In The Court Of Appeal Of The Cayman Islands
Holden At George Town, Grand Cayman

C.I.C.A. NO. 23/97
IND. NO. 61/95

BARRY VICTOR RANDALL

v

REGINA

BEFORE: The Rt. Hon. Edward Zacca, President
The Rt. Hon. Telford Georges and
The Hon. James Kerr, Justices of Appeal

Mr. Howard Hamilton QC & Mr. John Furniss instructed by Messrs. Collins Broadhurst & Furniss for the appellant Mr. Richard Small & Mr. Sam Bulgin for the Crown.

Heard on the 6th day of August 1998 Decision given on the 13th day of August 1998 written reasons delivered on the 10th day of December 1998.

REASONS FOR JUDGMENT

KERR, J.A.

In the Grand Court at George Town before Williams J, and a jury, after a trial lasting 41 days, the appellant was convicted on an indictment containing five counts; the **first four** for **theft** contrary to **Sections 223** and **229** of the **Penal Code [1995 Revision]** and the **fifth count for obtaining property by deception contrary to Section 235 (1)** of the said **Penal Code** and sentenced as follows:

Count 1	**4 years imprisonment.**
Count 2	**4 1/2 years imprisonment.** Compensation of US$500,000.00 or 6 months imprisonment in default of payment. Compensation to be paid to Trade Media Holdings (HK) Limited and Publishers Representatives Limited Hong Kong company.

Count 3	**3 years imprisonment.**
Count 4	**3 ½ years imprisonment.**
Count 5	**4 ½ years imprisonment** Compensation of US$500,000.00 or 6 months imprisonment in default of payment . Compensation to be paid to Ronald Jeffrey. **Count 1,2,3 and 4 to run concurrently with count 5.** Sentence in default of compensation with respect to counts 2 and 5 to run consecutively.

From these convictions and sentences the appellant appealed. His appeals against convictions on count 1, 2, 3 and 4 were dismissed and the convictions and sentences affirmed. On count 5, his appeal was allowed, the conviction quashed and a judgment and verdict of acquittal entered.

The particulars in the indictment read:

Count 1 – That the appellant between 10th day of May 1988 and 30th March 1989 stole assets to the value of the sum of US$200,000.00 the property of clients of Cayman Capital Trust Company, namely, the Asian Sources Retirement Plan (care of Trade Media Holdings Limited, a Hong Kong company formerly known as Publishers Representatives Limited).

Count 2 – That he between the 1st day of June 1988 and the 30th day of March 1989 stole assets to the value of the sum of US$500,000.00 the property of clients of Cayman Trust Company Limited, namely, the Asian Sources Retirement Plan (care of Trade Media Holdings Ltd., a Hong Kong company formerly known as Publishers Representatives Limited).

Count 3 – That he between the 3rd day of November 1988 and 30th day of March 1989 stole assets to the value of the sum of US$50,000.00 the property of clients of Cayman Capital Trust Company, namely, the Asian Sources Retirement Plan (care of Trade Media Holdings Ltd., a Hong Kong company formerly known as Publishers Representatives Limited).

Count 4 – That he between the 30th day of June 1988 and the 31st day of March 1989 stole moneys to the amount of approximately US$106,300.00 the property of a client of Cayman Capital Trust Company, namely, Mr. Anthony Tan, as beneficial owner of Mums Incorporated.

Count 5 – That he between the 24th day of November 1987 and the 30th day of June 1988 dishonestly obtained from Ronald W. Jeffrey valuable security to the value of US$500,000.00 with the intention of permanently depriving the said Ronald W., Jeffrey thereof by deception; namely, by falsely representing that a Sally Spence on whose account for investments the said Ronald W. Jeffrey intended to part with the said securities was shareholder of a Cayman Islands company named "Sunrise Starts Tomorrow Management Limited", the company by which the said investment was to be conducted, Barry Victor Randall, knowing that the said Miss Sally Spence was not a shareholder of that company even while purporting to the said Ronald W. Jeffrey to accept payment of the securities on the premises that she was in fact a shareholder.

The first three counts were concerned with the fraudulent conversion of the funds of the Asian Sources Retirement Plan (ASRP). This scheme was financed and established by the Trade Media Holdings (HK) Limited, (TMHK) [the principal company] and two other associated media companies, all of Hong Kong on December 17, 1983, as an insurance scheme for the benefit of the employees of this group. By Trust Deed of December 12. 1984, the retiring Trustees of foreign addresses were removed and replaced by the Swiss Bank & Trust Corporation of Cayman (Swiss Cayman).

The appellant was then an employee of Swiss Cayman and during his tenure there and according to the witness, Merle Hinrichs, Managing Director of TMHK, the appellant was

"appointed to communicate with TMHK". There was personal correspondence between appellant and management personnel of TMHK; in particular, Hinrichs and William Seitz, Investment Manager and a visit by the appellant to Hong Kong where he had discussion with Seitz. Whether as a result of appellant's persuasion as Hinrichs and Seitz allege and/or dissatisfaction with the attention Swiss Cayman was giving to ASRP's affairs, as appellant alleged, the end result was that by a Trust Deed of April 6, 1988, Swiss Cayman was removed as Trustee and replaced by Cayman Capital Trust Company (CCTC).

The Deed of April 6, 1988 (the Supplemental) incorporated by reference the terms and conditions of the Deed of December 12, 1984 (the Plan). It was a term of the Supplemental to which Swiss Cayman was a party that the assets as described in the schedule should be forthwith after the execution of the Supplemental be transferred by Swiss Bank into the name or control of CCTC

The appellant, no longer an employee of Swiss Bank, was at all material time the Managing Director and Secretary at CCTC holding 20% of the issued shares. The other shareholder was Milford Campbell, businessman, a U.S. citizen with the remaining 80%. He was the Chairman of the Board of Directors. The third Director was Ernest Foster of Grand Cayman. He had no vested interest but was appointed a Director as the signature of two directors were required for the transaction of certain business.

The transfer of assets was promptly effected as set out hereunder:

Asian Sources Retirement Plan

Summary on all payments to Cayman Capital Trust Co.

A. **PAYMENTS MADE TO CAYMAN CAPITAL TRUST CO.**

1. Initial Transfer:-

Remitted	d.d.7.4.88	USD	123,000.00
	d.d.11.4.88	JPY	10,163,028.53
	d.d.15.4.88	USD	69,487.18
	d.d.18.5.88	GBP	691.20
	d.d.18.10.88	USD	12,000.00

	d.d.21.10.88	USD	1,014.97

(Directly transfer from Old Trustee – SBC)

2.	8802-8905 Contribution paid by contributory company	USD	311,793.49
3.	Bond Interest-Bunds Republic Deutsheland (Directly deposited into Bank by Broker)	DEM	3,750.00

B. BONDS HELD BY CREDIT SUISSE IN NAME OF CAYMAN CAPITAL TRUST COMPANY

Security Name	QTY		Face Value
13.125% Creditanstalt-Bankverein 17.5.91	20000	USD	20,000.00
10% Commerzbank Overseas Finance N.V. 9.4.93	50000	GBP	50,000.00
4.75% Commonwealth Bank of Austrailia 27.3.91	100000	SFR	100,000.00
7.5% Bunds-republic Deutscheland Brd 20.4.95	50000	DMK	50,000.00
7.25% Nippon Credit Bank 16.4.91	110000	DMK	110,000.00
6.25% Deutsche Bank Finance NV EX-Warrants 28.2.96	50000	DMK	50,000.00
0% General Motor Acceptance Corp. 15.8.90	19000000	JPY	19,000,000.00
11.125% Export Development Corp 15.2.89	40000	USD	40,000.00

The amounts mentioned in the first three counts were loans negotiated by the appellant as Managing Director on behalf of CCTC from Credit Suisse Guernsey Limited (Suisse Guernsey). The first request was shortly after the execution of the Supplemental, namely, on April 25, 1988, signed by the appellant and was marked "attention Mr. Ronald Hurni". Hurni was a former co-worker of the appellant during their joint tenure at Swiss Cayman. The first request sets out the pattern for the other two loans. Its operative part reads:

Attn: Mr. Hurni

Re: Our Account 30108

Our clients wish to arrange a short term loan in the amount of USD200,000 secured by the assets held in the above account.

Is this something you can handle for us?

If so, the loan would be for three months and would have to be set up as a separate loan account without entries appearing over the existing current and /or deposit accounts. Our clients do not want it showing that they have had the use of the funds, albeit temporarily. It is OK to utilise a new loan account using the same 30108 account number as long as the asset accounts are not affected.

Please let me know if you need any additional forms signed by us other than those you already have in your possession.

We have some urgent payments to make out of these funds so if you are able to accommodate use I should be grateful if you would pay the sum of USD200,000 out of the loan account to:

Irving Trust Company, New York
for Credit to Guinness Mahon Cayman Trust Ltd
Account No. 803-3055-804

in favour of Cayman Capital Trust Company
Account no. 20709

Best regards
Barry Randall
Cayman Capital Trust Company
Account No. 20709

The reply of April 26, 1988, set out the terms on which the loans would be granted. These terms include:

Availability	:	The loan will be available until the 15th August, 1988, at which time we shall exert our best efforts to renew the facility for a further same period.
Drawings	:	The loan facility may be drawn upon in the form of a fixed advance for one or three months, rollover.
Interest rate	:	Interest will be determined by adding 1 ¼% per annum to the London Interbank Offered Rate (LIBOR) for US dollars. Interest will be calculated on the basis 365/360 days (Euromarket rule)
Repayment	:	All payments of principal and interest will be made at the due date, 15th August, 1988 without any deduction whatsoever, at this office or to any account designated by the bank.
Security	:	Cash and/or securities which may be deposited with the bank from time to time, blocked in our favour. In this connection we refer you to schedule (b) and (c) of our account agreement duly signed by authorised officers of your company.

Other Conditions : This Loan Facility will be made available to you subject to receipt by the bank of board resolutions approving the Terms and Conditions of this Loan Facility.

CCTC was advised by letter of May 3, 1988, from Credit Suisse that they were prepared to grant the loan subject to the following:

> "It is a condition of this loan facility that cash and negotiable securities held in your account No. 30108 are duly assigned to the loan account number 30116. In addition please provide us with a Board Resolution confirming the assignment of all assets held in your account number 30108 to the loan account number 30116.
>
> For the sake of good order, please indicate your agreement to these terms and conditions by signing and returning the enclosed copy of this letter to this office."

The acceptance of these conditions was confirmed including the presentation of a Directors Resolution signed by Ernest Foster as Chairman and the appellant as Secretary. The instructions to Irving Trust Company of New York was complied with on May 10, 1988.

By letter of May 30, 1988, from the appellant to Credit Suisse Gernsey advised, "our clients ------ urgently need to raise additional cash to meet a short term situation" and enquired as to the "maximum amount of additional credit facilities that could be extended against the assets currently held" and on being advised that the amount was US$700,000.00 a further application was made with the following directions:

> "Debit the loan account and pay the sum of US$500,000.00 to Irving Trust Company New York for the credit to the account of Guinness Mahon Cayman Trust Limited in favour of CCTC."

The formalities including Directors Resolutions having been completed, the loan was granted as asked and the instructions implemented.

A similar loan application of November 2, 1988, for US $50,000.00 with the usual request for urgent treatment was granted and the instructions to transmit to Credit Swiss of New York for the attention of Mr. David for the account of CCTC were promptly carried out.

At the material time John Furze was an employee of Guinness Mahon (Cayman) Trust Limited. Guinness operated banking accounts for CCTC and the Irving Trust Company (ITC) was its commercial arm in New York. CCTC operated two accounts, a fixed deposit and a current account with overdraft facilities against the fixed deposit. From the records he confirmed the transmission of the loan funds from Credit Suisse of Guernsey. The cheques drawn against the funds were in accordance with written instructions bearing the authorised signatures of the appellant and Foster. The instructions in relation to the US $500,000.00 were to the effect that with an additional from the CCTC account a cheque of $506,662.67 was drawn in favour of ER Realty to the credit of Ronald Jeffrey. This payment was short-circuited in the banking department since simultaneously with the receipt of the US$500,000.00 came the instructions to pay the total amount and as a result only the difference was drawn from the CCTC's account.

It was his opinion that it is the standard practice in administering trusts to ensure that each trust account is kept segregated from that of any other trust and in his experience it is not permissible for the assets of one trust account to be used for the purpose of another.

In his evidence Hinrichs said that the appellant did not advise the Principals in Hong Kong of the loans and the pledging of the securities or that he was in difficulty to repay the loans from Suisse Credit. While Seitz, the Investment Manager, said that had he discovered that the appellant had pledged the assets of ASRP he would have advised that the account with CCTC be closed and the funds withdrawn.

Now it was expressly provided in the Trust Deed that the power to borrow money was subject to the approval of the Principal Company. No such approval was ever sought.

The loans being on a separate account were never included in the monthly statement of affairs to the Principal Company. But above all, the Principal Company was not informed even when on March 30, 1989, the securities held by Credit Suisse were liquidated to satisfy the unpaid loans. The appellant who gave evidence admitted that he had the intention to inform the Principal in Hong Kong but had not done so even though April and May passed.

Edward Warwick, Assistant Manager Corporate and Trustee Services at Euro Services, Grand Cayman, was appointed by Peter Crooks, Inspector of Banks, to act as a "watch dog" at CCTC in relation to three trusts, including the ASRP. As arranged with the appellant he entered upon his duties some time between September 6 and 8, 1988. In relation to ASRP the appellant handed him a photo-copied printout of the assets of ASRP dated in June and July, 1988. The total value of the assets correctly reflected the round figure as advised by the Inspector of Banks. In reply to his enquiry the appellant told him that the list comprised the entire assets and that those assets were free and clear from all encumbrances. As an experienced Trust Officer he understood that to mean that there are no charges, pledges, mortgages, liens, cautions or guarantees of any kind attaching to the assets. He was also handed an up to September 1989 list from Credit Suisse. There were no indications on that list of any encumbrances listed in the file of ASRP. If there were encumbrances he expected to find a record of them in the file kept on the account. He however, observed that the file on Wintergreen Holdings Limited was missing.

Wintergreen Holdings Limited (Wintergreen) was a Caymanian company and the appellant was Director and Secretary and Michael Jarvis the principal shareholder. This file was found by Detective Chief Inspector John Boaden at the appellant's home at Palm Heights Drive in the execution of a search warrant on July 4, 1989. Warwick said that he first saw the file at the Commercial Crime Department.

Ian Baker, an accountant, was appointed along with Richard Harris, Inspector of Banks in June 1989, by the Governor in Council under powers conferred by the provision of the Cayman Law to examine and report on the conduct of the affairs of CCTC. In the course of his investigations he discovered that the Wintergreen file which would be of considerable assistance was missing. He found no connection between Wintergreen and ASRP. To his several requests concerning this file, the appellant replied that he did not know where it was. The appellant was advised that the file was needed to understand the activities of Wintergreen's account and locate supporting documentation. The appellant gave no explanation concerning those matters.

The loans of US$200,000.00 and US$500,000.00 were entered as being credited to Wintergreen and there was the letter from Credit Suisse increasing the existing loan account of ASRP from US$200,000.00 to US$700,000.00. When the Wintergreen file became available to him he was unable to trace in that file the US$50,000.00 loan although in the accounts at CCTC it was credited to Wintergreen. The assets securing the loans were sold on instructions given by the appellant

No portion of the loans went to ASRP. He found no evidence that the appellant had sought the authority of the relevant Principal Company to use the assets in the manner he did. He confirmed that Credit Suisse carried out the instructions of the appellant.

The Directors Resolutions covering the loans backed by ASRP Securities were co-signed by Ernest Foster, as a director of CCTC as well as such relevant documents to Guinnes Mahon and Irving Trust of New York wherever such documents required two approved signatures. However, the letters negotiating the loans were signed by the appellant alone. In addition, there was other evidence of oral and written communications to Credit Suisse of appellant being the originator and principal perpetrator and the appellant has not in his evidence sought to blame Foster.

Harris's report of June 28, 1989, to the Governor in Council was to the effect that the Company was insolvent and recommended that the CCTC be wound up and its licence

revoked. There followed an application to the Grand Court that CCTC be wound up. The application was granted on June 3, 1989 and Harris was appointed provisional liquidater.

Chief Inspector John Boaden, the Investigating Officer, who on July 28, 1989, in the execution of a search warrant at the appellant's home at Palm Heights Drive, Grand Cayman, found, retained and produced in Court a number of documents including the Wintergreen file. He also tendered in evidence the record of his interrogation of the appellant in the presence of his attorney. At the trial in examination in chief he read certain extracts. With the appellant exercising his right to decline to answer certain questions the evidential worth of this exercise was negligible. In December, 1991, he arrested and charged the appellant. He also arrested and charged Foster who was not before the Court during the trial of the appellant.

The appellant in his evidence said that at the material time he was one of the Directors of Resorts Plus Limited. The other Directors were Jay Jacobson and Michael Jarvis. In providing corporate services CCTC would include assigning the appellant as Director and Secretary. In his evidence as to the disbursements of funds from the three loans, the subject of the relevant counts, the appellant wove a tangled web. In chief, his evidence was to the effect that although there were sufficient funds to meet reasonable imminent payments to beneficiaries under the Scheme, the loans were in anticipation of substantial payments on behalf of ASRP. He was unable to show the basis on which he made this projection. Yet in the Wintergreen file there was a copy of the letter of April 25 (supra) applying for the US$200,000.00 loan which would indicate that Wintergreen was the undisclosed client. In addition, the loans were listed in the file as being made to Wintergreen without any attendant documents relating to the loans and their terms.

The appellant in cross-examination in an endeavour to explain the reason for the loan of US$50,000.00 said that the funds were intended to meet ASRP's obligations. He, however, admitted that at the time there was available in Credit Suisse (New York) liquid cash of US$82,000.00. He did not examine the records of Credit Swiss New York to ascertain if there was a correspondingly prompt payment of the US$50,000.00. When faced with his instructions to Credit Suisse Guernsey - "we have to cover an urgent

payment to be made to Credit Suisse (New York) on the 3rd November 1988", he referred to a list of payments on behalf of ASRP totalling US$48,000.00 by cheques dated 23rd idem. However, he had earlier admitted that on receipt of the proceeds of the loan on either the 2nd or 3rd November, on his instructions, a cheque for US$50,000.00 was issued in favour of Campbell Machine Company – the company of his co-director CCTC, Milford Campbell. He said that repayment of the US$200,000.00 loan was made in two moieties – July and August 1988.

In response to a letter of December 5, 1988 signed by the appellant a further loan of US$300,000.00 backed by the securities of Milford Campbell was granted by Credit Suisse Guernsey to CCTC and in keeping with the appellant's instructions the loan of US$50,000.00 was set off. Further he admitted that (i) CCTC as Trustee was the client referred to in the application for the loans; (ii) the US$200,000.00 temporarily covered the overdraft with the Irving Trust Company but that cheques totalling over US$223,000.00 were then drawn returning the account to an increased overdraft; that none of these cheques were concerned with ASRP's business and that payments of over US$105,000.00 in relation to the scheme was met by funds transmitted by Credit Suisse from the regular account of ASRP; (iii) the US$500,000.00 with interest added of about US$6,600.00 were used to meet the pressing demands of Jeffrey, the complainant in the fifth count but rather in more direct means than he anticipated and at the time of this loan the US$200,000.00 had not been repaid; and (iv) he admitted that by having a general account for the trusts in CCTC rather than segregated accounts for each trust resulted in an error attributing in the record as loans to Wintergreen which were not in fact loans to Wintergreen.

The appellant in chief gave detailed evidence of the purported contemporaneous loans to Wintergreen, of Wintergreen's transactions with Resorts Plus, of the securities and guarantees given by or on behalf of Resorts Plus and the prospects of Resorts Plus meeting the guarantees by sale of shares in foreign markets.

Now in the light of appellant's admission in cross-examination and in particular as to the loans being promptly used for purposes other than for ASRP, all this evidence of

Wintergreen's transactions with Resorts Plus and associated business activities was manifestly intended to be a smoke-screen. His consistently comprehensive and cardinal defence was that whatever was done, including the surreptitious raising of the loans and conversion of the funds was due to his belief that under the powers conferred on CCTC by the Trust Deed and the Trust Laws of Cayman entitled these acts to be done notwithstanding the admissions made in cross-examination as to the raising of the loans and conversion of the funds therefrom.

The jury's verdict on these Counts is explicable only on a rejection of this defence.

The facts and issues of the fourth count are comparatively simple. The complainant, Anthony Tan, a retired businessman of Toronto, Ontario, Canada, was the sole shareholder of Mums Incorporated and had his savings in a Canadian Bank under his company's name. He came in contact with the appellant when he was in the employment of Swiss Bank Cayman. His savings in the Canadian Bank amounted to US$160,574.00 In July 1979, on his instructions this amount was transferred to CCTC. According to his evidence the instructions which he had given to the appellant were to the effect that this money was his savings, it was to be placed on deposit in the name of Mums Inc. and for his use when he became resident in Cayman. The appellant's application for residence was successful as at the time of this trial he was residing at Northwest Point, Grand Cayman. In August 1988 he arrived in Cayman and was met at the airport by the appellant who confirmed that his money was held on deposit and that he understood that the complainant would be needing money on a regular basis. He received monthly statements from the appellant for July and August but not receiving any statements for September, October and November, he spoke to the appellant who provided him with statements for the months of October and December. Now in March 1989 when the balance stood at US$106,300.00 to the complainant's request for a withdrawal of US$15,000.00 the appellant advised that he could not get it then as the money was on a term deposit which would be due on the first of the month. To the request for an advance, the appellant told him that he had to wait until April 1, but agreed that at any time thereafter he could pick up a cheque for that amount. When the complainant attended on April 5, the appellant said that he had forgotten and that the deposit was

renewed for another month. In April 1989, the complainant's arrears of taxes in Canada amounted to US28,000.00 and on May 1, he asked the appellant to prepare a draft for US $57,000.00 and instructed him to put the remaining US$50,000.00 on deposit in his personal name in the Washington International Bank. On April 30 when the complainant attended on the appellant he was put off to May 8. Eventually on May 9, he was handed a bank draft for US$$57,000.00. The appellant confirmed that his instructions in relation to the balance of US$50,000.00 had been carried out. The draft for US$57,000.00 which was deposited in Barclays Bank for which the US$28,000.00 had been advanced by the Bank to pay the Canadian tax, should be set off, "bounced" for insufficient funds. No explanation or refund was offered or given.

When he demanded to see the Management Agreement he had signed the appellant said that he could not find it and presented another agreement which was signed that day May 29, 1989. The complainant spoke to Orren Merren, the Attorney for CCTC and on May 31, he asked and was given by the appellant acknowledgment in writing that CCTC owed him US$107,000.00 with the appellant's personal guarantee annexed.

The appellant in evidence said that Tan's company, Mums Inc. was formerly under the management of Swiss Bank Cayman but was transferred to CCTC and CCTC acted as nominee shareholder providing registered office, directors, officers and maintained corporate records and accounts. In standard form a Service Agreement was drafted and sent to Tan about July 1988. When Tan asked for it in 1989, he could not find it but Tan left and returned with the same form bearing date in 1988.

In June 1988, the funds were transferred on the instructions of Tan's attorneys to CCTC and recorded in CCTC's Ledger under the name of Mums Inc. To the best of the appellant's recollection Tan's instructions were that he was sending the funds for the deposit into Mums Inc. account with CCTC. In relation to Tans' request for the US$15,000.00 the appellant was hesitant and uncertain in his recollections. He admitted that Tan came to him on more that one occasion. He did not get the money although there was a balance of US$85,000.00 in CCTC in Credit Suisse (N.Y.) and would have been in a position to grant his request and that at some point Tan changed his request for

a cheque of US$57,000.00 to be issued at the beginning of May 1989. With respect to the cheque being dishonoured he explained that in issuing the cheque, he had relied on CCTC's account because the record did not reflect cheques drawn on the account in his absence. He recalled Tan making some request for the balance in the Mum's account to be deposited in his name but could not recall the specific date or circumstances.

For the jury, it was a simple case of competing credibility and their verdict is explicable on the rejection of the appellant's account and an acceptance of the complainant's. Their preference is justified because as appears from the transcript of evidence they had on the one hand the consistency and certainty of details from the complainant and on the other hand the uncertainties of recollection, evasiveness and inconsistencies of the appellant. It was not surprising that the appellant's Counsel abandoned the ground of appeal which contended that the Learned Trial Judge should have accepted the submission of "no case to answer".

Orren Merren, Attorney-at-Law, of Grand Cayman, said that on October 31, 1988 he was originally retained to represent Milford Campbell and the appellant in relation to Swiss Bank and CCTC's affairs, but on May 16, 1989, apparently because of conflict of interest, he appeared only for Campbell and CCTC and on his advice Mr. Paget-Brown was retained for the appellant. On Mr. Paget-Brown's suggestion, as evidenced by the minutes tendered, a meeting was held on June 2, 1989, to appoint Campbell as Inspector of CCTC.

Among the documents signed by the appellant on June 6, 1989, was a list of "unauthorised disbursements". Although no formal challenge was made when this document was being tendered, in his evidence the appellant challenged the voluntariness and accuracy of this document on the grounds: (i) that he was escorted from his home by Campbell and his son to the office of CCTC, that the son was armed with a baseball bat and as he was intimidated by Campbell's attitude and the presence of his son he signed the list; and (ii) the title "unauthorised disbursements" was Merren's as in reality it was a list of receivables and not a list of disbursements.

Counsel on both sides made much ado about this issue which would be relevant to Campbell's disassociation with the appellant's questionable activities but had minimal, if any, relevance to the counts in relation to ASRP's funds or to the fourth count relevant to Tan's deposit.

Ronald Jeffrey the complainant in the fifth count, was a Texas businessman of Houston. His evidence was to the effect that in January, 1988, he received a letter on CCTC's stationery with a resumé of the appellant and was subsequently introduced to him by one Sally Spence (Sally) also of Houston and with whom, he admitted in cross-examination, he was romantically involved. He had two transactions involving the appellant. The first was in relation to two deposits of US$300,000.00 and US$200,000.00 totalling US$500,000.00 with CCTC with instructions to open an account in CCTC and not to pledge or hypothecate the funds. In conversation the appellant had offered interest of 10% on the deposits with CCTC. As described ante, in response to his pressing demands this amount with interest was refunded to him.

His other transaction was in response to a proposition of Sally. It was to provide her with funds to establish a night-club business in Grand Cayman. The settled proposals after discussion with the appellant were that the appellant was to provide US$200,000.00 for the incorporation of a company to be called Sunrise Starts Tomorrow Management Limited (Sunrise) and Sunrise should invest in Monkey Business Limited; both business names were supplied by Sally; Sally should be the sole shareholder of Sunrise, holding a bearer share certificate; there were to be three Directors of Monkey Business – the appellant, Sally and a nominee of Randall of Caymanian status and decisions should require a unanimous consent of the Board of Directors; and Sunrise was to invest US$200,00.00 and Randall an additional US$100,000.00 if costs were over-run. On November 24, 1987, he forwarded through Sally his cheque for US$200,000.00. When he surprisingly learnt that the costs of establishing Monkey Business exceeded the early estimate of US$400,000.00 by Jarvis and was likely to cost US$1,000,000.00 he demanded in writing additional terms and guarantees from the appellant. There were elaborate loan agreements between Sunrise and Jeffrey and consultancy agreements with Sally, the appellant and Michael Jarvis of Resorts Plus Cayman Limited and Terry

Hatfield. A subsequent payment of US$300,000.00 by the complainant brought the total to US$500,000.00 as charged in the indictment. The complainant said that if he knew that the terms and conditions laid down by him were not fulfilled he would not have made the investments or loaned the money to Sunrise.

His Attorneys and Legal Adviser in relation to this business was the firm of Brill, Sinex and Hohman of Houston, Texas. He was dissatisfied with them. He realised that he should instead have retained Cayman Counsel and did so either at the end of 1988 or the beginning of 1989.

The complainant produced and handed over to the investigating police the documents in relation to the formation of Sunrise the shareholding and other relevant documents which he received from his Texan attorneys. He was cross-examined at length about their contents but nowhere was it successfully elicited from him that he was aware of the contents before the police investigations started.

The appellant in response, in evidence said that Sally was introduced to him by Michael Jarvis in the latter part of 1987. She was interested in opening a night club to be financed by the complainant Jefferey. He spoke with Jefferey who was willing to lend an initial sum of US$200,000.00 to her for that purpose and that his Attorneys, Brill, Sinex and Hohman of Houston, U.S.A., would be looking after the matter and would be preparing the necessary documentation and the Attorneys informed him that Sally Spence's name was not to appear as the borrower of the money advanced, nor should the shares in Monkey Business be in her name. The company "Sunrise" was duly formed. CCTC at the material time held all the shares and provided the directors and officers of the company in accordance with the exhibited Corporate Services Agreement dated October 30, 1987, between Sally Spence and CCTC. In that agreement, inter alia, Sally Spence was designated "the Principal" and sole beneficiary of the shares with the power to appoint agents and wide powers to give directions as to management. In his view the agreement accomplished the complainant's objective, namely that Miss Spence was at all times the 100 percent beneficial owner of Sunrise and by virtue of the powers given to her to

exercise full control over the company. It was she who handed him a cheque for US$200,00.00 representing a loan from complainant to her company.

The shareholding in Monkey Business was 40% by CCTC as nominee for the complainant Jeffrey as was evidenced by an appropriate shareholder's agreement dated December 23, 1987, on the instructions of Sally Spence. The appellant held the other 60% of the shares in Monkey Business.

The business did quite well at first but under Sally's management, as reflected in bank deposits, the "revenues" fell alarmingly. Sally, by opening a separate bank account created a problem with the Washington Bank in which he had overdraft facilities. He had no alternative but to take control and under his control there was remarkable improvement in Monkey Business.

Eventually Monkey Business was managed by Miss Spence and one Don Hill. On the instructions of Sally the management of Sunrise was transferred to Myers and Alberga, a firm of attorneys in Grand Cayman. He admitted that in July, 1989, the liquidator of CCTC obtained an injunction restraining him from involvement in Monkey Business and appointing Sally as manager. He said that instructions as allegedly given by Jeffery were not permissible under Cayman Law and in particular, as there was the limitation on foreign shareholders to no more that 40% of the shares in a local company Sally could not be the sole shareholder. It was his consistent contention that the funds provided by Jeffrey were loans to Sally and were invested through Sunrise in Monkey Business. The objectives of the complainant were accomplished by the way Sunrise was structured and the agreements. All the relevant documents were sent to Sally and/or Jeffrey's attorneys.

NATURE AND GROUNDS OF APPEAL

Under the rubric of unfair trial, Counsel for the appellant opened by making "two substantial complaints" – (1) the conduct of the Learned Trial Judge was unbalanced in

favour of the Prosecution and this posture characterised the entire trial; and (2) the appellant's defence was never adequately put to the jury because of the Judge's handling of the case.

Re (1), he said that there was a pincer action by Crown Counsel and Judge and this was the nature of the complaint in relevant grounds argued together. Specifically, the opening ground of appeal reads:

> **"The learned trial judge erred throughout the trial in allowing counsel for the prosecution to make comments and/or speeches in the presence of the jury prejudicial to the appellant on the pretext of summarising evidence and/or addressing the court in relation to issues raised by way of objection or otherwise"**

and particular reference was made to 79 instances. However, in argument the attention of the Court was adverted to only seven.

Appellant's Counsel submitted that while there were reasons for these interventions Crown Counsel made of them opportunities for interim prejudicial comments and address in the presence of the jury. Of the three earnestly pursued the first (page 1515 of the transcript) occurred when the appellant having admitted that to the best of his knowledge the trust fund of ASRP was worth about US$2,000,000.00 Mr. Collins, Counsel for appellant, asked "Now can you tell us what the fund was comprised of?". Mr. Small who led for the prosecution at the trial intervened, "When he took out the US$500,000.00 or when he took out the US$200,000.00?. Defence Counsel objected that Crown Counsel's intervention was clearly prejudicial.

In our view the question by Defence Counsel was unobjectionable; the intervention was, therefore, unnecessary and in infelicitous language. The Judge implicitly ruled against the intervention when he said, "Please let us get on Mr. Small". As the remarks related to the counts on the indictment it is highly improbable that it would have any effect on the jury adverse to the appellant.

The second (at page 1936) was concerned with an endeavour to tender documents by Defence Counsel on which there had been no previous agreement and the admissibility of the evidence was open to challenge.

Now this type of objection demands from a trial judge prompt and concise ruling in such conclusive language as to deter debate but the ambulatory approach of the Learned Trial Judge often opened the door to prolonged and semantic debate. It is also illustrative of Defence Counsel seeing in such instances a challenge to be taken up and to give as good as he got. In so doing, he had eroded any merit that might have existed in this type of complaint. In the instant case, the intervention was reasonable and no undue prejudice would be occasioned thereby.

The third (at page 2140) was concerned with the evasiveness of the witness recognized by Counsel on both sides while (at pp 2270 – 2272) implicit in the comments of Crown Counsel and the Trial Judge, Defence Counsel's consistent complaint of being unfairly treated were unfounded and purposeful.

The conduct of the Trial Judge was specifically categorised in the following amended ground of appeal:

> **The conduct and repeated intervention of the trial judge had the effect of:**
>
> **(a) inviting the jury to disbelieve the Defence;**
>
> **(b) making it virtually impossible for Counsel for the defence to do his duty in properly presenting the defence; and**
>
> **(c) effectively preventing in telling his story in his own way.**

The following subsidiary grounds typified the broad complaints with illustrative references:

"The Learned Trial Judge erred in his summing up in allowing Counsel for the Prosecution to make comments and/or speeches prejudicial to the appellant on the pretext of clarifying issues"

Reference was made to eight passages but only the three hereafter referred to were pursued.

Although throughout the trial a Court Reporter was provided for the recording of the evidence, the Trial Judge persisted in the laborious task of taking down the evidence in long-hand, often in question and answer, and the even more fatiguing exercise of often reading out to the jury both question and answer, even when answers were in the negative. Often the question and answer had to be repeated and sometimes taken down in segments. This resulted in not only slowing down the proceedings but on occasions in the aim of the question being missed or the import of the answer misinterpreted. The Learned Trial Judge explained that this drudgery was necessary to assist him in his summing up to the jury. In cases of uncertainty he would either invite Counsel on both sides or accept Crown Counsel's corrective suggestions. In so doing Crown Counsel would be responding to the Judge's invitation or acting in the interest of an accurate review of the evidence.

The first illustration (at p. 56) was favourable to the appellant. The second (at p. 593 – 7) was a request that the evidence relating to certain documents should be comprehensively reviewed. The Judge entertained a debate by Counsel on both sides. References by Crown Counsel to the evidence, having regard to the nature of his defence, was of no significant importance. In end the Learned Trial Judge ended the debate in favour of the defence.

We were also referred to what Counsel termed the infelicitous comments of the judge in the transcript of the evidence and in particular at pp 2663 – 5. The comments were due to Defence Counsel persisting with questions introducing new evidence inconsistent with evidence in chief. The indulgence of the Trial Judge resulted in prolonged debate on a collateral matter that was of dubious relevance to the important issues relating to the

three allegedly unauthorised and surreptitious loans and whether or not there was a fraudulent conversion of the moneys obtained thereby. It has not been shown that Crown Counsel had erred in his corrective measures or acted to the prejudice of the defence in so doing.

We have examined certain passages referred to in support of the complainant that the Trial Judge's summing up was generally fundamentally unbalanced by the making of unfavourable and prejudicial remarks concerning the appellant.

In support of his arguments and submissions that the appellant did not have a fair trial Counsel relied on the categorising of the Judge's conduct and the reasoning in amongst other cases in **Hulusi & Purvis [1973] 58 Cr. App E 378** the headnote reads:

> **"Interventions by the judge during a trial which lead to the quashing of a conviction occur (i) when they have invited the jury to disbelieve the evidence for the defence in such strong terms that the mischief cannot be cured by the common formula in the summing-up that the facts are for the jury, and that they may disregard anything said on the facts by the judge with which they do not agree; (ii) when they have made it impossible for defending counsel to do his duty in conducting the defence; (iii) when they have effectively prevented the defendant or a witness for the defence from telling his story in his own way.**
>
> **Convictions quashed where there had been frequent interventions by the judge (i) during the cross-examination of witnesses for the prosecution, suggesting that defending counsel was not doing his duty; (ii) during the evidence-in-chief or re-examination of the defendants and their witnesses (a) suggesting that defending counsel had not fully put his case to witnesses for the prosecution during their cross-examination and (b) in effect preventing the defendants and their witnesses from telling their story."**

The questions put a page 2583 of the transcript of the evidence to which we were referred were in the words of the Judge "a couple of things I wish to clear up" and in effect and to a great extent he recapitulated evidence already given in relation to his failure to advise the authorities in Hong Kong of the loan transactions.

It is clear from the transcript that the Trial Judge from time to time expressed his disapproval of the semantic antics of Counsel on both sides, though his language was in accents unlikely to deter repetition. Having considered the illustrations in the transcript to which we have been adverted we are of the view that the conduct of the Learned Trial Judge in the instant case did not fall within the offending categories described in the case **Hulusi & Purvis (ante).**

Another general ground of appeal pursued reads:

> **"The learned trial judge misdirected the jury in relation to counts 1, 2, 3, 4 and 5 as to the proper interpretation to be given to the words "in the belief that he has in law the right" appearing in Section 224(1)(a) and (b) of the Penal Code".**

This ground notwithstanding its generality was relevant to the defence specifically raised in relation to counts 1, 2, 3 and was so argued and considered.

Appellant's Counsel submitted that the test was what would an ordinary person believe given those circumstances i.e., the appellant believed that he had a right to dispose of the trust property without consultation even if he is risking it in questionable methods he is not guilty of the crime.

Now the realities are that the appellant, experienced in the administration of trusts, read into evidence the terms in the Trust Deed conferring wide powers in CCTC with emphasis on the concluding words "to the extent that the trustees have the same unrestricted powers of investing and transposing and varying investments, contracts, policies or deposits in all respects as if they were absolutely entitled thereto".

On this aspect of the case in summing up, the Learned Judge, said:

"Now, Section 224(1) says:

> **'A person's appropriation of property belonging to another is not to be regarded as dishonest (a) if he appropriates the property in the belief that he has in law the right to deprive the other of it on behalf of himself or of a third person; (b)...'**

which is the other portion that Mr. Collins says he is relying on in the defence...

> **'...if he appropriates the property in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it.'**

Now, those two provisions in **Ghosh** would be of no assistance to the accused if you find that the defendant acted in a fraudulent or dishonest manner. Any belief that the defendant may have had must be an honest belief. If it's a dishonest belief, then those provisions would not help him, because you will remember I pointed out to you earlier that fraud is inconsistent with a claim of right made in good faith to do the act complained of.

So, if you find that he acted honestly, then he hasn't committed any offence and you have to acquit. But, if you find he acted dishonestly, then you will look at that aspect of the law, combined with the other principles of law which are required – proof beyond a reasonable doubt – and that the prosecution must satisfy you in such a way so that you can feel sure of the accused's guilt and all the other elements of the law that are required. If you find those are in place, then you will find him guilty. But, if you find that he acted honestly, then he gets the protection of **Ghosh**, if he had an honest belief in what he was doing.

And he's saying if the Trade Media people had been informed, then they would have had no objection because the funds were being used to A.S.R.P. commitments. So, you will determine whether you believe that the funds were used for those purposes or not, because that is the other factor you will have to consider or whether they were used for other purposes."

On the law of trust, the Learned Trial Judge in relation to the defence that notwithstanding the terms of the Deed to the contrary there was no obligation under the law to inform the Principals concerning the loans, said, inter alia:-

> "Remember I told you I interpret that law in his favour and therefore having interpreted in his favour he was not under an obligation to inform them, but that one would have expected since he had an arrangement with them and if everything was above board, that he would have informed them of it, so I want to deal with that a little more clearly, but first I'm going to read, so you can have section 19 clearly in you mind. Section 19 has two sections, two parts. So Section 19(1):
>
> **'Where trustees are authorised by the instrument, if any, creating the trust or by law to pay or apply capital money subject to the trust for any purpose or in any manner, they shall have and shall be deemed always to have had power to raise the money acquired by sale, conversion, calling in, or mortgage, and all or any part of the trust property for the time being in possession.'**

Section 2, which is the section that the defendant through Mr. Collins, mainly rely:

> **'This section applies notwithstanding anything to the contrary, contained in the instrument, if any, creating the trust.'**

So, I've interpreted this in favour of the defendant.

Now, I think there was an important point that I overlooked yesterday when I was dealing with this issue, and the important point I failed to emphasize is that neither Section 19 of the trust law or any law for that matter permits fraudulent or dishonest acts. Fraudulent and dishonest acts are in themselves crimes and there is no law that can be called in aid when fraudulent or dishonest acts have been established. If you therefore find that the defendant acted dishonestly, then Section 19 of the trust law can be of no assistance to him." It is very important that you bear this in mind. Section 19 can only help him if he was acting in an honest way. If he was acting dishonestly or fraudulently, then section 19 is of no assistance to him at all."

In those passages the Learned Trial Judge, as he was entitled to do, adverted the jury to the incompatibility of deliberate deception with a genuine belief and that the provisions of the law could not be used as an instrument of fraud. Accordingly, we found no fault in his full and careful directions on this aspect of the case.

In the light of the appellant's admission to the actual disbursement of the loans in counts 1, 2 and 3 and the evidence of actual permanent deprivation in count 4, we found no merit in the ground of appeal which complained of the inadequacy of the directions in relation to the intention at the material time permanently to deprive the complainant.

For these reasons we affirmed the convictions on counts 1, 2, 3 and 4.

In relation to count 5, the specific ground was to the effect that the Learned Trial Judge erred by characterising in his direction to the jury the normal and prudent instructions from Sally to the appellant and/or CCTC as manipulation of Sally by the appellant.

On this the Learned Trial Judge said:

> "Now, the defence say that Sally Spence was indeed in control of things. They submitted documents in support of that; including letters written by Sally Spence giving certain instructions...**The Crown is saying that Sally Spence was duped by the defendant to believe that she was in control and that she was being manipulated by the defendant, and in a manner of speaking, was speaking through the mouth of the defendant.**"

With respect to the statement emphasized above, it was frankly conceded by Counsel for the Crown that there was no evidential basis for that statement. Later in the summing up when reviewing the appellant's evidence in which the appellant endeavoured to support his oral testimony with documentary evidence to the effect that Sally was in a managerial position to Sunrise and Monkey Business, the Learned Trial Judge commented thus:

> "And you will remember just about this time various documents were tendered in which Sally Spence was supposed to be giving instructions for certain things to be done. The Crown is saying that she was simply being used and that is matter for you whether you accept that or not. Was she genuinely giving instructions or was she sort of being a mouth-piece, so to speak, of Mr. Randall? It's a matter for you".

It was the appellant's cardinal defence that the funds provided by the complainant, Jeffrey, were used for his intended purpose. He not only raised this issue specifically but there was support in the documentary evidence he produced and from the evidence of Jeffrey himself. In that regard, for the first US$200,000.00 provided, Sally was the courier and Jeffrey's covering letter of November 24, 1987, to her reads in its operative part:

> "Enclosed herewith find the following:

(1) A bank check in the amount of $200,000.00, made payable to Sunrise Starts Tomorrow Management Ltd. with endorsement over to Monkey Business Ltd.

(2) Three copies of a guarantee agreement to be dated and executed by you.

(3) Three copies of a promissory note to be dated and executed by the managing director of Sunrise Starts Tomorrow Management Ltd."

Further, in cross-examination he admitted obtaining a judgment against Sally for US$500,00.00. It was his philosophy that if one borrowed money one should pay it back.

By those comments made by the Judge and for which there was no evidence he eroded one of the most important plinths of the appellant's defence. As **Lord Lane** put it in **Mears v R [1993] 42 WIR at page 290:**

> **"perhaps the most important point in the defence case was effectually neutralised".**

Further, in a case where the essential issues were so closely contested, for a fair and adequate summing up, in his review the Learned Trial Judge should have comprehensively collated the evidence for the defence and preferably placed it in juxtaposition to the evidence for the prosecution.

In failing to do so, it could not be said that his directions on this aspect of the matter were fair and adequate.

For these reasons we allowed the appeal against conviction on Count 5 and quashed the conviction.

With respect to the appeal against sentences on Counts 1, 2, 3, and 4, we were adverted to the fact that when the appellant was arrested on these charges he was on remand in custody pending appeal against an existing conviction. That appeal was allowed and the

conviction quashed. As an application for bail while that appeal was pending would be futile it was urged that consideration should be given to those special circumstance by a corresponding reduction of the present custodial sentence. We considered the custodial sentence in its totality and were of the view that having regard to all the circumstances including the nature of the offence, that such sentence was not excessive.

Accordingly, the appeal against sentence in respect of Counts 1, 2, 3 and 4 was dismissed and the sentences affirmed.

Zacca, P

CAYMAN ISLANDS COURT OF APPEAL

Georges, J.A.

Kerr, J.A.