JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO: 8/2001

BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE LANGRIN, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

SONIA JONES VS. REGINA

Frank Phipps, Q.C. & Garth McBean instructed by **Gresford Jones** for the appellant

Paula Llewellyn, Senior Deputy Director of Public Prosecutions and L. Gregg, for the Crown

May 29, 30, 31 and June 25, 2001

FORTE, P.:

The applicant was convicted in the Corporate Area Resident Magistrate's Court on two counts of fraudulent conversion. She was sentenced on each to eighteen (18) months' imprisonment at hard labour, and it was ordered that both sentences should run concurrently. In so far as the Indictment is concerned, it is sufficient to state that the first count related to the complainant Lloyd Reckord, who it alleged entrusted the appellant with the sum of $33,749.00 United States dollars so that she might invest it on his behalf but instead fraudulently converted that sum to her own use and benefit or to the use and benefit of another. The second count alleged the same offence in respect of $50,000.00 United States dollars entrusted to the appellant by Collin Garland for the same purpose.

Both complainants were friends of the appellant and had on one occasion in the past entrusted her with money for investment in the sum of $100,000 US dollars at a rate of 22% p.a. On this occasion they requested the same rate of interest to which the appellant agreed. Mr. Reckord handed over to the appellant a cheque for US$33,749.00 on the 1st February, 1995 with the understanding that he would be paid interest on a quarterly basis. Mr. Garland handed over to the appellant a cheque for the sum of US$50,000 in April 1995 on the understanding that his interest payments would be paid monthly. It appears that interest cheques were paid to the complainants throughout 1995 and into 1996 when the payments ceased. Mr. Reckord acting on behalf of Mr. Garland and himself requested an accounting from the appellant and since he had become concerned about the payments eventually asked that the principal be recalled. In so far as the accounting is concerned the appellant first gave in her handwriting an account in respect of both sums. This 'account' dated 26th April, 1996 stated nothing more than that the sums had yielded interest at 22% and that all sums due for interest accrued from 1st February 1995 to the date of writing had been paid in full to "LR & CG" (Reckord and Garland) and have been acknowledged. She promised to present a formal/typed document in due course.

In May of 1996 she presented a typewritten "statement of account" mostly dealing with the previous transaction in which she had invested moneys for the complainants. This account stated merely, that the sums of US$50,000 and US$33,700 had been "paid in" and that interest at 22% p.a. in respect of the former had been paid inclusive of 30th April 1996 and will continue to be paid and that in respect of the latter interest had been paid quarterly. The statement of account alleged that the investment had resulted in a triple gain from capital.

Significantly, there was no indication of the subject of the investments and in particular no mention of Seascape Hotel, the relevance of which will soon be seen.

Nevertheless, the complainants through Lloyd Reckord continued to complain that the interest payments had stopped, and continued to call for the return of their capital. These requests apparently met without success, at one time the appellant informing Reckord that the investment was on a "roll over" basis and therefore his principal could not be repaid until February 1998 when it would mature – February in each year being the date upon which it would mature. It was not until 1996 that Mr. Reckord was informed by the appellant, that the money was invested in a property named Seascape, a small hotel in Negril. It was after this and also after he received the written statements of account from the appellant that Reckord consulted another Attorney, Miss Janet Mignott who it appears contacted and had discussions with the appellant. As a result in July 1996, the appellant sent to Miss Canolle the owner of Seascape Hotel, a document for her signature seeking to create a legal mortgage in Seascape in relation to moneys allegedly loaned to Seascape by Mr. Lloyd Reckord. Miss Canolle whose evidence will be referred to later, refused to sign the document insisting that she had given the appellant no instruction to negotiate any mortgage of her property. As a result Miss Mignott advised that caveats be lodged against the title of Seascape by both complainants in order to protect their investment. She [Miss Mignott] drafted these documents which legally required Statutory Declarations from both complainants and the appellant through whom it was alleged that the money had been invested in Seascape. These Statutory Declarations will again be referred to later in this judgment for any effect they may have had in the determination of the learned Resident Magistrate as to the guilt of the appellant.

The prosecution's case rested on the evidence of the complainants re the entrustment of the money to the appellant, the cessation of the interest payments, and the appellant's information that she had made the investment in Seascape. The question then, was whether or not the money had been in fact invested in Seascape. In

order to prove that it was not, the prosecution called Miss Cecile Canolle, the owner of 99% shares in Seascape Ltd which owned the hotel, the other 1% share being owned by Canolle's mother.

Canolle testified that in June 1995, because of death threats she had received, she closed the hotel and came to Kingston. As a French national she went to the French Embassy, and there consulted the appellant who had in the past done legal work for her. She had to leave Jamaica in a hurry, and so handed the Title for Seascape to the appellant along with a document described in the evidence as a Power of Attorney authorizing the appellant "to act as her Attorney and authorized agent in all her business and personal transactions in Jamaica." She insisted in her testimony, that her only desire at that time was to sell the property, and she told the appellant so. She had bought the property for cash and had no interest in securing a mortgage as she had no intention of returning to the property. The only instructions that the appellant had from her were to sell the property and to pay "my outstanding bills". In respect to the latter she gave the appellant US$4,400. The appellant, she insisted, had no authority to enter into any mortgage agreement on her behalf. There was difficulty selling the property and when in November 1995 it had not been sold she made an arrangement with Mr. Robin McFayden to lease the property with an option to purchase. The appellant drafted the lease and sent it to her for approval. She made some amendments and sent it back to the appellant who signed it on her behalf. Mr. McFayden officially took over the property as of the 1st December, 1995 though he was allowed onto the property in November 1995 to get it in condition for the commencement of the lease. The property had been closed from June 1995 until Mr. McFayden took possession of it. He rented it at a rental of US$1,000 which in the first ten months was sent to the appellant to defray expenses owed on the property. Ms. Canolle admitted that she had asked the appellant to pay her

outstanding bills and it was to this end that she had left US$4,400 with her and had instructed Mr. McFayden to send the rental to the appellant.

Ms. Canolle maintained that she had no reason to mortgage her property, and had given no instruction, nor did she consent, to the appellant creating an equitable or legal mortgage on her property. Consequently, she refused to sign the mortgage document sent to her by the appellant and when she called the appellant and told her that she was not signing it, she (the appellant) said it was O.K. She came to Jamaica in January 1997 and had a meeting with the appellant at a restaurant. At this time the appellant had received on her behalf US$4,400, and US$9,700 from McFayden. She said that amount was calculated by her to take care of all the bills but when she met with the appellant in January 1997 they "came up" to an additional amount of US$2,500 which she gave to the appellant. The appellant told her then she was having problems as she was not agreeing with Guardsman so "she said she would fix that first and send me invoice after." She never ever got an invoice. She admitted employing Guardsman to guard the hotel while it was closed and the appellant in fact produced a letter at trial in which she terminated the services as at the end of November 1995. Canolle's testimony therefore speaks of giving money to the appellant to take care of the outstanding bills, and of Jones in 1997 agreeing to an amount of US$2500 to settle all the bills except with regards to Guardsman, which Canolle impliedly agreed to do when the amount owing was agreed. Significantly, the appellant produced in her own testimony correspondence with Guardsman which discloses no problem in that regard.

That was in summary the evidence for the prosecution. It was a story of moneys being entrusted to the appellant for investment, and of the appellant informing that the moneys were invested with Seascape, and the witness Canolle maintaining that it was not so invested.

The question arose therefore whether it was so invested, because if it were, then the appellant could not be held criminally liable. If it were not, then the presumption ought to be that it was converted to her own use or to the use of another. The appellant's defence is that the moneys received from the complainants were in fact invested in an equitable mortgage with Seascape. She admits to receiving the two cheques from the two complainants in the terms described by them. The two cheques were placed in the Foreign Exchange Client's account of the legal firm of which she is an associate. She is an experienced attorney of 28 years and has been accustomed to dealing with matters of this nature during that period. She spoke of Miss Canolle leaving the title deed with her as also the "power of attorney". Miss Canolle gave her US$3000 not $4,400 and she received money also from Mr. McFayden. There was no specific instruction from Miss Canolle that her authority was restricted to the selling of the property. She was put in full charge of the hotel and she interpreted the power of attorney as putting her in full charge of the hotel and all personal matters in relation to Canolle. She could commit the property to sale and sign sale agreement.

In accordance with the power of attorney she would have "wide" rights which would include leasing, mortgaging and/or negotiating a sale.

The defence was that at the time she got the Title and Power of Attorney from Canolle, the property was in debt, and so to offset these debts she created an equitable mortgage on the property investing the sums received from the complainants into the property. The money then became the property of Seascape, and thereafter she used the money to pay the debts of Seascape, and to pay the mortgage interests to the complainants. She was able to do so acting with the authority of the Power of Attorney. There was a time when Miss Canolle was out of touch and the bills had to be paid and so she thought it best rather than borrowing money from the bank at a higher rate of interest (45% - 60%) she would invest the complainant's money in an equitable

mortgage with Seascape at an interest rate of 22% p.a. In contrast to Canolle testifying that the first time she knew that there was an equitable mortgage on the property was on receipt of the notice of the lodging of caveats against the Title, the appellant testified that she had told her so in October 1995. The appellant, however said she never told Miss Canolle about a specific client. She admitted that she sent the mortgage documents to Canolle for signature. She told Canolle she was doing this because the person who held the equitable mortgage wished to have same registered on the Title. As we have seen Canolle denied all knowledge of an equitable mortgage until she was sent the notices in relation to the caveats lodged against the Title to the property at the Registrar of Titles Office.

In cross-examination counsel for the Crown, tested her on the expenditure of the money allegedly put on mortgage with Seascape. The defence objected on the ground that any question re the proceeds of the mortgage is not relevant to the charge as any accounting had to be made to Miss Canolle. The learned Resident Magistrate quite correctly overruled the objection.

Up to the time of her giving evidence she had estimated that she had paid a sum of $2.3 million inclusive of interest payments.

However she also testified that the money that McFayden sent to her for the property she used to pay interest on the amount which had been secured in the equitable mortgage, also arrears due to the security company, and the utilities, also for the substantial amount due to GCT. She stated she had documentation to show that she had paid these, and had these documents when she was giving evidence-in-chief and also when Canolle and McFayden were giving evidence. It should be noted that no questions were asked of Canolle concerning these specific documents – and of particular note is the absence of any questions concerning the sum allegedly owed for GCT or having paid that sum under protest. In the end, in re-examination, the appellant

produced copy letters, vouchers and bills in an attempt to demonstrate that she had made these payments on behalf of Seascape. The appellant maintained that from the mortgage of US$83,749.00 she paid out a total of J$2,517,973.00 on behalf of Seascape. She made the conversion of US$83,749 to be about J$3million. Canolle had left US$3,000 and she later received US$2700 from her. As recorded heretofore she also admitted to receiving monies from Mr. McFayden, the tenant.

Before us, the appellant has argued on Ground 1 that the verdict is unreasonable and cannot be supported having regard to the evidence.

In coming to her decision the learned Resident Magistrate recognized that the real issue in the case was whether or not the money was invested in Seascape as maintained by the defence. The prosecution through the witness Canolle had maintained that though the appellant said it was, it was in fact not so invested – the appellant having been given sums of money to meet the expenses of the hotel, and having been given no authority to mortgage the property. The learned Resident Magistrate was influenced in her decision by the Statutory Declarations by the appellant alleging that the investment moneys had been loaned to Seascape in February 1995 in respect of Reckord, and in April 1995 in respect of Garland. This could not have been possible as the appellant was not in a position to create an equitable mortgage in Seascape until June/July 1995 when she received the documents from Miss Canolle.

The Statutory Declaration of the appellant reads as follows:

> "I **SONIA JONES**, Attorney-at-Law of 5 Duke Street in the City and Parish of Kingston do hereby solemnly and sincerely declare as follows:
>
> > 1. That in February of 1995, the sum of Thirty Three Thousand Seven Hundred United States Dollars (US$33,700.00) was lent by Lloyd Reckord, theater Producer of Boscobel in the parish of St, Mary to SEASCAPE HOTEL LIMITED OF Norman Manley Boulevard, Negril in the parish of Westmoreland. The loan was for an initial period of

one year, and bore interest at twenty two per centum (22%) per annum, payable quarterly.

2. I acted as Attorney-at-Law in the transaction.

3. The security for the loan is property at Negril in the Parish of Westmoreland, title to which is registered at Volume 984 Folio 133 of the Register Book of Titles.

4. The duplicate Certificate of Title for the said property registered as aforesaid at Volume 984 Folio 133 of the Register Book of Titles was deposited with me by the registered proprietor Seascape Hotel Limited in my capacity as Attorney-at-Law for the said Lloyd Reckord to the intent that the said property should be charged with and be security for the repayment to the said Lloyd Reckord of the aforementioned sum advanced by him to the said Seascape Hotel Limited, and interest thereon at the rate of twenty two per centum per annum (22%) until repaid.

5. The said Duplicate Certificate of Title has remained and still remains in my possession.

6. That the principal sum outstanding as at the date hereof is Thirty Three Thousand Seven Hundred United States Dollars (US$33,700.00), equivalent for the purposes of registration fees to J$1,181,215.00.

AND I MAKE this Solemn Declaration conscientiously believing the same to be true and by virtue of the provisions of the Voluntary Declarations Act."

A Declaration in similar form except for the sum owing, the date of the loan, which was received April 1995, and the name of the lender, was also signed in respect of the investment of Mr. Garland.

In these Declarations the appellant solemnly and sincerely declared that the loans were made in February and April 1995 and that the title was deposited with her in her capacity as Attorney-at-Law for the complainants to the intent that the said property should be charged with and be security for the repayment to the complainant of the sum advanced by them.

Neither of those statements could be true. In respect of the dates, I have already stated that on her own evidence, the appellant did not come into possession of the Title from Ms. Canolle until June 1995 and decided on the equitable mortgage in July 1995. On her evidence also the Title was not deposited with her to the intent that the property should be charged with and become security for the loan. It was sometime subsequently that she decided to create an equitable mortgage. In any event the content of the Statutory Declarations were challenged by Ms. Canolle when she testified that she gave the appellant no instruction to mortgage the property either at the time she left the Title with her or at all.

The learned Resident Magistrate regrettably passed away after the trial of the case and her written judgment could not be located. However we have the benefit of the notes taken by prosecuting counsel of what the learned Resident Magistrate said in delivering the judgment. As the appellant's counsel has agreed to its correctness I will refer to those notes from time to time.

The learned Resident Magistrate addressed the question of the date of the commencement of the alleged mortgage as stated in the appellant's Statutory Declaration as follows:

> "Was there investment in Seascape? Miss Jones said it was possible for equitable mortgages like these to be protected by Caveats. It was not until November 1996 that document reached the Registrar of Titles and registered in 1997. Information on the document could only come from Sonia Jones. Statutory declaration of the complainants recites what is the statutory declaration of Sonia Jones. In her statutory declaration she said April 1995 Colin Garland lent $50,000.00 and in February 1995 $33,700 lent by Lloyd Reckord to Seascape. The amount and the dates on these documents are wrong. Her explanation for the difference in the dates was that it was a mistake. I find that to be ingenious. I do not find that to be so. Sonia Jones also said she had given her word to another Attorney. I do not accept that is how dates came to be put on documents. It was a deliberate act to indicate dates on which investments made."

The learned Resident Magistrate it should be noted found specifically that the declaration of these dates by the appellant in the Statutory Declaration was a deliberate act to indicate that the monies were invested at the time each sum was received by the appellant. This view is supported by the fact that in May of 1995 Reckord was paid a cheque for $59,125.00 representing interest on the money he invested. This cheque was in fact tendered in evidence by the Defence to establish that interest cheques had been paid to the complainants.

The learned Resident Magistrate must also have been influenced by the wording of the draft of the legal mortgage sent to Miss Canolle for her signature. The document states that the mortgagor covenants to pay the mortgagee the principal sum of $33,000.00 on the 28th February, 1996 or 28th day of February of each succeeding year when called upon to do so on or before 30th November in any previous year. This indicates that the mortgage would have commenced in February 1995 when the evidence is that no mortgage could exist until July 1995.

In support of this interpretation also is the fact that the draft mortgage speaks to interests being paid "quarterly on the last day of each quarter in each and every year during the continuance of this security, the first of such quarterly installments of interest to begin and be made on the 1st day of June 1995." Here again we have the appellant sending a document indicating that the first interest payment to be made to Reckord on a quarterly basis would be paid on the 1st June, 1995, a month before according to her own testimony she created the equitable mortgage, and of course at a time before she could, as she received the Title for Seascape and the Power of Attorney from Miss Canolle at the end of June 1995.

In my judgment, the learned Resident Magistrate's conclusion that the dates in the Statutory Declarations were indicative of a deliberate act to state dates on which the

investment was made is supported not only by the interpretation she placed on the Declaration but also by the draft legal mortgage sent to Canolle for her signature and the payment to Reckord of an interest cheque in May 1995.

There was evidence of repeated requests for interest payments which had stopped and calls for the principal to be repaid, none of which resulted in the complainants retrieving their money. In all of this, the appellant at no time spoke to them of any difficulty she may have been experiencing in respect of the equitable mortgage in which she allegedly invested the money. There was indeed no information given to Canolle that an equitable mortgage had been created on her property and indeed no request to her for the repayment of the capital sums. The learned Resident Magistrate was entitled to come to the view that an Attorney of the experience of the appellant dealing as she said she was with two clients on the one end of a transaction, and another at the other end would be careful to ensure that she was acting in the best interest of all the parties. Yet, the appellant insisting that all the interest payments were made, did not at anytime indicate to the complainants that all was not well with their investment; and this, even after Ms. Canolle had refused to sign the draft mortgage and indicated to her that she was not interested in securing a mortgage.

On the other side of the coin, she did not inform Ms. Canolle of the equitable mortgage at all; Ms. Canolle only discovering that fact when she was served with the caveat filed at the intervention of another Attorney. It would be unusual even acting on a power of attorney for an Attorney of the experience of the appellant to create a liability on her client's property without first having some consultation with her as to whether that was necessary as she (the client) may well have been able to meet any financial obligations which had arisen. It is important to note that at the time the appellant states that she created the equitable mortgage there was no physical transfer of the sums of investment to the Seascape Account. As Seascape was a registered company, the

appellant alleges that she contacted the bank in which the company had its account and was informed that a resolution of the Board of the Company was necessary to give her authority to withdraw the funds from the account once they were lodged therein. She made the decision then to keep the funds in her firm's foreign exchange account and to withdraw from that account when it became necessary. She made no attempt to contact Ms. Canolle in this regard to determine whether any arrangements could be made to put the necessary procedure in place to satisfy the bank's requirement. The learned Resident Magistrate was entitled to take this into consideration, given the years of experience that the appellant had as an Attorney, in determining whether the contention that the funds were invested in Seascape had any credibility. It is true that the appellant testified that there was a period of time when Ms. Canolle was "out of touch" and Ms. Canolle agreed to this. There was however, no evidence of any urgency in taking care of the bills in circumstances where there was no apparent demand except in relation to the public utilities, the payments of which could easily have been made with the sum left with the appellant by Ms. Canolle. Indeed, the question that the learned Resident Magistrate had to decide was whether, Ms. Canolle having left money with the appellant, and having instructed that the rental should be paid to her for the purpose of taking care of the outstanding bills, should not have made the appellant aware that Ms. Canolle was quite prepared to finance the payment of her liabilities; and in any event, is consistent with Canolle's evidence that the appellant was not free inspite of the "Power of Attorney" to do as she wished with the property. The learned Resident Magistrate obviously was of this view when in her findings of fact she stated:

> "The Power of Attorney by which Sonia Jones purported to act is short (the judge reads Power of Attorney)
> Constance Trowers said this not sufficient to exercise such a power. I accept that the documents were prepared as Cecile Canolle said because she did not intend to come back to Jamaica and when the property sold she would sign the transfer. True she left outstanding bills and funds.

> I do not find the Power of Attorney given gave Sonia Jones such wide powers. It was only to allow Miss Jones to sign Sale Agreement. Miss Jones had acted for Miss Cecile Canolle before in acquiring title. Sonia Jones outlined the lists of entities she dealt with after Cecile Canolle left but none of these ... I do not find that the Power of Attorney gave her wide scope to do as she wished and whether Cecile Canolle agreed. ... I cant believe an Attorney of 28 years would invest funds without ensuring that some recourse would be available. She said she was ill. If she had died where would the complainants find any document to show that the money is invested. Lloyd Reckord said he made efforts to ascertain how money invested and had gotten different responses. Documents tendered to support Sonia Jones contention that the sums were utilized on behalf of Seascape. Whether or not the funds were used is not in doubt because I accept Sonia Jones evidence that the funds were used. Were the funds invested in Seascape? I do not find that the funds were invested in Seascape on behalf of complainants ... . I find that initially sometime after the receipts of this funds she utilized the proceeds without making any investments on behalf of complainants. ...I find funds were still entrusted to her and no such invested (sic) was made. In light of that the verdict is Guilty on both counts."

In this passage, the learned Resident Magistrate rejected the evidence of the appellant that the bills and copy letters tendered by the appellant in her re-examination and the alleged payment of those bills in fact had any connection to the sums given her by the complainants for investment. This is in keeping with her earlier finding that the inconsistent dates in the Statutory Declaration and the proposed legal mortgage was a deliberate act of the appellant in an attempt to establish that the monies were invested in the property from February 1995 and April 1995 when she received the cheques.

It should also be noted that the learned Resident Magistrate found as a fact that the appellant had told the complainant Garland that the US$50,000 would be invested in an apartment in Kingston. This finding is supported by the evidence of Garland who stated:

> "Based on what she and I discussed I asked her about how the money was to be invested and she said it would

> be on an apartment in Kingston – that an apartment in Kingston would be my security."

In cross-examination in this matter, the witness was being questioned re the content of his Statutory Declaration as follows:

> Q. "If the 22% was on a loan, what loan?
>
> A. The loan was'nt to Seascape Ltd. I asked Miss Jones on phone how was my money being secured. She told me it was on an apartment in Kingston that was the $50,000 not the $100.000."

The witness maintained as he did in examination-in-chief that the appellant had told him that his $50,000 was invested in an apartment in Kingston. He had earlier said that he knew nothing of Seascape Limited until Miss Mignott told him about it.

In my judgment, there was ample evidence upon which the learned Resident Magistrate could have come to her conclusion, having accepted the evidence of the prosecution witnesses particularly that of Canolle. It is clear that having seen and heard the witnesses, she came to the conclusion that the truth rested in the prosecution's case and that the appellant's production of copy bills and copy letters were not sufficient to create any reasonable doubt in her mind, that the purported payment of those bills did not have any connection with the complainants' money which was entrusted to her for investment. In coming to that conclusion, the learned Resident Magistrate would be entitled to question whether an Attorney of the appellant's experience would honestly have invested funds in a hotel that was closed and not earning an income and which obviously could not offer any return on the investment. This was certainly a factor in determining the credibility of the defence. In the end, the learned Resident Magistrate must have concluded that the appellant had not satisfactorily accounted for the sums entrusted to her, a situation which by virtue of Section 64(2)(c) of the Larceny Act

creates a presumption that the appellant fraudulently converted the complainants' money. The section reads:

> "(2) On the trial of any indictment for the fraudulent conversion of any property, or the proceeds thereof, it shall be prima facie evidence of such conversion if it is established by evidence that the person to whom the property was entrusted –
>
> (a) ...
> (b) ...
> (c) having been duly called upon to account failed to give any satisfactory account of such property or the proceeds thereof."

When the interest payments stopped, Mr. Reckord, acting on behalf of both complainants requested an accounting and what he received was Exhibits 5 and 10A the contents of which said no more than that the money was invested at 22% and interest was paid up to date. The complainants disagreed and requested interest payments, which were long overdue. In fact it reached the stage where both complainants fearing the loss of their capital requested on several occasions its return. The learned Resident Magistrate expressed herself on this matter in this way:

> "One would have expected that if he called in his loan she would either have repaid his principal plus interest and that in 1997 and 1998 interest would not come into play. Lloyd Reckord said he kept phoning Miss Jones about what the investment is for –
> He made repeated calls in 1996, 1997 and 1998 and he was not told about the earlier dates. He also called in the loan."

The learned Resident Magistrate was obviously of the opinion that the appellant was not satisfactorily accounting to the complainants for the monies entrusted to her. On the evidence she would be entitled to come to such a conclusion and consequently the appellant would be presumed to have fraudulently converted the funds. At trial her attempts to show that the money was invested in Seascape were rejected by the learned Resident Magistrate, who found the prosecution had proven its case. In my view there

has been nothing offered before us upon which I could conclude that the learned Resident Magistrate was unreasonable in coming to such a conclusion.

The complaint in ground 3 that the learned Resident Magistrate did not address her mind to the principles and ingredients of the offence of fraudulent conversion, has been answered in her words which have already been recorded in this judgment. I agree that the real question was, - was the money invested on behalf of the complainants? The learned Resident Magistrate answered that question in the negative. That being so, the question that follows is whether the appellant has satisfactorily accounted for the funds entrusted to her. That question the learned Resident Magistrate obviously answered in the negative. That being so, her rejection of the evidence of the appellant could only have led her, given the facts that she found, to one conclusion and that is one of guilt.

I would dismiss the appeal and affirm the convictions and sentences.

LANGRIN, J.A: (Dissenting)

On December 6, 1999 the appellant was convicted in the Resident Magistrate's Court for the Corporate Area, held at Half Way Tree before Her Honour Miss Marcia Hughes, Resident Magistrate. The appellant an Attorney-at-law was charged on an indictment containing two counts for fraudulent conversion of sums of money entrusted to her by two friends contrary to Section 24 (1) (iii) (a) of the Larceny Act. She was convicted on both counts 1 and II and sentenced to 18 months imprisonment at hard labour on each count. Sentences are to run concurrently.

The two counts of indictment on which the appellant was convicted alleged in so far as is relevant as follows:

> **Count I**
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> "On a day between the 1st day of January, 1996, and the 31st day of December, 1996, in the parish of Kingston being entrusted by Lloyd Reckord with certain property that is to say Thirty-Three Thousand, Seven Hundred and Forty-Nine United States Dollars ($33,749.00) that she might invest the said US$33,749.00 for and on his behalf, fraudulently converted the said $33,749.00 to her own use and benefit or the use and benefit of some other person.
>
> **Count II**
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> Sonia Jones, on a day between 1st day of January 1996, and the 31st day of December, 1996, in the parish of Kingston being entrusted by Colin Garland with certain property, that is to say Fifty Thousand United States Dollars ($50,000.00) that she might invest the said US$50,000.00 for and on his behalf, fraudulently converted the said US$50,000.00 to her own use and benefit or the use and benefit of some other person."

The prosecution case as revealed from the record and the skeleton arguments indicates that the evidence relating to both counts in the indictment was substantially the same, except for the name of the two virtual complainants – Lloyd Reckord and Colin Garland and the respective amounts of money. The prosecution also alleged that Cecille Canolle, the owner of Seascape Hotel, when she was leaving Jamaica in 1995 wished to sell the property and, to that end she handed over the Title of the hotel to the accused along with a Power of Attorney. The prosecution further alleged that the Power of Attorney did not satisfy the statutory requirements to be effective and therefore was a nullity. However, the accused has asserted that in July 1995 she had used the monies given to her by Reckord and Garland as a to loan to Seascape thereby creating equitable mortgages on that property. In July 1996 the accused sent mortgage documents securing Reckord's and Garland's interests in Seascape, for Ms. Canolle to sign. She refused to sign and retained the documents. The prosecution concluded that the accused had no authority to effect the mortgages and did not. The accused has not refunded the monies to Reckord and Garland after a request by them, and has not returned the land title to Canolle. She was therefore guilty of the charges.

Evidence was led by the prosecution that the appellant was a close friend and lawyer of Lloyd Reckord. She assisted him in the sale of his property. On 27th February, 1995 he gave her US$33,749.00 for investment. When he gave her this money it was because the previous investment had been going quite well and therefore he decided to take this amount which he had in Cayman at

6% then and gave it to Miss Jones to put with a previous amount of $100,000 which also was going quite well for her to invest on the same terms as that $100,000. For a period of eleven months he was satisfied with the investment of $100,000. In relation to the US$33,749 he received interest payments for a few months. Mr. Record stated:

> "I was gleefully accepting the interest on an investment for a very short time...
>
> I conveyed to her that it was my understanding that the loan would mature in February, 1998. "
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> I did know all along that my money US$33,749.00 had been invested by Miss Jones. Naturally I asked Ms. Jones to do it. Accepting that I had been receiving interest on that money irregularly.
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> Miss Jones was very tardy in giving me my interest.
>
> "My real complaint then was that payment was irregular, too slow and sometimes inaccurate".

Mr. Reckord was to be paid interest quarterly on the $33,749. The $100,000 was related to an apartment in Trafalgar. He acted with the appellant on behalf of Garland and himself. He was not shown any documents or signed any mortgage for Seascape. He never gave her any such instructions. In my view, a most reasonable conclusion which may be drawn from this evidence is that the money he gave to Miss Jones was invested and he was receiving interest payments which were irregular, inaccurate and tardy.

Likewise, Colin Garland was the appellant's friend and she was his lawyer in respect of a sale of a house owned by Lloyd Reckord and himself. Garland was looking for ways to invest money with the proceeds of sale. The appellant

offered an interest rate of 22% and he gave her the money. She did not indicate the terms of the investment or where and with whom she was investing. Subsequently, he received interest by cheque once per month. Thereafter, he gave her US$50,000: "I intended her to invest it for the same amount of interest of 22%. The cheque was given on the 17th April, 1995." He received interest on the principal but he could not recall the amount. However, he believed he received interest for 1995. "I think in 1996 the interest payments became a little more erratic". He spoke to another lawyer, Miss Mignott,and instructed her to lodge a caveat. He said Mr. Reckord dealt with most of the details and we asked for the return of our monies. In order to secure our investments both of us took out caveats. A report was made to the Police in April, 1998 He did not authorise anyone to invest any money in a mortgage in Seascape. Under cross-examination he said:

> " One reason I went to the Police is that my returns on investment wasn't running as smoothly as I expected..."

Ms. Cecille Canolle testified that she is a French national and owner of Seascape Hotel, Negril, Westmoreland. The appellant assisted her in getting title to her property. In June 1995 she had to leave Jamaica hurriedly and so she left her title deeds to the hotel property with the appellant along with a Power of Attorney.

She wanted the appellant to take care of the property. She left money with appellant to pay her bills. She also wanted her property to be sold and did not want it to be mortgaged. In November the property was leased to Robin

McFayden and it was the appellant who prepared and signed the lease. In June, 1996 the appellant sent legal documents to her for her signature concerning mortgage of the property but she refused to sign them. When the appellant refused to return her title deed she reported the matter to the police. She did not want anyone to know that she still owned the property.

Miss Constance Trowers, Registrar of Titles stated that there was no legal mortgage or Power of Attorney recorded for the property Seascape Hotel, Ltd. Caveats for Reckord and Garland were lodged against the title for the property. She said in practice, the lodging of caveats as was done in this case normally and regularly protects equitable mortgages.

It is necessary to set out the caveat, statutory declarations of Lloyd Reckord and Sonia Jones for their full terms and effect:

"CAVEAT AGAINST THE REGISTRATION OF ANY CHANGE IN PROPRIETORSHIP OR ANY DEALING WITH ESTATE OR INTEREST

THE REGISTRAR OF TITLES

TAKE NOTICE that **LLOYD RECKORD,** Theatre Producer, of 4 Coolshade Drive, Kingston 19 in the Parish of St. Andrew claim an interest as mortgagee in **ALL THAT** parcel of land known as Seascape Hotel, situate in Negril in the parish of Westmoreland, being all the land described in Certificate of Title registered at Volume 984 Folio 133 of the Registrar Book of Titles, under and by virtue of an equitable mortgage for the sum of THIRTY THREE THOUSAND SEVEN HUNDRED AND FORTY NINE UNITED STATES DOLLARS (US$33,749.00) equivalent for the purposes of registration fees to Ja$1,181,215.00, and forbids the registration of any person other than the said Lloyd Reckord as Transferee or proprietor or of any instrument affecting such estate and

interest until after notice of the intended registration or dealing be given to or unless such instrument be expressed to be subject to the claim of the said Lloyd Reckord.

The Offices of Janet R. Mignott, Attorney-at-law care of Thomas & Thomas, 45 Duke Street, Kingston is appointed as the place at which notices and proceedings relating hereto may be served.

DATED the 12th day of Nov. 1996

JANET R. MIGNOTT, LL.M

per.....
Agent and Attorney-at-law
for and on behalf of the Caveator

Signed in the presence of:-

JUSTICE OF THE PEACE
for the parish of St. Andrew

STATUTORY DECLARATION OF LLOYD RECORD

IN THE MATTER OF LANDS REGISTERED AT VOLUME 984 FOLIO 133

I, **Lloyd Reckord,** Theatre Producer, of Boscobel in the Parish of St. Mary do hereby solemnly and sincerely declare as follows:

1. That in February of 1995, the sum of Thirty Three Thousand Seven Hundred United States Dollars (US$33,700.00) was lent by me to SEASCAPE HOTEL LIMITED of Norman Manley Boulevard, Negril in the parish of Westmoreland. The loan was for an initial period of one year, and bore interest at the rate of twenty two per centum (22%) per annum payable quarterly in arrears.

2. That Miss Sonia Jones, Attorney-at-law, acted for and on behalf in the transaction, and made the said advance to Seascape Hotel Limited.

3. That the security of the said loan is property at Negril in the Parish of Westmoreland, title to which is registered at Volume 984 Folio 133 of the Register Book of Titles.

4. The duplicate Certificate of Title for the said property registered aforesaid at volume 984 Folio 133 of the Register Book of Titles was deposited with my attorney-at-law, the said Sonia Jones, in her capacity as my attorney-at-law to the intent that the said property should be charged with and be security for the repayment to myself of the aforementioned sum advanced by me to the said Seascape Hotel Limited and interest thereon at the rate of twenty two per centum per annum (22%) until repaid.

5. That the said Duplicate Certificate of Title has remained and still remains in the possession of Miss Sonia Jones.

6. That the principal sum outstanding as at the date hereof is Thirty Three Thousand Seven Hundred United States Dollars (US$33,700.00), equivalent for the purpose of registration fees to J$1,181,215.00.

AND I MAKE this Solemn Declaration conscientiously believing the same to be true and by virtue of the Voluntary Declarations Act.

DATED the 3rd Day of March,1977

TAKEN AND ACKNOWLEDGED by the said)
LLOYD RECKORD)
At 46 Slipe Road)
This 3rd day of March, 1997)
Before me:-)

Justice of the Peace for the Parish of Kingston

STATUTORY DECLARATION OF SONIA JONES

IN THE MATTER OF LANDS REGISTERED AT VOLUME 984 FOLIO 133 OF THE REGISTER BOOK OF TITLES

I, SONIA JONES, Attorney-at-Law of 5 Duke Street in the City and parish of Kingston do hereby solemnly and sincerely declare as follows:

(1) That in February of 1995, the sum of Thirty Three Thousand Seven Hundred United States Dollars (US$33,700.00) was lent by Lloyd Reckord, Theatre Producer of Boscobel in the Parish of St. Mary to SEASCAPE Hotel Limited of Norman Manley Boulevard, Negril in the Parish of Westmoreland. The loan was for an initial period of one year, and bore interest at twenty two per centum (22%) per annum, payable quarterly.

(2) I acted as Attorney-at-Law in the transaction.

(3) The security for the loan is property at Negril in the Parish of Westmoreland, Title to which is registered at Volume 984 Folio 133 of the Register Book of Titles.

(4) The Duplicate Certificate of Title for the said property registered as aforesaid at Volume 984 Folio 133 of the Register Book of Titles was deposited with me by the registered proprietor Seascape Hotel Limited in my capacity as Attorney-at-law for the said Lloyd Reckord to the intent that the said property should be charged with and be security for the repayment to the said Lloyd Reckord of the aforementioned sum advanced by him to the said Seascape Hotel Limited and interest thereon at the rate of twenty two per centum per annum (22%) until repaid.

(5) The said Duplicate Certificate of Title has remained and still remains in my possession.

(6) That the principal sum outstanding as at the date hereof is Thirty Three thousand Seven Hundred United States Dollars (US$33,700.00), equivalent for the purposes of registration fees to $1,181,215.00)

AND I MAKE this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of the Voluntary Declarations Act.

DATED the 3rd day of December, 1996

TAKEN AND ACKNOWLEDGED by the said)
SONIA JONES)
at 21 East Street in the parish of Kingston)
before me:-)

Justice of the Peace for the Parish of Kingston

It should be noted that the caveat in respect of Colin Garland with the exception of the dates and amounts are identical to that of Reckord.

After an unsuccessful no case submission by Mr. Phipps Q.C. the appellant gave evidence on oath denying the charges. It is instructive at this stage to point out that Section 64 (2) of the Larceny Act deals with the evidential requirement in respect of an accused who is called upon to answer a charge. It states:

> "(2) On the trial of any indictment for the fraudulent conversion of any property, or the proceeds thereof, it shall be prima facie evidence of such conversion if it is established by evidence that the person to whom the property was entrusted -
>
> (a)...
>
> (b)...
>
> (c) having been called upon to account failed to give any satisfactory account of such property or the proceeds thereof."

The appellant gave sworn evidence in which she testified that she is an attorney-at-law and always understood that there was no professional impropriety for one attorney acting for both parties in conveyancing

transactions or for one attorney acting for lender and borrower in a mortgage transaction. She always understood that an informal deposit of title deeds can effect an equitable mortgage and this does not require an instrument in writing complying with the statutory requirements of the Registration of Titles Act. She admitted receiving the Title for Seascape from Ms.Canolle along with a Power of Attorney. She was never asked to account for the Power of Attorney or for the disbursements she made on behalf of Seascape.

She accounted to Lloyd Reckord for cheques given to her for investment by Colin Garland and himself. She informed Lloyd Reckord that their investments were secured on Seascape, renewable annually and she invited him to visit her office to inspect the Title as also the Power of Attorney. They both were paid interest on their investments.

The total sum for Reckord and Garland was just a little over US$83,000.00 That sum is converted to over J$3Million. Up to November, 1995 when McFayden took over the property she would have had in hand a shade over J$2Million. She further noted that it was not the complainants' money since she would in law have converted that money to the property of Seascape. So for any sum that was being utilized to pay the debts of Seascape, she said was accountable to Seascape/Canolle. She said:

> "The complainants would be entitled to interests on the funds invested and ultimately to a capital repayment from Seascape/Canolle. This is the law and I honestly believed that.
>
> In spending J$2.3Million on Seascape property I signed many documents as authorised agent for Seascape/Canolle".

The money that McFayden was sending her was being used to pay interest on the amount which had been secured on the equitable mortgage as also substantial arrears due to the Security Company.

She stated that the proceeds of the investment became the property of Canolle in law and interests payable from that resource operated as if one was paying interest to the bank. She said:

> "I received US$50,000.00 cheque for Garland and my foreign exchange client account was credited with it. It remained there until July , 1995 when I found an investment that was suitable, named Seascape. The funds were used to commence paying some of the indebtedness, not knowing how long the hotel was going to remain closed. Funds were used to defray the considerable debt the hotel was carrying at the time of Canolle's hurried departure.
>
> Once the equitable mortgage had been created in Seascape in July 95, the money belonged to Seascape and not the complainants".

Miss Jones pointed out that in January 1997 she accepted US$2,700.00 from Ms. Canolle as by then the amount expended on the property and/or due for payment would have exceeded the amounts obtained from the mortgages, interest accruing and rental assigned. This was brought to Ms. Canolle's attention and she made a further payment on account of the overall expenditure which had resulted in her asset being available to her. She spent the $2.3m both when the hotel was closed and after it had re-opened and Mr. McFayden was not correct when he said he alone spent all the money in refurbishing, renovation and bills of the hotel. She spent $2.3m on Seascape and never visited it. She had valuation done by Tavares & Finson.

Miss Jones said Ms. Canolle left her bank books with her. She could not sign on the National Commercial Bank Seascape accounts. She said against that background she did not transfer money into those accounts because she would not have been able to access those funds. She therefore did it through her clients account which would show a credit for Ms. Canolle of US$3,000.00 which she gave her plus US$83,000 transferred in her property from the account of Reckord and Garland. She said she paid the debt from Ms. Canolle's funds thereafter. She explained why she did not use the Power of Attorney to effect signing Seascape, Corporate account at National Commercial Bank. Miss Jones said National Commercial Bank requested the Managing Director of the Company to be present in Jamaica at a Corporate meeting in which a Banking Resolution in the form set out by the Bank would have had to have been passed and the seal affixed and the documentation signed by Ms. Canolle.

Miss Jones said in any event she knew it was perfectly normal and proper, based on the terms of the authority she held to receive and pay money on behalf of the clients through her clients' accounts. She said the rest of the money is at the credit of Ms. Canolle's account and subject to a final reconciliation and if Ms. Canolle is owed anything she will be paid and if she Jones is owed then Ms. Canolle will have to pay her. She said she has put it in separate foreign exchange accounts since she became aware of the case coming before the Court. She said she has not accounted to Ms. Canolle as once the matter went to the General Legal Council, one will have to account to the General Legal Council. The relationship of client/attorney between them

was severed in April 1997 and Ms. Canolle appointed a new attorney. She said she had indicated to Ms. Canolle that because her Title was encumbered with two mortgages and there are liens on it, she is not in a position to ask for Title to be returned. Miss Jones said it is the practice that if you hold Title for a client who has lent money to another client you are obliged to hold the Certificate of Title for the person who lent the money until it is repaid by those who borrowed.

Miss Jones said she had profit obligations to Messrs. Reckord and Garland, and if she was to give up Title they could look to her as a matter of negligence for parting with Title, the security for their mortgage loans. Miss Jones said she did not convert Garland and Reckord's money to her own use.

The funds were invested in mortgage on Seascape property and used in relation to Canolle/Seascape. She stated that she had full authority to mortgage Canolle's property.

The appellant said she was aware of Canon 4 of the Legal Profession (Canons of Professional Ethics) contained in Jamaica Gazette Rules, Proclamations, and Regulations of December 29,1978. She stated that in her mind and in her professional judgment as per the Canons there was no conflict of interest in her acting for Lloyd Reckord, Colin Garland and Ms. Canolle.

It is convenient to refer to the case of ***Clark Boyce v Mouat*** [1993]4 All ER 268. This case deals with the position of a solicitor who acts for both parties in a conveyancing transaction. It was held:

> "There was no general rule of law that a solicitor should never act for both parties in a transaction where their interests might conflict. Instead, a solicitor was entitled to act for both parties in a

> transaction even where their interest might conflict provided that he obtained the informed consent of both parties to his acting.
>
> Informed consent in that context meant consent given in the knowledge that there was a conflict between the parties and that as a result the solicitor might be disabled from disclosing to each party the full knowledge which he possessed as to the transaction or might be disabled from giving advice to one party which conflicted with the interest of the other, and if the parties were content to proceed on that basis the solicitor could properly act for both parties.
>
> In determining whether a solicitor had obtained informed consent to acting for parties with conflicting interests it was essential to determine precisely what services were required of him by the parties..."

This case speaks for itself.

It must be observed that the Crown was not permitted to call rebutting evidence in relation to the GCT payments. Also the Crown was not allowed to recall the accused for cross-examination after the documents were tendered during re-examination. That being so the Learned Resident Magistrate had to carefully consider the weight to be given to the appellant's evidence in relation to whether or not she had invested the funds in Seascape. The task for the learned Magistrate then appeared to be an uphill one.

The grounds of appeal filed and argued by Mr. Phipps Q.C. are stated as follows:

(1) The verdict was unreasonable and cannot be supported having regard to the evidence.

(2) The learned Resident Magistrate misdirected herself on the law applicable to the issues in the case.

(3) The learned Resident Magistrate failed to direct herself adequately or at all on the principles and ingredients for the offence of fraudulent conversion of property.

Mr. Phipps, Q.C. submitted that the appellant accounted to Lloyd Reckord for cheque given to her for investment by Colin Garland and himself. He was informed that his investment was secured on Seascape, renewable annually and she invited him to visit her office to inspect the Title and Power of Attorney. They both were paid interest on their investments.

He further submitted that the appellant had authority to mortgage Seascape and did so to secure investment of funds from Reckord and Garland. This money was used to defray expenses on the property and pay interest on the mortgage.

She had perfected the lease to McFayden and informed Canolle of the development from time to time.

Miss Llewellyn, Counsel on behalf of the prosecution in the main submitted that the equitable mortgage effected by documentation was based on a false premise as there had been no indication on the part of the registered proprietor Cecille Canolle to mortgage Seascape. Sonia Jones lied in the said statutory declarations.

That the Power of Attorney from Canolle did not give Sonia Jones any authority to effect an equitable mortgage on Seascape, Sonia Jones knew this, which is why she had to seek express authority to lease it to McFayden.

That Sonia Jones did not expend any of the complainant's funds on Seascape re outstanding bills, and for renovation purposes and that this "investment" was an illusion. Any money paid by Sonia Jones to the complainants purporting to be "interests" formed part of a ruse to discourage the complainants from realizing that there had been no investment and reporting the matter to the police.

Let me now deal with the first ground. Was the Verdict unreasonable and cannot be supported having regard to the evidence?

The Learned Resident Magistrate in finding the appellant guilty on these counts said this:

> "Was there investment in Seascape? Miss Jones said it was possible for equitable mortgage like these to be protected by caveats. It was not until November 1996 that document reached the Registrar of Titles and registered in 1997. Information on the document could only come from Sonia Jones. Statutory declaration of the complainants recites what is in the statutory declaration of Sonia Jones. In her statutory declaration she said April 1995 Colin Garland lent $50,000.00 and in February 1995 $33,700 lent by Lloyd Reckord to Seascape. The amount and the dates on these documents are wrong. Her explanation for the difference in the dates was that it was a mistake I find that to be ingenious I do not find that to be so. Sonia Jones also said she had given her word to another Attorney. I do not accept that is how dates came to be put on documents. It was a deliberate act to indicate dates on which investment made. The Power of Attorney which Sonia Jones purported to act is short and (the judge reads Power of Attorney)"

Before us Mr. Phipps Q.C. argued that the only way there could be an adverse verdict is where the property or proceeds were not invested as intended

but used for other purposes. The learned Resident Magistrate made a positive finding that the charges could not stand if there were investments.

It is plain that both complainants admitted lodging caveats to further secure their investments, and these caveats have never been lifted.

Section **139** of the Registration of Titles Act the "Act" provides:

> "**139.** Any beneficiary or other person claiming any estate or interest in land under the operation of this Law or in any lease, mortgage or charge, under any unregistered instruments, or by devolution in law or other wise, may lodge a caveat with the Registrar in the Form in the Thirteenth Schedule, or as near thereto as circumstances will permit, forbidding the registration of any person as transferee or proprietor of, and of any instrument affecting, such estate or interest, either absolutely or until after notice of the intended registration or dealing be given to the intended caveator, or unless such instrument be expressed to be subject to the claim of the caveator, as may be required in such caveat".

Section 140 deals with effect of lodging caveats with the Registrar and provides:

> "**140.** Upon the receipt of the caveat under this Law, the Registrar shall notify the same to the person against whose application to be registered as proprietor, or as the case may be, to the proprietor against whose title to deal with the estate or interest such caveat has been lodged, and such applicant or proprietor or any person claiming under any transfer or other instrument signed by the proprietor may, if he thinks fit, summon the caveator to attend before the Supreme Court, or a Judge in Chambers, to show cause why such caveat should not be removed and such Court or Judge may, upon proof that such caveator has been summoned, make such order in the premises, either ***ex parte*** or otherwise, and as to costs as to such Court or Judge may seem fit.

> Except in the case of a caveat lodged by or on behalf of a beneficiary under disability claiming under any will or settlement, or by the Registrar, every caveat lodged against a proprietor shall be deemed to have lapsed as to the land affected by the transfer or other dealing, upon the expiration of fourteen days after notice given to the caveator that such proprietor has applied for the registration of a transfer or other dealing, unless in the meantime such application has been withdrawn".

Section 142 deals with duty of Registrar as long as caveat is in force. It states:

> "So long as any caveat shall remain in force prohibiting any registration or dealing with the estate or interest in respect to which such caveat may be lodged, the Registrar shall not enter in the Register Book any change in the proprietorship or any transfer or other instrument presented for registration subsequent to the date on which such caveat was lodged purporting to transfer or otherwise deal with or affect the estate or interest in respect of which such caveat may be lodged, unless such transfer or other instrument or dealing be expressly exempted from the operation of the caveat or unless the caveator shall consent thereto in writing."

When the caveats are examined, it will be disclosed that equitable interests are claimed in the property of Ms.Canolle. In fact both complainants have made statutory declarations that the security of the said loans is the property, Seascape Hotel Limited, Negril. Until the caveats are withdrawn or lifted they provide a claim to an equitable interest in Seascape on behalf of the complainants.

The finding that the funds from Reckord and Garland were not invested in Seascape cannot be supported on the evidence. There is no evidence before the Court that these caveats were ever withdrawn or lifted. The Magistrate has no jurisdiction to remove the caveats. Since such jurisdiction is

founded on Section 140 of the Act, the caveators can only be summoned to show cause before a Judge of the Supreme Court why the caveat should not be removed.

These dates and amounts in the statutory declarations represent what the complainants said in their evidence. That is to say on those dates they gave the appellant the respective sums to be invested. What was being argued by the prosecution was that the appellant was not in a position to create an equitable mortgage until a date subsequent to June 95 when she received the Title and the Power of Attorney from Ms Canolle. In fact the appellant said in evidence she created the equitable mortgages in July 1995. An explanation was given by the appellant in relation to the error of the date in her statutory declaration. The appellant said the documents were prepared by Miss Janet Mignott, the attorney now representing the complainants and forwarded to her for execution and it clearly was a mistake that "July" was not inserted in the document. They were not her documents. Even so, the appellant had a right to retain the funds until a suitable investment was available. Moreover the dates are the ones on which the appellant was given for the sums to be invested. She explained that any delay in lodging the caveats was not detrimental to the interests of the complainants since at all times she was in possession of the title deeds as a security for the investments.

The Learned Resident Magistrate in convicting the appellant said further:

> "Documents tendered to support Sonia Jones' contention that the sums were utilized on behalf of Seascape. Whether or not the funds were used is not in doubt because I accept Sonia Jones' evidence

> that the funds were used. Were the funds invested in Seascape? I do not find that the funds were invested in Seascape on behalf of complainants either in February 1995 or at all. Purpose of giving cheques to her was that the funds would be invested. I find that initially sometime after the receipts of these funds she utilized the proceeds without making any investments on behalf of complainants. Indictment alleges 1st December, 1996 to 31st December, 1996
>
> funds roll over. I find funds were still entrusted to her and no such investment was made. In light of that the verdict is guilty on both counts."

Both complainants admitted in their testimonies that the cheques were handed to the appellant for investment at an agreed rate of interest. Both complainants admitted in evidence that each had an investment and from the outset each received interest payments from the appellant. The Power of Attorney given to the appellant by Ms. Canolle could confer on the appellant a power to create the equitable mortgage on her behalf.

Mr. Phipps submitted that a finding that there was no investment would be contrary to all the evidence in the case and a verdict based on such a finding would be unreasonable. He cited the case of ***R v Adrian Brown*** RMCA 2/87 delivered on July 11, 1988 by Campbell J.A. which demonstrated that tardiness is not an ingredient of the offence of fraudulent conversion. I will return to this later.

I now turn to the second ground of appeal. Did the Learned Resident Magistrate misdirect herself on the law applicable to the issues in the case?

Equitable Mortgage

Miss Jones said, in July 1995 she decided to put Reckord and Garland's money into Seascape. At the time of such decision Ms.Canolle was out of

touch with her for several months. She said that the Power of Attorney permitted her to have an equitable mortgage. Also, because of all the expenses in relation to the Hotel and the fact that the borrowing rate at the bank at the time was between 45% and 60%, she felt that being able to secure funds at 22% was advantageous to Ms. Canolle, and also honoured her agreement duties under the Power of Attorney. Sonia Jones stated that she had to ask Ms.Canolle nothing; she had to ask her nothing to mortgage her property. She said that in order to do an equitable mortgage on the property and by virtue of the Power of Attorney she had no obligation to ask Ms. Canolle anything. She noted that in order to upgrade that mortgage from an equitable mortgage by deposit of Title Deeds to a legal mortgage she had to ask her to sign the mortgage documents and she did. Miss Jones said she told Ms. Canolle in October 1995 that she had effected a mortgage on the property. She had no discussion with Ms. Canolle about a specific client. She didn't indicate to Ms. Canolle that she was going to mortgage her property to Lloyd Reckord or Colin Garland.

The deposit of title deeds by way of security is treated both as prima facie evidence of a contract to mortgage and as part-performance of that contract. In ***Wallen v Simmonds*** (Builders Ltd.) [1994] 1 All ER. 561 Templeman J, held that the equitable charge resulting from a deposit of title deeds was contractual in nature and specifically rejected an argument that the charge arose by operation of law. It follows therefore that the basis of an equitable mortgage is the making of an agreement to create a mortgage with the deposit of the title

deeds. The deposit of the title deeds can rank as a sufficient act of part performance to support a purely oral transaction. But some contract there clearly must be. The fact that the complainants had given the funds to the appellant to invest in a mortgage could form the basis of the agreement. In light of the Power of Attorney given to the appellant she could have used the authority to create the equitable mortgages on behalf of the proprietor of Seascape.

It should be noted in passing that since 1989 an equitable mortgage can no longer be created by a deposit of title deeds. In England Sec. 2 of the Law of Property (Miscellaneous Provisions Act) 1989 provides that contracts for the sale of land or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or where contracts are exchanged in each.

I would recommend the introduction of a similar provision in our statute law.

Power of Attorney

Miss Jones stated that she was Ms. Canolle's authorized agent and held a Power of Attorney. She said she was left to do all things in relation to the hotel and inherent in the Power of Attorney is the right to mortgage or lease. She said:

> "I was to look after all her business, financial and personal affairs, and to facilitate that process, the Title was left with me with the intention that I utilized it to carry out the mandates in the Power of Attorney."

She spoke of the type of Power of Attorney required under the Registration of Titles Act saying she would only require that type if attorney is going to sign the transfer document. She noted that the property Seascape is owned by Seascape Ltd a registered company. Ms. Canolle having a 99% shareholding, could in her personal capacity indicate the use of her asset. Miss Jones noted that she was aware that as a matter of law Seascape Ltd was a different legal entity from Ms. Canolle. She didn't prepare a Power of Attorney in relation to the company as Ms. Canolle was in great hurry to make an evening flight. She said it was unnecessary for her to prepare another Power of Attorney with Seascape as donor of power as she would not be signing any document for Seascape for presentation to Registrar of Titles.

In spending the $2.3m on Seascape's property she signed many documents as authorized agent for Seascape and Ms. Canolle. She said she did not agree that to bind Seascape Ltd she had to have a Power of Attorney for Seascape Ltd. under its seal. In speaking about the lease that Jones said she prepared and signed, she continued by stating that Exhibit 2 (the Power of Attorney) gave her full authority to act on her own autonomy and in her own discretion personal and professional.

The Power of Attorney which was signed by Cecille Canolle and witnessed by Jonathan Wemyss Gorman on 16th June, 1995 and given to Sonia Jones, Attorney – at – Law stated:

> "This shall be your authority to act as my Attorney and authorised agent in all business or personal transactions in Jamaica." (emphasis supplied).

She spoke of the type of Power of Attorney required under the Registration of Titles Act saying she would only require that type if attorney is going to sign the transfer document. She noted that the property Seascape is owned by Seascape Ltd a registered company. Ms. Canolle having a 99% shareholding, could in her personal capacity indicate the use of her asset. Miss Jones noted that she was aware that as a matter of law Seascape Ltd was a different legal entity from Ms. Canolle. She didn't prepare a Power of Attorney in relation to the company as Ms. Canolle was in great hurry to make an evening flight. She said it was unnecessary for her to prepare another Power of Attorney with Seascape as donor of power as she would not be signing any document for Seascape for presentation to Registrar of Titles.

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The Power of Attorney which was signed by Cecille Canolle and witnessed by Jonathan Wemyss Gorman on 16th June, 1995 and given to Sonia Jones, Attorney – at – Law stated:

> "This shall be your authority to act as my Attorney and authorised agent in all business or personal transactions in Jamaica." (emphasis supplied).

In Halsbury Laws of England 3rd Edition Vol. 1. para. 382, the learned author at paragraph 383 said:

> "In the absence of express directions, the agent may exercise his discretion so as to act in the best manner possible for his principal. (emphasis added).

Earl Jowitt; Dictionary of English Law at page 1379 defined:

> "Power of Attorney is a formal instrument in which one person empowers another to represent him or act in his stead for certain purposes. .. The donor of the power is called the principal or constituent; the donee is called the attorney... A Power of Attorney which authorises the attorney to do all acts of a certain class from time to time such as to carry on a business, collect debts etc. is sometimes called a general power as opposed to a special or particular power, or one which is confined to a specified act or acts. A limited power is one containing precise instructions as to the mode of executing it while an unlimited power leaves this to the discretion of the attorney".

The evidence that when Ms.Canolle handed over her Title she indicated to the appellant that she wanted her to sell the property was denied by the appellant. However, the real issue was whether the creation of the equitable mortgage was inconsistent with the Power of Attorney given to the appellant by Ms.Canolle? It does not appear to be inconsistent It is clear, however, that the Power of Attorney which the appellant had, could not be used to register the legal mortgage as opposed to an equitable one.

Mr. Phipps Q.C. raised the point that the two cheques given to the appellant and lodged in the appellant's client account at the Bank became the property of the Bank and not the complainants'. Therefore there can be no charge for conversion of money in the Bank or of interest payable on amounts when due. He cited ***R v Davenport*** [1954] 1 All ER 602 in support. The

definition of property - in Section 2 of the Larceny Act is sufficient to dispose of the point. "Property" is thus defined :

> "property includes any description of real and personal property, money, debts, and legacies, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods, and also includes not only such property as has been originally in the possession or under the control of any person, but also any property into or for which it has been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise."

I find no merit in that point.

I turn now to the third ground of appeal. Did the Learned Resident Magistrate fail to direct herself adequately or at all, on the principles and ingredients for the offence of fraudulent conversion of property?

The relevant part of section 24 provides:

> "**24.**—(1) Every person who—
>
> (i) being entrusted either solely or jointly with any other person with any Power of Attorney for the sale or transfer of any property, fraudulently sells, transfers, or otherwise converts the property or any part thereof to his own use or benefit, or the use or benefit of any person other than the person by whom he was so entrusted; or
>
> (ii) ...
>
> (ii) (a) being entrusted either solely or jointly with any other person with any property in order that he may retain in safe custody or apply, pay, or deliver, for any purpose or to any person, the property or any part thereof of any proceeds thereof; or

(b) ...

fraudulently converts to his own use or benefit, or the use or benefit of any other person the property thereof;
..."

It is instructive to observe that the appellant was never charged under Section 24 (1)(i) dealing with the Power of Attorney and therefore a detailed accounting in respect of the expenditure of funds held on behalf of Ms. Canolle cannot be relevant to these proceedings.

The ingredients of the offence under this section are these: Firstly, that the accused person was entrusted with funds for a particular purpose. Secondly, that she converted the funds to her own use and benefit or the use or benefit of any other person. Thirdly, that this was done with fraudulent intent. There is no issue in relation to the entrusting of the property.

Property must be converted for a purpose other than what was intended. On a global view of the evidence it was clearly indicated that the only payments made by the appellant were for the benefit of Seascape. There was no evidence of payments from the proceeds of the cheques for the appellant's own benefit, or that the proceeds of the cheques cannot be satisfactorily accounted for.

Miss Lewellyn on behalf of the prosecution cited a number of authorities to support her submissions that the property was fraudulently converted. Some of these were: ***R v Lloyd Gibson*** [1986] 23 JLR 499; ***Fitzritson v Administator General*** [1969] 11 JLR 288; ***Brian Bernal v R.*** 50 WIR 296 These cases are easily distinguishable from the instant case and cannot be of any assistance to the Court.

A case which bears some resemblance to the instant case is ***R v Hignett*** [1950] 94 Sol. J 149 (Lord Goddard, C.J. Humphreys and Sellers JJ) Court of Appeal (U.K.):

> "The appellant , formerly a solicitor was convicted at Sussex, Assizes on seven counts of an indictment
>
> charging him with fraudulent conversion and on two counts charging him with obtaining credit by fraud. Mr. Commissioner Clarke, K.C. sentenced him to four years' imprisonment on the counts charging him with fraudulent conversion and to nine months' imprisonment on those charging him with obtaining credit by fraud, the sentences to run concurrently. The charges of fraudulent conversion against the appellant were that he had received money from clients in the course of his practice as a solicitor to invest in first mortgages, and that instead of doing so he had retained the money for his own use. The defence to the first two counts of fraudulent conversion was that the appellant had had no fraudulent intent and that he had had authority to deal with the money in the way in which he did or that he had reasonable grounds for thinking that he had such authority. It was complained for the appellant that, whereas fraudulent intent was an essential ingredient of the offence of fraudulent conversion, the general trend of the commissioner's summing-up had been that various matters had to be proved to secure a conviction for fraudulent conversion, but that, it was not necessary to prove fraudulent intention. For the prosecution it was not sought to support the commissioner's direction, but reliance was placed on the power of the court to dismiss the appeal on the ground that there had been no substantial miscarriage of justice.
>
> Lord Goddard, C.J. in giving the judgment of the court, said that the evidence against the appellant had been remarkable and almost staggering; but the commissioner's direction with regard to the law of fraudulent conversion was most unfortunate; he had told the jury that if the appellant had received money for a purpose and did not use it for that purpose they would be entitled to

> convict him of fraudulent conversion. Over and over again he had told them that if he had applied the money as the prosecution had said that he had applied it that was fraud. That, however, was not the law, and the court could not allow the convictions of fraudulent conversion to stand. They had always taken the view that a conviction must be quashed if there had been a complete misdirection".

Although this case dealt with misdirection to the jury it underscores the importance of dealing with fraudulent intent in a charge for fraudulent conversion.

The primary issue which was determined by the Learned Resident Magistrate was whether the funds were invested. This is what the Learned Magistrate said:

> " The question is whether she invested the money. If she invested money then there is no basis for charges. On the evidence the question is whether an investment was made. Apart from caveats lodged with the Registrar of Titles on March, 1997 there is no other record of investments..."

There was no indication in her judgment that she had in the forefront of her mind the third ingredient of fraudulent intent.

The appellant must honestly believe in the existence of circumstances which if true would give rise to a reasonable requirement to effect an equitable mortgage. Was the appellant as an attorney-at-law having clients on the one hand with money to invest and on the other another client requiring her to act as her authorised agent in all business and personal transactions, trying her best to do her duty to both as she saw fit?

Is the legal imperative in the instant case that the appellant's belief must be reasonable or only that it be honestly entertained? If the latter, the appellant must be judged on the facts as she honestly believed them to be.

The appellant was entitled to an acquittal if her objective was to secure an investment for her clients in circumstances where having regard to her Power of Attorney from Ms.Canolle it was reasonable to do so.

It appears that the appellant had no fraudulent intent and in fact had authority to deal with the property in the way she did. Further she had reasonable grounds for thinking that she had such authority.

Having regard to the totality of the evidence before the Learned Resident Magistrate, I am of the view that the verdict was unreasonable and cannot be supported by the evidence.

It must always be borne in mind that delay in the payment of debts and matters of a similar nature are better dealt with by the Civil Court.

For the foregoing reasons I would allow the appeal.

PANTON, J.A:

The appellant, after a trial lasting fifteen days over a period of seven months, was convicted on December 6, 1999, in the Resident Magistrate's Court for the Corporate Area before Her Honour Miss Marcia Hughes, on an indictment containing two counts of fraudulent conversion. She was sentenced to concurrent terms of eighteen (18) months' imprisonment at hard labour on each count. Having given verbal notice of appeal, she has been on bail since the conclusion of the trial.

The appellant is an attorney-at-law. At the time of the conclusion of her trial, she had been practising law for twenty-nine years. The complainants in this case, Mr.Colin Garland, an artist, and Mr. Lloyd Reckord, playwright, were not only the appellant's clients but also her friends. Count 1 of the indictment alleged that the appellant having been entrusted by Mr. Reckord with US$ 33, 749.00 to invest for and on his behalf, she fraudulently converted that sum to her own use and benefit or the use of some other person. Count 2 was in a similar vein, except that the sum was US$50, 000.00 and the complainant was Mr. Garland. The conversions were alleged to have taken place during 1996.

Grounds of Appeal

On December 13, 1999, the appellant filed one ground of appeal, namely, that:

> **"the verdict was unreasonable and cannot be supported having regard to the evidence".**

Additional grounds were filed on May 21, 2001. These were numbered as follows:

> **2. The learned Resident Magistrate misdirected herself on the law applicable to the issues in the case.**

3. **The learned Resident Magistrate failed to direct herself adequately or at all, on the principles and ingredients for the offence of fraudulent conversion of property.**

4. **The sentence was manifestly excessive.**

The evidence presented by the prosecution

Messrs. Reckord and Garland gave separate sums of money to the appellant for her to invest. The agreed rate of return was 22% per annum. This rate though usual for Jamaican currency, was extraordinary for United States currency. In the case of Mr. Reckord the sum of US$33,749.00 was given on February 27, 1995, whereas in the case of Mr. Garland, he gave the sum of US$50,000.00 on April 17, 1995. Up to the time of their entrusting the appellant with these sums, they had been satisfied with investments that they had earlier made through her. Although there were at times separate contacts between the appellant and each complainant, it is clear that Mr.Reckord acted at times for both of them in their dealings with the appellant. Mr. Reckord, apart from the yield on the investment, was very interested in the security of the principal. The appellant, although she did not tell Mr. Reckord of the nature of the investment that she had undertaken on his behalf, assured him that it was "as safe as Desnoes and Geddes". He understood that to mean "absolute safety". Desnoes and Geddes, now a part of the Guinness family, has a solid, stable and strong history as brewers and bottlers of one of the world's best products – Red Stripe beer. Mr. Garland intended to use the profit from his investment to build an art gallery. The appellant told him that his money would have been invested in an apartment in Kingston, and that the apartment would be his security. During

1995 and 1996, both men received what the appellant advised them were interest payments. However, the payments were erratic in terms of the due dates and the calculations were often incorrect . In early 1996, both men became concerned about their investment. They repeatedly requested that the principal sums be returned to them. That was not to be. Instead, the appellant made them promises month after month - promises that have not been kept. Eventually, she told them that their monies had been invested in Seascape Hotel, Negril. The complainants retained the services of another attorney-at-law who advised that a report be made to the police, and who assisted in the placing of caveats on the Seascape property .

Ms. Cecille Canolle, a French citizen, who lived in Jamaica during the period 1993 to 1995, bought the Seascape Hotel property in September, 1993. This was a cash transaction. The appellant's services as an attorney-at-law were engaged by Ms. Canolle to finalize the transfer of Title to her. Seascape is a company. Ms. Canolle and her mother are the shareholders. Ms. Canolle returned hurriedly to France in June, 1995. Before doing so, she, in that very month, gave the appellant "authority to act as (her) attorney and authorised agent in all business or personal transactions in Jamaica". Ms. Canolle had closed the hotel and left a 24-hour watch on the premises. She left the Title with the appellant with instructions to sell the property. Apart from that, she also left US$4,400.00 with the appellant for her to pay utility bills in respect of the property. At the time of departure, she gave the appellant no instructions to mortgage the property. The appellant assured Ms. Canolle that she had nothing to worry about; she would pay the bills, and would find a purchaser for the property. The

expected sale of the property never materialized. When Ms. Canolle considered that the property was costing her, and there was no pending sale of it, she gave instructions for it to be leased. It was leased to Mr. Robin McFayden from December 1, 1995. Ms. Canolle had, while in France, telephoned Mr. McFayden prior to the lease agreement being entered into. Mr. McFayden actually took possession of the property in November, 1995, during which period he made improvements to it at his own expense. For nine months, he paid US$1,000.00 per month and in the tenth month, he paid US$700.00 for the lease. These payments were made to the appellant. It was Mr. McFayden's understanding from Ms. Canolle that these payments were to be used to pay arrears for utilities and security for the premises. From December 1, 1995, to the time of the trial, Mr. McFayden paid all utility bills as well as for security.

In July, 1996, the appellant sent mortgage documents to Ms. Canolle for her to sign. These documents indicated that a mortgage was being given in favour of Mr. Reckord on Seascape. Ms. Canolle refused to sign these documents . She was very surprised and concerned to have received these documents as she had not entertained the idea of a mortgage. She wished to part with the property. She telephoned the appellant and told her that she could not sign the documents. The appellant said, "alright". In January, 1997, Ms. Canolle visited Jamaica. On that visit, she paid US$2,500.00 to the appellant. She requested of the appellant the return of the Title for Seascape as well as the provision of "the final invoice...in respect of the bills what (sic) she'd paid". The appellant said she would work on the bill and would show Ms. Canolle the Title. Up to the time of trial, this promise had not been kept. Incidentally, Ms. Canolle

said she had never received any money from the appellant. "I have been paying but not receiving", she said in re-examination. In April, 1997, Ms. Canolle received notification of the caveats on her property. Subsequent to that, she reported the matter to the General Legal Council and the Police.

The caveats were grounded on statutory declarations made by Messrs. Reckord and Garland as well as by the appellant. In both cases, the appellant swore that an equitable mortgage had been created in favour of the complainants on the date of the receipt of the sums of monies by her, for investment.

The response by the appellant before the Resident Magistrate

The appellant placed her good character before the learned Resident Magistrate for consideration. She had for several years up to 1995 served as honorary secretary of the Jamaican Bar Association, member of the General Legal Council, and director of the Legal Aid Clinic. She has also been a director of the Gleaner Company and of the Jamaica National Building Society. From these latter directorships, she resigned when a newspaper published the fact that she had been interviewed by the Fraud Squad of the Jamaica Constabulary Force.

The appellant stoutly denied fraudulently converting the sums that she received to her use and benefit, or to the use and benefit of any other person. According to her, she advised the complainants of the nature of their investment and paid them interest at regular intervals. The investment was in Seascape Hotel. The sums, she said, had been invested by means of an equitable mortgage in the hotel. The power of attorney that she held from Ms. Canolle

empowered her, she contended, to create that mortgage in respect of that property. In 1994 or early 1995, she had looked for financial partners for Ms. Canolle in respect of the operation of the hotel as it had been under-capitalized. She denied that Ms. Canolle had left the Title with her for her to find a purchaser, and that her authority had been restricted to the sale of the property. The denial is captured in this answer which she gave in examination-in-chief: "Absolutely not! I was put in full charge of the hotel and all personal matters in relation to Cecille Canolle."

She said that Ms. Canolle left US$3,000.00 with her prior to leaving Jamaica. Thereafter, she (the appellant) proceeded to spend " well over Jamaican one million over and above that sum in respect of her property" (that is, Seascape). She said that in about March or April 1996, she sent to Ms. Canolle in France for her signature formal legal mortgage documents "in order to register a formal mortgage on the certificate of Title" as she (the appellant) "was aware that the terms of the power of attorney would not permit (her) to sign the mortgage documents". According to her, she sent two sets of documents, one for Mr. Reckord and one for Mr. Garland. Although Ms. Canolle returned the documents unsigned, according to the appellant, Ms. Canolle never at any stage protested in respect of the prospect of her property being mortgaged. Up to the time of her evidence, she (the appellant) had not been asked to give an account in respect of any money received "for or about Canolle" or "for the proceeds of the mortgage of Seascape".

Under cross-examination,the appellant denied making the statement about Desnoes and Geddes and stated that it was in July 1995 that she decided

" to put Reckord and Garland's money in Seascape". She said this: "When I decided to do so Ms. Canolle was out of touch with me for a period of several months". She apparently contradicted herself while being cross-examined in relation to the closure of the hotel. Firstly, she said this: "I recall Canolle's evidence that there were no creditors to the property. **She said that before the property was leased it was closed but that wasn't correct**". Then, shortly after, she said: "Funds were used - the money that Mr. Garland had paid - to commence paying some of the indebtedness of the hotel particularly as **there was no way of knowing how long the hotel was going to be closed** and the funds were used to defray the considerable debts the hotel was carrying at the time of Ms. Canolle's hurried departure and expenses which were accruing".

The appellant told the learned Resident Magistrate that she was aware that as a matter of law Seascape was a different legal entity from Ms. Canolle, and that she did not prepare a power of attorney in respect of the company as Ms. Canolle was hurrying in an effort to make an evening flight.

The monies paid by Messrs. Reckord and Garland were placed in the appellant's clients' account and, according to her, became the property of Seascape Hotel through the equitable mortgage she claims that she created. Accordingly, she felt at liberty to withdraw funds therefrom to pay the debts of Seascape. She did not have access to the bank accounts of Seascape Hotel. For her to have had access, the bank required :

> "the managing director of the company to be present in Jamaica at a corporate meeting in which a banking resolution in the form set out by the bank would have been passed and the seal affixed and the documentation signed by Ms. Canolle".

This summary of the evidence of the appellant may be concluded by quoting these words that she uttered:

> "Up to November 1995 when McFayden took over the property, I would have had in hand just a shade over $2 million. It was not the complainants' money. I would have converted their money; the money became the property of Seascape in law so any that was being utilized to pay the debts of Seascape are accountable to Seascape/Canolle. The complainants would be enTitled to interest on the funds invested and ultimately to a capital repayment from Seascape/Canolle. That is the law. I honestly believed that. I am a lawyer and I believed it and acted upon it and believe it up to this day."

The findings of the Resident Magistrate

We have been provided with notes agreed by counsel on both sides of the comments and findings of facts made at the time of the delivery of the verdict. The learned Resident Magistrate found the following:

1. The cheques for the amounts stated in the indictment were entrusted to the appellant in order that she may invest the proceeds in a manner to secure interest at 22% per annum.

2. The complainants relied on the appellant to source investment yielding that return.

3. The appellant told Mr. Garland that she would have invested his funds in an apartment in Kingston.

4. The appellant was very hesitant to inform the complainants how their monies had been invested.

5. Eventually, after many enquiries, the appellant told the complainants that their monies had been invested in Seascape Hotel.

6. No funds were invested in Seascape at any time by the appellant on behalf of the complainants.

7. The appellant deliberately and dishonestly made false statutory declarations to the effect that

equitable mortgages had been created in Seascape in favour of the complainants at the time the latter had entrusted the monies to her.

8. One set of mortgage documents indicating Mr. Reckord as lender was sent in July, 1996, to Ms. Canolle in France for her signature.

9. The appellant had no authority to effect a mortgage on the property.

10. The appellant had a power of attorney from Ms. Canolle; so far as it extended to Seascape, it would only allow the appellant to sign a sale agreement.

11. The power of attorney did not give the appellant wide scope to do as she wished, whether Ms. Canolle agreed or not.

12. The funds entrusted to the appellant have been used, but no investments whatsoever were made on behalf of the complainants.

The learned Resident Magistrate did not believe that the appellant, an attorney-at-law of such long standing, had invested funds without ensuring that some recourse would be available to the complainants, if for example she (the appellant) had died. In short, there would have been some form of security. This was against the background of the appellant's assertion that there was an equitable mortgage in respect of Seascape, yet there was no documentation to evidence it until the complainants had secured the services of another attorney-at-law who took steps to lodge caveats.

I find it convenient to deal with the grounds of appeal in reverse order to that in which they are numbered. So, I shall commence with ground 3.

The ingredients of the offence of fraudulent conversion

Regina v. Marshall Nicholas Bryce (1955) 40 Cr. App. R. 62 is solid authority for saying: "where the charge is one of fraudulent conversion, it is essential that three things should be proved... first, that the money was entrusted to the accused person for a particular purpose; secondly, that he used it for some other purpose; and thirdly, that such misuse of the money was fraudulent and dishonest" (page 63).

In the instant case, there is no dispute that money was given to the appellant for a specific purpose, that is, to invest on behalf of the complainants to yield 22% interest per annum. The appellant, while being examined in chief, confirmed this. The record of appeal shows this:

> **"Question** - did you receive a cheque from Mr. Reckord in the sum of $33,749 ?
>
> **Answer** - Yes. It was in February, 1995. He gave me instructions in respect of that money. They were that I was to invest the sum together with some interest that was accruing from him, on terms similar to the first instrument and yielding interest at 22%."

She continued :

> "In that same year I received a cheque for Mr. Garland in the sum of $50,000.00 It was in April of that year. The instructions came from Colin Garland to invest but the details were worked out with Mr. Reckord and the yield was to be 22%."

In delivering the verdict, the learned Resident Magistrate is reported as having said the following:

> "Cheques could not be the item to be invested. Understanding was and Court finds that the proceeds of the cheques were to be invested. Therefore on

> either construction of the word 'property', proceeds were by necessary implication entrusted for investment at 22% rolled over".

The appellant claims that she invested the monies in Seascape. The learned Resident Magistrate pondered seriously the question of the investment. She said:

> "The question is whether she invested the money. If she invested the money then there is no basis for charges. On the evidence, the question is whether an investment was made."

Later, in her judgment, she said :

> "Documents tendered to support Sonia Jones' contention that the sums were utilized on behalf of Seascape. Whether or not the funds were used is not in doubt because I accept Sonia Jones' evidence that the funds were used. Were the funds invested in Seascape? I do not find that the funds were invested in Seascape on behalf of the complainants either in February, 1995, or at all."

On the question of whether the misuse of the monies was fraudulent and dishonest, the learned Resident Magistrate considered the reluctance of the appellant to disclose the nature of the "investment", the information given to Mr. Garland as to his investment being in an apartment in Kingston, the failure to take early appropriate steps to register a legal mortgage, or to lodge a caveat to secure the 'investment' in Seascape as well as the appellant's entry of false dates in the statutory declarations sworn by her and filed in December, 1996. The learned Resident Magistrate said:

> "The amount and the dates on these documents are wrong. Her explanation for the difference in the dates was that it was a mistake. I find that to be ingenious. I do not find that to be so."

In other words, the Magistrate found that the appellant had indulged in sharp practice. What had occurred was calculated.

In the face of what appears on the record, it is unsustainable to say that the magistrate had failed to direct herself adequately on the principles and ingredients of the offence. Accordingly, Ground 3 fails.

The law applicable to the issues in the case

I have already adverted to the ingredients of the offence. In addition to the issues surrounding those ingredients, the Court below was obliged to specifically consider the question of the credibility of those who gave evidence. There were also the questions relating to a power of attorney as well as what constitutes an equitable mortgage.

> (1) **power of attorney**- this is a deed by which A empowers B to be his/ her agent, either generally or for a particular matter:

In the instant situation, Ms. Canolle authorized the appellant to act for her "in all business or personal transactions in Jamaica". (Exhibit 2).

This authority became effective on June 16, 1995. The learned Resident Magistrate accepted that the appellant had this power conferred on her. She concluded that the power so far as it may have related to Seascape, a property which was owned by a company in which the donor of the power of attorney was not the only shareholder, only allowed the donee to sign a sales agreement. She said:

> "I do not find the power of attorney given, gave Sonia Jones such wide powers. It was only to allow Miss Jones to sign sale agreement...I do not find that

> the power of attorney gave her wide scope to do as she wished and whether Cecille Canolle agreed".

It is clear that the learned Resident Magistrate considered the evidence of Ms. Canolle, accepted it and related it to the law which limits the exercise of a power of attorney to the limits placed thereon by the principal, explicitly or implicitly. As she said, the donee of a power of attorney is not at liberty to do anything he or she wishes, without regard for the specific instructions of the principal. Furthermore, Ms. Canolle and the company, Seascape, are two separate legal persons – a fact acknowledged by the appellant.

> (2) **equitable mortgage**- a form of security for a debt which lacks the formality required by law or which relates only to equitable property. **(Osborn's Concise Law Dictionary- 8th edition).**

In this regard, the learned Resident Magistrate addressed her mind to the claim by the appellant that an equitable mortgage was in existence. She focussed on the need for some form of security on which the complainants could call. She said this:

> "Miss Jones said it was possible for equitable mortgages like these to be protected by caveats. It was not until November, 1996, that documents reached the Registrar of Titles , and registered in 1997.....I can't believe an attorney of 28 years would invest funds without ensuring that some recourse would be available. She said she was ill. If she had died where would the complainants find any document to show that the money is invested. Lloyd Reckord said he made efforts to ascertain how money invested and had gotten different responses".

In view of the above, it is clearly inaccurate to say that the learned Resident Magistrate either did not address the issues in the case or misdirected herself on them. In recording her findings of facts, she cannot be expected to provide a dissertation on every legal or factual matter that requires

consideration. What is required is for her to clearly demonstrate that she was conscious of the relevant law and issues and that she applied the relevant principles correctly. I find that she cannot be faulted in this respect. Ground 2 also fails.

Finally, it has been submitted that:

> **"the verdict was unreasonable and cannot be supported having regard to the evidence".**

That is the complaint in ground 1.

Mr. Frank Phipps, Q.C., said that:

> "all the evidence in the case coming from the prosecution witnesses and the appellant herself indicates that in fact there was an investment for each amount. All the hallmarks and trappings of an investment were there. If an investment can be defined as putting money in a financial scheme expecting to achieve a profit, that was done in this case. The profit had in fact been realized".

I am unable to agree with learned Queen's Counsel as the evidence, in my view, points clearly in the direction of a conversion of a fraudulent nature of the complainants' funds by the appellant. The learned Resident Magistrate accepted the prosecution's case which I have attempted to summarize earlier. There is no need to repeat it. However, no harm is done in recalling that the monies were entrusted to the appellant in February and April, 1995, and the power of attorney received in June, 1995. Further, the Seascape hotel was closed between June and November, 1995, and thereafter the appellant received lease payments on a monthly basis in respect of the hotel. Earlier, it was mentioned that the appellant made declarations at the request of the

complainants' new attorney-at-law in order to have caveats lodged in respect of the property. The declarations by the appellant are exhibits 7 and 8. They are in similar terms except for the names of the complainants, sums of money, and the date of the alleged loans. In exhibit 7, the appellant declared in paragraph 1:

> "**that in February of 1995, the sum of ...US$33,700.00 was lent by Lloyd Reckord...to Seascape Hotel Limited**..." .

In paragraph 4, she declared:

> "**The duplicate certificate of Title for the said property ...was deposited with me by the registered proprietor** Seascape Limited in my capacity as attorney-at-law for the said Lloyd Reckord **to the intent that the said property should be charged with and be security for the repayment to the said Lloyd Reckord of the aforementioned sum** advanced by him to the said Seascape Hotel Limited... ."

The declaration ends with the following words:

> "And I make this solemn declaration **conscientiously believing the same to be true** and by virtue of the provisions of the Voluntary Declarations Act".

At the heart of the appellant's defence was her claim that she lent the monies to Seascape, thereby creating an equitable mortgage. The statutory declaration by her, on the face of it, would have shown that she did indeed lend the monies to Seascape. Alas, she seems to have overlooked the fact that the Seascape escape route would not have been available to her before the period June/July, 1995, that is, after Ms. Canolle had left Jamaica. So, having said that these sums of money were lent at the time she received them, that is in February and April, 1995, it was open to the learned Resident Magistrate to say whether or not she accepted the appellant's assertion that she had made a mistake.

Having made her assessment, she concluded that it had been deliberately done. The appellant, perhaps more than anyone else involved in the case, would have appreciated the importance and seriousness of the document she was signing, fully conscious of the legal consequences to her clients if she were to misstate a date. She would also have been fully alive to the importance of every single day so far as the matter of interest payment is concerned. It is clear also that the learned Resident Magistrate found that the appellant was being untruthful when she declared that the Title to Seascape had been deposited with her "to the intent that the..property should be charged with and be security for the repayment etc.." Ms. Canolle had no such intention and never communicated any wish to the appellant for any monies to be obtained as loan for Seascape. The appellant well knew, as an attorney-at-law, that she was not free to do anything she wished with the affairs or property of Ms. Canolle, merely because she had a power of attorney. Her powers were circumscribed by whatever instructions she would have received from the donor of the power of attorney. She knew that fully well, given her vast experience as an attorney-at-law and her clear understanding that Ms. Canolle and Seascape were different legal persons. The learned Resident Magistrate obviously concluded that she knew her powers were limited; and the evidence amply justified such a conclusion. The learned Resident Magistrate had other evidence from the appellant herself, which suggested that she was being untruthful. Under cross-examination, she said that it was in July, 1995, that she decided to put the monies in Seascape. When she decided to do so, Ms. Canolle had been out of touch with her for a period of several months, she said. The obvious untruthfulness

arises from the fact that in July, Ms. Canolle had not been away for **several months**. Indeed, it would have been less than a month since she had left Jamaica.

The appellant had clear instructions as to what she should have done with the monies--invest in a scheme that would have yielded 22%. She undertook that. She would have known what instruments were available to produce such a yield. It is a notorious fact that at that time, Jamaica was the land of very high interest rates. She gave evidence indicating her awareness of the going interest rates. if she found that it was not possible for the complainants' wishes to be realized, her duty was to return the capital promptly. She made no investment. It is the only conclusion that the learned Resident Magistrate could have arrived at as the appellant's evidence that she invested the monies in an enterprise that was **closed** and therefore unable to yield anything but grief is unbelievable. Added to that is the fact that Ms. Canolle wished no loan; the monies were not even lodged to the account of Seascape, instead they were placed in the current account of the appellant. When these facts are added to the deception that the appellant practised on the complainants in advising Mr. Reckord that the investment was as safe as Desnoes and Geddes, and Mr. Garland of the investment being in an apartment in Kingston, the verdict of guilty was inevitable. For the above reasons as well as the reasons in the judgment of Forte, P. I would therefore dismiss the appeal and affirm the decision of the Resident Magistrate.

In relation to the sentences that were imposed, I see no reason for them to be disturbed. It is a fact that the appellant had previous good character but

the nature of the offences is such that immediate imprisonment is appropriate. The appellant used her position as an attorney-at-law, one in whom the public ought to have confidence and trust, to the great detriment and inconvenience of these unsuspecting clients and friends of hers. The sentences are accordingly affirmed.

ORDER

FORTE, P:

By a majority (Langrin J.A. dissenting) appeal dismissed. Conviction and sentence on both counts affirmed.