THE REPUBLIC v. IBRAHIM ADAM, DR. SAMUEL DAPAAH, KWAME PEPRAH, DR. GEORGE YANKEY AND ATO DADZIE [28/4/03] NO.FT/MISC. 2/2000.

IN THE SUPERIOR COURT OF JUDICATURE, THE FAST TRACK

HIGH COURT SITTING AT ACCRA ON MONDAY

THE 28TH APRIL 2003

SUIT NO. FT/MISC. 2/2000

28TH APRIL 2003

CORAM: AFREH, J.S.C., SITTING AS AN ADDITIONAL

JUSTICE OF THE HIGH COURT

THE REPUBLIC

v.

1. **IBRAHIM ADAM**
2. **DR. SAMUEL DAPAAH**
3. **KWAME PEPRAH**
4. **DR. GEORGE YANKEY**
5. **ATO DADZIE**

MR. OSAFO SAMPONG DPP, WITH HIM MR. AUGUSTINE OBUOR ASSISTANT STATE ATTORNEY, BEING LED BY MS. GLORIA AKUFFO, DEPUTY ATTORNEY- GENERAL

MR. SAMUEL CUDJOE FOR 1ST ACCUSED WITH HIM MR. EKOW BAIDEN

MR. ADADEVOH FOR NENE AMEGATCHER FOR 2ND ACCUSED WITH HIM MS. MAA NAA DJOLETTO

MR. KWAKU BAAH FOR 3RD ACCUSED WITH HIM MR. VANDERPUYE

MR. KWAKU BAAH HOLDING MR. LAMPTEY'S BRIEF FOR 4TH ACCUSED.

NANA ADJEI AMPOFO FOR 5TH ACCUSED.

JUDGMENT

The Accused Persons are charged with the following offences:

COUNT ONE

STATEMENT OF OFFENCE

Conspiracy to Commit Crime contrary to Section 23 & 179A(3)(a) of the Criminal Code (Act 29) 1960.

PARTICULARS OF OFFENCE

Ibrahim Adam, Samuel Dapaah, Kwame Peprah, George Sipa-Yankey, Nana Ato Dadzie; between January 1994 and December 2000 in the Greater Accra Region acted together to commit crime, namely wilfully causing financial loss to the State.

COUNT TWO

STATEMENT OF OFFENCE

Causing financial loss to the State contrary to section 179A(3)(a) of the Criminal Code (Act 29) 1960.

PARTICULARS OF OFFENCE

Samuel Dapaah, Kwame Peprah, George Yankey between the months of November, 1996 and September 1997 at Accra in the Greater Accra Region wilfully caused financial loss of six million one hundred and ninety-six thousand three hundred and thirty United States dollars ($6,196,330.00) to the State.

COUNT THREE

STATEMENT OF OFFENCE

Causing financial loss to the state contrary to section 179A(3)(a) of the Criminal Code (Act 29) 1960.

PARTICULARS OF OFFENCE

Kwame Peprah, George Yankey, Samuel Dapaah between July 1997 and September 1998 at Accra in the Greater Accra Region wilfully caused financial loss of three million United States dollars ($3,000,000) to the state.

COUNT FOUR

STATEMENT OF OFFENCE

Causing financial loss to the state contrary to section 179A(3)(a) of the Criminal Code (Act29) 1960.

PARTICULAR OF OFFENCE

Kwame Peprah, during the month of February 1999 at Accra in the Greater Accra Region wilfully caused financial loss of two million United States dollars ($2,000,000.00) to the State.

COUNT FIVE

STATEMENT OF OFFENCE

Causing Financial loss to the State contrary to section 179A(3)(a) of the Criminal Code (Act 29) 1960.

PARTICULARS OF OFFENCE

Kwame Peprah, George Yankey, on or about 22nd July, 1997, wilfully caused Financial Loss of One million two hundred and seventy-four thousand, three hundred and five United States dollars and twenty-five cents ($1,274,305.25) to the State.

COUNT SIX

STATEMENT OF OFFENCE

Causing Financial loss to the State contrary to section 179A(3)(a) of the Criminal Code (Act 29) 1960.

PARTICULARS OF OFFENCE

George Yankey, on or about 10th November 2000, in Accra, wilfully caused

Financial Loss of the sum of Twenty-eight thousand four hundred United States Dollars ($28,400.00) to the State.

COUNT SEVEN

STATEMENT OF OFFENCE

Causing Financial loss to the State contrary to section 179A(3)(a) of the Criminal Code (Act 29) 1960.

PARTICULARS OF OFFENCE

Samuel Dapaah, Kwame Peprah, George Sikpa-Yankey, Ato Dadzie, between December 1998 and December 2000, wilfully caused Financial Loss of three billion, eight hundred and twenty-six million, two hundred and fifty thousand five hundred and forty-seven thousand cedis five pesewas (¢3,826,250,547.05) to the State.

The original 6th Accused, Mr. Kwesi Ahwoi, was acquitted and discharged at the end of the prosecution's case on a submission of no case to answer.

After nearly two years of trial, interrupted by long breaks, and about 3000 pages of evidence and Exhibits, the Day of Judgment has come and I proceed to deliver my judgment.

This case has aroused considerable interest. There is a widespread belief that the accused persons are being tried for stealing millions of US dollars or for corruption. That is not correct. They are being tried for wilfully causing financial loss to the State under Section 179A (3) (a) of the Criminal Code, 1960 (Act 29) a relatively new offence created by the Criminal Code (Amendment) Act, 1993 (Act 458).

The law was passed by the First Parliament of the Fourth Republic which was almost entirely made up of members of the National Democratic Congress (NDC), of which three of the accused persons were (or are) senior members, and its allies, the National Convention Party (NCP) and the EGLE Party. There were no members from what were the then opposition parties, the new Patriotic Party (N.P.P), various factions of the once dominant Convention Peoples Party (C.P.P.) and one or two small parties, as a result of their boycott of the 1992 Parliamentary elections. According to the Long Title of Act 458 one of its purposes was to include in the Criminal Code, 1960 (Act 29) “special offences relating to loss of State funds” - and that was what became section 179A of the Code. In the Memorandum accompanying the Bill, the then Attorney-General and Minister of Justice, Mr. Anthony Kofi Forson, explained the reasons of the amendment;

> “-Thirdly, clause 3 of the Bill seeks to amend the Criminal Code by the insertion of a Chapter on “Special Offences”, these are;
>
> (a) Causing loss, damage or injury to public property-section 179A
>
> (b).....……....

(c).....

These are some of the offences dealt with by the Regional Public Tribunals as special offences under the Public Tribunals Law, 1984 (P.N.D.C.L.78).

With the integration of the Public Tribunals into the traditional court system, it has become necessary to bring these offences into the basic Criminal Code to enable jurisdiction in these areas to be conferred on the Regional Tribunals even if the jurisdiction is exercised concurrently with the High Court.

To this end, there is specific reference to this jurisdiction in the Courts Bill, which is to be considered concurrently with this amendment Bill. Owing to the desire to deter people from such crime and the anti-social nature of the crimes there is provided, on conviction, a minimum penalty of not less than ¢5 million or imprisonment for a term not exceeding ten years."

The provision in PNDCL 78 on the "special offence" of causing financial loss, Section 9(1) (a) of the Law, provided;

"9(1) Any person who—

(a) By any wilful act or omission or recklessly causes or caused any loss, damage or injury to the property of any public body, whether monetary or otherwise, shall be guilty of an offence."

Under Section 16 of the PNDCL 78 the death penalty could be imposed by a Public Tribunal for such offences as might be specified by the PNDC and in respect of cases where the Tribunal was satisfied that very grave circumstances meriting such penalty had had been revealed.

PNDCL re-enacted substantially the Public Tribunals Law, 1982 (PNDCL 24) under which there was no right of appeal. Under PNDCL 24 and 78 several persons were sentenced to long terms of imprisonment for "economic crimes" and even in, at least, one case it was reported a civil servant was executed for misappropriating about ¢13 million.

I have given this background to indicate the purpose for which Section 179A of Act 29 was enacted. It was, I believe, thought to be in consonance with one of the ideals of PNDC, which became enshrined in the 1992 Constitution as one of its fundamental principles in its Preamble, Probity and Accountability.

CONSTITUTIONALITY OF 179A (3) (A)

In the course of these proceedings it was strenuously argued, especially by counsel for the 5th Accused, that Section 179A(3)(a) was unconstitutional because it was incompatible with Article 19(l1) of the 1992 Constitution. The matter is now settled.

In Mallam Ali Yusuf Isa vrs. The Republic, unreported, 2nd April, 2003, S.C, the Supreme Court adopted and affirmed the decision of Court of Appeal on the same matter, that S. 179A(3)(a) does not

offend Article 19(l1) of the Constitution and is therefore Constitutional; See Mallam Ali Yusuf Isa vrs. The Republic; unreported, 25th June 2001, C. A.

That decision is binding on me. I do not, therefore, think it is necessary for me to react to submissions of counsel on that matter. All that I have to do is to interpret and apply S. 179A(3)(a) to the facts of this case.

ACTION OR OMISSION

The accused person must have taken some action (or must have done some act) or omitted to take some action (or to do some act). I do not think it is necessary to define the word action" (or act) except to say that under the Interpretation Act, 1960 (C.A. 4), S.32 (1) act includes omission. In Mallam Ali Yusuf Isa vrs The Republic, unreported, 25th June, 2001, C.A, the Court of Appeal held that the words "or omission" in S. 179A (3)(a) of Act 29 (The provision under consideration) were obviously added for the avoidance of doubt and ex abundantia cautela because by S. 32(l) of the Interpretation Act, 1960 (C.A 4) in an enactment "act" includes an omission and references to the doing of an act shall be construed accordingly. So the words "or omission" do not create a separate or alternative offence. Under S. 179A(3)(a) of Act 29 the forbidden act may be an action or an omission.

"THROUGH": CAUSATION

For prosecution to succeed it must show that the State incurred a financial loss through the action or omission of the accused person. Of the more than a dozen meanings of the word "through" the most appropriate or relevant for this case are those indicating cause, reason/or motive, in consequence of, by reason of, on account of, owing to, as a result of; by means of. In other words it must be proved that the cause of the State's financial loss is the action or omission of the accused. There must be a direct causal link between the action or omission of the accused and the financial loss incurred by the State. It is not enough for the prosecution to show that the accused's action or omission could have caused or contributed to the loss. It must prove that it did cause or contribute to cause the financial loss. See the dictum of Amonoo-Monney J.A infra.

BURDEN OF PROOF

I need not emphasise the trite law that the prosecution has to prove its case beyond reasonable doubt.

FINANCIAL LOSS

An essential ingredient of the offence with which the accused have been charged is, of course, financial loss. According to Blacks Law Dictionary:

> "Loss means deprivation, Loss is a generic and relative term. It signifies the act of losing or the thing lost; it's not a word of limited, hard and fast meaning and has been held to be synonymous with, or equivalent to, "damage" "deprivation", "Detriment", "injury" and "privation". It may mean expenses exceeding costs; actual losses; bad and uncollectible accounts; a decrease in value of resources or increase in liabilities; depletion or depreciation or destruction of value; deprivation; destruction; failure to keep that which one has or thinks he has; shrinkage in value of estate or property; state or fact of being lost or destroyed; that which is gone and cannot be recovered or that which is withheld or that of which disposed; unintentional parting with something of value.

The word is not a term of art and should be given its ordinary meaning.

In Mallam Ali Yusuf Isa vrs. The Republic (supra) Amonoo-Monney J. A. said:

> "Counsel for the appellant submitted that the expression 'financial Loss' in the section has not been defined. Surely, the expression 'financial loss' is not a term of art and one does not need any profound erudition or a course in macroeconomics to understand it.
>
> I venture to say that 'financial loss' just means 'financial loss'. A recourse to any English dictionary will remove any lingering difficulty of comprehension or understanding.
>
> The words 'The State incurs a financial loss' postulate a result, the end-product of an anterior or antecedent activity (or inactivity); and from the wording of the Section a causative human factor or activity brings about, or produces, or is responsible for, or is the reason for, the result or the event.
>
> The Chambers Dictionary 1993 gives us one of the meanings of the word 'incur', 'to suffer', and also states as one of the meanings of suffer, **'TO BE THE OBJECT OF AN ACTION."**

The accused persons contend that there is no loss because everybody agrees the project is feasible and viable and with good management will make enough profit to repay the loan or whatever the Ghana Government has paid under the guarantee. In their testimonies they went into great detail to show why as an investment the project is not a loss and called at least two witnesses to back their contention.

In reaction to this contention the prosecution has argued that the defence arguments that the state has lost nothing and that sums involved can be recovered are completely misguided and totally groundless. The issue is not whether a "world class mill" has been installed but that the first class mill bears a tag far less in value and costs than the accused would have the whole world believe.

I agree with the prosecution that the issue is not whether the state can recover the sums involved or a world class mill has been installed but whether the state, has suffered a financial loss in the sense of having been made to pay more than the project actually cost.

In my opinion the fact that a project is viable and profitable does not mean parties interested in it cannot suffer loss as a result of the misappropriation or misapplication of some of its resources by its officers or employees. If a company or the state is made to spend a Hundred Million Cedis (¢100,000,000.00) on a project which actually cost Fifty Million Cedis (¢50,000,000.00) it has been deprived of Fifty Million Cedis (¢ 50,000,000.00). And it is no defence or consolation that at the end of the day the project will make a profit.

As I have already said the word loss should be given its ordinary meaning of damage, deprivation, detriment, injury or privation and it is not necessary for me to consider whether the project is viable and will make profit if properly managed.

WILFUL

In the course of this trial there has been much debate about the meaning and effect of the word “wilful”. There are some who have argued that its only meaning is intention and does not include recklessness as an alternative meaning; others have suggested that it should be equated only with recklessness. There are even those who think it is a new word in the lexicon of Ghana Criminal Law.

In fact the word "wilful" is one of the oldest words in English Criminal Law, which is the main source of our Criminal Code. Among the earliest statutes in which it appears is the Uniformity of Service Act, 1548 which made it an offence for any person, vicar or minister to "use, wilfully and obstinately... any other Administration of Sacrament or other open prayer than is mentioned and set forth in the Book of Common Prayer": See J. LL. J. Edwards, Mens Rea in Statutory Offences (1955) page 30. It has appeared in our Criminal Code since 1892 when the Code was first passed but mainly in provisions dealing with public nuisances. Thus it appears in S. 292 (3) and S. 296 (3), (7), (15), (16), (19) (20) and (25). It is also an essential element of the crime of wilful oppression under SS 239 and 246. But it is rarely used in modern statutes, which in its place are likely to use the words "intentionally" or "recklessly' or both. This may be a reason why people are surprised it was used in a statute, the Criminal Code (Amendment) Act 1993 (Act 458), passed only ten years ago.

According to the Shorter Oxford Dictionary (3rd Edition) Vol. II, N-Z, page 2427 "wilful" means:

(1) Asserting or disposed to assert one's own will against persuasion, instruction, or commands; governed by will without regard to reason; obstinately self-willed or perverse.

(2) Willing; consenting; ready to comply with a request, desire, or requirement;

(3) Proceeding from the will; done or suffered of one's own free will or choice; voluntary

(4) Done on purpose or wittingly; purposed, deliberate, intentional. (Chiefly, now always in bad sense, of a blame-worthy action; frequently implying 'perverse' obstinate'), Similar definitions can be found in other English Dictionaries and Law Dictionaries.

Two things stand out in the definition just cited;

(i) A wilful act is one done or suffered of one's own free will and choice it is voluntary; or

(ii) It is done on purpose, with knowledge or awareness of what one is doing, consciously, deliberately, or intentionally.

This in my opinion implies knowledge of the concomitant circumstances. Depending upon how the word act is defined, it may imply awareness of foresight of the consequences of the act.

Judicial opinion has differed as to whether the word "wilful" or "wilfully" is a "mens rea word" or creates a crime of strict liability. The word is said to create a crime of strict liability where it is held to apply only to the act but not to some circumstance or consequence, which is an element of the crime. Thus in Hudson vrs. Macrae (1863) 4 B and s. 585 D. C the defendant was held guilty of wilfully fishing in private waters although he believed there was a public right to fish there; in Cotterill vrs. Penn [1936] 1 K. 53 the defendant was found guilty of wilfully killing a house pigeon when he shot a bird, believing it was a wild pigeon; in Maidstone Borough Council vrs. Mortimer [l980] 3 ALL E.R. 552, D.C., the Court found the defendant guilty of wilfully destroying an oak tree in contravention of a tree preservation order even though he was unaware of the order and believed that permission had been given for the tree to be felled; and in Arrow Smith vrs. Jenkins [1963] 2 Q.B.561 it was held that wilful obstruction of a high-way contrary to Section 121 of the Highway Act, 1959 did not import mens rea. In all these cases what the accused did were all wilful acts in the sense that they were voluntary or deliberate; but in none of them was the commission of the crime wilful, in the sense that the accused persons knew or were aware that what they were doing was wrongful.

A similar meaning of the word seems to have been adopted by Baddoo J.A (as he then was) in the

case of The Republic vrs. Victor Selormey, High Court, Unreported, 10th December 2001. Among the charges against the accused person in that case were two counts of conspiracy to cause financial loss to the State and two counts of causing financial loss to the state founded on S.179 (A) (3) (a) of Act 29, 1960. After quoting this provision His Lordship said:

> "In plain ordinary language it means any deliberate act/or omission of any person which results in a financial loss to the State constitutes an offence. Therefore for the prosecution to succeed in proving this charge against the accused person they must show that:—
>
> (a) That the accused person took certain actions:
>
> (b) That those actions resulted in a financial loss to the State".

As against cases which have imposed strict liability notwithstanding the use of the word wilful in the relevant provision, is a large body of cases which have interpreted the word as requiring proof of mens rea. The leading case in this group is R vrs. Sheppard [1981] A.C 394, H.L.; [1980] 3. All E.R. 899**.** In that case the youngest child of Mr. & Mrs Sheppard died at the age of 16 months from malnutrition and hypothermia. They were convicted of causing cruelty by wilful neglect under section 1 of the [English] Children and Young Persons Act 1933. The [English] Court of Appeal felt bound by authority to uphold the direction of the trial judge that no element of foresight of harm was necessary for the offence, but granted leave to appeal to the House of Lords. By a three to two majority the House allowed the appeal. In the course of his speech which was in favour of allowing the appeal Lord Diplock said, at page 904 of the All England Law Reports, on the meaning of the word wilful, and rejecting the strict liability interpretation;

> "……..'Wilfully', which must describe the state of mind of the actual doer of the act, may be Capable of bearing the narrow meaning that the wilfulness' required extends only to the doing of the physical act itself which in fact results in the consequences described, even though the doer thought that it would not and would not have acted as he did had he foreseen a risk that those consequences might follow. Although this is a possible meaning of 'wilfully', it is not the natural meaning even in relation to positive acts defined by reference to the consequences to which they are likely to give rise; and, in the context of the section, if this is all the adverb “Wilfully” meant it would be otiose. Section 1 would have the same meaning if it were omitted; for even in absolute offences (unless vicarious liability is involved) the physical act relied on as constituting the offence must be wilful in the limited sense, for which the synonym in the field of criminal liability that has now become the common term of legal art is “voluntary”.

See also Lewis vrs. Cox [1985 Q.B.509. [l984] 3 All E.R. 672.

In my opinion the use of the word wilful (or its noun or adverb) in a charge brought under s. 179(A)

(3) (a) of Act 29 requires proof of mens rea.

It is not enough for the prosecution to show that the accused did a deliberate or voluntary act which caused a prohibited consequence. They must also prove that the accused person foresaw the consequence and desired it or took an unreasonable risk of it occurring. I think the context in which the word wilful, is used in section 179 (A)(3) (a) shows that it should be interpreted as requiring mens rea: the other words in the section which describe mental state, "malicious" and "fraudulent", are undoubtedly mens rea words. I do not think that of the three words, "wilful" alone was intended to impose strict or absolute liability.

From the definition of the word quoted above from the Shorter Oxford Dictionary and in Law Dictionaries as well as Judicial Pronouncements there is no doubt that wilful is a synonym for intention. As Glanville Williams Criminal Law-General Part 2nd Edition paragraph 16 page 35 says;

> “A dyslogistic synonym (of intention) much favoured in Criminal Law is "wilfulness".

In that sense it may connote bad or evil purpose either to disobey or to disregard the law. It may also mean nothing more than action done intentionally, knowingly, and purposely without justifiable excuses as distinguished from an act done carelessly, thoughtlessly, heedlessly, or inadventently; see Black's Dictionary 6th Edition page 1599.

But this is not the only meaning of wilful. While wilful means intention it also covers recklessness. As Blackstone's Criminal Practice (1992) states at paragraph, A2.8 page 25:

> "Wilfully" which has some similarities with ‘malice' since it dates from an earlier legislative vocabulary, should not be understood merely in its most obvious or literal sense of “deliberately” or voluntary”. It is now taken as a composite word to cover both intention and a type of recklessness. It differs from malice, however, in that it but includes, apparently, Caldwell recklessness or something very similar to it. The leading case is Sheppard [1981] A.C. 394 which in many ways was the precursor of the decision in Caldwell vrs. Metropolitan Police Commissioner [1982] A.C. 341.

In Sheppard (supra) at [1980] 3 All E.R 906; Lord Deplock gave what is regarded as the model direction on a charge under s(1)(1) of the English Children and Young Persons Act 1933 and also mutatis mutandi on the meaning of the word wilful. He said:

> "The proper direction to be given to a jury on a charge of wilful neglect of a child under s. 1 of the Children and Young Persons Act 1933 by failing to provide adequate medical aid is that the jury must be satisfied,
>
> (1) That the child did in fact need medical aid at the time at which the parent is charged with failing to provide it (the actus reus) and
>
> (2) Either that the parent was aware at that time that the child's health might be at risk if it

> was not provided with medical aid or that the parent's unawareness of this fact was due to his not caring whether his child's death was risk or not (the mens rea)".

As Lord Diplock himself said in his speech the mens rea, as stated by him, 'imports the concept of recklessness, which is a common concept in mens rea in the criminal law'.

Lord Keith of Kinkel, one of the majority, also said at page 914:

> "The primary meaning of 'wilful' is 'deliberate'.
>
> So a parent who knows that his child needs medical care and deliberately, that is by conscious decision, refrains from calling a doctor, is guilty under the subsection. As a matter or principle, recklessness is to be equipirated with deliberation. A parent who fails to provide medical deliberation. A parent who fails to provide medical care which his child needs because he does not care whether it is needed or not is reckless of his child's welfare. He too is guilty of an offence. But a parent who has genuinely failed to appreciate that his child needs medical care, through personal inadequacy or stupidity or both, is not guilty"

The majority in Sheppard therefore equated wilfully with recklessness. I agree with Archibold's submission that in the absence of a specific decision on a specific statutory provision to the contrary any provision containing the word "wilfully" in the definition of a crime should be construed in accordance with the approach in Sheppard: Archbold 2000 paragraph 17-48 at page 1574.

What do the words intention and recklessness mean? Intention is defined by S. 11 of Act 29. I am bound by it even though I believe that in the light of recent developments in the law relating to intention and recklessness some of the definitions in that section, for example subsections 2 and 3 thereof, may not today be accepted in England and other countries as the correct meaning of the word intention. The Code does not define recklessness but in my opinion it is comprehended within the concept of intention as defined by section 11 of Act 29: I think the definition of intention in S. 11 (2) is not much different from subjective recklessness as defined in R vrs Cunningham [1957]. Recklessness as a kind of negligence is also known to our Criminal Law Section 11 of Act 29 defines intention as:

> "(1) If a person does an act for the purpose of thereby causing or contributing to cause an event, he intends to cause that event, within the meaning of this code, although either in fact or in his belief, or both in fact and also in his belief, the act is unlikely to cause or to contribute to cause the event.
>
> "(2) If a person does an act voluntarily, believing that it will probably cause or contribute to cause an event, he intends to cause that event, within the meaning of this of causing or contributing to the cause of the event.

> "(3) If a person does an act of such a kind or in such a manner as that, if he used reasonable caution and observation, it would appear to him that the act would probably cause or contribute to cause an event, he shall be presumed to have intended to cause that event, until shown that he believed that the act would probably not cause or contribute to cause the event, or that he did not intend to cause or contribute to it."
>
> (The definitions in subsections 4 and 5 of the section are not relevant for our purpose).

INTENTION AS DESIRE OF CONSEQUENCE

Section 11(l) gives intention its ordinary sense as meaning a purpose or goal; aim; the resolve or design with which a person does or refrains from an act. In this sense the accused person desires the consequence, he purposes it, engineers it, strives after it. He acts wilfully in respect of it; the result is his purpose or aim or design, the goal of his endeavours.

Words which express the idea of intention as desire of consequence are "intent", "will", "wantonness", volition", "purpose", "aim", "design", "deliberation" and wilfulness" (which is sometimes used as a dyslogistic synonym). Intention also includes foresight of certainty. That is a consequence is intended, though it is not the doer's purpose to cause it, when the result is a virtually certain consequence of his act and he knows it is a virtually certain consequence.

INTENTION AS FORESIGHT OF CONSEQUENCE

Section 11(2) defines intention as foresight of probable consequence. In cases falling within the subsection, the degree of criminality depends on the knowledge and consciousness on the part of the actor that the prohibited consequence is likely to result from what he does, that's on whether or not he wilfully incurred the risk of causing the prohibited consequence: See R vrs Quaye 14WACA 488. To put it in another way;

> Was the act done in the consciousness that it was likely to cause the prohibited consequence? See the State vrs Gyamfi [1960] GLR 45. (Although these two cases were murder cases, they neatly state the principle in Section 11(2)). If a person foresees a consequence as probable or likely and unjustifiably incurs the risk of causing it he can be said, under Section 11(2), to have intended to cause it.

Modern authorities in England today would reject this type of mental state as intention and classify it as recklessness for it has long been established that recklessness involves foresight of probable or possible consequence.

> "Recklessness as to consequence occurs when the actor does not desire the consequence but foresees the possibility and consciously takes the risk. In inadvertent negligence, on the other hand, there is no such foresight. For many, if not most, legal purposes recklessness is classed with intention. It is like intention in that the consequence is foreseen.

> If the actor foresaw the probability of the consequence he is regarded as reckless, even though he fervently desired and hoped for the exact opposite of the consequence, and even though he did his best (short of abandoning his main project) to avoid it. Judges in speaking of recklessness frequently insert words to the effect that the defendant "did not care whether he caused damaged or not" but the better view is that this is irrelevant. Recklessness is any determination to pursue conduct with knowledge of the risks involved though without a desire that they should eventuate":—Glanville Williams:
>
> Criminal Law—The General Part, 2nd Edition (1961) paragraph 24 page 53-54.

At paragraph 27 pages 64-65 he further describes the connection between intention and recklessness:

> "It is a general, though not a universal, principle that recklessness is classed with intention for legal purposes.
>
> The thing that usually matters is not desire of consequence but merely foresight of consequence, which is the factor common to intention and recklessness. It is this foresight of consequence that, it is submitted,
>
> constitutes mens rea. Consequently every crime requiring mens rea, if it does not positively require intention, requires either intention or recklessness".

This statement supports the view that willful means both intention and recklessness. The leading judicial pronouncement on subjective recklessness is to be found in R vrs Cunningham [1957] 2 Q. B. 396; [1957]2 All E.R. 412: 41 Criminal Appeal R 155, where the English Court of Criminal Appeal in defining "malice" stated;

> "...malice must be taken not in the old vague sense of wickedness in general but as requiring either
>
> (1) An actual intention to do the particular kind of harm that was in fact done; or
>
> (2) Recklessness as to whether such harm should occur or not (i.e., the accused has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it.

RECKLESSNESS AS A KIND OF NEGLIGENCE

Recklessness is part of the law of negligence, which is defined in section 12 of Act 29. There are two kinds of negligence—advertent negligence, also called recklessness, and inadvertent negligence. It is this kind of recklessness, that is advertent negligence, that the Supreme Court of the First Republic

considered in The State vrs. Tsiba [1962] 2 GLR 109 (a manslaughter case). The Court, per Akufo-Addo, JSC (as he then was) adopted the definition of reckless action or conduct in the Shorter Oxford Dictionary as one characterised by heedless rashness or by a carelessness of the consequences of such action or conduct. Some of the illustrations to section 12 can be regarded as examples of advertent negligence rather than inadvertent negligence.

Again Glanville Williams explains the nature of this kind of recklessness thus:

> "Recklessness is a branch of the law of negligence;
> it is that kind of negligence where there is
> foresight of consequences. The concept is therefore
> a double—barreled one, being in part subjective
> and in part objective. It is subjective in that one
> must look into the mind of the accused in order
> to determine whether he foresaw the consequence.
> If the answer is in the affirmative, that is the end of the
> subjective part of the enquiry and the beginning of the
> objective part. One must ask whether in the
> circumstances a reasonable man having such
> foresight would have proceeded with his conduct
> notwithstanding the risk. Only if this second
> question, too, is answered in the affirmative is
> there subjective recklessness for legal purposes".

Glanville Williams: Criminal Law—The General Part paragraph 25 page 58.

THE PRESUMPTION OF INTENT

Section 11(3) of Act 29 is generally interpreted as stating the well-known presumption of intent: that a person is presumed to intend the ordinary consequences of his voluntary act—see section 38 of the Evidence Decree, 1975 (NRCD) 323). Applying the subsection's interpretation by the Supreme Court of the First Republic in Akorful vrs State [1963] 2 GLR 371 it may be stated by reason of subsection 11(3) a court (or jury) is entitled to presume that the accused person intended to cause the prohibited consequence if in the absence of any explanation it is satisfied on the facts adduced by the prosecution it would have appeared to the accused if he had used reasonable caution and observation that there would be great risk of his act causing or contributing to cause the prohibited consequence. The presumption of intention is rebuttable and not absolute and if the court believes the accused person's evidence relating to his intention, or thinks it is probable, and if the evidence raises a reason doubt in the mind of the Court, the accused person is entitled to be acquitted; see also R vrs Amponsah [1938] 4 WACA 120; Adekura vrs. The Republic [1984-86] 2 GLR 345.

CALDWELL/LAWRENCE RECKLESSNESS

As we have seen willfulness apparently includes Caldwell recklessness or something very similar to it.

In my opinion the best definition of this type of recklessness is to be found in Archbold 2000,

paragraph 17-52 at page 1575.

> "Recklessness on the part of the doer of an act presupposes that there is something in the circumstances that would have drawn the attention of an ordinary prudent" [and sober] "individual to the possibility that his act was capable of causing the kind of serious harmful consequences that the section that created the offence was intended to prevent, and that the risk of those harmful consequences occurring was not so slight that an ordinary prudent individual would feel justified in treating them as negligible. It is only when this is so that the doer of the act is acting 'recklessly' if, before doing the act he either fails to give any thought to the possibility of there being any such risk or, having recognized that there was such a risk, he nevertheless goes on to do it." (per Lord Diplock in R vrs Lawrence [1982] A.C. 510 at 526 E, following his own speech in R vrs. Caldwell [1982] A.C. 341 at 354C)"

The authors add that the words in square brackets are inserted on the basis of D.P.P vrs. Majewskc [1977] A.C. 443; [1975] 2 All E.R. 142 H.L.

These states of mind are not mutually exclusive. Which of them is applicable in a particular case depends on the facts of that case.

To sum up, the essential elements of causing financial loss under S. 179A(3)(a) are:

i. a financial loss;

ii. to the State;

iii. caused through the action or omission of the accused; and

iv. that the accused

(a) intended or desired to cause the loss; or

(b) foresaw the loss as virtually certain and took an unjustifiable risk of it; or

(c) foresaw the loss as the probable consequence of his act and took an unreasonable risk of it; or

(d) if he had used reasonable caution and observation it would have appeared to him that his act would probably cause or contribute to cause the loss.

COUNT ONE

All the accused persons are charged with conspiracy to cause financial loss to the State contrary to sections 23 and 179A(3) (a) of Act 29.

Conspiracy is defined by s. 23(1) of the Criminal Code, 1963 (Act 29) as:

> "If two or more persons agree to act together
>
> with a common purpose for or in committing
>
> or abetting a crime, whether with or

without any previous concert of deliberation,

each is guilty of conspiracy to commit or abet

that crime, as the case may be."

A conspiracy, then consists not merely in the intention of two or more but in agreement of two or more to commit a crime. From this definition the main ingredients of criminal conspiracy are:

(i) There must be two or more parties to it;

(ii) The parties must agree or act together;

(iii) They must do so for a common purpose; and

(iv) The common purpose of their agreeing or acting together must be to commit a crime.

THE ACTUS REUS OF CONSPIRACY—The Agreement

The essence of conspiracy lies in the formation of a scheme or agreement between the parties, not in doing the act or accomplishing the purpose for which the conspiracy is formed nor in attempting to do them, nor in instigating others to do them. Agreement or collaboration is essential. Mere knowledge or even discussion of the plot is not per se enough. The actus reus or external factor of the crime is acting in a co-ordinated fashion by which initial consent to a common purpose is exchanged.

To prove the existence of a conspiracy it is not necessary to show that any overt act was done beyond the agreement. It is also not necessary that the means or devices for achieving the purpose of the conspiracy have been agreed. It is the agreement itself which is proscribed and which gives the state an interest to interfere by instituting proceedings. As Brett J.A. said R v Aspinall (1876) 2 Q. B.D 48 at page 58:

" The crime of conspiracy is completely

committed, if it is committed at all, the moment

two or more have agreed that they will do,

at one or at some future time certain things.

It is not necessary in order to complete the

offence that any one thing should be

done beyond the agreement. The conspirators

may repent and stop, or may be prevented

or may fail. Nevertheless the crime is

committed; it was completed when they agreed".

Once a conspiracy has come into existence any person who subsequently joins the plot hatched is contaminated from the moment of entry: R. V. Hammond 170 E.R. 508.

PROOF OF AGREEMENT

In the course of submissions of counsel the case of C.O.P. vrs. Afari and Addo [1962]1 GLR 483, was often cited. In that case the Supreme Court of the First Republic held that the law of conspiracy as contained in S.23 (1) of the Criminal Code, 1960 (Act 29) "is wider in scope and content than the English law on the subject. It consists not only in the criminal agreement between two minds, but also acting together in furtherance of common criminal objective". This dictum has been used to support

the view that “our law is wider in the sense that while it is essential to prove a previous agreement in all cases of conspiracy in English Law a person may be convicted in Ghana even though there is no proof of such previous agreement”. See **Twumasi: Criminal Law in Ghana P.106**. With respect, it has probably never been essential even in England that an agreement should have been made prior to the parties acting together. If a person (A) is doing something for the purpose of committing a crime and another (B) goes to his assistance and the two act together or in concert, they might thereby be held to have conspired. If however, A is unaware of, or rejects B’s assistance there is no conspiracy although B may be guilty of abetment of offence committed or attempted by A: see R v Leigh [1775] 1 C. and K. 28 28: 17. E.R 697, [1959] Crim. L. R. 211.

Their Lordships in the Afari case did not elaborate on how the Ghana Law of conspiracy is wider in scope and content than the English common law of conspiracy. That case was not cited in the State vrs Otchere [1963] 2 GLR 403, which contains perhaps the most comprehensive Statement of the law of conspiracy by a court in this country, a judgement the prosecution in this case describes as the Locus classicus

Though it is the judgment of the Special Criminal Division of the High Court, I think it is as authoritative as any judgement of the Supreme Court of the First Republic or any other Court of Appeal in the history of this country. The court consisted of Korsah C. J., Van Lare and Akufo-Addo JJ.S.C. In their judgement per Korsah C.J their Lordship observed that the law of conspiracy as stated in our Criminal Code embodies the principles of the English law of conspiracy as enunciated in judicial decisions of the English Courts...” which have been followed by this court in the case of State v. Teiko Tagoe” (High Court) (Special Criminal Division) Accra, 17th April 1963 unreported)". The court then proceeded to cite several English cases to support its judgment. Nowhere in its comprehensive judgement did it say or suggest that the Ghana Law of conspiracy is wider in scope and content than the English common law of conspiracy.

If I had to choose between Afari and Otchere as to differences or similarities between the English common law of conspiracy and our law I would choose Otchere. In my opinion the words 'acting together' does not create a new species of conspiracy wider in scope and content than conspiracy based on agreement. By using those words S. 23 (1) the code merely puts in statutory form, and states as a rule of law what today would or should be regarded as a matter of evidence, i.e. that a previous concert may be inferred from the fact that two or more persons acted together for the common purpose of accomplishing a certain result. In Afari counsel for the appellants had argued that there was no evidence of conspiracy. It was in reaction to this argument that the Supreme Court made the Statement quoted above; and then went on to re-iterate the well-established rule of evidence in conspiracy that:

> "It is rare in conspiracy cases for there to be direct evidence of the agreement which is the gist of the crime. This usually has to be proved by evidence of subsequent acts, done in concert and so indicating a previous agreement".

This statement accurately sums up what has always been English law and our law and explains the scope and significance of the words "acting together". It states a principle of the law of evidence in conspiracy cases that conspiracy is often a matter of inference deduced from certain acts of the parties done in pursuit of a common purpose to do acts which constitute the substantive crime.

The agreement may be proved by direct evidence or by proving circumstances from which the court may presume it. In his direction to the jury in R v Murphy (I 837) 8 C. and P. 297; 173 E.R. at said:

> "Although the common design is the root of the charge, it is not necessary to prove that these two parties came together and actually agreed in terms to have the common design and to pursue it by common purpose, and so to carry it into execution. This is not necessary because in many cases of the most clearly established conspiracies there are no means of proving any such thing, and neither law nor common sense requires that it should be proved. If you find that these two persons pursued by their acts the same objects, often by the same means, one performing one part of an act, and the other another part of the same act, so as to complete it, with a view to the attainment of the object which they were pursuing, you will be at liberty to draw the conclusion that they have been engaged in a conspiracy to effect that object. The question you have to ask yourselves is, had they this common design, and did they pursue it by these common means - the design being unlawful?"

Also in R v Parnell [1881] 14 Cox C.C. 508 at page 515 Fitzgerald J. said:

> "It may be that the alleged parties have never seen each other, and have never corresponded, one may have never heard the name of the other, and yet by law they may be parties to the same common criminal agreement... it was necessary that the prosecution should establish, not indeed that the individuals were in direct communication with each other, or directly consulting together, but that they entered into an agreement with a common design. Such agreements may be made in various ways. There may be one person, to adopt the metaphor of counsel, round whom the rest revolve. The metaphor is the metaphor of a circle and its circumference. There may be a conspiracy of another kind, where the metaphor would be rather that of a chain; A

> communicates with B, B with C, C with D, and so on to the end of the list of conspirators.
>
> What has to be ascertained is always the same matter: is it true to say in the words already quoted, that the acts of the accused were done in pursuance of a criminal purpose held in common between them."

See also R v Meyrick and Ribuffi 21 Criminal Appeal R. 94 at 99.

As Glanville Williams cautions, properly read, this type of direction, is a valuable statement of a principle of the law of evidence, but it is capable of dangerous misinterpretation.

> "It must not be understood to mean that the mere fact that two persons independently pursue the same end is enough to convict them of conspiracy… A conspiracy is not merely a concurrence of wills but a concurrence resulting from agreement... If the jury are satisfied that the concurrence of the defendants' acts was accidental, the conspiracy charge must fail for the concurrence of acts is only evidence of conspiracy, not equivalent to conspiracy".

Criminal Law, The General Part paragraph 212 at page 667.

So it is not enough to prove the charge of conspiracy for the prosecution to show that the concurrence of the acts of the accused persons resulted in a loss to the state; or to put it in another way, it is not enough to show that each of the accused worked on an aspect of the Quality Grain Project or did some act in respect of the project and the combined effect of the actions was a financial loss to the State. It must also be shown, as is clear from S. 23(1) of Act 29, that they agreed or acted together with a **common purpose** to commit a crime. It is the **agreement or collaboration with a common criminal purpose** that constitutes the conspiracy and not just a collaboration that produces a result that is criminal.

In my opinion the problem with S. 23(1) is that it confuses the question of what is a sufficient agreement to found a charge of conspiracy with the type of evidence that is needed to prove it. I believe the problem created by the section and how to treat is best described in the words of Smith and Hogan, Criminal Law, 10th Edition p. 319-20.

> "The question of what is a sufficient agreement to found a charge of conspiracy is one of several questions in the criminal law which are aggravated by a confusion between the substantive law and the law of evidence. The actual agreement in most cases will probably take place in private and direct evidence of it will rarely be in existence. A very frequent way of proving it is by showing that the parties concerted in the pursuit of a common object in such a manner as to show that their actions must have been co-ordinated before hand.
>
> The danger is that the importance attached to the acts

> done may obscure the fact that these acts do not in themselves constitute a conspiracy, but only evidence of it. If the jury are left in reasonable doubt, when all the evidence is in, whether the two accused persons were acting in pursuance of an agreement, they should acquit, even though the evidence shows that they were simultaneously pursuing the same object.
>
> It may not be necessary to show that the person accused of conspiracy were in direct communication with one another. Thus, it may be that the conspiracy revolves around some third party, X, who is in touch with each of D1, D2, D3 though they are not in touch with one another; or D1 may communicate with X, X with D2, D2 with Y, Y with D3 (a chain conspiracy).
>
> "Provided that the result is that they have a common design, for example, to rob a bank, D1, D2, D3 may properly be indicted for conspiracy together though they have never been in touch with one another until they meet in the dock. It must be proved, of course, that each accused has agreed with another guilty person in relation to that single conspiracy.
>
> What has to be ascertained is always the same matter, is it true to say the acts of the accused were done in pursuance of a criminal purpose held in common between them.
>
> These propositions, for which there is ample authority, are stated in the case of Meyrick, though that case itself seems a questionable application of them."

I must say in passing that as indicated in the above quotation, most authorities now doubt the correctness of the application of the law to the facts in Meyrick (supra). What I have to decide is whether the accused persons agreed or acted together for purpose of doing something or of embarking of a course of action which would result in financial loss to the state.

Did the accused persons agree or act together? There is no doubt that each of them acted on some aspect of the Quality Grain Project. But this per se is only evidence, not proof, of conspiracy. The question is whether they agreed or acted together. "Together" means with co-operation and interchange between constituent-elements, members etc; in or into contact or union with each other; in or into one place or assembly; at the same time: — See Collins English Dictionary 2nd Edition (1986) p. 1600.

In my opinion there is evidence that some of the accused persons agreed or acted together on the Quality Grain Project. The question is whether what they did or contemplated amounted to the offence charged.

THE MENS REA OR THE MENTAL ELEMENT

It is clear from S. 23(l) that the mental element of conspiracy is purpose: that is the common purpose of the agreement or collaboration between the parties must be to commit the crime charged. This is so even where the crime contemplated is one that can only be committed recklessly or negligently or

even is a crime of strict liability.

Purpose means reason for which anything is done, created or exists; a fixed design, outcome, or idea that is the object of an action or other effort; fixed intention in doing something; determination. There must be an intention to carry out the unlawful purpose. This was emphasised by the Privy Council per Lord Griffiths in Yip Chip-Cheung vrs. R (1994) 99 Criminal Appeal R. 406, 410.

> "The crime of conspiracy requires an agreement
>
> between two or more persons to commit an
>
> unlawful act with the intention of carrying it out.
>
> It is the intention to carry out the crime that
>
> constitutes the necessary mens rea of the offence."

See also R v Anderson [1986] A.C. 27 H. L. per Lord Bridge at P. 39.E.

The accused persons must know the facts which make the purpose unlawful. This is so even when the offence to which the parties have agreed to commit is one of strict liability. Knowledge of the law on the part of the accused is immaterial. These propositions were stated by the House of Lords per Viscount Dilhorne in Churchill vrs. Walton [1967] 2 A. C. 224; [1967] ALL E.R. 497; 51 Criminal Appeal R. 212. I think the head note of the Criminal Appeal Reports at p. 212-13 sums up the ratio dedidendi of the case well.

> "Before a person can be convicted of conspiracy to commit an offence (even if the offence is one absolutely prohibited by Statute), it must be proved that he was a party to an agreement the object of which was to do something unlawful. Mens rea is an essential ingredient in conspiracy only in so far that there must be an intention to be a party to an agreement to do an unlawful act.
>
> Knowledge of the law on the part of the defendant is immaterial. If what the alleged conspirators agreed to do was, on the facts known to them, an unlawful act, a person cannot excuse himself by saying that, owing to his ignorance of the law, he did not realize that such an act was a crime. A person is not, however, rendered guilty of conspiracy if, following an agreement to which he was a party, an unlawful act is done, unless the act is one which he and others agreed to do. If, on the facts known to him, what he agreed to do was lawful, he is not rendered artificially guilty by the existence of other facts, not known to him, giving a different and criminal quality to the act upon which he agreed."

The mens rea sufficient to support the substantive offence is not necessarily sufficient to support the charge of conspiracy to commit that offence. The mens rea of conspiracy is always common purpose, a specific intent. But the mens rea of the substantive offence may be intention, recklessness or negligence; on it may require no mens rea at all.

I now turn to the evidence on Count One.

The prosecution has submitted that the conspiracy was first hatched at a meeting that the 1st, 2nd, 3rd and 4th accused persons had with Mrs. J. R. Cotton in the office of 3rd Accused in or about February 1996 at which the 1st accused introduced Mrs. Cotton and her project to the 3rd accused. It was at this meeting that the 1st and 3rd accused in the presence of 2nd and 4th accused, decided to recommend to the Government of Ghana to guarantee a loan of US $7 million that Mrs. Cotton said she was about to obtain from the Exim Bank of the United States.

The defence does not deny that this meeting took place. But counsel for both 1st and 3rd Defendants argued that none of the prosecution's 21 witnesses made any mention of this meeting. Evidence of it was given by 1st, 2nd, 3rd and 4th accused persons themselves. Therefore, according to counsel, granted that the accused persons conspired at this meeting, the evidence on it was adduced after the court had overruled the submission of no case to answer and accordingly the prosecution failed to prove the charge of conspiracy.

Counsel did not indicate the legal basis for this submission. In any case, as the prosecution pointed out, evidence of the meeting is contained in the interrogation or charge statements of some or all of the accused person which form part of the prosecution's case. But even assuming that the evidence first emerged in the evidence of the accused persons after the submission of no case was overruled that, in my opinion, does not preclude the prosecution, at the end of the trial, from producing it as part of its case against the accused persons. This is clear from Section 11 (2) of the Evidence Decree, 1975 (NRCD 323) which provides:

> "In a criminal action the burden of producing
>
> evidence, when it is on the prosecution as
>
> to any fact which is essential to guilt,
>
> requires the prosecution to produce sufficient
>
> evidence so that on all the evidence a
>
> reasonable mind could find the existence
>
> of the fact beyond a reasonable doubt."
>
> [Emphasis is mine].

See also S. 11 (3) and (4) on the tests of sufficiency.

At page of 15 of the Commentary On The Evidence Decree, 1975 there is this explanation of the phrase "on all the evidence".

> "The party with the burden of producing evidence is entitled to rely on all the evidence in the case and need not rest entirely on evidence introduced by him. The party with the burden of producing evidence on the issuemay point to evidence introduced by another party which meets or helps meet the test of sufficiency. It is for this reason that the phrase ‘on all the evidence’ is included in each of the tests of sufficiency".

CONSPIRACY TO CAUSE FINANCIAL LOSS TO THE STATE

In my opinion if two or more persons agree or act together for the common purpose of doing something, such as proposing a cause of action which on the facts known to them if done will necessarily cause or is likely to cause financial loss to the State, they are guilty of conspiracy to cause financial loss to the State.

In the circumstances of the instant case, the likelihood of financial loss to the State at the time it was agreed to recommend to the Government to guarantee the loan was obvious or ought to have been obvious to the accused persons. The Quality Grain Co. (Ghana) Ltd. had been registered only a few months or weeks before. It and its parent company Quality Grain Co. Inc. had virtually no presence in Ghana. It had not been registered as an investor by the Ghana Investment Promotion Council. It had no on-going business in Ghana. No track-record. Quality Grain Co. Incorporated the parent company of the Ghana company and its Chief Executive and dominant, moving spirit, Mrs. Cotton, were unknown quantities. They did not have any business reputation in America or elsewhere apart from what they themselves claimed.

Neither the Quality Grain Co. Inc nor Quality Grain Co. (Ghana) ltd. had money in Ghana. They had no assets in this country, which the Government of Ghana could charge as security. The Ghana Company (No.1) had failed to raise a loan of US$4.2 million form the Agricultural Development Bank because it could not provide the minimum deposit of 40 percent that the bank demanded as a condition for granting a loan. And it had not yet secured the land on which the farm was going to be made and the mill, the silos and other structures were going to be built.

All that Mrs. Cotton and the companies (which she completely controlled) had to back their request for a sovereign guarantee were the project document, the prospect of an Exim Bank Insurance for a loan from South Trust Bank of Atlanta, Georgia, U.S.A, and some self-serving references of dubious authenticity and credibility. According to P.W. 20 when he checked on them he drew blanks.

There was nothing extraordinary about the project document. It could have been written by any Department or Faculty of Agriculture of any of our Universities or an Agricultural research institute or any staff member thereof specialising in rice cultivation. One of the references, according to 1st and 3rd accused, came from the late Ron Brown, then the U.S. Secretary for Commerce, while on a visit to this country. It was apparently verbal. There was another from the Agricultural Attache' of the U.S. Embassy in Nigeria. It was written in October 1994 to back the Quality Grain Co. Inc. in negotiations with the Nigerian Government and was addressed to the then Nigerian Federal Minister of Agriculture, Alhaji Adama Ciroma. It claimed that Quality Grain was one of only two African American rice milling operatives, it was technically sound and could assist Nigeria in rice development. It said Quality Grain had had a distinguished record in rice production since 1970 and that it was a force to reckon with among small to medium size businesses. This was obviously false because according to Mr. Amoa-Awua's letter quoted bellow, it was only registered in 1990.

Another recommendation came from an Organisation called the Institute For African and Carribean Affairs at Tennessee State University. It was dated June 1991 and addressed to Alhaji Aminu Dantata of Dantata Organisation, Lagos, Nigeria. The purpose of the Institute was to promote international trade between the State of Tennessee and the nations of Africa and the Caribbean. It wrote the recommendation to support the Quality Grain Company Inc. It said after touring the processing factory of the company they were impressed with the size of their equipment etc.

It does not appear that these laudatory recommendations got Quality Grain Co. Inc. any contract in Nigeria. The last written recommendation was from Bolivar County, Mississippi, dated November 15, 1995. It was in effect a certificate that Quality Grain Co, had experience in rice and beans production.

It must be noted none of these recommendations mentioned the credit or financial situation (if any) of

the Quality Grain Co. Inc., in respect of which they were written. From what we now know it appears some if not all of the recommendations (if they were authentic) were nothing more than puffs intended to promote an American Company which was looking for business in Africa Experience has taught decision-makers to treat such recommendations or references with a healthy dose of scepticism.

It must be pointed out that technically these recommendations did not apply to Quality Grain Co. (Ghana) Ltd. They were written before this company was registered. They were written about Quality Grain Inc. of the U.S.A. Those who wrote them did not and could not know anything about the Ghana company. Therefore so far as the Ghana company was concerned these recommendations were useless and should not have been accepted as evidence of its capacity, experience, competence and viability.

In addition to the above-mentioned recommendations were the impressions of the 1st accused when he first met Mrs. Cotton in 1994 during the President's investment tour. According to him he had conversations with the staff of the Quality Grain Co. Inc. and was impressed with their knowledge and competence. However he could not visit the farm Mrs. Cotton and her staff claimed the Company had. Again it must be pointed out that a year can be a long time in business and it is possible that by the time the accused persons met in the 3rd accused's office some or all of these people might have moved on. They were the staff of the American Company and not of the Ghana Company, which had not been formed or registered as a company.

For whatever they were worth these were the only recommendations or assessments on Quality Grain Co. I do not think any prudent banker or other lender or person would lend money or guarantee a loan to any company or individual with only such references without further checks on its background, credit, resources, capacity, competence, capability or financial situation. I believe if the appropriate professional checks had been done it would have been found, as Mr. Amoa-Awuah found in 1992, that most of the claims of the company were false. As former Ghana Ambassador to the United States of America, Ambassador Koby Koomson found, proper due diligence was not done to determine if Quality Grain was capable of developing large scale rice production.

Everybody knows that a loan or guarantee of a loan carries with it the risk of default in payment and loss. That is why bankers, moneylenders and in fact all who lend money or guarantee loans demand certain counter-guarantees or security before they grant or guarantee loans. In the case before me the accused persons admit that they were aware of the risk of loss involved in the government of Ghana guaranteeing the loan to the Quality Grain Company. In fact some months after the first loan was approved by Parliament 3rd and 4th accused persons got Quality Grain Company per Mrs. Cotton to execute a Deed of Indemnity and floating Charge. But it seems when the 1st, 2nd, 3rd and 4th Accused persons met in the 3rd Accused's office to discuss Quality Grain's request for a sovereign guarantee they did not discuss with or demand from Mrs. Cotton any counter-guarantees as a condition for Ghana Government providing the guarantee. This was a reckless thing to do since in the circumstances the likelihood of the state incurring a financial loss through the company's default, non-performance, incapability or incompetence was high.

I think the prosecution have been able to establish a conspiracy to cause financial loss to the state. I must say parenthetically that conspiracy in law is not necessarily some sinister plot. It is not necessarily evil. In fact the agreement to do the unlawful act might have been motivated by good intentions or by a desire to achieve a result which the accused persons think will be beneficial. In criminal law motive is generally irrelevant in determining the question whether the act of the accused amounted to a crime. So in this case all that the prosecution had to prove was that two or more of the accused persons agreed or acted together with a common purpose for or in committing or abetting a crime, that is for doing something such as recommending a course of action which on the facts known to them, constituted the offence of causing financial loss to the state. I think the prosecution has

succeeded in doing that.

Who among the accused persons were involved in the conspiracy? Agreement implies decision. This means that at the meeting only those present who could decide on the Quality Grain's request for a sovereign guarantee and could act on that decision to get the government to grant the guarantee can be held to have conspired.

To determine the question posed it is necessary to consider the conduct and role of each of the accused persons in respect of the alleged conspiracy.

1st ACCUSED

The 1st accused, Mr. Ibrahim Adam, was PNDC Secretary for Agriculture from 1992 to 1993 and Minister for Agriculture under the 1992 Constitution from 1993 until sometime in 1996 when he was transferred to the Ministry of Trade and Industry. Before he was appointed full PNDC Secretary for Agriculture he had been Deputy Secretary for Agriculture for several years. He was Secretary when P.W.5, Ambassador Amoa-Awua, sent Exhibit "B" indicating that his findings on Quality Grain and Mrs. Cotton (then Woodard) were negative and rather recommended AG-AM of the Anderson brothers. In the normal course of things he should have received and read that letter.

As I have already said, 1st accused was in the entourage of former President Rawlings when he went on his investment tour of America in 1994. He met Mrs. Cotton during the tour and had discussions with her on her plans for rice development in Ghana. He also had discussions with the staff of Quality Grain Company Inc. and was impressed with their knowledge and competence but did not visit the company's farm. When Mrs. Cotton came to Ghana in 1995 she called upon him in his capacity as Minister of Agriculture. 1st accused did everything possible to assist her and her company. He advised her to register a company under the laws of Ghana and introduced her to the Ghana Association of Farmers and Fishermen whose President, Mr. Bismark Nettey, was appointed, one of the first directors of Quality Grain Company (Ghana) Ltd. (No.1) when it was registered in July 1995. It was also 1st accused who introduced her and her company to Egala, Atitso and Company, a firm of chartered accountants, which prepared the cash flow analysis attached to the project document the Quality Grain submitted to the Agricultural Development Bank when the company applied for a loan from that bank. The meeting between the bank and Mrs Cotton was arraigned through the instrumentality of 1st accused.

Apart from all this advice and assistance and encouragement he gave to Mrs. Cotton and her company, 1st accused promised them that the government would provide the land, that is, Aveyime land — for the farm, the mill and other facilities. He and former President Rawlings flew with Mrs. Cotton over the land.

1st accused also promised that the government would provide land clearing equipment and other amenities for the project. Two or three years later Mrs. Cotton used the failure to fulfil these promises as a justification for delays in the completion of the project and her claim for compensation of US$ 5.5 million.

Even after he had left the Ministry of Food and Agriculture and had ceased to be minister his association with the rice project did not completely cease. When the Ministry was looking for more, land for Quality Grain Company in the Northern part of Ghana it was to him that Mrs. Cotton and a delegation were sent to lead them in a search for land. He also attended Mrs. Cotton's wedding in August 1997 Atlanta, Georgia, USA.

More important, and crucial, was the meeting in the office of the 3rd accused in February 1996 when according to the prosecution, the conspiracy was hatched. It was at this meeting that the 1st accused introduced Mrs Cotton to the 3rd accused. 1st accused must have told the 3rd accused of the

favourable impressions he had formed about the Quality Grain Project, Mrs. Cotton and her staff, the viability of the project and how it was likely to reduce rice imports and, of course, the prospect of an Exim Bank loan. He obviously succeeded in convincing the 3rd accused to support the project.

1st accused has denied that Mrs Cotton and her company were given special treatment. According to him the assistance and advice he gave to them were routine and formed part of the efforts of Ministry of Food and Agriculture to attract and encourage investment in the agricultural sector. I agree that everything should be done to attract and keep investors. But this does not mean that we should not do due diligence checks on them or get Ghana Government to be committed to them financially and materially without ensuring that there are adequate safeguards for the protection of the interests of the nation.

3RD ACCUSED

At all material times the 3rd accused, Mr. Kwame Peprah, was the Minister of Finance. As such he was the keeper of the national purse. There could be no government expenditure or financial commitment without his concurrence. If in the instant case he had refused to back the project it would have died in his office. He could have laid down conditions for issuing the guarantee and the mechanism for monitoring the use of the money the government had guaranteed. At the meeting in his office he agreed to recommend to the government to guarantee the loan Mrs. Cotton and Quality Grain wanted. He subsequently got the Cabinet and Parliament to approve the guarantee.

I find that at the meeting in February 1996 in the 3rd accused's office 3rd and 1st accused agreed to get the government to, guarantee a loan which Quality Grain expected from South Trust Bank with Exim Bank insurance in circumstances which on the facts known to them was likely to cause financial loss to the state.

It was the 3rd accused who ordered repayment of the loan when Quality Grain defaulted without demanding Quality Grain to indemnify the government or enforcing the floating charge. But more on this later.

2ND ACCUSED

2nd accused, Dr. Samuel Kwadwo Dapaah, was the Chief Director of the Ministry of Food and Agriculture throughout the period the alleged offences occurred. In fact he continued in that capacity until after the trial of this case began in May 2001. As the Chief Director he was the Civil Service Head of the Ministry. His direct boss was the Minister who at the time the conspiracy was formed was the 1st accused.

According to the prosecution, the role of 2nd accused, in the realisation of the conspiracy consisted in his reaction to the request from Mrs. Cotton in Exhibit “AAAAA” fraudulently to inform officials at Exim Bank that the feasibility study on the Quality Grain Project in Ghana was carried out by a private sector firm and that the Government of Ghana or its representatives had no role to play in the production of the proposal. In the view of the prosecution this was a misrepresentation and no doubt this misrepresentation assisted in the grant of the Exim Bank facility to Quality Grain Company (Ghana) Ltd which was being fraudulently presented as a joint venture between Mrs. Cotton and the Government of Ghana. The prosecution say this was a misrepresentation because it thought the project document Quality Grain submitted to Exim Bank had been written by the Ministry of Agriculture and ADB. According to P.W. 20, on whose evidence this view was based, Exhibits “AAAAA” and “QQQ” confirmed this.

Exhibit “AAAAA” was a memorandum dated 16/9/96 from Mr. William Browning, then Vice-President of South Trust Bank, to Mrs. Cotton seeking some information. Mrs. Cotton minuted it to 2nd accused thus:

"Dear Dapaah,

I informed the Exim Bank that Quality Grain Company Ghana Limited would use Agricultural Development Bank as the Bank for our company, and the ADB would make the wire transfer for our loan payments since that would be the bank used to deposit the proceeds from the sale of rice. They are aware that the ADB is a Government Bank, but I told them they helped put the proposal together with information submitted to them by Egala, Atiso and Associates, Chartered Accountants referred by Minister Adam, that is why the charge for $3000.00 is in the proposal, in order for us to pay them for the accounting work that they did. Also Angela in your department assisted in gathering data from the Ministry of Trade and Industry of the import value, so the sensitivity pricing could be done.

I just need a brief letter from your ministry, that an independent 3rd party put this proposal together and it was not the Ministry of Finance. I guess they want to make sure that Government is not trying to get "free money."

Thanks, J.R. Woodard

(Signed)

"I NEED THIS TODAY FAXED TO OUR OFFICE

BEFORE YOU LEAVE, PLEASE, PLEASE"

In reply 2nd accused faxed:

"Dear Madam,

RE: QUALITY GRAIN COMPANY (GH) LIMITED

This is to confirm that the Feasibility Study on the Quality Grain Project in Ghana was carried out independently by a Private Sector firm of Chartered Accountants: Egala, Atiso and Associate and that the Government of Ghana or its representatives had no role to play in the production of the proposal.

For: HON. MINISTER OF FOOD AND AGRICULTURE

(S. K. DAPAAH) DR

CHIEF DIRECTOR

While it is not entirely true that Egala, Atiso and Associates prepared the whole of the feasibility study (the firm having only supplied the financial statement attached to it which might have been updated by ADB), I do not see how this correspondence between 2nd accused and Mrs. Cotton confirmed the hand of the Ministry of Agriculture in the preparation of the study. There is nothing in or about the study, which indicates the authorship of the Ministry of Agriculture or any representative of the Ghana Government. Although P.W.20 insisted under cross-examination that it was prepared by the Ministry of Agriculture he could not produce any evidence in support of his contention. P.W.20 seemed to think the $3,000.00 mentioned in Mrs. Cotton's letter was paid to officers of the Ministry of Agriculture; but it is clear from that letter that that money was going to be paid to Egala, Atiso and Associates.

I think the allegation that 2nd accused misrepresented the authorship of the feasibility study is not

supported by evidence.

2nd accused was present at the meeting in 3rd accused's office when it was agreed to recommend to the government to guarantee the 1st loan. He accompanied his boss, the 1st accused. This was in consonance with the normal practice of Ministers being accompanied to official meetings of that kind by a Chief Director or Director or some other senior officers of the Ministry. At such a meeting the officer accompanying the Minister has no decision-making rights or powers. He has no right to speak or proffer his advice or opinion unless asked by his boss to do so.

There is evidence that at the meeting under reference the 4th accused did not speak. The law is that the mere presence of a person at the scene of crime does not make him an accomplice or perpetrator. I therefore find that mere presence of 2nd accused at the meeting did not make him a co-conspirator.

In support of its case against 2nd accused the prosecution alleged that to satisfy Mrs. Cotton's demand for more land 2nd accused sent Mr. Torgbor; P.W. 12, and a delegation with Mrs. Cotton to 1st accused in Tamale to find land for them. On the evidence before me I accept 2nd accused's explanation that he did that on the instructions of the then Minister of Food and Agriculture, Dr. Kwabena Adjei.

Perhaps the most serious evidence against 2nd accused is that he attended Mrs. Cotton's wedding as her paid guest. 2nd accused himself has admitted that this was wrong and has expressed his regret for it. Undoubtedly this has created the suspicion that the invitation was a reward for some favours 2nd accused like others, did for Mrs. Cotton. It is also evidence of a cordial relationship between them. But the question is whether this implicates 2nd accused in a conspiracy to cause financial loss to the state.

In my opinion the answer must be in the negative. There is no evidence that 2nd accused used any state resources for the journey. Mrs. Cotton's wedding took place after the meeting where the conspiracy was first hatched. I do not think the only irresistible conclusion one can infer from 2nd accused’s attendance at the wedding was because he and others had conspired to cause financial loss to the state by unlawfully favouring Mrs. Cotton.

2nd accused attended several meetings, wrote memoranda and letters and did many other things in connection with the Quality Grain project. Inevitably in some of these activities he had to act together with other state officials including the accused persons. But in my opinion whatever 2nd accused did was done in the normal course of duty and in compliance with Code of Conduct of the Ghana Civil Service. As P.W. 20, who gave the main evidence against 2nd accused as against other accused persons), admitted, the position of 2nd accused made him duty-bound to serve the government of the day in accordance with the Code. He was required to fully support and implement Government policies, which were brought to him. He was also required to conduct affairs in such a much manner as would retain the confidence and trust of the sector Minister, his boss. He was supposed to be faceless and not to project himself by indicating his specific contribution to government policy development. His duty was to implement government policies impartially, transparently and painlessly at all times.

In my opinion, in so far as the conspiracy charge is concerned, the 2nd accused did not do anything, apart from attending Mrs. Cotton's wedding which went beyond what a civil servant in his position should or can do or which fell grossly below the standard of care and skill expected of a Chief Director.

4TH ACCUSED

For the greater part of the period material to this case 4th accused was a civil servant as Head of Legal Division of the Ministry of Finance. His boss was 3rd accused.

In the course of the meeting in February 1996 where the conspiracy was allegedly formed 3rd accused called in 4th accused. The evidence is that 4th accused did not talk during the meeting but only took down notes. Like 2nd accused he did not have decision making powers or rights at the meeting. I therefore find, as I have found in the case of 2nd accused, he was not a party to the agreement made at the meeting to recommend to the government to guarantee the first loan.

But, unlike 2nd accused, 4th accused subsequently did several things which made him a party to the conspiracy formed by 1st and 3rd accused persons. At or as a result of the meeting it was decided to form a new company in which the government would have shares. It was registered in February 1996. It was agreed that Mrs. Cotton representing Quality Grain would have 76 per cent of the shares and the government of Ghana 24 per cent. The new company had the same name and objects as the company registered by Mrs. Cotton in July 1995. But there were two differences between the two companies; as I have said the government of Ghana had 24 per cent of the shares in the new company while it had none in the first one; and 4th accused was a director of the new company, not Mr. Nettey.

P.W. 1 Mr. Harlley testified that he drew the attention of Mrs. Cotton and 4th accused to the anomaly and irregularity of two companies having the same name and objects. 4th accused promised that the two companies would be amalgamated. This was never done. The result is that throughout the period covered by this case there were two companies registered by the Registrar bearing the same name and having the same objects. This was a recipe for confusion; It seems the existence of the 2nd company was not well known. For example P.W.15 who wrote a report on the project seemed to know of the 1st company only.

4th accused as a director appointed by the government was supposed to protect the interest of the government. He was also expected to participate in the management of the company. He did neither well. As a director of a company registered under the Companies Code, 1963 (Act 179) he was bound by the provisions of that Act; so of course were Mrs. Cotton and the Company itself. The Code requires that a company must hold an annual general meeting every year unless such a meeting is lawfully waived: See S.149(l) and (3) of Act 179. No general meeting was held throughout the relevant period. There is no evidence that 4th accused made any effort to get one held, such as by applying to the Registrar to convene a meeting under S.149(4) or by requisitioning a meeting under Sections 150 (3) and 271 of Act 179.

There never was a directors' meeting. It appears Mrs. Cotton ran the company as if she were the sole shareholder and only director of the company; 4th accused only did her biddings or accompanied her to the Castle to make demands for more assistance. Throughout the relevant period the company never circulated nor filed annual accounts as required by S.124 of Act 179. It is most likely, it never kept books of account as required by S.123, in Ghana.

It is not surprising that 4th accused, even though he was a director and others did not know how the moneys borrowed with government guarantee were utilised.

4th accused did all the legal work in connection with the project and the loans the government guaranteed or granted to Quality Grain Co. This usurpation of the functions of the Attorney General drew a strong protest from the then Governor of Bank of Ghana, Dr. G. K. Agama. On November 8, 1996 he wrote the then Attorney General and Minister of Justice, Dr. Obed Asamoah, to review the processes involved in the Government's external borrowing function and to direct the Solicitor-General to get fully involved in the legal aspects of the Government's foreign borrowing as had been the case in the past before the legal unit of the Ministry of Finance was set up. He stated that the Bank of Ghana was empowered under Section 48(2) of the Bank of Ghana Law, 1992 (PNDCL 225) to guarantee foreign loans at the request of the Minister of Finance. Before the Bank provided such guarantees it insisted inter alia that the Minister provided Solicitor-General's Opinion confirming

the legal validity of the loan transaction and the fact that all relevant Cabinet/Parliamentary and other approvals had been obtained by the Minister. Since the Solicitor-General reported to the Attorney-General and Minister of Justice who was the Principal Legal Advisor to the Government, the Bank had always relied on his legal opinion as conclusive that the Minister of Finance had satisfied all legal requirements governing government borrowing from external sources. For years, this practice had worked smoothly.

He continued

> "However, when a legal unit was set up at the Ministry of Finance, the unit apparently took over the role of the Solicitor-General in so far as external borrowing is concerned."

The bank was relying not only on the legal opinion of the Solicitor-General's but also on written confirmations from the legal unit of the Ministry of Finance that all legal conditions relating to specific government borrowings had been satisfied.

The Governor wrote that investigations had revealed that the legal unit of the Ministry of Finance was involved in the following:

(i) Loan negotiations;

(ii) Loan documentation;

(iii) Requesting the Bank of Ghana and the Controller and Accountant-General to issue overseas guarantee and counter-guarantees respectively.

(iv) Obtaining Cabinet and Parliamentary approval

(v) Participating in the disbursement of the loans.

This was obviously a matter of concern to the Governor hence his request for a review of the processes involved in the Government's external borrowing functions and the involvement of the Solicitor-General. The Governor's letters was copied to 3rd accused.

In reaction to that letter the Attorney-General wrote a letter dated 4th February, 1997 to 3rd accused. He wrote, referring to the Governor's letter,

> "In that letter the Governor raised
>
> the issue of the need of the staff of my
>
> department getting involved in all
>
> aspects of the Governments
>
> external borrowing. The points raised by the
>
> Governor in this regard are valid.
>
> By Article 88 of the 1992 Constitution
>
> the Attorney-General is the principal
>
> legal advisor to the Government.
>
> As such, all documents involving
>
> legal issues which have a binding
>
> effect on the government must have
>
> the Attorney-General's representative

involved in the negotiations prior to
the signing of the documents.
The staff of my department had hitherto
been left out of such negotiations.
I am by this letter calling your attention
to the need to have my staff involved
in all aspects of Government external borrowing.
This office will no longer
issue a Legal Opinion on any external
loan transaction unless we have prior
involvement in such transaction."

The letter was copied to the Governor.

It does not appear these letters had any effect on 3rd and 4th accused so far as Quality Grain was concerned. There is clear evidence that in later transactions with Quality Grain the Attorney General's Department was not involved and did not know the extent of Ghana Governments commitment. Thus the Solicitor-General first got to know of those sometime in January 1999 when he attended a meeting to discuss Mrs. Cotton's demands for a compensation of US$5.5 million and other things. It was then that he was briefed. By that time the damage had been done: Ghana had become liable to pay the loans granted to Quality Grain and had in fact started to make some payments.

4th accused was also the contact between creditors under the loans granted to Quality Grain and Ministry of Finance. It was to or through him that creditors who claimed there had been default in paying their debts wrote letters or sent debit notes. So far as I know such demands should be addressed to the Minister of Finance himself, the Controller and Accountant General or the Bank of Ghana – not to a legal Officer in the Ministry of Finance who had no power to approve, order or make disbursements of state money. This situation shows the extent of 4th accused's involvement in the Quality Grain Transaction; it went far beyond the functions of a civil servant in his position.

In my opinion 4th accused by failing to take adequate measures to protect or, promote the interests of the government of Ghana whom he represented on the board of Quality Grain Company acted in breach of his duties as a director of the company. For the purposes of the Companies Code the expression "directors" means those persons, by whatever name called, who are appointed to direct and administer the business of the company. S.179 (1) of Act 179, I presume that when 4th accused was appointed a director of Quality Grain he was expected to be involved in the direction and administration or management of the company so as to protect and promote the interests of the company.

By his own admission he could not do so because he was too busy with other matters and the affairs of the company were in effect being Managed from the Castle by the then Vice-President Prof. J. E. A. Mills. These are not good excuses. If he was too busy he should not have accepted the appointment or should have resigned. I do not think this was an appointment he was bound to accept or retain. He was not indispensable unless of course because of his relationship with Quality Grain Company or for special reasons it would not have been prudent to replace him.

4th accused described Prof. Mills as the super-director of the Quality Grain Company. From the evidence, including the Professor's own evidence, I do not have any doubt that Prof. Mills often

intervened in and even ran the affairs of the Quality Grain Company. He was in effect, what in Company law is called a “Shadow Director”. Section 179(2) (b) of Act 179 defines such a director as a person on whose directions or instructions the duly appointed directors are accustomed to act. Such a director is subject to the same duties and liabilities as if he were a duly appointed director of the company. But the existence of a shadow director does not release the duly appointed director from his duties or liabilities as a director, for the proviso to Section 179(2) provides "that nothing in this subsection contained shall be deemed to derogate from the duties and liabilities of the duly appointed directors, including the duty not to act on the directions or instructions of any other person”. The involvement of Former Vice-President Prof. Mills did not preclude 4th accused form taking measures to protect the interests of the government. In fact it should have made it easier for him to draw attention to the delays, anomalies and irregularities being perpetrated by Mrs. Cotton and her Company - if he was aware of them - since because of the former Vice-President's interest it might have been easier to reach him personally or through memos and letters.

4th accused even got involved in a suit discussed elsewhere in this judgment, in America between Mrs. Cotton and some of the Shareholders of Quality Grain Company Ltd. who were trying to get a receiver and manager for the company appointed and its accounting accounts opened up for inspection. He made an affidavit in support of Mrs. Cotton.

I do not think it is necessary for me to continue to refer to things done by 4th accused in respect of Quality Grain Company, which went beyond his functions as a civil servant.

As I have said 4th accused failed to discharge well his duties as a director of the company. Section 203 lays down the basic duties of a director of a company registered under Act 179. I quote subsections (1) and (2):

> (1) A director of a company stands in
> fiduciary relationship towards the
> company and shall observe the utmost
> good faith towards the company in any
> transaction with it or on its behalf.
>
> (2) A director shall act at all times in what
> he believes to be the best interests of
> the company as a whole so as to preserve
> its assets, further its business, and promote
> the purposes for which it was formed, and
> in such a manner as a faithful, diligent,
> careful and ordinarily skilful director would act in
> the circumstances".

Subsection 2 is particularly pertinent. I do not think it is necessary to enter into any detailed discussion of it. All I would like to say is that the duties it imposes on directors are more onerous than the lowly standards set in Re City Equitable Fire Insurance Company Limited. [1925] Ch.407.

The effect of the subsection is summed up in Gower's Report page 146;

> “Subsection 2 emphasises the primary

> duty of the directors to preserve the company's assets and promote its business or objects. It further provides that a director shall act in such a manner as a faithful, diligent, careful and ordinarily skilful director would act in the circumstances. The word “faithful” adds little to what has gone before. But the remaining words are important. They emphasise that in addition to his duties of good faith a director must display some degree of care and skill. Under the existing law this is a very low degree: See Re City Equitable Fire Insurance Company [1925] Ch. 407.”

In my opinion on the evidence I have already referred to 4th accused failed to reach the standards set in s.203 (2) of Act 179.

4th and 3rd accused in evidence, and through counsel in their addresses, strenuously contended that by getting Mrs. Cotton to reluctantly sign the Deed of Indemnity and Floating Charge they took adequate measures to protect the interest of the Government. I do not agree. The floating charge was registrable under Section 86(5) and Part L of Chapter II of Act 179 (sections 107-118). It was never registered when the accused persons were in office. It therefore became void under Section 107(l). Equally serious, no effort was made to enforce the terms of indemnity and floating charge agreement even though Mrs. Cotton and her company completely ignored it. The indemnity clauses obligated the company to irrevocably and unconditionally guarantee to Government the due and punctual payment in US Dollars of the principal, interest, charges and all amounts which may become due from the company (whether at stated maturity, by acceleration or otherwise) under the loan agreement. It never gave such guarantee. It made only one payment and Mrs. Cotton regarded even that as a favour it had done to the government: thereafter she clearly expected the government to repay the debt. The company undertook in the deed to open before the first disbursement an escrow account into which 20 percent of its gross income and such additional sums as might be agreed would be paid to ensure that at all times during the validity of the Indemnity, the positive balance on the account would be sufficient to meet the company's repayment obligations under the Loan Agreement for the succeeding six months period. The company never opened any escrow account.

Under the Indemnity and Floating Charge agreement, the company's defaults in the payment of the loan, its failure to open the escrow account, its threats not to carry on all or a substantial part of its business and the actual cessation of its operations and other breaches of the agreement, entitled the government to 'convert' the floating charge into a fixed charge and demand repayment of moneys already paid by it under the Loan Agreement and the Promissory Note it had issued. Instead of exercising this right, the government allowed itself to be bullied and blackmailed by Mrs. Cotton. 4th accused as a director and the lawyer who drew up the agreement should have insisted upon the government enforcing its rights when Mrs. Cotton was making her demands for compensation or more money. He never did.

In my opinion, by his actions and omissions 4th accused joined the conspiracy to wilfully cause

financial loss to the state formed by 1st and 3rd accused at the meeting in February 1996.

5TH ACCUSED

5th accused was the Chief of Staff for much of the period of the alleged conspiracy. He was not at the meeting held in 3rd accused's office in February, 1996. He does not seem to have been involved in the affairs of Quality Grain Company until 1998 when in his capacity as Chief of Staff, he paid to occupants of Aveyime land compensation recommended by the Gamey Committee and attended some meetings to discuss Mrs. Cotton's demand for compensation and other things.

Although he dealt with an aspect of the Quality Grain Project i.e. Payment of compensation to occupants of Aveyime land (also called in these proceedings 'squatters') he did not share a common purpose with 1st, 3rd and 4th accused persons or any of them.

The prosecution has therefore failed to establish the charge of conspiracy against 5th accused.

SECOND COUNT (FIRST LOAN)

Following the meeting in February 1996 in 3rd accused person's office, his Deputy Minister Mr. K. B. Amissah-Arthur signed and sent a memorandum on 26th July, 1996 to Parliament inviting members to consider and give approval to Government to issue a guarantee for an Export Credit of US $7,000,000.00 from the US Exim Bank to the Government of Ghana. According to the memorandum

> "The guarantee is to enable Quality Grain Inc.
>
> of the U. S. to finance 85% of the cost of
>
> farm equipment for the Aveyime Rice Mill and
>
> for the provision of services incidental to
>
> the Aveyime Rice Project". [Emphasis supplied]

It went on to say that Government was then importing about 250,000 metric tonnes of Rice at the cost of about US $100 million to supplement local production. The guarantee would enable the Ministry of Food and Agriculture the production of 20,000 tonnes of Long Grain Rice on 4,000 acres of land in the Aveyime area by Quality Grain Company (Ghana) Limited, a Ghanaian American Joint Venture Company.

The Financing terms of the Export Credit for which the guarantee was sought were as follows:

Borrower	-	Republic of Ghana represented by the Minister of Finance
Amount	-	U. S. $7,000,000.00
Interest Rate	-	7.49%
Commitment Fee	-	0.50 per annum.
Exposure Fee	-	4% of the Facility.

(I must point out that at the time the memo was sent 1st accused had left Ministry of Food and Agriculture for Trade and Industry.) It must be noted that the impression this memo created was that it was the Government of Ghana which was borrowing the money to enable the American Quality Grain Inc. to acquire farm equipment to enable the Ministry of Food and Agriculture promote rice production by the Ghanaian Quality Grain Co. (Ghana) Ltd. It is a bit confusing.

If it was the Government which was borrowing the money to enable Quality Grain Company Inc. and Ghana Ltd. to carry out a project then the Loan Agreement should have stated that it was the borrower. Rather it said the Quality Grain Company (Ghana) Ltd. was the borrower and the

Government of Ghana was the guarantor. Also if the Ghana Government was the borrower the loan proceeds should have been paid into its account at the Bank of Ghana. But it appears the proceeds were, eventually paid into a Quality Grain Company account in America which was completely controlled by Mrs. Cotton.

The memorandum did not say anything about Quality Grain Company (Ghana) Ltd. or Mrs. Cotton to enable members determine whether they were capable of carrying out a large scale rice production project. There was some uncertainty about the amount being borrowed or guaranteed: the Report from the Finance Committee of Parliament stated it to be U.S. $5.9 million while Mr. Amissah Arthur's memorandum said it was U.S. $7 million. During debates 3rd accused said it was U.S.$7 million. And it was U.S. $7 million Parliament approved. On the basis of the memorandum members of Parliament thought the loan agreement was between the Government of Ghana and the justly prestigious Exim Bank while in fact the lending bank was a relatively obscure bank. Exim Bank only insured the loan. On the recommendation of the Agriculture Committee Parliament approved the guarantee on 31st July 1996.

A Loan Agreement between Quality Grain Company (Ghana) Ltd. as the borrower, the Ministry of Finance of the Republic of Ghana, as guarantor and South Trust Bank of Alabama, as the lender (The Bank), was signed on 13th November 1996. The Agreement stated the amount to be borrowed to be U.S.$6,196,330.00 (and not U.S. $7 million approved by Parliament). The purpose of the loan was solely for the acquisition by the company of certain rice milling equipment and certain agricultural implements and equipment (the “Equipment”), including shipment (insurance and freight) of the Equipment to Accra. The U.S. $6,196,330 was stated to be the purchase price of the Equipment “from various suppliers pursuant to certain purchase orders initialled by the suppliers and the company. As we shall see presently there were in fact no purchase orders initialled by suppliers and the company but some spurious invoices prepared by Mrs. Cotton and one of her colleagues.

Under the Loan Agreement a condition precedent to the Bank making each disbursement under the Loan was prior receipt by it of certain documents including

(i) Promissory note for the amount of the disbursement;

(ii) A duly executed Release and Authorisation from the company and the Ministry;

(iii) A duly executed and unaltered Exporter Certificate and Agreement;

(iv) A duly executed and delivered Demand Note

(v) Completed transport documents of title regarding the specified equipment for which the disbursement was being made consist on their face with the Exporter Certificate and Agreement and the Beneficiary Certificate and Agreement;

(vi) A Commercial invoice from the supplier regarding the specific Equipment for which the disbursement was being made consistent on its face with the Exporter Certificate and Agreement and the Beneficiary Certificate and Agreement

(vii) A certificate of Marino cargo and freight insurance

(viii) An executed copy of the loan agreement duly stamped in Ghana by the company with satisfactory evidence that all stamp duties, taxes, charges and fees payable in connection therewith have been duly paid.

The obvious purpose of these conditions precedent to disbursements was to ensure that each disbursement was only made against submission of appropriate documents in order to ensure that the loan was used for the purpose for which it was granted and to eliminate or reduce fraud, misappropriation or misapplication.

However, at the time the Loan Agreement was signed or soon thereafter, 3rd accused signed a "Release and Authorisation" document irrevocably authorising the Bank to disburse the amount of U.S. $6,196,330 (that is the whole loan amount) to the company for purchase of "certain equipment and goods". In the same document he also certified that he had inspected and reviewed either personally or by duly authorized agent, or had waived inspection and review of the goods to be delivered to the company. The Ministry concurred that the company accepted and took delivery of such equipment and goods and would not hold the Bank responsible for any failure for such delivery. The Bank was also released from all obligations.

Mrs. Cotton also signed a similar document. By authorizing the whole amount of the loan to be released to the company and waiving inspection and review of equipment and goods, 3rd accused put all the loan found at the complete disposal of Mrs. Cotton to use as she saw fit. And she did use it to enrich herself.

3rd accused also signed a Demand note evidencing the debt of U.S. $6,196,330 as well as a promissory note undertaking to repay it in ten instalments at U.S. $619,633 each, payable every six months on every 15th day of March and 15th day of September.

With the whole loan amount at her disposal Mrs. Cotton embarked on her fraudulent schemes. Contrary to Exim Bank rules that no supplier shall have an equitable interest in the purchasing company she and a colleague, one James McGarrh, decided to do exactly that so that she could, of course, misappropriate the funds. Before the loan funds became available to Quality Grain Company Inc. the company had three shareholders: Mrs. Cotton owned 65 per cent, her uncle Oscar Hudson 35 per cent and James McGarrh 10 per cent. On the loan funds becoming available, McGarrh, acting on instructions of Mrs. Cotton, offered to supply the equipment the company wanted to buy. Since this was contrary to Exim Bank, rules he was compelled to give up his interest in Quality Grain Company Inc. Since he was not a member of Quality Grain Company (Ghana) Ltd. He appeared free to be a supplier to that company. For that purpose he registered a company in Tennessee called Agric-Tech. He was the sole shareholder. This company entered into an agreement, called "Purchase and Sales Agreement For Management and Technical Services" with Quality Grain Company (Ghana) Ltd. On 7th November, 1996.

But before I say what the agreement was about perhaps we should let Mr. MacGarrh say in the words of an Affidavit he made on 1st October 1999 when he and Oscar Hudson were locked in litigation with Mrs. Cotton the real purpose of Agri-Tech:

> "That Juliet R ("J.R.") Woodard Cotton formed Quality Grain Company (Ghana) Ltd. to grow rice in Ghana, West Africa.
>
> That in 1996 acting on the instructions of Juliet R. (J.R.) Woodard Cotton I registered a company in Tennessee called Agri-Tech as a sole proprietorship to handle the purchase of farm equipment and render other services for Quality Grain Company (Ghana) Ltd. for a fee with the understanding that such fees would be split between myself, Mr. Oscar Hudson and Juliet ("J.R.") Woodard Cotton.
>
> That I used my home address for Agri-Tech and Agri-Tech did not have any employees. That I

> opened an account on behalf of Agri-Tech at First Tennessee Bank. That in order to avoid conflicts of interest and to avoid violating non-affiliation provisions in the loan agreement, which financed Quality Grain Company (Ghana) Ltd., I was instructed by Juliet ("J.R.") Woodard Cotton to resign as Vice-President of Quality Grain Inc. and to continue to hold my 10% share of the stock of Quality Grain Company Inc. when I set up Agri-Tech.
>
> That at the instruction and demand of Juliet R ("J.R.") Woodard Cotton, I signed blank purchase orders and invoices on Agri-Tech's letter head so that Juliet ("J.R.") Woodard Cotton could use these at her convenience to present as accounts payable to financial institutions including South Trust Bank of Atlanta, Georgia, for services supposedly provided, by Agri-Tech. That to the best of my knowledge based on upon Juliet ("J.R.") Woodard Cotton's submission of Agri-Tech invoices over $12,000,000 (Twelve Million Dollars) were wire transferred into the account of Agri-Tech which Juliet ("J.R.") Woodard Cotton in turn transferred into the accounts of Quality Grain Company Inc. or in to other accounts for her personal use.
>
> That to the best of my knowledge Agri-Tech did not perform any services or purchase any equipment or ship any equipment for or on behalf of Quality Grain Company Inc. or on behalf of Quality Grain Company (Ghana) Ltd.
>
> That I did not receive any money or fees which were charged by and paid to Agri-Tech and to my knowledge neither did Oscar Hudson".

This affidavit was made during the trial of the action Oscar Hudson and McGarrh brought against Mrs. Cotton which I have referred to elsewhere. They apparently fell out with her when she refused to give them a share of the booty which the loan funds were.

Under the spurious Purchase and Sales Agreement that Agri-Tech made with Quality Grain Company (Ghana) Ltd. the seller (Agri-Tech contracted to provide about 21 services to Quality Grain Company (Ghana) Ltd. As McGarrh himself admitted in the affidavit quoted above Agri-Tech did not provide any such services.

In accordance with her plan to defraud the Government of Ghana, Mrs. Cotton, on behalf of Quality Grain Company (Ghana) Ltd., and Mr. McGarrh, on behalf of Agri-Tech, on November 15, 1996 entered into an "Agreement To Subcontract with Quality Grain Company Inc." According to the terms of this fraudulent contract, Agri-Tech, the seller, agreed that it could not fulfil under the

contracts previously submitted that were accepted by the buyer Quality **[p.57]** Grain Company (Ghana) Ltd. Agri-Tech agreed to honour the Sub-contract with Quality Grain Co. Inc. and to pay the latter U.S. $150,000.00 as a Management fee.

Agri-Tech also agreed “to pay the Exporter of record fee” to Mrs. Cotton “for sourcing and putting the equipment for the project in the agreed amount of U.S. $1,200,000.00 out of the initial payment received from the Seller (Agri-Tech) through Quality Grain Company Ghana Ltd. which is to be paid Quality Grain Company Inc., the Subcontractor”.

Agri-Tech further agreed that it could not meet the 15 per cent down payment that was required of it in the amount of $1,050,000.00. It therefore agreed to give full control of the Subcontract "Submitted" to Quality Grain Company Inc. to carry out the fulfilment of the invoices since it was not able to get any expatriates to go to Ghana to and execute the project.

In spite of this Agri-Tech “Submitted” several pro-forma invoices which Mrs. Cotton “accepted” on behalf of Quality Grain Company (Ghana) Ltd. All of them were prepared on April 8, 1997. They were supposed to be for different phases of the project.

PHASE I - DESIGN AND CLEARING LAYOUT

DESIGN OF FIELDS

Total Invoice Phase I = U.S.$ 2,215,000

This amount was stated to be due and payable on or before September 30, 1997.

PHASE II - INFRASTRUCTURE, STRUCTURE DESIGNS,

SITE ENGINEERING

Total Invoice Phase II = U.S.$ 4,980,161.36

This amount was stated to be due and payable on or before October 25, 1997.

PHASE III - INFRASTRUCTURE, STRUCTURE ERECTION,

SITE ENGINEERING

Total Invoice Phase III = U.S.$1,740,000.18

This amount was stated to be due and payable on or before October 18, 1997.

PHASE II - INFRASTRUCTURE, STRUCTURE DESIGN,

SITE ENGINEERING

Total Invoice Phase II = U.S.$3,240,161.18.

This amount was stated to be due and payable on or before October 15, 1997.

There is an interesting invoice dated November 26, 1996, prepared by Mr. McGarrh for Agri-Tech and accepted by Mrs. Cotton on behalf of Quality Grain Company (Ghana) Ltd. It was for:

> “Delivery for Service executed in Section:
>
> Services completed November 13, 1996.
>
> a. 737 Days Total Time spent for execution of
>
> section 1:U.S.$2,299,281.40 Re-imbursement
>
> for pre-project services, November 7-November

13, 1996. Travel Expense, Lodging expense:

1. Senior Executive Billing at - **U.S.$2552.77**
   per day X 737 days - **U.S.$1,859,281.40**
2. Junior Executive Billing at - **U.S.$1050.00**
   per day X 200 days - **U.S.$ 440,000.00**

TOTAL AMOUNT - U.S.$2,299,281.40

INVOICE PAYABLE AND DUE NOW. PLEASE WIRE TRANSFER FUNDS TO ACCOUNT NO. 37-0609048, ACCOUNT NAME, AGRI-TECH NAME OF BANK: FIRST TENNESSEE BANK BANK ABA NUMBER 084000026"

By November 13, 1996 Quality Grain Company (Ghana) Ltd. had existed in Ghana only about 10 months. So it was impossible that any body could have worked for it 737 days. And note preposterously huge per Diems.

We now know that these invoices were spurious. But they show how Mrs. Cotton got around any restrictions that existed in Exim Bank rules or the Loan Agreement on disbursements of the loan and was thus able to misappropriate or misapply funds that were intended to be used to buy equipment for the Aveyime Rice Farm Project. On March 17, 1997 South Trust Bank apparently thinking Agri-Tech invoices were genuine, paid Agri-Tech U.S.$3,576,865.51 which of course was paid to Mrs. Cotton.

It is the contention of the prosecution that the whole loan amount of U.S.$ 6,196,330 was misappropriated by Mrs. Cotton and never used to buy equipment as it was intended. The defence, especially 4th accused contend that all of it was properly and legitimately used. 4th accused submitted a table of expenditure to support his contention.

According to 4th accused the facility of U.S.$6,190,330.00 was made up of U.S.$5,950,000.00 (being 85 per cent of U.S.$7,000,000.00 with Quality Grain providing the remaining 15 per cent of U.S.$1,050,000.00 in accordance with the rules of Exim Bank of the U.S. and U.S.$248,330.00 (representing Exim Bank insurance (exposure) fee of 4.14 per cent) paid to Exim Bank in Section 15 (c) of the loan agreement. The report P.W. 20 presented to the former Vice-President, Exhibit "ZZZZ1" and 2 tendered in evidence by the prosecution to the Court proved to the court of the loan amount of U.S.$5,950,000.00 guaranteed by Government U.S.$5,854,200.00 was utilised to purchase equipment only, leaving a balance of only U.S.$96,200.00. According to 4th accused the remaining U.S. $96,200.00 and some additional money added to it was expended to meet the cost of design installation, other services and working capital and salaries since there was no production during the construction period.

In view of the foregoing I accept the prosecution's case that the first loan was misappropriated by Mrs. Cotton. Even if some equipment was purchased for the project not all the loan was used to do that. In criminal law when a person is charged in respect of a specified sum but only a part of that sum is proved to have been lost or misappropriated he can be convicted.

4th accused counsel submitted that the prosecution did not challenge this testimony of 4th accused. It is not correct that 4th accused's testimony was not challenged. He was subjected to rigorous cross-examination during which the veracity of his testimony was challenged all the way and the

prosecution put its case to him. As for his testimony on how the U.S. $6,196,330.00 was utilised there is overwhelming evidence, which I have already referred to that Mrs. Cotton fraudulently siphoned all or most of it into her accounts or that of Quality Grain Company Inc. It now appears clear that when P.W.20 prepared his report Exhibit "ZZZZ" he was not aware of the existence of the 2nd loan, hence the impression he created that the equipment might have been bought from the first loan.

We now know better. I accept the prosecution's case that during the period of the first loan – that is from November 1996 to about July 1997 no equipment for the Aveyime Project arrived in the country and that whatever was put on the land were purchased by Mrs. Cotton in this country. "2nd accused in a memorandum he sent to the former President about December 1998 attributed the project's difficulties largely to the non-performance of Agri-Tech.

In my opinion Mrs. Cotton was able to perpetrate her blatant fraud as a result of the failure of 3rd and 4th accused to discharge their responsibilities. We have already seen that by signing the document entitled "Release and Authorisation" 3rd accused placed the whole loan fund at the complete disposal of Mrs. Cotton and waived any right to inspect and review equipment to be purchased with the loan. He had the ultimate responsibility for monitoring the use of the loan and he failed to discharge it. 4th accused did nothing to ensure the money lent to Quality Grain Company (Ghana) Ltd., of which he was director and guaranteed by the Government of Ghana was properly used for the purpose for which it was intended. I have already said a lot about the conduct of 4th accused and I do not think it is necessary to repeat it.

I find that the actions and omissions on the part of the 3rd and 4th accused persons enabled Mrs. Cotton to defraud the Government of Ghana. In this age of electronic communication – computer database, web-site, e-mail etc– I do not think it is a good excuse that Mrs. Cotton perpetrated her fraud in America and the accused persons were in Ghana. Apart from this it would have been easy to hire someone or a company in America to monitor the activities and transactions of Quality Grain Company (Ghana) Ltd. or more particularly, Mrs. Cotton. And of course, there was the Ghana Embassy in Washington which could have been instructed to represent and protect Ghana's interest in Quality Grain. I also think if the financial wing of the Ministry of Finance and the Bank of Ghana had been involved in monitoring the use of the funds it is likely Mrs.Cotton would have found it difficult to get away with what her fraud.

I do not think 2nd accused can be held liable for any loss incurred by the State under Count 2. He was the Chief Director of the Ministry of Food and Agriculture. There is no evidence that he had any responsibility for monitoring the use of the funds.

COUNT THREE (SECOND LOAN)

2nd, 3rd and 4th accused are charged with wilfully causing financial loss of U.S.$3,000,000.00 to the state.

This charge arises out of the 2nd loan. Both the prosecution and the defence said the loan was U.S.$12,000,000.00. But this is not strictly speaking correct. The principal sum was U.S.$12,000,000.00 but the interest was U.S.$3,400,000.00 making a total debt of U.S.$15,400,00.00 which was the amount mentioned in the Loan Agreement signed in July 1997 between Quality Grain Company (Ghana) Ltd., as borrower, Ministry of Finance of Ghana as guarantor and South Trust Bank of Atlanta, Georgia, U.S.A. This is also the amount mentioned in a memorandum 2nd accused sent to the former President Rawlings in or about December 1998 at the request of the President. In any case Government of Ghana as guarantor signed 12 promissory notes of U.S.$1,274,305.25 each as evidence of indebtedness and a promise to pay the amounts covered by the notes when they became due. This meant the Government committed itself to pay U.S.$15,291,665.00. Eventually Ghana Government will pay more since there has been defaults.

It must be noted as a matter of interest the high interest rate this loan attracted: about 28 per cent compared with a total interest and charges of about 11 per cent on the first loan which had Exim Bank backing.

The Loan Agreement was signed with South Trust Bank but the 12 promissory notes issued by 3rd accused when the agreement was signed were negotiated to Natwest Bank which in turn negotiate them to other banks or financial institutions. The prosecution contended that 4th accused and 3rd accused "syndicated" the loan from several banks. I do not think that was what happened. What happened is what I have just said: Natwest which had provided the loan fund negotiated the promissory notes to other financial institutions which in turn presented them for payment when they became due or sent demand notes or letters to 4th accused when there was default in payment.

A few months after the first Loan Agreement and all the appendices attached thereto, some of which I have mentioned above, were signed, Mrs. Cotton apparently started to demand more facilities. She complained that the government had failed to provide her with land clearing and moving machinery and equipment as she had been promised. Although there were such machinery and equipment available in the country she refused to hire them. This is clear from the following letter.

On 6th February, a Director at the Ministry of Food and Agriculture, Mr. H. P. Basta, sent the following memo to the Chief Director of the Ministry, that is 2nd accused.

"Chief Director,

My contact with Ms. J. R. Woodard this afternoon
tends to give the impression that she is not
after any machinery for which there should be
payment. She is under the firm conviction that the
Ministry of Works and Housing or Roads and
Highways has such equipment which can be
taken on such terms. It seems therefore that
you may need to contact your colleagues
in those Ministries at your level to see if such
facilities are available with them on such terms.
In fact, she said there are no funds to pay
for the equipment when I told her of the hiring
rate of one contracting firm I spoke to this morning".

Mr. Batsa then attached a list of 12 Construction Machinery contracting firms.

It seems from Mr. Batsa's letter that what Mrs. Cotton was asking for was free use of construction machinery or equipment. But soon this develop into a request for a loan to purchase such equipment. On 24th March 1997 the then Deputy Minister of Agriculture, Mr. V. K. Atsu-Ahedor, sent a memo to the Secretary to Cabinet:

"AVEYIME RICE PROJECT

Kindly find enclosed copies of a memorandum
on the issue of guarantee for a loan of

U.S.$14,750,000.00 from U.S. Exim Bank

as additional funding for the consideration and

approval by Cabinet".

There is no record as to whether Cabinet approved the memorandum. But by June 1997 negotiations for a new loan had begun. There is evidence that 4th accused was involved in the negotiations with South Trust Bank, Exim Bank was not involved in this loan. It was rather Natwest Bank which agreed to provide funds.

On June 10, 1997 Mrs. Cotton on behalf of Quality Grain Co. (Ghana) Ltd. wrote to Mr. Bill Browning, Vice President of South Trust Bank and Mr. Jay Hermandes of Natwest Markets of New York that "Quality Grain Company (Ghana) Ltd. along with the Ministry of Finance agrees to accept your offer based on the Summary of Calculators for the fixed rate loan of 9.89 per cent, without a penalty for prepayment; and directed them to fax a copy of six promissory notes to be issued under the proposed agreement with Quality Grain Company (Ghana) Ltd. and Ministry of Finance to Mrs. Leslie Dadzie of the Ministry by June 12, 1997.

The Loan Agreement for this loan was executed on July 22, 1999. It was signed by 3rd accused for the Ministry and Mr. Browning for South Trust Bank. According to a "Letter of Agreement" signed by Mr. Browning the purpose of the agreement was to finance the importation of agricultural equipment and land clearing/earth moving equipment for the continued development of commercial rice farms in the Aveyime region of the Republic of Ghana.

Unlike the first loan agreement, this second one was not sent to Parliament for its prior approval before guaranteeing the loan. According to 4th accused when he advised that this should be done 3rd accused said since Parliament had already approved the project and the first loan the additional amount to complete it did not require Parliamentary approval. 3rd accused and former Vice-President Mills in their evidence confirmed and strongly defended this view. They and defence counsel argued that because the 2nd loan was only a supplementary one the President or Cabinet could give it an administrative approval. 3rd accused tried to justify this by giving instances in his predecessor's time where such approval was given: ECGD of U.K. loan, loans for Cape Coast Regional Hospital, Tamale Road, Kumasi - Yeji Road, Telecom Sectors, Industrial sector – in all these cases according to 3rd accused approval was given once and subsequently, all the moneys that were received from latter to continue projects and to start new ones, did not go to Parliament; or as in the case of Kumasi-Ejura-Yeji Road the loan came in tranches.

I do not think it is necessary for me to embark on an interpretation of Article 181 of the 1992 Constitution, which deals with Loans. I do not have the power to do so. Its effect was not in dispute: both the prosecution and the defence agreed that every loan raised by the Government on behalf of itself or any other public institution or authority must receive Parliamentary approval. The only issue was whether the second loan was a supplementary loan or a new one. In my opinion even a "supplementary" loan requires Parliamentary approval if its terms are different from those of the first or previous loan or loans or it cannot be said to be merely a part or a tranche of the previous loan. The loan under review was a new loan. It was not an Exim Bank insured facility as 3rd accused apparently thought. The main provider of the funds was Natwest Markets. The terms of the 2nd loan were quite different from those of the first loan: for example the interest on the 2nd loan was much higher than that on the first loan. The principal amount was about twice that of the first one. The terms of this loan made the proceeds immediately disbursable and available to Quality Grain Company Inc.

I think the 2nd loan should have been sent to Parliament for approval, but this was not done. Instead, according to the former Vice-President Mills, the former President alone, without reference to

Cabinet, approved the Ministry of Agriculture's request to guarantee the loan.

The administrative approval and the loan itself were shrouded in some mystery and secrecy. Only a few people must have known that such a loan existed. For example Prof. Mills assumed office as Vice-President on January 6, 1997. The request for the guarantee was made by the Minister of Agriculture in March 1997. The administrative approval must have been given before June 1997 when negotiations for the loan were in their final stages. The Loan Agreement was signed on July 22, 1997 and it seems disbursement probably started almost immediately. Yet it was not until November 1997 that Prof. Mills, the Chairman of the Government's Economy Team, got to know about the Aveyime Project when the former President asked him to go and visit it. It was only after this visit that 3rd accused briefed him on the extent of Government's financial commitment to the project. It appears that when P.W. 20 wrote his report on the project towards the end of 1998 he was not aware that this loan existed for he never mentioned it and apparently attributed certain commitments under the second loan to the first loan. Mr. Vordzorgbe, P.W.15, too when he wrote his report also in 1998, did not seem to be aware of the second loan. I have mentioned elsewhere that the Solicitor-General was not aware of the government's commitment until he was briefed at a meeting in January 1999. I am inclined to agree with P.W.20 that most public officers who met to discuss Mrs. Cotton's shut down of the project and her demand for compensation in 1998, did not know about the 2nd loan. Parliament of course did not know anything about it and it is possible that even neither the Accountant-General, Auditor-General nor the Bank of Ghana were aware of its existence or the full extent of Government's financial commitment to Quality Grain.

The prosecution say out of the U.S.$12,000,000.00 available for use on the project only about U.S.$9,000,000.00 was used. Hence the charge of financial loss of U.S.$3,000,000.00. The defence say, assuming U.S.$9,000,000.00 was spent on the purchase of equipment there were other expenditures on charges, Salaries etc that were not included in the U.S.$9,000,000.00 and if all those item are taken into account there was no financial loss. 4th accused made a table and testified on it to show that the company even spent more than the U.S.$12,000,000. According to him about U.S.$888,824.11 was used to repay part of the first loan in September 1997, U.S.$720,000 was deducted upfront by the bank before the loan was disbursed, and U.S.$2,065,000.00 remitted to Ghana.

The points made by 4th accused appear attractive. But they contain serious flaws. There is no evidence that the amounts mentioned in addition to the US$9,000,000.00 were all deducted from the U.S.$12,000,000.00. If the first and only payment in respect of the first loan of U.S.$888,824.11 by Quality Grain was made from the U.S.$12,000,000.00 then it was a serious misapplication of funds since the 2nd loan was not intended to be used to repay the first loan or any part of it. It is most probable that the Non-Refundable Facility fee was deducted by the Bank before the U.S.$12,000,000.00 became disbursable to Quality Grain company Inc. According to Section 2.01 the Credit established in favour of the borrower was "the Net Proceeds amount not to exceed U.S.$ 12,000,000.00 to enable the Borrower to finance the Purchase of capital equipment and related engineering services." And under section 3.01 the amount that was to be disbursed and made available was the "Net Proceeds Amount". It would be surprising in view of this provision that the Non-Refundable Facility Fee which is normally deducted before disbursement are made or the new proceeds are released to borrower was in this case deducted from the net proceeds.

On August 6, 1998 the Agricultural Development Bank in response to a letter from Mrs. Cotton confirmed that "a total of U.S.$2,065,669 so far has been received through our correspondent banks for the credit of you U.S. Dollar account..." Assuming that this amount was remitted from the 2nd loan. It was a misapplication of the loan funds and contrary to Section 4.02 of the Loan Agreement of July 22, 1998. So too were payment of part of the first loan and the Non-Refundable Facility Fee if

they were paid from U.S.$ 12,000,000.00 loan.

For a better appreciation of this point I quote sections 2, 3 and 4 of the Loan Agreement.

"SECTION 2: THE CREDIT

2:01 Amount

The Lender hereby establishes the Credit, upon the terms and conditions set forth in this Agreement, in favour of the Borrower with the net Proceeds amount not to exceed U.S.$12,000,000.00 to enable the Borrower to finance the purchase of capital equipment and related engineering services.

2:02 Availability

Subject to the terms and conditions provided herein including, without limitation, the conditions set forth in section 6 hereof, upon Borrower's request, Lender shall make a single Disbursement under the Credit, which shall be made on a Business Day after the Effective Date and before the Firm Disbursement Date; provided, however, that the amount of the Disbursement shall not exceed the Facility amount.

"SECTION 3: DISBURSEMENTS

3.01: Disbursement

Upon satisfaction of the conditions set forth in Section 6, the Credit may be disbursed by the Lender (the "Disbursement") upon at least five (5) Business Days' prior telephone notice from Borrower of the requested disbursement confirmed in writing not later than the next Business Day. The request by the Borrower for the Disbursement hereunder must specify the amount of the "Disbursement and the Business Day on which the Disbursement is to be made and such request shall be irrevocable. No later than 11:00A.M.

New York City time) on the date specified in the Borrower's notice for the requested Disbursement, the Lender shall make available to the Borrower the Net Proceeds amount in accordance with this Section 3.0: hereof. The

Lender shall make the proceeds of the Disbursement available in accordance with Section 4.01 hereof, and all such disbursements of Net Proceeds shall constitute an unconditional and irrevocable Disbursement of the Credit.

"SECTION 4: USE OF PROCEEDS

4.01 Use of Proceeds

All proceeds of the Disbursement, which shall be made on a Net Proceeds basis, made in accordance with Section 3.01 hereof, shall be made available at South Trust Bank.

N.A's office at One Georgia Centre, 600 West Peachrea Street. Atlanta, Georgia, U.S.A. The proceeds shall be used exclusively as cash collateral for the reimbursement of Letters of Credit. The Letters of Credit shall be issued

(a) for the account of Quality N.A., for the benefit of corporation(s) which have contracted with Quality N.A., to sell farm equipment to Quality N.A., and for related engineering services, which farm equipment will be shipped by Quality N.A to Borrower for use in the operation of Borrower's business in Ghana and (b) in accordance with South Trust Bank, N.A.'s standard customs and practices.

4.02.1.1. Returned Proceeds

In the event that (a) (A) by November 7, 1997, there are more than U.S.$3,000,000.00 of proceeds of the Disbursement which are in excess of the aggregate amount of Letters of Credit that have been issued and drawn upon (the amount of such proceeds of the Disbursement so in excess of such $3,000,000.00 is referred to herein as the "First Excess Funds'), or (B) by December 5, 1997 there are any proceeds of the Disbursement which are in excess of the aggregate amount of Letters of Credit that have been issued and drawn upon (the “second Excess Funds"), or (b) if on or before November 7, 1997 the Lender has not received satisfactory evidence of the use of proceeds as provided in Section 4.01 above (the 'Unused

> Proceeds"), than upon any such event, on November 7, 1997 with respect to the First Excess Funds and the unused Proceeds and on December 5, 1997 with respect to the Second Excess Funds, the Borrower and the Guarantor shall repurchase from the Lender, by making payment in immediately available funds in U.S. Dollars, Notes in an original facts amount equal to (i) the First Excess Funds, the Second Excess Funds, or the Unused Proceeds, as the case may be, minus the pro rata amount of the Discount (as defined under the definition of "Net Proceeds") attributable to such Note (s), plus (ii) interest on the amount determined pursuant to subparagraph 4.02 (i) at the Rate (as defined under the definition of "Net Proceeds") from the date of the Disbursement to and including the date of repurchase. To the extent not all Notes are repurchased, Notes shall be purchased, Notes shall be purchased in inverse order of their respective maturities and if part of any Note is to be repurchased the Borrower and the Guarantor agree to execute and issue new Notes as requested by Lender in order to effect the repurchase herein provided.
>
> The obligation to purchase Notes provided above shall apply to both the Borrower and the Guarantor on a joint and several basis."

As I understand section 4.02, if after the use of the loan for the purpose for which it was intended i.e. the purchase of equipment, a part of it remained in excess or unused it should be returned, subject to some specified charges, to the lender for the cancellation of equivalent promissory note or notes. So when Quality Grain Company spent U.S.$9,000,000.00 of the U.S.$12,000,000.00 loan the remaining U.S.$3,000,000.00 should have been returned to the lender in accordance with the terms of Section 4.02 of the Agreement. If this had been done it would obviously, as intended, have reduced the indebtedness of Quality Grain Company (Ghana) Ltd. and the Government of Ghana. The loan was not intended to finance the recurrent or capital expenditure (apart from the purchase of equipment) such as emoluments, taxes, rent, acquisition of vehicles and planes etc. By using the excess or unused funds for wrong purposes such as, if 4th accused is right, for payment of part of the first loan and the Non-Refundable Facility Fee and remittances to the Company's account in Ghana to pay current and other expenditures, the company acted wrongly and thereby caused the Government of Ghana to pay about U.S.$3,000,000.00 more than it should have done. This was a loss to the State.

Again the question is: Why hold any of the accused persons liable for a loss caused by Mrs. Cotton's dishonesty. The answer is the same as in Counts 1 and 2: these officers of state who were responsible

for ensuring that a loan guaranteed by the government was properly used for the purpose for which it was intended, failed to discharge their responsibilities and through that failure or omission enabled Mrs. Cotton to misappropriate or misapply the funds. The officers concerned were 3th and 4th accused.

Only they and President Rawlings, his Vice-President (after November 1997) and a few other people knew about this loan until Mrs. Cotton's arrogant behaviour drew the attention of the general public to the Aveyime Rice Project and its problems in 1998. It was 3rd accused who signed the loan agreement and twelve promissory notes in favour of the lender. Some of these notes are still outstanding and will have to be paid one day plus default interests. It does not appear 3rd accused informed the financial wing of the Ministry of Finance, the Accountant-General's Department or the Bank of Ghana and instructed them to monitor its use. But when the borrower company defaulted in payment he instructed these two institutions to repay the loan. When Mrs. Cotton through the Ministry of Agriculture asked the government to guarantee another loan to buy agricultural equipment and land clearing/moving equipment at a time when there was no evidence that she had properly used the first loan, 3rd accused did not ask her to account for that loan. Rather he caused negotiations for another loan to start.

When the loan was obtained 3rd accused refused to use it to acquire a bigger equity share in the company. This would most probably have given Government control of the Company. In spite of the fact that the Government of Ghana had in effect provided or obtained all the financing for the Aveyime Rice Project Mrs. Cotton was allowed to have complete control over the project and its finances.

4th accused rightly advised that the loan agreement should be sent to Parliament for its approval. When this was refused he continued in as director of the company and to be involved in concealing the loan. As I have indicated elsewhere he usurped the functions of the Attorney-General in respect of the loan and became a miniature Accountant-General or Bank of Ghana, dealing with questions regarding defaults, and repayment. He must have known that he was abetting a breach of the Constitution by the then Government.

As Chief Director of the Ministry of Food and Agriculture 2nd accused probably knew about the second loan. After all the request for a government guarantee of the second loan emanated from his ministry. He must also have known about the problems of the Aveyime Project. But these alone do not make him liable for any financial loss to the State caused by Mrs. Cotton's fraud. He had no direct responsibility for monitoring the utilisation of the loans.

There is ample evidence on record that the Ministry of Food and Agriculture under Dr. Kwabena Adjei and Mr. J. H. Owusu-Acheampong were not well disposed towards Mrs. Cotton, to say the least and her management of the project and left to them, the project might have been taken over by the government. Mrs. Cotton later became very hostile to 2nd accused apparently because he was pursuing the policies of his Ministers or the Ministry.

I do not think 2nd accused can be held liable for any loss incurred by the State in respect of the 2nd loan.

COUNT FOUR

3rd accused alone is charged under this count with causing financial loss to the State of U.S.$ 2 million on 29th February 1999.

Even after she had obtained the proceeds of the two loans totalling at least U.S.$ 18,000,000.00, by August 1998 Quality Grain Company had not started producing any rice. After the 2nd loan was granted, equipment and machinery came in, about 3000 acres were cleared (but only about 2000 acres

were suitable for rice production and actually only about 200 acres were planted with rice), a rice mill was installed, silos were built, vehicles and even an aeroplane were purchased. But no rice was being produced to earn money to pay the loans.

Those who assessed the project objectively attributed lack of tangible progress to mismanagement by Mrs. Cotton. One former colleague or employee of Mrs. Cotton thought she was not sincere about growing rice. Mrs. Cotton characteristically had new excuses for the poor or non-performance of Quality Grain: there were still people on the land, there was no electricity and water for the project, the road to the farm was bad, there was no 'Telecom' telephone, etc. She claimed the Government had promised to remove the people and villages from the land (which the Government had almost totally done by the second half of 1998) and provide the utilities but failed to do so. She wanted the company to be given subsidies and exempted from certain taxes, which it was not entitled to.

In August 1998 she took her complaints onto T.V. In one programme she claimed she had spent U.S.$ 27,000,000.00 on the project but the Government had failed to fulfil its promises and this had affected the project. After the broadcast she continued to put pressure on the Government. She threatened to shut down the project unless her demands were met. She wrote two letters to former Vice-President, which at a meeting in November 1998 he described as being in "intemperate and insulting" language. She actually carried out her threat. In November 1998 she announced she had temporarily shut down the project. She demanded the provision of the things she had complained about and U.S.$5.5million as compensation or reimbursement of wasted loans or she would abandon the project and leave the country.

To deal with the problems created by the shut down and her demands the former Vice-President convened or caused to be convened a series of meetings. That first meeting on January 6, 1999 was chaired by himself and attended by Mr. (now Justice) Addo, then Solicitor-General, Nana Ato Dadzie, (5th accused), late Col Jeff Asmah, of PMG (Policy Management Group), Alhaji Huudu Yahaya, then General Secretary of the NDC, Mr. Jimmy Amissah, then Secretary to the former President, Mr. J.E.E. Turkson, then secretary to the former Vice-President. In attendance was Mr. Daniel Barnor of the Office of the Vice-President who took the minutes of the meeting.

Membership of subsequent meetings varied. Among the persons who attended all or some of these meetings were, in addition to the person mentioned above, Mr. J. H. Owusu-Acheampong, then Minister of Food and Agriculture, Mr. Kwame Peprah (3rd accused), Mr. Austin Gamey, then M. P. for the Aveyime area, Dr. George Yankey (4th accused), Dr. S. K. Dapaah (2nd accused), Mr. Theophilus Cudjoe of the Serious Fraud Office (P.W.20) and Mr. P.K. Addae of Ghana Investment Promotion Centre (P.W.9). Some of the meetings were attended by Mrs. Cotton and a team from the company.

This group of Ministers and senior public officers considered Mrs. Cotton's complaints and demands at meetings held on 6/l/99, 12/1/99 (also attended by Mrs. Cotton and her group), 14/1/99 and 20/1/99.

They decided that steps should be taken to extend electricity to the mill and improve the water situation. But most of Mrs. Cotton's demands were rejected. Among them a claim for "Reimbursement of Wasted Funds in the amount of U.S.$ 5,505,158.79 by January 20, 1999.” On that date the meeting "decided that the Quality Grain Company Limited demand for U.S.$ 5.5 million cash cannot be met."

The meeting also “decided that should the company refuse Government's proposals and left the country, then the Government should be prepared to take over the project. And to make the taking over legal, members suggested that Dr. Yankey should contact the bank to provide the Committee with a copy of the Sales Agreement, clearly defined the purpose of the 12 million cedis (SIC), a copy of the Loan Agreement between MOF, MOFA and the Bank, and also a Promissory Note for the

amount."

(This is an indication that even these high-powered individuals did not have all the information on the Quality Grain Project available to them. It appears even the Loan Agreement for the U.S.$12,000,000.00 loan was not available in this country).

It was also decided that the Minister of Food and Agriculture should draft a letter conveying the proposals, agreed upon by members, to the company for their reaction. The draft was to be cleared with the Minister of Finance and the Chairman of the meeting; [Col. Asmah] before it was signed by the Minister for Food and Agriculture (Mr. Owusu-Acheampong who was present at that meeting.) But 3rd accused was not present.

Contrary to these decisions, on January 29, 1999, only nine days after the meeting where they were taken, 3rd accused and Mrs. Cotton signed Loan Agreement between the Government of Ghana and Quality Grain Company (Ghana) Limited under which the Government of Ghana “lent” the company U.S.$2,000,000.00. The reasons given for making this loan are interesting and deserve to be quoted to give them their full effect:

> "The Government has committed itself to ensuring that the country is self sufficient in food production and to achieve food security for the country.
>
> In accordance with the preceding paragraph, the Government has already given support by way of facilitating the company to procure loan facilities to undertake a large scale mechanised irrigated rice-farming project in the Volta Region of Ghana.
>
> As a result of difficulties such as lack of basic infrastructural facilities to the farm and continued occupation by squatters on the farm the company has not been able to commence farming operation despite investments already made including huge expenditure incurred in clearing and preparing the land for planting.
>
> Following the delay in commencing operations, the company has not earned any revenue, has lost most of its investments and will, at the same time, have to make new investments to include, among others, the re-clearing and preparation of the land for planting.
>
> The Company is in need of working capital and funds to re-clear and prepare the plant for planting and to pay for services necessary to resume and continue with the farming project.
>
> The Government is committed to ensuring the success of the project, and thus not to put to waste the support already given.”

The loan was for five years including a grace period of three years. 3rd accused said in evidence that the recommendations of the Committee that met in the Castle were taken to the Vice-President who upon further reflection directed that "we undertake the review of the itemised expenditure and to reimburse the company as appropriate”. 3rd accused further explained, “the decision of Vice-President was that we should reject the $5.5million outright but look at those justifiable items and settle. This is the complete decision."

The former Vice-President did not instruct or direct 3rd accused as to how much he should give to Quality Grain Company (Ghana) Ltd. It was 3rd accused, with assistance from 4th accused, who decided that U.S.$ 2,000,000.00 should be given to the company (in effect Mrs. Cotton). 3rd accused said in evidence that he later informed the former Vice-President of his decision.

3rd accused also said the "Loan" was supposed to be a reimbursement that Ghana Government was not supposed to recoup. But he decided to make it to the company as a loan. Mrs Cotton and the company reluctantly agreed to the Loan arrangement but he was sure that was because they were not aware that the decision had been taken to refund it. In February 1999. 3rd accused informed the Accountant-General that the Government of Ghana had entered into an agreement with Quality Grain Ghana to provide finance to the latter to meet requirements and to pay for services.

One would have thought, looking at the preamble to the agreement or the recital and the letter to the Accountant-General, that all or most of the loan or reimbursement would be spent in Ghana to complete the project or at least deal with the problems Mrs. Cotton had complained about. But 3rd accused instructed the Accountant-General that he should transfer U.S.$1.45 million of the U.S.$ 2,000,000.00 into the account of Quality Grain Company Inc. (not the Ghana Quality Grain Company the other party to the Agreement) at First Tennessee Bank, Tennessee, U.S.A to enable it to meet payment obligations for goods and services in the United States of America. The Accountant-General was further authorised to release the remainder of the U.S.$ 2,000,000.00 less the U.S.$1.45 million sent to America and ¢100,000,000.00 million already paid to the company on January 29, 1999, to enable the company meet payment obligations for goods and services in Ghana.

In framing the refund as a loan 3rd accused forgot that as it was a "loan' it had to be sent to Parliament for its approval; he did not do that.

It is clear that the Government of Ghana represented by 3rd accused did not intend to recover the loan. It is a loss to the State. In my opinion there was no justification for paying this amount to Quality Grain Company Inc. or the Ghanaian Company. It was nothing more than a give-away to appease the woman who must always have her way. Those who decided to give it way, the former Vice-President and 3rd Accused, should be held responsible for this loss.

COUNT FIVE

3rd and 4th Accused are charged with wilfully causing financial loss of U.S.$1,274,305.25 on 22nd July 1997.

I think this count is based on an error. The prosecution thought the promissory note covering the amount specified in the count was issued to enable Mrs. Cotton to pay for the 15 per cent of the first loan of U.S.$7,000,000.00 as required under the terms of that loan. But a look at the date of the promissory note, 22nd July 1997, shows that this could not have been possible. The first loan was released to Mrs Cotton or Company in November 1996. If the 15 per cent had not been paid the money would not have been released.

The promissory note on which Count five is based was one of the twelve notes issued under the second loan agreement as evidence of government's indebtedness and as security.

This charge should not have been brought. It should be dismissed.

COUNT SIX

4th accused alone is charged under this count with wilfully causing financial loss of U.S.$ 28,400.00 to the State.

This amount is part of U.S.$60,000.00 borrowed by Quality Grain Company (Ghana) Ltd. from

ECOBANK. It was a loan transaction between two private companies. There was no guarantee by the Government of Ghana. Therefore if it was lost it was loss to ECOBANK not the State.

The charge is also duplicitous or constitutes double jeopardy. The amount of U.S.$ 60,000.00, of which the U.S.$ 28,400.00 forms a part, is one of the items included in the amount of ¢3,980,281,081.05 which is the subject matter of Count Seven. A person cannot be liable to be punished twice for the same offence: see Section 9(l) of the Criminal Code, 1960 (Act 29).

It is not clearly established that it was 4th accused who caused ECOBANK to lend the money to the Quality Grain Company (Ghana) Ltd. P.W. 10, Ms Ruth Frances Croffey who was the Manager of Quality Grain Company (Ghana) Ltd. and who applied for the loan from ECOBANK and transferred it to Mrs. Cotton in America, said it was 4th accused who called ECOBANK to introduce her to the bank. “And that is where the help ended;” she added.

It also appears the money was intended to be used for a legitimate purpose by the company, to buy Silos Equipment, pay expatriate salaries and pay for rice bags.

For these reasons I do not think the charge has been proved. It should be dismissed.

COUNT SEVEN

2nd , 3rd, 4th and 5th accused persons are charged under this count with causing financial loss of ¢3,826,250,547.05 to the State.

The amount specified in the count is made up of several amounts spent on many different and unrelated items over a period of two years, from 1998 to 2000. Some of the accused dealt with some items, which others did not know about. The following list prepared by counsel for 4th accused demonstrates the diversity of items covered by the count.

"LOCAL EXPENDITURE"		
A. Resettlement of Aveyime inhabitants		
And compensation for Crops		
(Authorized by Ex-Vice-President)	—	¢2,655,472,966.00
OTHER EXPENDITURE AUTHORISED		
BY EX-VICE PRESIDENT		
B. Cost of installation of transformers for	—	¢241,000,000.00
Electric Power.		
MOF guarantee for fuel supplied by		
ELF Ghana Limited	—	¢346,000,000.00
Expenditure on utilities - Water	—	¢32,738,663.00
Ghana Telecom and ECG		
(Authorised by Ex-Vice President)		
SUB-TOTAL	—	¢619,738,663.00
EXPENDITURE FOR WHICH		
GOVERNMENT HAS NO LIABILITY		

C. ADB loan to Quality Grain		
For workers 2000 December salaries	—	¢50,000,000.00
ECOBANK loan to Quality Grain		
(U.S.$ 60,000.00) plus interest	—	¢445,069,452.05
Fertilizer Facility Provided by		
E. Wienco (U.S.$35,000.00 x 6000)	—	¢210,000,000.00
SUB TOTAL	—	¢705,069.452.05
GRAND TOTAL	—	¢3,980,281,081.05

I think the charge is unfair to the accused persons concerned. It is hopelessly bad for duplicity.

Although it is strictly not necessary for me to say anything after declaring the charge bad for duplicity I must add that there was nothing unlawful about paying compensations to the people who were on the land designated for the Aveyime Project.

The prosecution called them squatters. They were not. They lived on their ancestral land. The government apparently compulsorily acquired the land sometime in the 1970's but did not pay any compensation. It was only natural that they would ask for compensation for their crops, houses, schools, churches, shrines etc that they had to leave behind or the cost of conveying their things to their new homes.

Under Article 20(3) of the 1992 Constitution the state was bound to resettle any inhabitants who were going to be displaced by the project on Suitable alternative land with due regard for their economic well-being and social and cultural values. This necessarily implied payment of compensation. And this inter alia was what the Austin Gamey Committee was appointed to determine. The government accepted its recommendations. 5th accused was charged with the responsibility of paying to each affected person the compensation recommended for him. I think he did it efficiently and even saved the state millions of cedis.

The 5th accused therefore did what he was required to do by the Presidency. He did not do anything wrong by paying the compensation. No financial loss was thereby wilfully caused to the state.

As regards the utilities and water that were extended to the area it cannot fairly be said they constituted a financial loss to the state.

I think this charge should be dismissed.

OTHER EVIDENCE OF FINANCIAL LOSS

I have narrated elsewhere how Mrs Cotton approached the Government through first accused during the Presidential investment tour of the United States in 1994, her visit to Ghana in 1995 and how with 1st accused assistance she sold her rice production project and eventually succeeded in getting Government to buy and adopt it.

Two years before in or about June 1992, Mrs Cotton had approached the Ghana Embassy in Washington with a similar project. The then Acting Ambassador, Mr. Amoa-Awua who gave evidence in this case as P.W.5, visited the farm she claimed her company owned and checked the background and commercial standing of Mrs. Cotton and her company from reputable professional database organisations which specialise in such matters. Their reports were negative. Because of Mrs. Cotton's later dealings with the Government of Ghana, I think the letter Mr. Amoa-Awua wrote to Mrs. Cotton on these reports deserve to be quoted in full.

"EMBASSY OF GHANA

3512 INTERNATIONAL DRIVE, N.W.

WASHINGTON, D.C. 20008

June 19, 1992

Madam,

PROPOSED U.S. LONG GRAIN RICE FARMING PROJECT IN GHANA - QUALITY GRAIN CO. INC.

I have had the opportunity to visit Memphis TN to deliberate with you on the very important and laudable proposals your Company has put forward; namely to farm, mill and sell U.S. Long Grain Rice in Ghana.

2. This project, when implemented, would definitely help Ghana partly meet its objective of self-sufficiency in food, a major objective of our Government.

3. Upon running checks on your company, this Embassy has been presented with the following negative findings:

a. A local Consultant has affirmed that your company is not:

i. a member of the Memphis Area Chamber of Commerce;

ii. registered with the Memphis Area Better Business Bureau; and

iii. listed in "Who is Who" in Memphis Business.

b. A Dun & Bradstreet Confidential Report of 21st May 1992 stated the following:

i. QGC incorporated on 08/06/1990 in the State of Tennessee as GRAIN BROKER;

ii. Starting Capital — Undetermined

iii. Stock Ownership — Undetermined

iv. Employees — Undetermined

v. History — Incomplete

vi. As at 11/25/91, Robert Bullins' was the Registered Agent and Chief Executive with Sharon Thompson as Principal. Robert Bullins' background - undetermined and Sharon Thompson's background undetermined;

vii. Believed to operate as grain broker (100%)

viii. Terms of sale – undetermined;

ix. Sells to commercial concerns;

x. Territory - Regional;

xi. Robert Bullins on 2/24/1992 filed a suit in Shelby County General Sessions Court; Memphis, TN against the QGC, Inc. The Docket Number is 422885.

3. In the light of these negative findings on your company the negotiations can only resume after you have sent to this Embassy the following:

   - Documentation from the State of Tennessee giving adequate information on your company;

   - Document submitting appropriate information on the portions of the Dun & Bradstreet where the qualifying word "undetermined" has been used;

   - Documents from the Court attesting that the Bullins suit against QGC Inc. has been settled out of court as alleged by you during my visit to Memphis two weeks ago.

4. Since your company is reported by Dun & Bradstreet as "operates as grain broker (100%)", you would need to furnish conclusive evidence that "WOODARD FARMS" and "RALSON MILLS" are part of QGC Inc. set up. If these two enterprises are simply going to be brought into the project as "contract partners" then please indicate so.

5. I have gone to great lengths to let you appreciate how investment business is handled in Ghana. I have also sent you guidelines on the presentation of feasibility proposals. I must re-iterate that it is imperative to proceed chronologically lest the adage "more haste less speed" becomes a reality. Please act speedily as this project meets with our government's approval and has our support.

6. Please let me hear from you.

Yours sincerely

(Signed) E. A. AMOA-AWUA

CHARGE D'AFFAIRES

MISS J. R. WOODARD

QUALITY GRAIN CO. INC.

3035 DIRECTOR ROW SUITE 202,

MEMPHIS TENNESSEE 38131

FAX: (901) 332-7953.

There is no evidence Mrs. Cotton reacted to this letter. P.W.5 also testified that when he visited the farm with Mrs. Cotton the gentleman she introduced as the farm Manager claimed the farm belonged to him, not to Mrs. Cotton.

P.W.5's letter was not copied to any one. On August 20, 1992 he sent to the PNDC Secretary for Agriculture, who then was 1st accused a letter entitled **"PROPOSALS TO ORGANISE AND IMPLEMENT U.S. LONG GRAIN RICE FARM IN GHANA - AG-AM CORPORATION OF EAST BERNARD, TEXAS.**

In the first paragraph of the letter he wrote:

> "The proposal by Quality Grain Company Inc.
>
> of Memphis, Tennessee to grow U.S. long
>
> Grain Rice in Ghana has fallen through.
>
> The failure to implement the project was
>
> due mainly to Quality Grain's inability to
>
> convince this Mission of their ability and

experience to implement the project.
The Quality Grain Company also had
negative confidential reports
from an internationally acknowledged
database financial reporting institution
in the U.S. Furthermore, the original
founder of the Quality Grain Company
had a suit pending in the courts
against the Quality Grain Company."

He then went on to introduce AG-AM whose members, Jay and John Everret Anderson, gave evidence in this case as P.W. 16 and P.W. 19 respectively.

The letter was copied to, among others, the 2nd accused. Following this letter Jay Anderson visited Ghana as the guest of Ministry of Agriculture then headed by 1st accused with 2nd accused as Chief Director. The letter was sent by Diplomatic ponch and in accordance with the presumption of regularity I deem it that they received it.

It appears from the Statement just quoted that the addressee, 1st Defendant, knew about Quality Grain Company and its proposals to farm, mill and sell Long Grain Rice in Ghana before P.W.5 sent the letter of August 20, 1992 or even before he visited the farm Mrs. Cotton claimed belonged to her or her company which must have been before or in May 1992.

I have elsewhere dealt in some detail with the two loans obtained by Quality Grain Company (Ghana) Ltd. completely controlled by Mrs. Cotton with Government of Ghana guarantees and how they were misappropriated and misapplied by Mrs. Cotton. There is no need to repeat what I said there. In this part of my judgment I consider more generally evidence of loss caused to the State by Mrs. Cotton's fraud and dishonesty.

The total amount of the two loans, including interest and other charges, guaranteed by the Government of Ghana came to about U.S.$ 21,486,330. If you add further interests paid or payable as penalty for default in repayment of the loans the final total indebtedness of the Government of Ghana should be about U.S.$22,000,000.00 or more. Repayment of the loans by Government of Ghana began in 1998 and contained, even after the change of Government, until about August 2001, during the course of this trial, when the present Minister of Finance suspended payments. By that time a total of U.S.$ 20,865,823.07 (including default interests) had been repaid. Since the promissory notes issued by 3rd accused when the loans were granted were negotiated to other people, it is likely other holders in due course will have to be paid later.

As against the total indebtedness or total of repayments, the prosecution has been able to establish that not more than U.S.$10,000,000.00 was spent by Mrs. Cotton for the purpose for which the loans were obtained i.e. the purchase of farm equipment and machinery and related items. In the suit between Mrs. Cotton and two directors of Quality Grain Company Inc. they were able to show that at least U.S.$ 9,000,000.00 were misappropriated by her for her own personal use.

The investigation officer in this case Detective Inspector Stephen Kwame Adarkwa, P.W. 17, put the amount legitimately spent by Mrs Cotton or her companies at about U.S.$9,000,000.00. Mr. Everret Anderson put it at a little less than that, around U.S.$ 8,920,000.00. So did Mr. Cudjoe, P.W. 20, also at about U.S.$ 8,500,000.00. Taking into account other expenditures, such duties and other charges

the prosecution thought not more than U.S. $10,000,000.00 was legitimately spent for the purpose for which the loans were obtained.

The prosecution's case is supported by the outcome of the suit brought by the two directors mentioned above, Mr. Oscar Hudson (Mrs. Cotton's uncle) and Mr. James McGarrh. It shows that Mrs. Cotton misappropriated several millions of dollars obtained with the Government of Ghana guarantees. According to Mr. Codjoe, P.W. 20, whose testimony on the Suit was hardly challenged and was definitely not shaken, the pleadings in that case were founded on breach of trust and misappropriation of corporate funds and they were able to show that monies spent by Mrs. Cotton on her personal self and her family, were directly from Quality Grain company funds because these monies which were approved under the loan were put in various accounts all bearing the name Quality Grain Company Incorporated. Monies were also appropriated to two other accounts at First Tennessee Bank and they showed to the Court, that all these monies were taken by Mrs. Cotton.

They showed at least US$9 million which were appropriated by her for her own use. They showed that she had bought a house for US$ 1 million, she had bought land, she had spent lavishly on her wedding, bought expensive cars including two Mercedez Benz, etc. She had paid for mortgage for family members, she had paid her husband US$200,000.00 a year for being an Executive Officer of the Ghana Company, she herself paid herself over US$2 million salary for being an Executive of Quality Grain. All these things totalled to US$ 9 million and their case was that this US$9 million had been unlawfully appropriated because they didn't see any Board minutes where the Board decided she should take too much salary. When they asked her in court the relevance of the house she bought had to do with Quality Grain farm in Ghana, she said her clients told her that they needed a Guest House when they came to America from Ghana and that is why she bought it. They needed cars to be riding in style in US when they visited US, so she bought expensive cars. At the end of the case the court decided that they had made their case and awarded them US$ 3 million damages and US$ 10 million in what they termed as loss of business profits, that is the way they termed it, and then they gave them constructive trust over all those properties which were found she had bought and then to take over her shares in the company in Ghana and whatever was left in that company. So they are holding this judgment now.

In the face of clear evidence of fraud and misappropriation by Mrs. Cotton the Government of Ghana failed, in fact refused, to take action to stop her rapacious conduct or to claim refund of monies paid by it. By a letter dated September 15, 1998 Ghana's Ambassador to the United States, Mr. Koby Koomson sent his **REPORT FINDINGS ON QUALITY GRAIN COMPANY** to the former President J.J. Rawlings, he stated categorically that Quality Grain Company and Mrs. Cotton completely misrepresented the extent, of their knowledge about rice production to officials in Ghana. The company and Mrs. Cotton obviously established a unique working relationship with some officials in her attempt to defraud the Government of Ghana.

According to the evidence of both the prosecution and the defence sometime in 1999 Mr. Oscar Hudson came to Ghana and reported to Government officials that there was a problem with the loans because Mrs. Cotton was misusing the loan funds. But he did not get any particular attention from Government members he talked to. So he went back. He contacted an American Congressman who went and reported the matter to FBI that the loan funds guaranteed by Ghana Government and supported by Exim Bank, which is a Federal institution, had allegedly been misappropriated by Mrs. Cotton and therefore they were calling for investigation.

In the course of this trial the question arose as to why the Ghana Government failed to join Mr. Hudson and Mr. MacGarrh in their suit against Mrs. Cotton. One argument of the defence was that the Government of Ghana had no locus standi in that suit. I do not know American law on the matter but I assume, in accordance with the rules of Private International Law, that it is the same as Ghana Law. I

believe if the Government had applied to join the suit it would have been allowed to do so, for after all it had a substantial interest in the subject-matter of the suit and was likely to suffer loss if the misuse of the funds continued. Prof. Mills said the reason why they did not take action against Mrs. Cotton was because the Government had a "trump card" - the Deed of Indemnity and Floating Charge. But as I have stated elsewhere the floating charge had not been registered and was therefore void under Section 107(l) of Act 179 and no attempt had been made to get a court to grant an extension of time within which to register it; and the terms of the indemnity were not being enforced. In any case the trump card was never used by the Government of Prof Mills. Rather it threw more money after bad - by giving Mrs. Cotton another US$2,000,000.00.

In 1999 FBI started investigations against Mrs. Cotton. They wanted the Government of Ghana to come forward as a victim so that they could bring a prosecution. It did not come forward. FBI nevertheless went ahead with a prosecution. It is notorious, and I take judicial notice of the fact, that last year Mrs. Cotton was convicted by an American court of misappropriating millions of dollars of the loan funds obtained with Government of Ghana guarantees, sentenced to a long term of imprisonment and ordered to refund the money she had stolen.

WHO IS MRS. COTTON (NEE WOODARD)

Mrs. J. R. Cotton (nee Woodard) was an unmarried African-American young lady of about 33 years old when she embarked on her adventure of fraud and dishonesty in 1995 - 1996. She apparently arrived in this country without much money. Her company Quality Grain Co. Inc did not bring any capital into this country. Neither did the two companies she registered in this country, Quality Grain Co. (Ghana) Ltd. (No.1) and No.2 until she hit the jackpot with Ghana Government guarantees. Within one year, 1996 - 1997, she had become a multi-millionaire.

Who was this woman who could induce so much money from a highly indebted poor country like Ghana with such apparent ease? There is not much evidence about her origins or her social or class status, but she does not appear to have been born rich. Like any average modern American woman she probably had university or college education. But there was no evidence that she had any training, qualifications or experience in agronomy. She was not a specialist in rice production. Her company was a rice broker not producer. James Garrett, one of her employees and the Anderson Brothers, were of the view that the Aveyime land which she intend to use for the rice farm was not suitable for rice cultivation. Garrett left Ghana within two months of his arrival due to frustration with J. R. and Gene Cotton of the Quality Grain Co. Inc over the proper growing of rice. He resigned shortly thereafter.

According to Ambassador Koomson in his Report Findings, the Quality Grain Company and Mrs. Cotton right from the beginning intended to employ the services of an outside contractor from the United States with the experience and knowledge in rice growing to do all the work.

Much of the problems of the Quality Grain project were due to poor management. This was the conclusion of the Gamey Committee and P.W. 15. She used the problem of the occupants on the land and other matters as an excuse for doing little or nothing to implement the project.

According to witnesses for the prosecution Mr. Egala and P. W. 20 and for the defence, Prof. Mills, and even some of the accused, she was very

It also appears she was ruthless. She apparently wrestled the company from the founders of the company. By the time she came to Ghana in 1995 she was in complete control of Quality Grain Co. Inc. She tried to cheat and kick out her co-shareholders in 1998/99. Her ruthlessness shows in how she dealt with Ghanaian officials over the Quality Grain project. She knew how to pile on the pressure or exploit her relationship with government officials and thereby succeeded in almost always having her own way. Woe betides anyone who opposed her or stood in her way!

I believed if she had been anybody else she would have been rebuffed and her demands rejected out of hand.

As we have seen by the middle of August 1998, Mrs. Cotton had succeeded in causing consternation and panic among Government officials. According to Prof. Mills, the government was desperate to rescue the project. He said in evidence:

> 'My Lord, I would say that throughout my four years as Vice-President, there was no project, which occupied more of my time than this Quality Grain Project.
>
> Indeed, my Lord, if I should say so there was a time when we were even prepared to lie down for this woman to walk on us so long as we would have rice in place. That was the extent of our desperation. We were prepared to assist the company give us something in this country. That was our pre-occupation. Quality Grain was perhaps living in the Castle. We had meetings and meetings with officials of this company, going to their site, trying to solve problems."

The Government lay down. She walked on them. But she did not produce any rice. How sad and humiliating! At a meeting with the Chinese Ambassador on March 21, 2000, Prof. Mills confessed that despite the fact that the government acquired the land for the company and even the loan for the commencement of the project as well as the machinery for the smooth operation of the project, the actual cultivation of rice, which was the overall aim of the project, had not been carried out up till the time he was speaking.

- Why did the Ghana Government get into such a horrible mess?
- Why did this nation get into such a humiliating and desperate pass?
- Why did this young woman of little experience and with no special qualifications in rice farming get away with her blatant fraud and dishonesty in spite of clear signs and warnings and even evidence?

The answer is: Somebody up there liked her. She used to bombard the former President from America with complaints and demands. And when she was in Ghana or even in America, it was to the Castle that she addressed her requests. Yes, somebody up there liked her - and that was the source of her power and influence. As P.W. 20 said in evidence:

> "My impression was that she is very arrogant and as we say in the local parlance, her behaviour came out because as we say 'her foot was stepping on something' ... it means that before she speaks to you, she has some authority behind her and when she says I want this, you should give it to her, otherwise you will see."

DEFENCE OF SUPERIOR ORDERS.

For all these reasons the defence raised the defence of superior orders. Their argument is that under Article 58 of the 1992 Constitution, the executive authority of Ghana is vested in the President and he is required to exercise it in accordance with the provisions of the Constitution. Under Article 76 (2), the cabinet merely assist the President in the determination of the general policy of the government. Ministers are therefore no more than advisors and assistants to the President. It is their duty to obey and carry out his decisions.

I can understand the difficult situations in which ministers may sometimes find themselves vis-a-vis the Presidency. But as the Prosecution pointed out “superior orders” is not a defence in law. This may appear harsh but it is in consonance with the basic principles of criminal law. Under our Criminal code every sane person of the age of twelve years and above is fully responsible for the consequences

of his voluntary act. If he acts on the orders of a superior he is responsible as the doer or perpetrator of the act while the **[p.93]** superior is the abettor. See S.20 of Act 29. So even if in these things the accused carried out orders of the President they are responsible for their own acts.

I must say that the accused did not press their defence of superior orders. Everybody seemed anxious to keep the former President out of the case. So the court does not have full details of his involvement though there is no doubt that he was involved.

But even assuming that Superior Orders constitute a defence, the defence did not lead evidence to show that it was the former President who ordered 1st and 3rd accused to agree to recommend that government should guarantee the first loan, a course of action which on the facts known to the accused, was likely to cause or contribute to cause financial loss to the State; or that he ordered 3rd accused, as Minister of Finance, and 4th accused, director of the Quality Grain Company (Ghana) Ltd., who had usurped the functions of the Attorney-General in so far the Quality Grain project was concerned, not to monitor how Mrs. Cotton was using the loan funds or propose measures for doing so; or ordered 3rd accused, with 4th accused's assistance, to unjustifiably give away US$ 2,000,000.00 to Mrs. Cotton and her North American Company.

I want to end this judgment with a humble submission. Section 179A(3) (a) is so wide and elastic that it is possible to punish that under it civil servants or other career public servants who in compliance with the Code of Conduct for civil servants or similar regulations obey ostensibly lawful orders. I do not think Parliament intended such a result. Otherwise the civil and public services will be crippled as civil and other public servants will be reluctant to carry out instructions for fear of being punished if the order turns out to cause financial loss to the state. I am of the opinion that a career civil or public servant bound by the Code of Conduct for Civil Servant or similar regulations may only be punished under S.179A (3)(a) if he knows the superior orders to be unlawful, such as an order to forge documents, to steal or fiddle with accounts; or he goes beyond his position or functions as a civil or public servant and then does an act or acts which cause or contribute to cause financial loss to the state; or he is grossly negligent or reckless in the performance of his duties and thereby causes financial loss to the state.

Ministers are in a different position. A minister is not a mere advisor or assistant of the President as the defence would have us believe. The President or Cabinet may lay down broad policies of government.

The Minister as the political head of his Ministry then works it out in detail and ensure the efficient implementation of those government policies which affect his Ministry. On the other hand he formulates and proposes policies for the consideration of the President or the Cabinet. As far as I know a Minister is allowed or left to run his Ministry with as much freedom as possible and to the best of his ability. The President normally will not direct how a Minister performs his functions. He has a lot of discretion and powers of decision. He is not a robot, a rubber stamp, an amanuensis, a messenger, or a parrot of the President. He is entitled to send memos to advise against a policy, which he thinks is not in the best interest of his Ministry and the Country. Above all he has the power of resignation if he disagrees with the President or the Government - a power which 3rd accused's predecessor used. As to why other people who worked on the project were not charged or called as witnesses that was for the prosecution to decide. That is its prerogative. Of course, if as a result of failing to call vital witnesses, its case were weakened that would have inured to the benefit of the defence. But as against some of the accused it has been able to prove its case while against others and on some counts it has failed.

DECISIONS

I now announce my decisions in respect of each accused person on each count.

COUNT ONE

1) 1st Accused - Guilty and sentenced to Two (2) years imprisonment.

2) 2nd Accused - Not Guilty. Acquitted and discharged.

3) 3rdAccused - Guilty and sentenced to Three (3) years imprisonment.

4) 4th Accused - Guilty and sentenced to Two (2) years imprisonment.

6) 5th Accused - Not Guilty. Acquitted and discharged.

7) 3rd Accused - Guilty and sentenced to Three (3) years imprisonment

8) 4th Accused - Guilty and sentenced to Two (2) years imprisonment

COUNT THREE

9) 2nd Accused - Not Guilty. Acquitted and discharged.

10) 3rd Accused - Guilty and sentenced to Three (3) years imprisonment

11) 4th Accused - Guilty and sentenced to Two (2) years imprisonment

COUNT FOUR

12) 3rd Accused - Guilty and sentenced to Four (4) years imprisonment

COUNT FIVE

13) 3rd Accused - Not Guilty. Acquitted and discharged

14) 4th Accused - Not Guilty. Acquitted and discharged

COUNT SIX

15) 4th Accused - Not Guilty. Acquitted and discharged

COUNT SEVEN

16) 2nd Accused - Not Guilty. Acquitted and discharged

17) 3rd Accused - Not Guilty. Acquitted and discharged

18) 4h Accused - Not Guilty. Acquitted and discharged

19) 5th Accused - Not Guilty. Acquitted and discharged

All sentences to run concurrently.

(SGD)

D. K. AFREH, JSC.