[2010] UKPC 8
Privy Council Appeal No 0058 of 2009

JUDGMENT

Patrick Thomas Tibbetts *v* the Attorney General of the Cayman Islands

From the Court of Appeal of the Cayman Islands

before

Lord Saville
Lord Rodger
Lord Brown
Lord Kerr
Lord Clarke

JUDGMENT DELIVERED BY
Lord Clarke
ON

24 March 2010

Heard on 21 January 2010

Appellant	*Respondent*
Geoffrey Robertson QC	David Perry QC
Lucy Corrin	Duncan Penny
(Instructed by Simmons Cooper Andrew LLP)	(Instructed by Treasury Solicitors)

LORD CLARKE:

INTRODUCTION

1. Between 11 May 2004 and 3 February 2005 the appellant, Patrick Tibbetts, was tried before Smellie CJ and a jury in the Grand Court of the Cayman Islands on two counts of assisting another person to retain the benefits of the proceeds of criminal conduct or, more colloquially, of money laundering. He was convicted on both counts. His co-defendant, Denton Rowe, was acquitted on two almost identical counts. On 28 February 2005 the appellant was sentenced to three years' imprisonment on each count to run concurrently. He was given bail pending an appeal to the Court of Appeal in the Cayman Islands. On 18 November 2005 the Court of Appeal (comprising Zacca P, Taylor JA and Forte JA) dismissed his appeal against conviction. They gave their reasons on 24 January 2006.

2. The appellant advanced a number of grounds of appeal against the decision of the Court of Appeal but has special leave on only one ground. On 11 February 2009 the Board granted special leave on the sole ground that the verdict was infected by apparent bias on the part of one of the jurors.

The principles

3. Subject to one point, the principles to be applied are not in dispute. The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the jury were biased: *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357, per Lord Hope at paras 102 and 103. The fair-minded and informed observer must adopt a balanced approach and is to be taken as a reasonable member of the public, neither unduly complacent or naïve nor unduly cynical or suspicious: *R v Abdroikof* [2007] UKHL 37, [2007] 1 WLR 2679 per Lord Bingham at para 15. The appellant's case is that there is a real possibility that one of the jurors was biased in favour of one of the witnesses. It is common ground that the question to ask is whether the fair-minded and informed observer ('the putative observer'), having considered the facts, would conclude that there was a real possibility that the juror was biased, such that he might have accepted the evidence of that witness as a result. It is accepted on behalf of the respondent that, if the answer to that question is yes, the putative observer would also conclude that there is a real possibility that the jury would have done the same.

4. In the respondent's written case it was further suggested that in a case of this kind, where the allegation is one of partiality towards a witness (by contrast with a

party) there is a further question to be asked in the event that the first two questions are answered in the affirmative, namely whether the putative observer would consider that such partiality might have affected the outcome of the trial. That suggestion was based on *R v Khan and Hanif* [2008] EWCA Crim 531, [2008] 2 Cr App R 161. However, in the course of the argument Mr David Perry QC accepted on behalf of the respondent that, if the first two questions are answered in the affirmative, the conviction in this case should be quashed.

5. In the instant case the juror was Mr Justin Uzzell and the relevant witness was Mr Johan Bjuroe. The question is whether the putative observer would conclude that Mr Uzzell might have accepted Mr Bjuroe's evidence as a result of his previous relationship with and knowledge of him. This raises the question of what is the correct approach to the observer's knowledge of the facts. It was submitted during the argument that it was for the observer, as it were, to conclude what the facts were. The Board does not accept that submission. See for example the summary of the principles by Mummery LJ (with whom Latham and Carnwath LJJ agreed) in *AWG Group Ltd v Morrison* [2006] EWCA Civ 6, [2006] 1 WLR 1163. He put the test in this way at para 7:

> "The test … is that, having ascertained all the circumstances bearing on the suggestion that the judge was (or would be) biased, the court must ask 'whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility … that the tribunal was biased' "

6. It is thus for the court to ascertain the circumstances. The court must approach the issues in two stages. First, it is for the court to find the facts on the balance of probabilities. It is then for the court to decide on the balance of probabilities whether, with knowledge of the facts so found, the putative observer would conclude that Mr Uzzell might accept Mr Bjuroe's evidence as a result of his previous relationship with and knowledge of him.

7. It follows from the above that in a case of this kind, where the allegation is that a juror might have accepted the evidence of the witness, not for what it was but because of his or her previous relationship with or knowledge of the witness, two aspects of the matter must be investigated. The first is the nature of the juror's relationship with, or knowledge of, the witness and the second is whether that relationship or knowledge would have led the putative observer to conclude that the juror might have accepted the evidence of the witness because of it. For example, if the evidence of the witness was unchallenged, the observer would no doubt not conclude that the juror might have accepted the evidence because of his relationship with or knowledge of the witness. All depends upon the circumstances of the particular case.

The dramatis personae

8. The issues in this appeal have focused on the relationship between four individuals: the juror, Mr Justin Uzzell, his previous girlfriend, Ms Jennifer Dillon, the witness, Mr Johan Bjuroe, and his wife, the witness Ms Susan Schaller. The Board notes that in the course of argument Mr Perry referred to the spelling of Mr Bjuroe's name without an 'e' but, since Mr Bjuroe said in evidence that it was spelt with an 'e', it seems right to spell it with an 'e' in this judgment. At the relevant time Mr Justin Uzzell worked as a financial journalist at Cayman Free Press. He met Ms Dillon in April 1994 and she moved in with him in March 1995. Their relationship lasted until 2001. Ms Schaller and Ms Dillon have been very good friends since 1994 and for a time shared a flat. They remain very good friends. At the relevant time Ms Dillon worked as an accountant for Quin & Hampson, the appellant's attorneys both at the trial and in the Court of Appeal. Ms Schaller also worked for Quin & Hampson as a corporate administrator, but only from 6 January 2005. Ms Schaller had known Mr Uzzell since she shared a flat with Ms Dillon. Ms Schaller and Mr Bjuroe started dating in September 1997 and got married in 2002. They are still married.

The appellant's case in summary

9. As summarised in his written case, the appellant's case is this. Mr Uzzell had been closely associated with Mr Bjuroe as a result of a close friendship between his wife Susan Schaller and Mr Uzzell's girlfriend, Ms Dillon. They had met as a foursome on many social occasions and had taken two holidays together, one to the USA and Canada for three weeks, and Mr Uzzell and Mr Bjuroe had discussed the investment that was the subject matter of the prosecution. In circumstances where the appellant's case called for the jury to disbelieve the evidence of Mr Bjuroe, who was a key witness, the putative observer would regard Mr Uzzell as likely to be biased in favour of his friend, or at least as likely to hold a preconceived opinion that Mr Bjuroe's evidence was more worthy of belief than that of the appellant.

10. That case is not dissimilar to the way the case was summarised by the Court of Appeal at page 10 of its judgment as follows:

> "Counsel summarized the facts of significance, on which he relied as giving rise to apprehension of bias, as follows: (i) the juror failed to disclose that he knew the male Crown witness either in the questionnaire or when the witness testified at trial; (ii) the juror and the two witnesses socialized on an intermittent basis until three years before the trial; (iii) they discussed the investment of the witnesses in the Cash 4 Titles scheme on several occasions; (iv) the juror knew of the collapse of the scheme and that the witnesses had lost money as a result; (v) the male witness and juror had previously lost money in the failure of another

> business; and (vi) the evidence of the male witness assumed particular importance when it was referred to by the judge in his charge to the jury as potentially corroborative of that of the accomplice Gause."

11. In the course of the argument Mr Geoffrey Robertson QC submitted on behalf of the appellant that the effect of what the juror Mr Uzzell said to the witness Mr Bjuroe would have led the putative observer to conclude that he had a preconception of the appellant's guilt. That depends upon the nature of facts which the observer must have in mind. The Board returns to this point below.

12. In considering the appellant's case in this appeal it is important to have in mind that it is not part of his case that Mr Uzzell acted otherwise than in good faith throughout. No criticism was made of his honesty, either as to his relationship with Mr Bjuroe or as to why he failed to disclose it either in the questionnaire or when he was called to give evidence.

The prosecution case against the appellant

13. The prosecution case is summarised in the judgment of the Court of Appeal. In short the appellant was convicted of money laundering arising out of the collapse of a United States car loan business known as Cash 4 Titles ('C4T') that became a so-called Ponzi scheme. Money raised from new investors was used to pay interest due to earlier investors and also misappropriated by the two promoters of the scheme, Michael Gause and Richard Homa. The scheme collapsed in October 1999 following the arrest of Mr Gause. Mr Gause and Mr Homa were prosecuted in the United States and given long sentences of imprisonment. They both gave evidence for the prosecution at the appellant's trial.

14. The appellant faced counts 3 and 4 on the indictment. They alleged that the appellant, while knowing or suspecting that Mr Homa and Mr Gause were engaged or had been engaged in criminal conduct, (1) was concerned in an arrangement that facilitated the retention by them of the proceeds of their criminal conduct (count 3) and (2) was concerned in an arrangement whereby the proceeds of their criminal conduct were placed at their disposal (count 4). The allegations related to the period between 9 December 1997 and 19 April 2000. The first date was the date when the appellant left his co-accused's company, Zephyr International Ltd, which carried out work on behalf of Mr Homa and Mr Gause, and began operating through a company called Everest Management Ltd ('Everest'), which managed the investment companies formed as the vehicles through which investors would place funds with C4T. The second date, 19 April 2000, was the date when Everest was no longer under his control.

15. It was common ground throughout that the investment scheme had been operated dishonestly by Mr Homa and Mr Gause, that investors' money had been improperly diverted and misapplied and that the appellant had been instrumental in the movement of funds. The only issue before the jury was whether the appellant had the knowledge or suspicion of criminal activity on the part of Mr Gause or Mr Homa necessary to establish guilt on either count. The prosecution asserted that he did. The appellant's case, by contrast, was that he had the relevant knowledge or suspicion only after the nature of the scheme had become public knowledge. In particular it was his evidence that he had no suspicions that C4T was a Ponzi scheme before 15 October 1999, which was the date on which Mr Gause was arrested. It follows that the issue between the prosecution and the defence was a narrow one. The Board will return to the evidence in more detail below.

Jury selection

16. Each prospective juror was sent a jury questionnaire which was tailored to the circumstances of the case and had been agreed by counsel. Mr Uzzell filled it in on 4 May 2004. Part 1 of the questionnaire was entitled 'ASSOCIATION'. Prospective jurors were asked whether they had or had ever had an association with a number of different organisations. Mr Uzzell gave details of his association with 'Ernst and Young, E&Y Restructuring Ltd, Arthur Anderson or KPMG' in the Cayman Islands through a Mr Hunter. He also noted an association with an officer at Aall Bank and listed a number of people whom he knew at Quin & Hampson, including Ms Dillon. In answer to a general question whether there were any other reasons why he would not be able to return a fair and impartial verdict he said that his position at the Cayman Free Press, publishers of the Caymanian Compass and the Cayman Islands Journal, brought him into contact with vast amounts of information relating to the workings of the business and financial worlds present in the Cayman Islands. He added that he could not guarantee that he would not be subjected to information relating to the case as he continued to fulfil his role at the Cayman Free Press.

17. Attached to the questionnaire was a list of 58 witnesses. Prospective jurors were asked whether 'you, your immediate family or any close friends are associated' with any of them. The Court of Appeal noted that these questions asked only about present association with witnesses, whereas the questions in the questionnaire included past association. The witnesses in the list included 'Johan Bujore' at no 30 and 'Susan Schaller' at no 31. Against Ms Schaller Mr Uzzell noted 'friend'. He did not make a note against Mr 'Bujore' because he did not recognise the name. The Court of Appeal held, not only that the name was mis-spelled on the list, but also that it is pronounced neither as properly spelled, viz Bjuroe, nor as spelled on the list. On 5 May Mr Uzzell attended the Grand Court in answer to the jury summons.

18. In the meantime, on 4 May Quin & Hampson wrote to the prosecution with a list of 95 prospective jurors whom they were challenging for cause. No 94 was Mr Uzzell. The grounds of challenge were that he knew Mr Hunter, a compliance officer at the Aall Bank and a number of people at Quin & Hampson, that his positions at Compass and Cayman Free Press had 'brought [him] into contact with all information' and that he was a friend of Susan Schaller.

19. Jury selection then proceeded on 5 May. By the end of the day a panel of twelve had been selected and only four prospective jurors remained, including Mr Uzzell. They were asked to return on 11 May because it seemed likely that one of the twelve would be excused. Counsel for the appellant asked to be told the names of the four, in order, so far as the Board can see, that a decision could be taken whether to object to them. In the event the appellant did not persist with his objections to Mr Uzzell. One of the twelve was excused, Mr Uzzell was added to the panel and the trial began on 11 May.

The trial

20. Although the trial did not end until 3 February 2005, there was a substantial adjournment in the middle because of the effects of Hurricane Ivan. Susan Schaller was called as the seventh witness for the prosecution. She recognised Mr Uzzell on the jury. She told her husband. Her evidence was followed by that of some forty witnesses before Mr Bjuroe was called. Mr Uzzell recognised Mr Bjuroe but said nothing. In his evidence before the Court of Appeal, which comprised two affidavits and which the Court of Appeal accepted, he said that he immediately recognised Mr Bjuroe. He was shocked when he saw Mr Bjuroe walk into the witness box and was concerned that he had not revealed his association with him in the questionnaire. However, he decided not to raise the matter because he had identified Mr Bjuroe's wife as a friend and no-one had objected. He concluded that there was no material difference between his association with Ms Schaller and that with Mr Bjuroe and that it would be unnecessarily disruptive of court proceedings for him to say at that point that he also knew Ms Schaller's husband, a person he described as 'barely even an associate, let alone a friend'. Of the vacation together, referred to further below, he said that that was something arranged by the two women and that he had forgotten about it. He also said that he believed that it was reasonable to assume that the court, the prosecution and the defence would infer that if he knew Ms Schaller he probably knew her husband as well and that, since no-one had objected to her, they would not object to him. He therefore decided not to disrupt the trial by saying anything himself.

21. In the course of the trial Mr Uzzell happened to meet Ms Schaller and Mr Bjuroe by chance on two occasions. The first was at a bar in September 2004 and the second was at a restaurant in January 2005. They were both brief encounters and there

is no evidence or suggestion that anything untoward was said. The trial continued and the appellant was convicted on 3 February 2005.

22. During the trial and shortly after Ms Schaller gave evidence, she told Ms Dillon both that she had given evidence and that she had seen Mr Uzzell on the jury. Ms Schaller also told her at some stage that Mr Bjuroe was going to give evidence. Ms Dillon, who was of course working for Quin & Hampson at the time, albeit not as a lawyer, did not tell anyone connected with the appellant's defence at the time, either that Mr Uzzell knew both Ms Schaller and Mr Bjuroe or what she recalled had been discussed between them. She said in evidence that there was no reason for her to do so. However, Ms Dillon said that after the appellant's conviction an attorney from the firm, who knew that she had dated Mr Uzzell for a long time and that she and Ms Schaller were good friends and whose wife was a good friend of Mr Uzzell's, came to her and asked her whether Mr Uzzell and Mr Bjuroe would have known each other and she said that they definitely would have done. Some time after that a representative of Quin & Hampson discussed the matter with her in more detail and she swore her first affidavit, which was dated 22 February 2005 and was before the Court of Appeal.

The association between Mr Uzzell and Mr Bjuroe

23. The Court of Appeal had available affidavits from all four relevant witnesses. In addition Ms Dillon, Mr Bjuroe and Ms Schaller gave oral evidence and were cross-examined. Counsel for the appellant declined to cross-examine Mr Uzzell. The Board notes in passing that it was not suggested before the Court of Appeal that Mr Uzzell's evidence was not admissible. None of his evidence related to the deliberations of the jury; so the Board can see no basis for concluding that his evidence was not admissible. It follows that he could have been cross-examined on behalf of the appellant and that it must have been a deliberate decision not to do so. There were few material differences between the evidence of the witnesses. In so far as there were, as the Board reads the judgment of the Court of Appeal, it accepted the evidence of Mr Uzzell.

24. The facts can be summarised in this way. In so far as there was an association between Mr Uzzell and Mr Bjuroe, it arose out of the very close friendship between Ms Dillon and Ms Schaller. As Mr Uzzell put it in evidence, Ms Schaller and Mr Bjuroe were Ms Dillon's friends, not his. Mr Bjuroe put it in a similar way. He said that he and Mr Uzzell were people with very different interests who were dating two people who happened to be friends. Ms Schaller said much the same. So too did Ms Dillon. However, in 1999 Ms Dillon and Mr Uzzell began to socialise fairly frequently with Ms Schaller and Mr Bjuroe. The four of them went on a three week holiday to Canada and the United States in September 1999, although they travelled separately and did not always stay together. They were also members of a larger party

which had made an earlier weekend trip to Central America and they went out on Mr Uzzell's boat together from time to time. The two men rarely socialised other than when their girlfriends were present, although they went fishing, according to Mr Uzzell, on one occasion. They may have played golf together but, if so, very rarely because, unlike Mr Uzzell, Mr Bjuroe was not a keen golfer. After the holiday to Canada and the United States they started to see less of each other as couples and they drifted apart in early or mid 2000, when the relationship between Mr Uzzell and Ms Dillon was running into difficulties. Mr Uzzell and Ms Dillon split up in about March 2001. There was little or no contact between Mr Uzzell and Ms Schaller or Mr Bjuroe after that.

25. At some stage, probably in 1999, there was a conversation between the couples about the C4T scheme. The Cayman Islands is a small community in which, as the witnesses agreed, everybody knows one another. The C4T scheme was well known and much discussed in the Cayman Islands. However the evidence of Ms Dillon and Mr Uzzell was not entirely consistent in this regard. Ms Dillon said in her affidavits and in evidence that she had discussed the scheme with Mr Uzzell, Ms Schaller and Mr Bjuroe as follows. Ms Schaller and Mr Bjuroe recommended the scheme because they had invested in it and were delighted when they received their first payment from the scheme. She and Mr Uzzell decided not to invest in the scheme because it seemed too risky. In a discussion over dinner at which all four were present, Ms Schaller and Mr Bjuroe said that they were adamant that the scheme was lawful but she and Mr Uzzell had reservations. The collapse of C4T occurred when they were on holiday together or shortly after they got back. There was some discussion of the loss incurred by Ms Schaller and Mr Bjuroe because, as their friends, Ms Dillon and Mr Uzzell were very concerned for them. Mr Uzzell was sure that the whole scheme was illegal, a view he shared with his father.

26. In cross-examination Ms Dillon said that most of the discussion on this topic was between her and Mr Bjuroe. She was somewhat vague about the detail but she said that there was also some discussion when they learned of the collapse of the scheme, which was in October 1999, shortly after the end of the holiday to Canada and the United States. It is fair to say that the oral evidence of Ms Dillon as to what was said about the detail of the scheme and the Bjuroes' investment in it was less firm than that contained in her statement; in particular, as the Court of Appeal observed, she did not know if Mr Uzzell had said that the scheme was a pyramid scheme because she could not recall any specifics of the conversation in question.

27. Ms Schaller's evidence was to the effect that there had been general discussion about the scheme and the fact but not the detail of their investment in it. Mr Bjuroe's evidence was to much the same effect. It is a fair inference from the evidence taken as a whole that Mr Uzzell knew from what was said that Ms Schaller and Mr Bjuroe had lost money from their investment but not the amount, save in very general terms.

Importantly, there is no evidence that anyone mentioned Mr Tibbetts' name in the context of the scheme. Nothing was said which implicated Mr Tibbetts in the scheme.

28. Mr Uzzell said in his second affidavit in response to that of Ms Dillon that he had no recollection of any discussions concerning the C4T scheme or investing in it. Critically he said that before his involvement as a juror at the trial he did not know how a pyramid or Ponzi scheme worked so that he could not have expressed views to that effect to Ms Dillon or anyone else. For the same reason Mr Uzzell took issue with Ms Dillon's statement that he had some preconceived belief that the C4T scheme was 'an illegal scam run from the Cayman Islands'.

29. As the Board reads the judgment of the Court of Appeal, it accepted the evidence of Mr Uzzell, as it was entitled to do, especially when the appellant declined to test the evidence in cross-examination. There was thus some discussion about the C4T scheme in general and the fact that Mr Bjuroe and Ms Schaller had invested in it but Mr Uzzell did not say that it was a pyramid or a Ponzi scheme or that it was illegal. Further, no-one mentioned the appellant or the fact that he was involved in the scheme. In these circumstances there is no warrant for the suggestion made in oral argument before the Board that Mr Uzzell had a preconception of guilt based on what he was told by Mr Bjuroe or anyone else. Subject to what follows, the highest that the case can be put is as it was put to the Court of Appeal in the passage quoted above.

30. It is true that Mr Uzzell failed to disclose that he knew Mr Bjuroe either in the questionnaire or when the Mr Bjuroe testified at the trial. However, the Court of Appeal accepted his explanation for that, as it was entitled to do. He cannot be blamed for failing to appreciate that 'Mr Bujore' was Ms Schaller's husband when he was filling in the questionnaire. If he had done so, there can be no doubt that he would have noted on the form that he knew him. When he saw Mr Bjuroe come to give evidence he reasonably thought that all parties would know that he was married to Ms Schaller and it was a reasonable inference that, if none of them raised any objection to her, none of them had any objection to him. It is true that he and the two witnesses socialised on an intermittent basis until three years before the trial, which is certainly a relevant factor and, indeed, one of potential significance, but he was in no sense a close friend of Mr Bjuroe. Equally, it is true that there was some discussion of the C4T scheme and at least some discussion of the fact that the two witnesses had invested in the scheme and had lost money. However, it was common ground at the trial that the scheme was fraudulent and that investors had lost money but the discussions did not link the appellant with the scheme. In this connection the Board does not accept the submission made on behalf of the appellant that any discussion of the scheme would somehow automatically implicate the appellant. There is no evidential support for that conclusion. Finally, it is true that Mr Bjuroe and Mr Uzzell had lost money in the failure of another business but there is no suggestion that that was in any way relevant to the failure of the C4T scheme.

31. Thus, while those factors are relevant facts to take into consideration, they must be put in context. Part of that context is the significance of Mr Bjuroe's evidence. The relevance of the significance of that evidence was accepted on both sides. As the Court of Appeal's summary of the appellant's case shows, the appellant relied on what was (and is) said to be the particular importance of the evidence. Mr Perry submitted, by contrast that it was of no real significance because it was largely unchallenged. Its significance is relevant to the question whether, in all the circumstances, Mr Uzzell might have accepted Mr Bjuroe's evidence because of his previous association with him, which would of course include what he learned in the course of that association. Before considering the correct answer to the legal questions identified above, the Board therefore turns to consider the part played by the evidence of Mr Bjuroe in the trial.

The significance of Mr Bjuroe's evidence

32. In the course of the argument Mr Perry relied upon a document which the Board has found of considerable assistance. The Board feels sure that it has Mr Duncan Penny to thank for its preparation. It focuses in part upon the prosecution case. Mr Robertson submitted that Mr Bjuroe's evidence played a key part in the trial and relied, with some force, on the way the case was summed up to the jury by the Chief Justice. However, the Board thinks it right to analyse for itself the way in which Mr Bjuroe's evidence was approached at the trial.

33. The prosecution case can be summarised in this way. As stated above, the only issue for the jury to decide was whether the appellant had the necessary knowledge or suspicion. If the jury were sure that he did, it would have no alternative but to convict him, whereas if he might not have done, he was entitled to be acquitted. It was not in dispute that the investment scheme had been operated dishonestly by Mr Homa and Mr Gause, that investors' money had been improperly diverted and misapplied and that the appellant had been instrumental in the movement of funds through Everest, which managed the investment companies formed as the vehicles through which investors would place funds with C4T. The only issue was whether the Appellant had the knowledge or suspicion of criminal activity necessary to establish guilt on either count. Since the appellant's case was that he gained the knowledge or suspicion only at a time when the nature of the scheme became public knowledge, it follows that the issue between the prosecution and the defence was a narrow one.

34. The appellant gave evidence over four days in early December 2004. His case was that he had no suspicion that C4T was a Ponzi scheme before Mr Gause was arrested on 15 October 1999. The prosecution relied upon various pieces of evidence from which it sought to establish guilt, all of which was fully summed up to the jury.

i) The evidence of Mr Gause was to the effect that in August 1998 he and Mr Homa switched most of their business from Mr Rowe to the appellant. Mr Gause would call the appellant on a weekly basis to discuss how much money was being raised. Mr Gause said that the appellant was very familiar with the business and was responsible for carrying out the transfer of funds. He gave evidence of two important conversations: (a) a conversation in late 1998, following a meeting between Mr Gause and Mr Homa (and others) at Mr Gause's home in Atlanta, when the appellant was told (in effect) that the C4T investment scheme was a Ponzi scheme; and (b) a conversation in early 1999 when Mr Gause and the appellant discussed both the fact that new money was being used to pay off existing investors and the intense scrutiny to which the scheme was being subjected by the authorities in the United States. In spite of what the appellant was told by Mr Gause, the scheme continued to operate with monies from new investors being used to pay off earlier investors. The level of new funds required to pay off existing investors was at least $10 million per month.

ii) The evidence of investors in the scheme, notably Mr Halm, Mr Black and Mr Franklin, implicated the appellant and was relied upon by the prosecution as showing that he had the relevant knowledge or, at the very least, suspicion. For example Mr Halm said that the appellant had described Mr Homa and Mr Gause as crooks. Mr Franklin gave evidence that, after an FBI raid in September 1999, he telephoned the appellant and informed him that the focus of the raid was C4T documentation and that the FBI was asserting that the scheme was a Ponzi scheme. Mr Black said that he was concerned that the scheme was a Ponzi scheme and that in August or September 1999 he spoke to the appellant to pass on his concerns.

iii) Mr Don Seymour of the Cayman Islands Monetary Authority gave evidence that he met the appellant on 21 October 1999 and that he appeared to have an excellent understanding of the flow of funds and knew that the funds were not going to C4T but were instead being diverted into companies controlled by Mr Gause. Mr Seymour said that the appellant admitted his knowledge that funds had been diverted and invested in aeroplanes and condominiums.

iv) The appellant himself filed a Suspicious Activity Report on 20 October 1999.

v) Only ten days before Mr Gause’s arrest the appellant told another investor, Mr Maurice Walker (who gave evidence), that he did not have

> financial statements and the only person who had them was Mr Homa. Following the arrest of Mr Gause, Mr Walker telephoned the appellant, and was told by him that Mr Gause had $60 to $70 million in C4T and that the money should cover the investors, which was, the prosecution said, simply untrue.

35. The prosecution also relied upon a number of admissions made by the appellant in the course of cross-examination which, save as mentioned below, it is not necessary to set out here. The Board turns to the evidence of Ms Schaller, Mr Bjuroe and Mr Paul Williams. Ms Schaller's evidence was to the effect that she had been introduced to the scheme in October 1997 by Mr Neil Morris, who worked for the appellant. Both Mr Morris and the appellant came to their home. The appellant said that any investment would be made through a company which he had set up, called MTM Limited ('MTM'), and that the funds would be sent directly to the C4T programme through that company. She and her husband, Mr Bjuroe, invested US$50,000 in the scheme on 26 November 1997 and further sums of US$20,000 and US$30,000 in September 1998 and January 1999 respectively. They received no financial statements in relation to the investment. In October 1999 they learned that Mr Gause had been arrested and tried to contact the appellant. Save for one minor point that leading counsel for the appellant said probably did not matter, her evidence was not challenged.

36. Mr Williams' evidence was shortly to this effect. He met the appellant in 1998 and invested US$50,000 in the C4T scheme after discussing it with Mr Bjuroe. He invested other sums later in 1998 and in 1999. He invested, not through MTM but through JMP Limited ('JMP'), which was another of the appellant's companies. He first became aware of difficulties with his investment in November 1999 and he and Mr Bjuroe then attended a meeting with the appellant at the appellant's office. At the meeting the appellant explained the movement of funds. The appellant accepted that he had been responsible for the transfer of investors' funds to a company controlled by Mr Gause.

37. According to Mr Williams, at the meeting in November 1999 the appellant said that in principle the funds were to go to Opal, a company in the Cayman Islands, and were moved from there into another company, Sunset Financial, and thereafter to C4T's stores in America. Some of the monies were then to return to the Cayman Islands to pay interest. This downward flow of monies was through Sunset Financial and another Cayman Islands company, Interworld, and then to the investors via JMP. However, as Mr Williams put it, the appellant

> "admitted taking money from Interworld and, instead of sending it to Sunset Financial directly, put it into Interworld, and that money from Interworld would come back to the investors. So basically the money

that was going into JMP or one of the other companies never made it to C4T as an investment in the company itself. …"

When Mr Williams asked the appellant why he was taking the money and not investing it in the C4T scheme, he said 'because money is a bit short here and we have to … pay the investors every month. So instead of taking the money all the way up and then bringing it all the way down, we just cross it over earlier and bring it down to the investors'. In short, Mr Williams said that the appellant had no real answer when it was put to him that the money was not being put where it was intended to go. Mr Williams made notes during the meeting and made further notes on his computer when he returned home. In December 1999 Mr Williams and Mr Bjuroe attended a meeting with the appellant at the offices of Quin & Hampson at which the appellant admitted that he had moved money to a company controlled by Mr Gause and not to the United States.

38. In cross-examination it was put to Mr Williams that his recollection of what the appellant had said at the November and December meetings was entirely wrong. He was also cross-examined to some considerable effect about the accuracy and reliability of notes he said he had made of the meeting in November. In re-examination, Mr Williams said that his recollection of the meeting in November was accurate. He said that he was keenly interested as to why his investment was gone and how it had happened.

39. Mr Bjuroe gave evidence to this effect. He was a friend of the appellant's and they had known each other for about ten years. He gave details of his investments in C4T, including the fact that interest would be paid monthly (after six months) at a rate of about 36 per cent per annum, which was paid until about October 1998. He said that in January 1999 he had spoken to the appellant who told him that C4T was being supported by the United States Government and that Al Gore had taken a personal interest in the scheme. In April 1999 the appellant told Mr Bjuroe that the Florida State Government had limited the interest rates available to the car loan industry and that money would be harder to come by but that the company was 'very very strong'. In August 1999 the appellant told Mr Bjuroe that C4T had raised US$20 million in one month but that they did not really need the money because they were so strong and Mr Gause had told him to keep the money for future expansion. In October 1999 Mr Bjuroe learned that Mr Gause had been arrested.

40. Mr Bjuroe attended the meeting in early November 1999 with Mr Williams. He said that at the meeting the appellant said that he hoped to get their money back but was unable to recall what else had been said at the meeting. At the December 1999 meeting the appellant produced court documents and explained the company structure. In addition, he stated that the money had not been paid directly to C4T but to accounts in the Cayman Islands. He said that the allegation in the United States, as

demonstrated by the court documents, was that the scheme was a Ponzi scheme, which involved the transfer of funds, not to C4T in America, but to Mr Gause's accounts in the Cayman Islands.

41. Mr Bjuroe was not cross-examined in any detail but only for some 10 or 15 minutes. Leading counsel for the appellant said that there was very little he wanted to ask him. In particular, there was no challenge to the discussions which took place in January and April 1999. In relation to the August 1999 conversation, leading counsel suggested that Mr Bjuroe was 'a bit wrong' about what had been said and that the appellant had in fact said that $20 million had been raised, not in one month, but during the appellant's time at Everest. There was no challenge to Mr Bjuroe's accounts of the meetings in November and December 1999. In relation to the December meeting, he was asked whether the court documents produced by the appellant suggested that the C4T scheme was a Ponzi scheme and whether the appellant sought to demonstrate what the Ponzi scheme shown in the documents was. He said that he recalled that the appellant 'showed us how he had moved money horizontally within the companies here instead of moving them up', that is to C4T in America.

42. Mr Bjuroe was re-examined and was then asked some questions by the Chief Justice in order to clarify whether what the appellant explained at the December meeting was what was alleged in the court documents in the United States or what had actually taken place. Mr Bjuroe replied that the appellant told them that 'he personally transferred funds between the company here --- the companies here on the island'. The Chief Justice asked whether there were any questions arising from that and neither leading counsel for the appellant nor anyone else asked any further questions.

43. When the appellant gave evidence he was not asked any questions concerning either Ms Schaller or Mr Bjuroe in his evidence in chief. Nor did he refer to either of them himself. In the course of cross-examination there were some references to them but he did not contradict their evidence to any significant extent. Thus the appellant accepted that he had known Mr Bjuroe for 10 years, that Mr Bjuroe had asked for financial statements but that these had not been provided and that he may have spoken to Mr Bjuroe in April 1999 about the problem in Florida. He could not recall talking to Mr Bjuroe in the summer of 1999 and could not recall making the statement that C4T had raised $20 million in one month but he accepted that this was at a time when new investors were needed to buy out other investors (although new investors were not told this). He accepted that he had met Mr Bjuroe and Mr Williams in early November 1999. He said that he liked Mr Bjuroe and had probably shown him court documents during the meeting in December 1999 but that he was not sure if Mr Bjuroe understood the explanations which he had given him.

44. In the course of cross-examination the appellant did not dispute the evidence given by Ms Schaller. In response to cross-examination based on the evidence given by Paul Williams, the appellant said that he did not think that Mr Williams had 'total recall', but he admitted that he may have explained the movement of funds to Mr Williams, although he could not recall the 'specifics'.

45. The Chief Justice summed the case up to the jury in very great detail and at very considerable length. Mr Robertson relied upon the fact that the Chief Justice attached importance to the evidence of Mr Bjuroe. Thus he gave the jury this direction, among many others:

> "Members of the jury, you will realise, of course, that these admissions which this witness [Paul Williams] and Mr Bjuroe attribute to Mr Tibbetts are of importance in this trial. You will have to ask yourselves whether you can rely on what these witnesses or either of them had to say, whether there is any reason for them to make things up, whether they may have been mistaken. Being such an important matter, my direction to you is that, like all other important aspects of the Crown's case, you must be sure about the reliability and accuracy before you might rely upon it to convict an accused person."

46. The Board has reached the clear conclusion that Mr Robertson's submission overstates the importance of Mr Bjuroe as identified by the Chief Justice. Some judges might perhaps have distinguished in that paragraph between the evidence of Mr Williams and Mr Bjuroe because the evidence of Mr Williams was more damaging to the appellant's case than that of Mr Bjuroe. It is however fair to say that the Chief Justice had just summed up their respective evidence separately, so that the jury were well aware of the differences between them.

47. Mr Williams' evidence was more damaging to the appellant because he said that at the November meeting the appellant accepted that he had been responsible for the transfer of investors' funds to a company controlled by Mr Gause and did not know whether in fact the money was paid to C4T in the United States. The appellant had no real answer when it was put to him that the money was not being put where it was intended to go. As summarised above, Mr Williams said that the appellant said that 'instead of taking the money all the way up and then bringing it all the way down, we just cross it over earlier and bring it down to the investors'. That evidence was challenged and Mr Williams' credibility was in issue.

48. The evidence of Mr Bjuroe was somewhat different. Mr Bjuroe did not say in examination in chief that the appellant had admitted to him that he knew that Mr Gause and Mr Homa were operating a pyramid or Ponzi scheme, merely that he had

transferred funds out of the companies to which they were paid into other companies in the Cayman Islands and not, at any rate directly, to C4T in America. That evidence was not challenged, either in cross-examination or after the judge had asked the specific question, received a clear answer and asked counsel whether they wished to ask further questions arising out of the answer. Mr Bjuroe's evidence was scarcely challenged in cross-examination at all and the appellant said no more than that he was not sure that Mr Bjuroe had understood the explanation which he, the appellant, had given at the December meeting.

49. It is not surprising that Mr Bjuroe was not cross-examined on the answer he gave to the judge because the evidence shows that the appellant was indeed instrumental in making the transfers to other Cayman Island companies. The monies had been paid by the investors to MTM in Mr Bjuroe's case and JMP in Mr Williams' case and, since the appellant controlled MTM and JMP, he had no alternative but to accept that he had in effect transferred the monies to other Cayman Island companies and not, at any rate directly, to C4T in America. The appellant's evidence was that monies were transferred from MTM and/or JMP to a number of different companies controlled by Mr Gause or perhaps Mr Homa. The appellant did not name the companies to whom monies were transferred in 1997. However he referred to a number of Gause companies without giving their precise names. They were OTA, which became Opal in 1999, and ITL, which became Interworld in 1999. He also referred to Homa companies, namely Sunset Financial (Cayman Islands) and Sunset Financial (US). Sunset Financial later became International Professionals but it is not clear whether that was true of both the Cayman Islands and the US company. The appellant said in evidence that the monies were transferred from those companies to the United States, although it is far from clear whether he was saying that it all did.

50. It is entirely understandable that Mr Bjuroe was not further cross-examined on behalf of the appellant. As summarised above, his evidence was simply that the monies were transferred from his companies to companies controlled by Mr Gause (and Mr Homa) in the Cayman Islands and not to the United States. That was true. The inference which the prosecution invited the jury to draw from this evidence was no doubt that the appellant knew or at least suspected that the monies were being siphoned off by Mr Gause and Mr Homa for their own benefit. However, while that was an inference which the jury could draw from the evidence of a number of witnesses, including Mr Bjuroe and Mr Williams, Mr Bjuroe did not say in evidence that the appellant had admitted that to him, only that he had admitted that he was instrumental in the transfers to companies controlled by Mr Gause and Mr Homa.

51. When Mr Bjuroe's evidence is seen in that light and it is appreciated that, although it was significant as part of the chain of evidence against the appellant, his evidence was not challenged to any real extent, the part of the summing up relied upon by Mr Robertson and quoted above must also be seen in that light.

Decision of the Court of Appeal

52. The Court of Appeal accepted that, if all the facts had been known at the time of jury selection, the prosecution would not have opposed Mr Uzzell being excused and, if they had been known when Mr Bjuroe was called to give evidence, it would not have opposed his discharge. The Court of Appeal further accepted that any judge aware of the true facts would have discharged him. The Board agrees that to excuse him or to discharge him would certainly have been a sensible step to take as a case management decision. However, the Court of Appeal correctly held that the issue must now be faced and determined on the basis of the principles set out at paras 3 to 6 above. There is no suggestion that the Court of Appeal misdirected itself as to the correct principles. Nor could there be.

53. The Court of Appeal correctly identified the issue for the jury to decide at the trial. The Court of Appeal was conscious of the fact that the Cayman Islands is a small jurisdiction which presents certain problems in a case of this kind. It put the problem in these terms:

> "Even in populous jurisdictions there are, of course, cases of notoriety in which some or all jurors have read, heard and seen pictures of people and events involved, and may have discussed, and perhaps expressed opinions about, the issues raised at trial. In a jurisdiction such as the Cayman Islands, with a small and closely-knit population, there is a greater possibility that a juror may also have been associated in some way with one of the witnesses, and this must particularly be so in a trial such as the present, which involved more than 50 Crown witnesses. The jury questionnaire was obviously intended to identify prospective jurors whose connection with a party or witness was close enough to be of concern. The possibility that a potential juror might have knowledge of facts of the case was not raised in the questionnaire. Nor was the possibility that a juror might in the past have been associated with a Crown witness. The fact that the juror in question erroneously declared himself to be a *current* friend of a Crown witness did not, in the event, lead to objection being taken by counsel."

The Board agrees with that approach. It is noteworthy that the questionnaire was agreed between counsel with the very problems identified by the Court of Appeal in mind.

54. In the same vein the Court of Appeal noted that in his opening remarks to the jury at the beginning of the trial the Chief Justice emphasised the burden and standard of proof and both then and in his summing up stressed that the jury must decide the case only on the basis of the evidence before them. In particular they must cast aside

their feelings of sympathy or prejudice one way or the other, either for or against the defendants or for or against any witness. The Court of Appeal correctly treated those principles as relevant to the answer to the question before it.

55. The Court of Appeal had earlier set out the relevant facts to which the Board has already referred and identified these particular facts which the putative observer would have in mind. It noted

> "… that counsel for [the appellant] had accepted the juror understanding him to be a friend of the female witness, who had invested through the accused and lost money, and with the knowledge that she was married to another Crown witness who lost money, and would testify also regarding an allegedly inculpatory statement by the accused. The observer would in our view take into account also that the juror's association with these witnesses had never been particularly close, and had ended more than three years earlier. Of importance, too, would be the fact that the apprehension of bias asserted was not said to arise from prior knowledge by the juror of prejudicial facts, but rather from sympathy that the juror might feel for the loss suffered by the witnesses, and from willingness to accept their evidence on account of former friendship."

56. Those are indeed relevant factors to have in mind. The Court of Appeal ultimately held that, looking at the matter from the point of view of the putative observer, it was unable to conclude that the evidence would satisfy such a person that there was a real possibility that, despite the directions given by the judge as to the nature of the jury function, the juror, viz Mr Uzzell might, consciously or unconsciously, be influenced by the former friendship in carrying out his duties.

Discussion

57. The question in this appeal is whether the Court of Appeal was wrong in reaching the conclusion that it did. The Board has reached the conclusion that it was not. In doing so it has considered the various aspects of the case in some detail. It has done so because it recognises that it is on the face of it striking that a defendant in a criminal trial can be convicted in circumstances in which a witness who knows and has been on holiday with a juror has given evidence for the prosecution. This is indeed only likely to happen in a very rare case but all depends upon the circumstances. The questions for decision in each case are those identified above.

58. The Board has sufficiently set out the facts relevant to the association above. The critical question is whether, on the facts found, which it must be assumed are

known to the putative observer, he or she would conclude that Mr Uzzell (and thus the jury) might have accepted Mr Bjuroe's evidence because of Mr Uzzell's relationship with him. Like the Court of Appeal the Board has had regard to that relationship and what was said between them. However, the most important point, in the judgment of the Board, is the unchallenged nature of Mr Bjuroe's evidence as described above. The putative observer would not conclude that Mr Uzzell might have accepted Mr Bjuroe's evidence because of the relationship. He or she would have accepted it because it was not challenged and it was not challenged because it was true that the monies invested in MTM were transferred to companies controlled by Mr Gause and Mr Homa and not, at any rate directly, to C4T in the United States.

59. This conclusion is contrary to the central submission made on behalf of the appellant that his case called for the jury to disbelieve the evidence of Mr Bjuroe. It did not. That submission is inconsistent, not only with the failure to challenge his evidence in cross-examination, but also with the fact that, as explained above the appellant did not contradict the evidence of Mr Bjuroe. He was not asked any questions in examination in chief about what Mr Bjuroe had said he had said at the December 1999 meeting and in cross-examination the furthest he went was to say that he was not sure if Mr Bjuroe understood the explanations which he had given him at the meeting. Thus the appellant's evidence does not support the submission that his case called for the jury to disbelieve Mr Bjuroe's evidence.

60. It seems to the Board to be noteworthy in this regard that when Ms Dillon was told by Ms Schaller in the course of the trial that she had given evidence, that Mr Uzzell was on the jury and that Mr Bjuroe was to give evidence, it did not occur to Ms Dillon to tell the appellant's defence team. Ms Dillon was of course privy to all the facts which are relevant for present purposes, including the nature of the relationship or association between Mr Uzzell and Mr Bjuroe and the conversations which had passed between the two couples. If it had occurred to her that there was anything untoward about Mr Uzzell sitting on a jury in a case about the C4T scheme in which Mr Bjuroe was to be a witness, the Board feels sure that she would have mentioned it during the trial. The Board does not criticise her in any way for not mentioning it but the fact that she did not strongly suggests that in the particular circumstances of this case, there was nothing untoward about it.

61. In all these circumstances, in the judgment of the Board, the putative observer with knowledge of the facts would not conclude that Mr Uzzell might have accepted Mr Bjuroe's evidence as a result of his previous relationship and conversations with him. It follows that he or she would conclude that there was no real possibility that Mr Uzzell – and hence the jury – was biased. It further follows that the Court of Appeal was correct to hold that the verdict of the jury was not tainted by apparent bias. The Board will therefore humbly advise Her Majesty that the appeal should be dismissed. Unless application is made to the Board within 28 days, the appellant is to pay the respondent's costs of the appeal.