occasions re trust".

In November, 1996, being dissatisfied with the low interest the fund was receiving in Cayman, she went to the appellant with a view to getting a higher rate of interest. According to her, she "spoke to him as (her) lawyer, financial advisor, someone who would advise (her) how to get interest higher". The appellant advised her to send United States dollars to Caribbean Trust, and "they could get much higher interest rates on Jamaican Treasury Bills". He said he would keep a "hands on" on it and that she did not have any need to worry. According to her, she suggested to the Trust that they were to accept and act on

the advice. She further went back to the appellant, she said, and informed him that her daughter had been accepted to do a doctorate at Harvard University and would need between \$4,500 and \$5,000 per month to continue the studies, and that that rate was needed for at least one year. The appellant, she said, informed her that the only place that he knew that could give that kind of interest was JHG Mapp Successors, which was headed by his uncle. Mrs. Tortello recognized the appellant's uncle as one who had built a clinic in the constituency for which her brother, the Leader of the Opposition, was the Member of Parliament. The mention of this uncle, she said, made her feel secure, but she reminded the appellant that he had to get written instructions from the trust in Cayman.

22. In January, 1997, Mrs. Tortello "made a phone call to the trust". She "recommended it to them", then "told" the appellant what she had done, and instructed him to "be in touch with the Trust". The trust, she told the appellant, had said that "they would have to investigate the company themselves". In her evidence in chief, she said that she then told the appellant that she "could not give any instructions, only the trust alone". The appellant advised Mrs. Tortello that for her to receive the amount of interest that she wished, the money to be invested had to be US\$350,000.00. She made a recommendation to this effect to the Trust. Thereafter, there was communication between Mr. Richford in Cayman on the one hand and various persons in Jamaica at Caribbean Trust and Clinton

Hart & Co. on the other hand. These included the appellant, Ronnie Chin Loy, Miss Henney and Miss Leith Brown.

23. On May 2, 1997, Mrs. Tortello said that she received a telephone call from Mr. Richford. Then, on May 5, she received a faxed message from him, which she showed to the appellant in his office. The appellant placed a three-way telephone call to Mr. Richford - Mrs. Tortello being the third party involved in the conversation. According to her, the appellant inquired of Mr. Richford whether the trust deeds could be amended "to provide the loan to Mapp, and an indemnity attached". Mr. Richford replied that he did not think so. The appellant "said nothing else". Mr. Richford suggested that the US\$350,000.00 could be disbursed to Mrs. Tortello, who could lend it to Ballena which would further lend it to Mapp, which company would be protected by an indemnity. Mrs. Tortello said she never responded to this suggestion. Once per month as of April 1997, she said, the appellant would bring her "a big white envelope with Mapp letterhead" for her to send to Cayman on her brother-in-law's aeroplane. She never opened these envelopes. She received a great shock, she said, when on July 30, 1998, the appellant told her that Caribbean Trust had folded. She received from Cayman copies of the relevant documents and proceeded to make a report to the Fraud Squad. Up to the time of the trial she had received all interest payments, but one, on her investment.

24. The appellant gave evidence in respect of these counts which were added at the end of the prosecution's case on the instructions of the learned Resident Magistrate. She said that the evidence presented by the prosecution did not amount to a conspiracy, but warranted a response to charges under section 35(1) of the Larceny Act. Consequently, she directed the amendment of the indictment. [See page 280 of the record]

25. The appellant, who was the chairman of the board of directors of Mapp, said that the complainant, Mrs. Tortello, was not an easy person to deal with when expressing her opinions. She had told him near the end of 1996 that she wished to invest in Jamaica Treasury Bills and was seeking his opinion. He told her that many persons were doing that and that it seemed a good idea, but there was an exchange risk. Mrs. Tortello acknowledged the risk, but said that she was going to do it. She said that the money in the Cayman Islands was earning little or nothing, and that she would be instructing the people in Cayman to send the money to Miss Henney at Caribbean Trust.

26. He said that subsequently Mrs. Tortello told him that the funds "had been moved and placed into Jamaican Treasury Bills and expressed a desire to have the money put into \$US as she had reservations about the risk and she wanted to get monthly income in \$US to send her daughter Rebecca to ... Harvard law School". She asked the appellant to try to find an investment that would give her

increased US\$ interest. The appellant said that he told her that the only place he could think of that could give her that return on US\$ was JHG Mapp Succs. Ltd. According to the appellant, Mrs. Tortello indicated that she was aware of the Chin Loy family that owned JHG Mapp. The appellant said that he would make enquiries in respect of the interest that was possible.

27. The appellant told the management committee of Mapp of the conversation with Mrs. Tortello. At first, he said, the committee was reluctant to enter into the transaction with Mrs. Tortello, due to the high interest rate desired and expected by her. However, he convinced them that if they accepted the money, it would be rolled over for a long time and as long as they adhered to the terms of the loan, it would be rolled over. They eventually agreed. Mrs. Tortello was made aware of the hesitancy of the committee in respect of the transaction. Mrs. Tortello wished that the appellant and Ronnie Chin Loy, managing director of Mapp, would guarantee the loan. This was done.

28. The appellant told the learned Resident Magistrate that his understanding was that the US\$350,000.00 in Cayman was Mrs. Tortello's, and that she had the authority to give the trustees instructions in respect of what was to be done. He said that in May, 1997, Mrs. Tortello brought to him a letter that she had just received from Mr. Mark Richford in Cayman. It expressed certain concerns in respect of the investment of the money. Mrs. Tortello requested that the appellant call Mr. Richford to arrange for action in keeping with a particular

paragraph in that letter. The appellant called Mr. Richford in the presence of Mrs. Tortello who was on an extension. During the conversation, according to the appellant, he suggested to Mr. Richford means by which his concerns could be dealt with but they were not accepted. Instead, Mr. Richford suggested that Capstan would hold as nominee for the remainder of the promissory note which was for ninety days. At the end of the ninety days, Mrs. Tortello would lend that money to Ballena Investments Ltd. which would then lend the money to Mapp. The note between Ballena and Mrs. Tortello would say that Ballena had no liability to pay the money back to Mrs. Tortello, if Ballena could not receive the money from Mapp. The plan was for the documentation to be done by Mr. Richford in Cayman, and the appellant would have nothing to do from the Jamaica end of the transaction. This was agreed to by Mrs. Tortello and, according to the appellant, he made handwritten notes on the letter indicating what was decided. This document was admitted in evidence as exhibit 83.

29. In her findings of fact in respect of these counts, the learned Resident Magistrate found as follows:

- (i) the appellant was "the 'causative factor', the reason for money being sent to Mapp Limited". She said that it was based on his recommendation that Mrs. Tortello recommended or instructed that the money be moved to Mapp;
- (ii) the appellant could not honestly have thought that Mapp was in good financial standing;

- (iii) the appellant was well aware that the situation at Mapp "was 'risky' for the investor";
- (iv) the appellant "did not tell Mrs. Tortello that Mapp was 'safe' in actual words but his recommendation to her and his position in the company would have caused her to draw such an inference"; and
- (v) Mrs. Tortello would not have recommended or instructed the making of the investment with Mapp, had she known that Mapp was in serious financial difficulties.

In the circumstances, the Resident Magistrate said she inferred an intention to defraud on the part of the appellant, due to his secrecy "and his knowledge that, at least, Mrs. Tortello could be exposed to risk of possible economic injury". Therefore, she said, she recorded the verdict of guilty on both counts.

The grounds of appeal

30. As stated earlier, the appellant filed several supplemental grounds of appeal. Two of these grounds were dealt with in respect of the conviction on count eleven. The other grounds are as follows:

"1. (a) The learned Resident Magistrate wrongly added counts 14 and 15 where no application to amend the indictment had been made by the prosecution or the defence, and failed to comply with the provisions of section 6 of the **Indictment Act** when she omitted to invite the parties and in particular the defence, to express their views on the matter of adding the two additional counts and proceeded, in a manner which was gravely prejudicial to the defence, by adding those counts when it was not in the interest of justice to have done so.

(b) The convictions of the learned Resident Magistrate in relation to counts 14 and 15 are manifestly unfair as same were added after the close of the prosecution's case and after a no case submission, independently of the prosecution and defence, and confronted the Appellant with a different and more difficult case, to which the Appellant was deprived of the opportunity to mount a defence.

2) The learned Resident Magistrate erred in law in that she failed to discharge the Appellant at the close of the prosecution's case and wrongly added counts 14 and 15 by way of amendments to the indictment as the evidence of Faye Tortello was so manifestly discredited by Cross-examination and that there was no other evidence adduced at the trial from which it could have appeared necessary to the Court to have added the counts 14 and 15, particularly on the basis that Capstan Investments Limited (hereinafter referred to as Capstan) was defrauded.

3) The learned Resident Magistrate failed to appreciate that the relevant intent to defraud must in law exist at the date the alleged investment was made that is on or about the 1/4/97 (Count 15) and 27/3/97 (Count 14).

4) The verdict of the learned Resident Magistrate was unreasonable having regard to the evidence in that :

(a) The learned Resident Magistrate failed to pay any or any sufficient regard to the evidence that the virtual complainant was investing money in a trading company in order to obtain a higher interest rate than would be obtained in secure trust investments.

(b) The learned Resident Magistrate failed to pay any or any sufficient regard to the evidence that the virtual complainant and the trustee were aware of the investment and knowingly participated in a device

whereby the trust funds would be made available for this purpose.

(c) The learned Resident Magistrate failed to pay any or any sufficient regard to the evidence that the Appellant gave a personal guarantee to Ballena Investments Ltd., that if JHG Mapp & Successors Ltd. (hereinafter referred to as Mapp) breached its agreement he would indemnify them.

(d) The learned Resident Magistrate failed to pay any or any sufficient regard to the fact that there could not have been an intent to defraud because the Appellant gave a personal guarantee of repayment.

(e) The learned Resident Magistrate failed to appreciate that if Mapp failed and the complainant in consequence did not receive the return on investment the Appellant would have been liable on the guarantee.

(f) The learned Resident Magistrate failed to pay any or any sufficient regard to the evidence that the virtual complainant breached the agreement with Mapp by wrongfully demanding full repayment prior to the due date of the Promissory Note and falsely accused the Appellant of criminally investing her money without her knowledge which was contrary to her own documentary evidence. [see Exhibit 6]

(g) The learned Resident Magistrate failed to appreciate that virtual complainant's conduct amounted to a wrongful repudiation of the loan which in law discharged the Appellant.

(h) The learned Resident Magistrate failed to appreciate that there was no or no credible evidence to support a finding of an intent to defraud when the investments were made.

(j) (sic) The learned Resident Magistrate failed to appreciate that the evidence that the accused explained to the virtual complainant the nature of the company, his family connection to the company and the fact that he personally guaranteed the investment negates any or any allegation that there was an intent to defraud.

(k) The learned Resident Magistrate failed to appreciate the evidence of Mr. Canute Maye that Mapp was a going concern [p.120 Record] and that up to the time of the virtual complainant's wrongful repudiation of the note there had been no default by Mapp in its monthly payments to her, or to any other creditor [p. 121 Record]

(l) The learned Resident Magistrate failed to pay any or any sufficient regard to the fact that it was the complainant's evidence that it was the accused who came to her and first informed her of the problems at CTFI, [p.22 Notes of Evidence].

(m) The learned Resident Magistrate failed to appreciate that the following evidence plainly demonstrated that Mapp's ultimate failure was caused by;

- i. The complainant's false accusations to the police;
- ii. The arrest of the Appellant and the Managing Director;
- iii. The resultant precipitation of a run on Mapp by its creditors;
- iv. The complainant's filing of a petition to wind up the company;"

None of which occurrences could have been intended, foreseen, or contemplated by the Appellant.

“(n) The learned Resident Magistrate failed to pay any or any sufficient regard to the unchallenged evidence that the Appellant and others were doing everything to make Mapp a successful and profitable company and did not stand to gain in any way if Mapp failed.

5. In finding that “If Mrs. Tortello had known that JHG Mapp was in serious financial difficulties she would not have recommended/or given consent to the investment in Mapp”, and inferred therefrom the intention to defraud by the secrecy of the Appellant, the learned Resident Magistrate wrongly relied on the evidence of Mrs. Tortello to support this finding, though she had clearly indicated that she had rejected Mrs. Tortello as a reliable witness.

6. The learned Resident Magistrate wrongly admitted into evidence extraneous material which protracted the fair and expeditious hearing of the case and was of prejudicial rather than probative value and bore no relation to the offences charged.

7. The learned Resident Magistrate erred in finding as a fact that ‘in all the circumstances Vincent Chen could not honestly have thought that Mapp was in good financial standing’ as this is not supported by the totality of the evidence. [p.310-311 Record]

8. The learned Resident Magistrate failed to give any or any adequate consideration to the unchallenged evidence that before making the decision to invest at Mapp Mrs. Tortello sought and obtained a personal guarantee from the Appellant and Ronnie Chin Loy for the monies she directed to be placed at Mapp.

9. The learned Resident Magistrate erred in that she wrongly allowed the counsel for the prosecution to submit and read 19 pages of an opening which for the most part was irrelevant to the facts that were allegedly in issue in the proceedings, and which was highly prejudicial in relation to the Appellant since this opening made assertions in respect of which no

evidence was adduced. Further, the learned Resident Magistrate gave no indication, in her findings as to whether or not she had rejected this prejudicial material as influencing her determination of the Appellant's guilt.

10. The learned Resident Magistrate wrongly embarked upon the trial of the Appellant along with Caribbean Trust and Finance Investment Limited (hereinafter called CTFI) and Mapp as joint accused in circumstances where CTFI or Mapp were never before the court as they were never served criminal process to be parties to these proceedings. Consequently the prosecution was allowed to adduce evidence against CTFI, and Mapp without any of those corporate entities being able to mount a defence on their behalf, and thereby allowed evidence of a substantially prejudicial nature with respect to the Appellant who was the only accused properly before the court."

The intent to defraud

31. The learned Resident Magistrate found that Mrs. Tortello's credibility had been affected by previous inconsistent statements concerning the appellant and the removal of funds from Caribbean Trust to Mapp without her consent. It is therefore surprising that she found that the appellant was the "causative factor" in the investment in Mapp. This finding clearly ignores the credibility finding. It cannot be overlooked that there was no evidence from Richford who was the key mover in the transaction between the trust in Cayman on the one hand, and Mapp in Jamaica on the other. Mr. Richford's evidence was essential for the prosecution to prove the case in respect of the counts that were added on the instruction of the learned Resident Magistrate.

32. Mrs. Tortello was not led into the transaction. She knew exactly what she wished. She needed more money. That was not forthcoming in respect of the Cayman investment. She knew that Mapp was a trading company, not a bank. She clearly decided to take a gamble. It backfired. This does not translate into an intent to defraud on the part of the appellant. Mrs. Tortello, obviously conscious that she was taking a risk, requested of the appellant a guarantee. He obliged, and did so with Ronald Chin Loy whose "family name" made Mrs. Tortello feel comfortable. The provision of a guarantee, which has not been shown to have been worthless at the time it was given, is wholly inconsistent with an intent to defraud. It is interesting to note that Ronald Chin Loy, Managing Director of Mapp, who co-signed the guarantee, was acquitted by the learned Resident Magistrate at the commencement of the trial.

33. The learned Resident Magistrate underestimated or ignored the legitimacy and history of Mapp. The evidence of Mr. Canute Maye was that Mapp was in fifth position in relation to the biggest trading company in the country. Mapp had been in business since 1920 or 1930, according to the appellant. Mr. Maye had worked with Mapp for 22 years. These were signs of stability and success, which the learned Resident Magistrate failed to consider in assessing Mrs. Tortello's decision to invest in the company.

Mr. Maye testified that Mapp had been experiencing competition from one man operations. However, a sales plan had been designed to overcome the difficulty.

After Mrs. Tortello's injection of funds in the company, the products bought did particularly well and improved the status of the company. However, according to Mr. Maye, Mrs. Tortello's public statements about Mapp triggered a number of demands on Mapp. He also said that up to the time of Mrs. Tortello's demand for her funds, there had never been a failure to pay out to her as agreed. Payment may have been a day or two late. If it was late, Mrs. Tortello would call.

34. This case is one in which the complainant made an unwise investment, managed to obtain a guarantee in respect of that investment, received her interest payments, and then created an uproar which propelled the collapse of the company. In the circumstances, the convictions on these counts cannot stand.

The Order

The appeal is allowed. The convictions are quashed and the sentences set aside.

Judgment and verdict of acquittal entered.