

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS****P.O. BOX 633,****KINGSTON,**

June 7, 2017

MEDIA RELEASE**RE: RESPONSE OF THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS
(ODPP) TO CONCERNS RAISED IN THE PUBLIC DOMAIN ON THE MATTER
INVOLVING CARLOS HILL AND CASH PLUS LIMITED**

On May 24, 2017 the Prosecution offered no evidence against Mr. Carlos Hill in the Home Circuit Court. The Office of the Director of Public Prosecutions (ODPP) is aware that a significant amount of criticism from well-meaning members of the public has been advanced because of a deficit of information which is not usually readily available to the public. In an effort to assist the public with understanding the development of the matter and the circumstances which led to its conclusion, the ODPP has prepared this document after having researched the records, statements on file and consulted with the lead Investigating Officer, Assistant Commissioner of Police Fitz Bailey who at the time of the investigation was head of the Organised Crime Division. Please bear in mind that I was appointed as Director of Public Prosecutions in March 2008.

THE GENESIS OF THE CARLOS HILL/CASH PLUS CASE

The Role of the Financial Services Commission (FSC)

According to the website of the Financial Services Commission (“FSC”), their mission is to “regulate and supervise the securities, insurance and pensions industries for the protection of their users thereby enhancing public confidence through the efforts of a competent workforce”. Their statutory remit is wider, and the law requires them to, among other things, supervise and regulate financial institutions, and to promote public confidence and understanding (see, section 6 (1) of the Financial Services Commission Act). **Financial regulation is therefore largely a matter for the FSC.**

In recent media comments, Mr. David Geddes, a public relations officer at the FSC, sought to redirect attention, and perhaps blame, away from his office, accusing the ODPP of, among other things, a failure to collaborate. This assertion can be flatly denied.

The ODPP on its file had the statement of the former then Acting Executive Director of the Financial Services Commission Mr. Edmond George Roper dated 2008.05.02, who was due to give evidence in the case against Mr Hill and Cash Plus. The prosecutors had a series of meetings with Mr Edmond Roper, at the DPP’s Office, and his contribution proved quite valuable to the prosecution in enhancing the understanding of the true role of the FSC and providing the necessary insight as to the true state of affairs of Cash Plus.

As the premier regulator for the purpose of protecting customers of financial services, aspects of his statement, paraphrased and quoted, are instructive on the genesis of this matter.

In late 2004, Cash Plus Limited was brought to the attention of the Financial Services Commission (FSC) by an “individual enquiring whether Cash Plus could legitimately engage in deposit taking as there were advertisements appearing in local newspapers inviting individuals to invest \$100,000.00 or more and receive a 10 percent return on their investment monthly. Specifically, on December 27, 2004, two advertisements appeared in the Daily Gleaner.”

The FSC’s mandate is set out in section 6[1] of the Financial Services Commission Act. The FSC monitors institutions and individuals who issue securities to the public to ensure that they abide by the regulatory regime that is implemented to protect investors. There are persons in the FSC who are responsible for conducting due diligence, checks on individuals who come forward to deal in securities and to provide other related services to the public. **The FSC also investigates and institutes criminal proceedings against individuals or institutions as required by law.** Please note they have this power as investigators to initiate proceedings before the criminal Court, without having to consult the ODPP. **As the potential complainants under the Securities Act they need only consult with the JCF and immediately move to have the offender arrested and charged and taken before the Court.**

The FSC made covert telephone calls to glean further information about Cash Plus. *“In or about April 2005, there were calls from the public enquiring into the registration status of an entity called Cash Plus. In late May 2005 an FSC agent received confidential information from a potential investor who revealed that Cash Plus Limited offered a wide range of services.....”* In June 2, 2005, the FSC’s chief investigator was placing calls to staff members of Cash Plus to ascertain the true nature of the operations of Cash Plus.

It would appear that up to 2007 the FSC was seeking to have meetings with Carlos Hill and/or his agents to obtain information about the financial operation. Financial information was provided by Cash Plus to the FSC which raised certain concerns. Cash Plus was asked in writing by the FSC to provide an explanation for apparent discrepancies noted, but up to August 2007 the FSC could not get any further clarification.

To quote from Mr. Roper’s statement, *“from review of the lone documentation provided by Cash Plus, the FSC legal services department concluded that the company’s loan agreement were securities. The implication of this was that Cash Plus was in breach of the law since it was not registered as an issuer with the FSC and it was not licensed as a securities dealer”*.

The Attorney General's Chambers at the time in a separate opinion also concluded that Cash Plus Limited "**Loan Agreement**" was a security within the meaning of the Securities Act and was therefore operating in contravention of sections 7, 10 and 26 of that Act. It must be noted that although the FSC had received these two opinions on the interpretation of the "**Loan Agreement**" the FSC did not move at that time to arrest and charge Carlos Hill and Cash Plus Limited for contravening the Securities Act though they were so empowered under their statute (any enquiry to ascertain the reason why this was not done, would need to be directed to the FSC).

From Mr. Roper's statement it appears that on May 7, 2007 Cash Plus Limited, filed an affidavit in the Supreme Court which was served on the FSC on May 15, 2007 to ascertain among other things:

- (i) If Cash Plus carries on business of a nature and form that cause it to fall within the purview regulation by or under the Financial Services Commission Act and/or regulation under the Securities Act;
- (ii) whether a loan agreement which is non tradable between a private company and a private citizen constituted a security under the Securities Act; and
- (iii) whether if a private company borrows money from members of the public, pays a return on the borrowed money and makes the principal available on demand those actions by themselves constitute the taking of deposits and so define the company as a "Bank" under the Banking Act.

On January 23, 2007 in a Court Hearing before Hon. Justice Brooks, Cash Plus withdrew their application for the Declaratory Judgment. It appears from Mr. Roper's statement that as far as the FSC was concerned, in so doing, Cash Plus acknowledged that their activities fell within the regulatory ambit of the FSC.

Please note that even at this time, the FSC did not move to initiate Court proceedings against Mr. Hill or Cash Plus for breaches of the Securities Act. This is so even though Mr. Roper's statement went on to state that "in keeping with legal findings on an examination and review of documents provided and obtained in the course of this investigation, Cash Plus Limited was never registered with the Financial Services Commission to offer securities hence Cash Plus and its principal, Carlos Hill, are in violation of the Securities Act."

On December 20, 2007 the FSC received from Carlos Hill a set of indicative financial statements for Cash Plus as of September 2007 which suggested in effect that the company was insolvent. Mr. Roper's statement highlighted that the following concerns:

"The company had accumulated historic losses in excess of \$8.9 billion which suggested that the company was not generating sufficient income to enable it to pay the high interest rates it was offering its investors; and

If the indicative financial statements had correctly classified the loans from investors as a liability, and not preference shares, the company's liabilities would have exceeded its assets by an amount in excess of \$1.4 billion. In other words, it appeared that the company was insolvent."

Thereafter the FSC issued a Cease and Desist order to Cash Plus Limited and Carlos Hill which was served on the company by an agent of the FSC. Even at this stage the FSC with all this information did not move as empowered by their statute, to prosecute Mr. Carlos Hill and Cash Plus.

On March 31, 2008 the Supreme Court approved the appointment of Kevin Bandoian of Price, Waterhouse, Cooper of the USA as joint receiver/manager for Cash Plus Limited and its affiliates. The last paragraph of the statement of the FSC senior manager states "In order to allow the receiver/manager to pay out Cash Plus's investor on April 4, 2008 the FSC varied the cease and desist order it had issued to Cash Plus. The FSC's variation order was served on Cash Plus (in receivership) on April 7, 2008 by an officer of the FSC on an employee of Cash Plus.

The Role of the Jamaica Constabulary Force (JCF)

Sometime in 2007, the Organized Crime Division of the Jamaica Constabulary Force led by now Assistant Commissioner of Police Fitz Bailey also received complaints from disgruntled depositors, as a result of which investigations were commenced by the police into the operations of Cash Plus and Mr. Carlos Hill.

Prepared by the Office of the Director of Public Prosecutions
June 7, 2017

The investigation took a multi-agency approach which included the Financial Investigations Division (FID), and incorporated investigations that had already been commenced by the Financial Services Commission (FSC) and other arms of the Jamaica Constabulary Force (JCF).

All these entities collaborated throughout the entire investigation after the police entered the arena. The means allegedly used by Mr. Carlos Hill to obtain the money of disgruntled investors received particular attention during the investigation. ACP Bailey has informed us that as a result of this multi-agency approach, potential tax liability was explored, and possible breaches of the Banking Act, the Securities Act and the Financial Institutions Act were explored.

Given the methodology employed by Mr. Hill making use of signed loan agreements from the depositors to Cash Plus, it was ultimately decided by the police investigators that Mr Carlos Hill, Mr Bertram Hill and Mr Peter Wilson were to be charged with Conspiracy to Defraud at common law and Obtaining money by means of false pretences. Based on the fact that the interpretation of the loan agreement as a security was a moot point and given the broad scheme of the allegations surrounding this enterprise, the police took the view that given the high standard of proof required, the public interest, the grey area surrounding the interpretation of the loan agreement as a security and the sentencing options of available under the Securities Act which was much less than the common law and under the Larceny Act that these charges were preferred.

Commencement of Court Proceedings

The matter was brought before the Corporate Area Resident Magistrate's Court (Parish Court), on July 17, 2008 by the police. Our records further indicate that the matter remained in the lower Court for some time and was incomplete. Please note that I was appointed DPP March 5, 2008 and as far as I am aware, under my tenure the Office of the DPP was never consulted before the matter was brought before the Court. It came to our attention under my tenure sometime in 2010 when either the police, the Clerk of Court or the FSC asked us to take over the matter in the Lower Court given my Constitutional remit and to ascertain why it was still incomplete.

A Deputy Director was assigned to the file and on our perusal and research we discovered that there was insufficient material to support the charges levied against Mr Hill, his brother and Mr Wilson. We advised that another charge be laid by the police in respect of a breach of section 28(c) of the Larceny Act and this was done.

A charge of **Fraudulently Inducing Persons to Invest contrary to section 28(c) of the Larceny Act and Attempting to Fraudulently induce Persons to Invest** was laid against Mr Carlos Hill alone. Notwithstanding the original opinion of the Attorney General's chambers and the FSC lawyers in respect of their interpretation that the **'loan agreement'** could have qualified as a security we like the police, thought that a charge under the Securities Act would have been fraught with difficulty in the interpretation of the **'loan agreement'** that we saw on file being a security. We also thought that the maximum sentence would be

too small to do justice to the allegations in the case which involved the operation of a ponzi scheme by ingenuous means. **Under section 7[3] of the Securities Act, a person is subject to a fine not exceeding \$2m or imprisonment not exceeding 3 years.**

A *nolle prosequi* was entered to discontinue the previous charges against the other co-accused leaving Mr Carlos Hill to be tried before a judge of the Supreme Court on an indictment. **The charge of Fraudulently Inducing Persons to invest - if proven to the requisite standard i.e. beyond a reasonable doubt, could attract a sentence of up to seven (7) years.** The *nolle prosequi* was entered on Tuesday, November 10, 2010 and the matter brought up before the Home Circuit Court.

Under the guidance of the prosecutors from the Office of the DPP, the police collected other statements, and after further documentary material was gathered and they were all disclosed to the defence attorneys for Mr Carlos Hill.

The First Trial

In 2013, the prosecution embarked on a trial, with the concurrence of the defence and the Court. after calling at least three witnesses, the defence attorneys requested additional disclosure of material for their defence which did not at the time form part of the prosecution's file, and had not been part of the prosecution's case. This material included documentary evidence relating to the civil aspect of proceedings by a party against Cash Plus (for which the DPP's Office

has no responsibility). The trial, having started, had to be discontinued as we would have needed several months to get the additional material requested by the defence and to have it disclosed on them. The prosecution also amended the indictment to make the particulars of offence more specific. It must be noted that in the criminal law process, though the prosecution is obligated to serve all documents in its possession on the defence, there is no obligation on the defence to disclose anything at all on the prosecution. So usually we commence a trial not knowing what exactly the defence is going to be. In this case given the issues arising, the credibility of the witnesses would have been critical given the allegations of the Crown.

After the matter was discontinued, Mr. Carlos Hill, at the instance of the DPP was re-arrested the same day and placed back before the Court and thereafter a date certain for his return to Court was set.

The prosecution sought and obtained the additional material for disclosure, as the law requires us to facilitate, and new trial dates were canvassed from the defence for the re-commencement of the trial. The setting of trial dates depend on the availability of a Court and Counsel for the Defence. Bear in mind that when matters come up for trial, they cannot be embarked upon because another matter is in progress and as such has to be adjourned.

Before each trial date, subpoenas were issued to the police by the Court on our application for the relevant witnesses to attend trial on the given date.

Editorial Comments

The ODPP in particular notes, the comments of the editor of the Daily Gleaner published on Friday, May 26, 2017 concerning the recent fraud case concluded against Mr. Carlos Hill, the principal of an entity known widely as “Cash Plus”. In his opening remarks, he avers that *“Paula Llewellyn is not on entirely firm ground with her suggestion that people like Locksley Comrie are not entitled to their outrage over the collapse of the criminal case against Carlos Hill, the boss of a dodgy investment scheme that crumpled 10 years ago, leaving thousands of Jamaicans out of pocket to the tune of more than J\$10 billion.”*

We would wish to affirm that the staff of the ODPP’s Office, from those occupying the very highest position in the organizational hierarchy to the very lowest, are always sympathetic to the alleged victims of crime, and outrage.

Prosecutors have the daily professional responsibility of interfacing with persons who have themselves been victims of crime, often violent crime, or who have lost loved ones to violent crime, particularly murder. Sympathy, empathy, patience, tolerance and compassion are professional skills that develop organically as a result. We therefore reject what must be a misunderstanding on the editor’s part in his interpretation of comments attributed to me. At no time did I say that persons were not entitled to their “outrage”.

We acknowledge that the named Mr. Comrie, like any disappointed investor, would be entitled to express outrage at the prosecution’s legal decision to offer

no evidence. We would also hasten to point out that while Mr. Comrie turned up at Court on the fateful day to observe proceedings he, at no point in time whatsoever, gave a statement to the police regarding Cash Plus and/or Carlos Hill. Even if he had volunteered to give a statement at that stage, it would have been unfair given the circumstances of the matter for us to accept that statement given the history of the matter and the nature of the allegations. Though we can empathise and sympathise with victims of crime, we have a duty to be dispassionate, objective and fair to all parties in a criminal trial. Mr Comrie in fact told the prosecutor that day that he did not want to give a statement but would go into the witness box to make a statement. That procedure would not have been allowed by the Court as a matter of law.

The Role of Witnesses

It is useful to now consider the value of evidence in criminal prosecutions. In short, there are no criminal prosecutions without presentation by the prosecution of cogent, credible, reliable evidence. Evidence is the foundation of every conviction in law.

Evidence, in the ordinary course of things, comes from witnesses who have given written statements and are courageous enough to attend Court and speak it in a witness box on oath or on affirmation. **The giving of a statement by a witness is a voluntary act and actually speaking the evidence on oath or affirmation is a voluntary act. There is no magic wand that a prosecutor can wave to get a**

witness to speak without he or she doing it voluntarily. In specific and narrow circumstances, evidence can also come from a statement given by the witness, usually to the police, or from a document produced by a witness. In this case because the main issues surrounded the credibility, for fairness, it was critical that the witnesses come and give evidence on oath/affirmation so that they can be tested under cross examination.

The starting point regarding evidence is that it must first take the form of material which can be disclosed to the defence to equip them to prepare to meet the prosecution's case. This is what the Constitution of Jamaica requires as interpreted by the Privy Council, Jamaica's highest Court. Therefore witnesses, as a starting point in criminal proceedings, must give statements.

It is unfortunate that in some cases, a cultural apathy, driven often by fear or ignorance because of Jamaican socio-cultural realities, makes many witnesses to crime, and victims of crime, though willing to talk about it, are unwilling to give signed statements to the police. It also cannot be ignored that investors in this particular case reported, as reasons for their unwillingness to assist the police in their investigations by giving a statement, embarrassment at having possibly been misled and reluctance to disclose the amount of money invested, some for fear that they may attract the scrutiny of tax authorities. Some persons also reported that their main objective was the return of their money, and they felt that Mr. Carlos Hill going to prison was inimical to that purpose. These reasons were given to the police and to prosecutors anecdotally throughout the course of this matter.

In my present research of this matter to prepare this report, in speaking with police officers who had worked on the Olint matter, they recounted that whilst disappointed investors and possible complainants were willing to make verbal reports, but were adamant that they would not reduce these reports to written statements.

The Constitutional Role of the DPP in Jamaica

Under section 94 of the Constitution, the DPP has a prescribed role to initiate, take over or discontinue prosecutions with the assistance of the other 43 other lawyers who work in the office for whose decisions I am accountable. **The ODPP has no investigative remit** and is **NOT** administratively in charge of the Clerk of the Courts in the Parish Courts. In the ordinary course of things, prosecutors attend Court to prosecute files collated by the police or INDECOM, or any other body which have investigative functions.

Ordinarily, therefore, prosecutions come after the initiative of police or other investigators in conducting investigations, or after acting upon the due complaint of citizens, or both so far as they are complementary.

How is Law Made?

The police investigators have primacy of decision making during their investigations and in excess of 90% of criminal matters are put before the Court by the Police without any input from prosecutors in the lower Courts or Crown prosecutors in the ODPP. The Director of Public Prosecutions also has no power

to make law. Prosecutions can only be conducted based on law which exists. Law is made either by Case law by the Judiciary or by Parliament through legislation.

Since the Office of the DPP cannot invent law, it must look to the country's legal framework to evaluate a basis upon which a prosecution can be conducted. In this particular case, because of the disquiet in the public domain, the ODPP was invited to review the matter which had been meandering in the Lower Court for over a year before it came to my attention. We exercised initiative and astuteness in identifying, based on laws which existed, an appropriate charge upon which to conduct a prosecution: section 28(c) of the *Larceny Act*. This, based on the evidence available to prosecutors, was the most viable charge, carrying with it a penalty upon conviction of seven (7) years. Jamaica's Larceny Act is modelled off the 1916 Larceny Act of the United Kingdom (UK) and has not kept pace with developments there. The UK many years ago repealed their **1916 Larceny Act** and had replaced it with the **Theft Act**.

The UK has also passed the **Fraud Act of 2006**, section 1 states that **a person can receive a ten (10) year prison sentence for committing fraud by making a false representation, or for committing fraud by failing to disclose information. There is no direct statutory equivalent in Jamaica.**

What Entity is responsible for Restitution of Monies in these circumstances?

The criminal process exists for the State to ensure accountability for breaches of the criminal law. While other government agencies have responsibility for

financial regulation and restitution, this has never been the responsibility of the Office of the Director of Public Prosecutions. In fact, from time to time over the duration of this matter, when members of the public including some witnesses in the matter, contacted the ODPP to ascertain whether they would recover their money at the end of the process. Once it was explained to them that they would not recover their monies at the end of the criminal trial they disengaged from the process. We invited them to contact the Trustee in Bankruptcy's office whose remit dealt with the recovery or possible recovery of monies in circumstances of this nature.

What was the Legal Responsibility of the ODPP?

This DPP's legal responsibility in this matter came about after the matter had been placed in the Lower Court and we were contacted and asked to review the matter. This of course was long after the tail end of the investigative process which involved the FSC, FID and the JCF. It can fairly be described as tragic that the operations of Cash Plus remained largely unchecked to the point where, if anecdotal reports are accurate, some 40,000 investors lost, collectively, billions of dollars. We understand that frustration is a natural reaction that demands expression.

Disappointed investors, particularly those still desirous of recouping their losses, would find their valid frustrations misdirected at the DPP's Office. The number of investors and the amount of money lost was, generally speaking, not relevant to the criminal charge under section 28(c) of the Larceny Act.

Prosecutions in Other Countries

Reference has been made by commentators to successful prosecutions for what is perceived to be similar offences elsewhere in the world. These references can actually be misleading, because the circumstances in each case are different, existing in an entirely different legal reality.

Bernard Madoff in New York, USA pursuant to a plea deal for example pleaded guilty based on the evidence of willing witnesses to three counts of money laundering. Money laundering was not a viable charge in the Carlos Hill context given the circumstances of the matter. To date, from a USA Today post on May 24, 2017, indicated that none of the victims have received any of their monies despite US\$4billion recovered out of reported losses of US\$67.8b....nearly 8½ years after Madoff's arrest.

Allen Stanford in Texas, USA was convicted of conspiracy to commit mail fraud, money laundering and obstructing justice. Similarly, the circumstances and legal framework are not analogous.

David Smith of OLINT entered a plea deal in the Turks and Caicos Islands whereby he pleaded guilty to money laundering and conspiracy to defraud, in exchange for which prosecutors dropped charges against his pregnant wife. In my research, I recently spoke to both the Prosecutor - English Queen's Counsel and the defence counsel, both well known to me and they confirmed the basis of the plea deal and

that there were no local witnesses in that case. All the witnesses were foreign to the Turks and Caicos and Jamaica.

In an editorial note, proper enquiries for reasons why no case was prosecuted against David Smith/Olint when he resided in Jamaica should be made to the FSC or Mr Walter Scott, Q.C. who was retained by the FSC in the matter and Mr Kent Pantry Q.C., the former DPP. I was not seized of the existence of a file on Olint until a few months after my appointment as DPP when the FSC made me officially aware of the matter and reconstituted a file for my perusal.

Let me make it quite clear that in the Olint matter when I became DPP in March 2008, having done an audit of the files in my new office, there was no file on Olint which was either handed to me or which was in the office. I had discussions with Mr Walter Scott, the police and the FSC who briefed me on certain matters and it became quite clear to me that the ODPP would not be in any position as a matter of law to action a prosecution for a variety of reasons against Mr Smith and Olint who had already quit the Jamaican jurisdiction for the Turks and Caicos Islands before I was appointed as DPP. However, in my remit as designated Central Authority for Mutual Assistance, I authorised my officers to facilitate the request of a US attorney and we obtained several production orders for bank records and provided boxes of documentary material for a case which was mounted in the United States against Mr David Smith.

Challenges in the Prosecution of Mr Carlos Hill

The modus operandi of Mr. Carlos Hill and Cash Plus made prosecutions difficult. Mr. Hill structured the mechanism for collecting money from investors as a loan agreement. Under the carefully worded loan agreement which the depositors signed, as structured, depositors *made a loan* to Cash Plus, which would be repaid with interest. Based on the rates of interest offered, depositors/lenders would actually or could potentially have been in breach of the Moneylending Act of Jamaica, which prescribes that entities are not generally permitted to lend other entities money in excess of a particular rate of interest.

As cleverly structured, Mr. Hill was never as far as the police and the ODPP were concerned dealing in securities, which would have made him vulnerable to a prosecution under the Securities Act. This is our view notwithstanding the legal opinion of the lawyers from the FSC and the Attorney General's Chambers. In any event at the time previously stated the FSC did not move to prosecute him under the Securities Act.

Any breach of the loan agreement would largely be a civil matter between parties, and not a matter for criminal prosecution. We note legal commentary and commentary from the FSC expressing a contrary view, but this view is, with the greatest of respect, not sustainable on a proper reading and construction of the Securities Act, Larceny Act, or any statute referring to offences involving dealing in securities.

What was Carlos Hill indicted for and the particulars of offence?

Statement of Offence:

“Fraudulently inducing persons to Invest, contrary to section 28(c) of the Larceny Act”

Particulars of Offence:

“Carlos Hill on diverse dates between the 1st day of April 2007 and the 30th of November, 2007 in the parish of St Andrew, fraudulently induced persons to invest money in Cash Plus Limited and/or Cash Plus Group by making statements representing that the said Cash Plus Limited and/or Cash Plus Group was then a viable company and that in return for monies paid to the said Cash Plus Limited and/or Cash Plus Group the said persons would secure a profit on their monies which said statements were false and misleading.”

And in the alternative:

Statement of Offence:

“Fraudulently attempting to induce persons to Invest contrary to section 28(c) of the Larceny Act”.

Particulars of the Offence:

“Carlos Hill on diverse dates between the 1st day of April, 2007 and the 30th day of November 2007 in the parish of St Andrew attempted to fraudulently induce persons to invest money in Cash Plus Limited and/or cash Plus Group by making statements representing that the said Cash Plus Limited and/or Cash Plus Group was then a viable company and that in return for monies paid to the said Cash Plus Limited and/or Cash Plus

group, the said persons would secure a profit on their monies which said statements were false and misleading.”

What were the Ingredients of the Offence against Carlos Hill for Fraudulently Inducing Persons to Invest?

Having identified section 28 (1) (c) of the Larceny Act as the most suitable charge for the indictment (*“Fraudulently Inducing Persons to Invest”*), the prosecution would be required to prove three things:

- a. that Carlos Hill made statements inducing persons to invest in Cash Plus;**
- b. that Carlos Hill made promises relating to securing a profit with respect to fluctuations in the value of property other than securities, and**
- c. that at the time of making the statements, he knew or ought to have known that the statements were misleading, false or deceptive.**

Whereas it would not have been unduly challenging to establish the first element of the offence through evidence if the witnesses/complainants came and gave the evidence, the second element would have been challenging to establish, given that Cash Plus was a conglomerate of ostensibly legitimate companies, required proof from within the company about the viability or lack thereof of Cash Plus’ financials. One of two former employees of the organization who had given

statements were not disposed for several reasons to attending Court, to give evidence in the trial and refused all attempts at moral suasion to participate in the trial process. We had hoped that with the passage of time the witness would re-engage and cooperate, but this was not to be. This made the prosecution ill-equipped to discharge its burden of proof as the law requires. This witness' evidence was critical given her former position in the company.

The Role of the DPP revisited

Members of the public have expressed disappointment in the DPP for the perceived failure to protect the interest of investors in Cash Plus.

The DPP's responsibility, according to the Constitution of Jamaica, is to initiate, take over, or discontinue prosecutions. That role is dissimilar from that of the FSC, the FID, the Public Defender and the Trustee in Bankruptcy. Ethically the DPP is not empowered to be an advocate for disgruntled members of the public to include disgruntled depositors of a failed institution.

The DPP's role is a legal one, which has also been defined in case law and the DPP's conduct is governed by strict ethics, even where and perhaps especially when the discharge of those responsibilities produces unpopular outcomes. If the DPP acted as an advocate for a disgruntled member of the public in a subjective, emotional way, the accused could rightly complain that the DPP's actions could be unfair to the trial of the accused as I was not showing the level of

dispassionate objectivity required in the role of DPP in making decisions as a matter of law.

Outrage, while legitimate and understandable in this case, is not a basis in law for a viable prosecution. It has never been.

The Office of the DPP retains a function to prosecute persons charged for crimes based on existing law within a code of ethics requiring fairness to all persons including the complainants, other witnesses and the accused. It is for the regulators and policymakers to intervene through the implementation of appropriate laws and regulations to maximize protection of members of the public, sometimes even to save persons from themselves where ponzi schemes are concerned.

Perhaps there might have been a role for members of the private bar to lead, where appropriate, once there was no conflict of interest, advocacy efforts for financial redress for disappointed investors.

Reasons for Delay of the Trial – The Capacity of the Courts

The Office of the Director of Public Prosecutions, and by extension the justice system is best served by, an environment where matters are tried without inordinate or undue delay. Unfortunately, because the physical infrastructure and the capacity has not been significantly improved since 1962, increase in crime

and the population has overburdened the criminal list island wide. The ODPP as stakeholders has to play the hand we have been dealt. When the Easter term commenced, on April 16, 2017 the Home Circuit list had 706 cases apart from the Carlos Hill matter to be dealt with in only four criminal courts. The St Catherine Circuit Court commenced with 349 cases. The Clarendon Circuit Court commenced with 186 cases and the St James Circuit Court commenced with 205 cases. This reflects the situation island-wide. There is only one Circuit Court for each rural parish sitting at intervals of three or four weeks per term. There are three terms in the Court calendar per year.

All these matters are prepared by the ODPP to be dealt with by the same number of court rooms that existed since 1962.

Trials, when they start, rarely last one or two days, and more frequently last one or two weeks. While a trial is going on, no other trial can go on simultaneously in the same Courtroom. There are, on average, seven trials per week, which means that when a trial starts in a given week, six or more matters are often put off to a future date.

This inevitably fosters delay and frustrates witnesses who must sometimes wait for years for matters to be tried. Fortunately, in the majority of cases island wide, it is our experience that most of the witnesses continue to be courageous and keep faith with the Justice System which is why our Circuit Court convictions for the most part outweighs acquittals. We will always salute those witnesses who

continue to step up to the plate in giving the evidence whether for the prosecution or the defence.

CONCLUSION

It is well known that Jamaica has a celebrated culture of “throwing a partner” which has depended on trust between the parties and the “informal banker” to work. It is indeed unfortunate that this culture may have rendered citizens vulnerable, willingly suspending their disbelief by engaging in these ponzi schemes also throwing caution to the wind as it was known in the public domain that initially persons did receive “benefits” or “profits”.

The allegations surrounding the Mr. Carlos Hill saw citizens signing an agreement to lend their money in an explicitly high-risk arrangement to a company, lead by a principal who was for the most part a stranger to most investors. They had, for a time, been receiving the promised interest, and when the arrangement was disrupted, public pronouncements were made blaming the banks for the disruption.

The laws in Jamaica pertaining to any type of fraud generally require proof of an intention to defraud. It is generally acknowledged by legal commentators that the prosecution would have had a challenge meeting the burden of proof for intention to defraud (not least because investors were, at the beginning, receiving payments, and that Mr. Carlos Hill, Cash Plus and its affiliates owned or had an interest in a wide range of companies that appeared on the surface to be

successful). That is why the ex-employees of Cash Plus would have been critical since they would have been able to outline the true financial health of these companies given what the FSC had found based on disclosure made by Cash Plus in the indicative financial statements.

There is no offence in Jamaica known as “**Operating a Ponzi scheme**”. We note public commentary to the contrary. Given the evidentiary material which existed, and the circumstances, we were constrained to proceed to offer no evidence in the manner outlined. The Office of the DPP comprises trained lawyers collectively with years of specialized training and experience in prosecuting at every level as well as appearing in the Court of Appeal, to make submissions in law to uphold convictions in all types of cases.

The initial charge of **Obtaining Money by False Pretences** laid by the police was not sustainable, given the evidence on the prosecution’s file that Mr. Carlos Hill was repaying a loan made to him at an agreed rate of interest signed to by the investor, a loan acknowledged to be high in risk. The offence of **Conspiracy to Defraud** also could not be made out as we would have needed at least one person from within the company to give evidence of an agreement with the accused to do an illegal act or to do an act by illegal means. Contrary to public opinion, the Office of the DPP made a careful assessment and concluded based on the laws which exist that no other charge other than section 28(c) of the Larceny Act was viable.

Having proceeded in this manner, we required particular evidence from witnesses who had given statements and who did not, in the final analysis, co-operate. Objectively, ethically and in law, we had no other options but to offer No Evidence. As the prosecutor we could not go into the witness box to give the evidence. It is unfortunate that some commentators, even some members of the legal profession who have not had the benefit of seeing the contents of the file; statements, specimen of the loan agreements, statements from the two ex employees of Cash Plus, and statements from the executive of the FSC – have chosen to make certain negative pronouncements as to the efficacy of our decision and the handling of the matter. Some persons have gone as far as to engage in personalities and making unfair comments. As professionals bound to act within a very strong ethical ethos, we at the ODPP will continue to take the high road and engage in discussions in an objective issues and law based context.

RECOMMENDATIONS

It would seem looking at the history and the genesis of this matter from 2004 where the FSC would have been alerted to issues arising to the operations of Cash Plus that the public interest or the protection of the public would have benefitted from more robust action by the FSC. This would have seen more urgency in the investigation of Cash Plus, and its financial health. There ought to have been more effective, strident, communication and education of the public which may have encouraged more due diligence before engaging with Cash Plus thus preventing persons from making decisions which would have been inimical to their interest.

It is hoped that the modus operandi of the FSC going forward will see more robust engagement and effective communication with the public from very early once the possibility of a ponzi scheme rears its head. We would also urge that where appropriate, action be taken as a matter of urgency to implement that part of its remit to prosecute where the offence falls within the breaches of the Securities Act.

Review of Present Legislation

It is our recommendation that Parliament reviews the Larceny Act which is antiquated and make the necessary amendments to the law to bring it into the 21st century which would make it easier and perhaps act as a deterrent to prevent ponzi schemes flourishing to the detriment of our citizens. Our legislators would demonstrate great wisdom, given the history of failed investment schemes in Jamaica, and our cultural affinity for generating wealth through “partner” plans, to augment our legislative framework to assist prosecutors in meeting public demands on, and expectations of public prosecutions. It is ideal to do this sooner rather than later.

We have always understood the tragedy of the effect on people’s lives of a ponzi scheme. However, given the constitutional responsibilities of the Office of the Director of Public Prosecutions (ODPP), the Office recognises that it is a manifestly easy target for criticism when criminal prosecutions produce outcomes that differ from public expectations. In other words, though as prosecutors we may be correct in a court of law, we may be seen in some quarters of coming up short in

the court of public opinion. Criticism is, in large measure, unavoidable, and legitimate criticism is a welcome platform on which standards for improvement can be evaluated. As professionals we hope that commentators will do their due diligence to get the facts before making commentary that may prove to be unfair because of a deficit of information.

Please be assured that I lead a team of individuals who are very hard working and take pride in the intellectual rigour, objectivity and integrity which must be constant companions of any good prosecutor. We are constantly striving to do our best in very challenging circumstances and would welcome along with the criticism, the understanding that this effort we make to educate and to explain the reasons for our actions in some high public interest matters is part of giving service above self for the public whom we serve.

Paula V. Llewellyn, Q.C.
Director of Public Prosecutions