IN THE SUPREME COURT OF BELIZE, A.D. 2009

CLAIM NO. 41 OF 2009

	ATTORNEY GENERAL	**Claimant**
BETWEEN	**AND**	
	FLORENCIO MARIN	**First Defendant**
	JOSE COYE	**Second Defendant**

—

BEFORE the Honourable Abdulai Conteh, Chief Justice.

Ms. Lois Young SC for the claimant.
Mr. Francis Fonseca, with Mrs. Magali Marin Young, for the first defendant.
Dr. Elson Kaseke, with Mr. Anthony Sylvestre, for the second defendant.

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DECISION

Introduction

The claimant in this case is the Attorney General suing for and on behalf of the Government of Belize.

2. The two defendants are former ministers of government. The political party which formed the administration of which they were members lost the General Election held on 7th February 2008. The first defendant was up until 7th February 2008, the Minister in government responsible for

among other things, national lands. The second defendant was up until that date, the Minister of Health.

3. The substance of the claim is that the two defendants, while ministers of government committed the **tort of misfeasance in public office** in relation to the sale and transfer of some 56 parcels of national lands being the property of the Government of Belize. It is specifically claimed against both defendants that between December 2007 and February 6th 2008 they wrongly (sic) and in breach of the National Lands Act – Chapter 191 of the Laws of Belize, Revised Edition 2000, arranged and procured the transfer of the said 56 parcel of National Land owned by the claimant for a price which the defendants knew was less than the value of the said land with knowledge that, or reckless that, the consequence of disposing of the National Land at the price would cause damage to the claimant. It is further claimed that the conduct of the defendants jointly and severally, was in bad faith and constituted misfeasance in public office. Particulars of the conduct of both defendants are stated in the Statement of Claim. As a consequence, the claimant claims special damages for the alleged loss to it of $924,056.60; exemplary damages; interest at the statutory rate on any award of damages from 7th February 2008 until payment; and costs. The pith of the claim is that the defendants wrongfully agreed to sell and transfer the 56 parcels of land at an under value.

4. The case was initially after case management by the Registrar, assigned to another judge. However, at a conference with the Registrar at which cases are finally assigned by me to individual judges, I read the respective statements of case in this action. From this I noticed that there was joined between the parties, the issue of the cause of action: the first defendant in particular, averred in his statement of case (The Defence) that the claim disclosed no cause of action.

5. The substance of the claim itself, as I have said, was for damages against the defendants for the tort of misfeasance in public office.

6. This is a cause of action that is seldom, if ever, litigated in this jurisdiction, particularly against former ministers of government by a successor administration. These considerations weighed with me to take on the case myself. Thereafter, notices were sent out to the parties that the case would be heard by me.

The Preliminary Issue

7. The matter eventually came before me on Friday 19th June 2009. I then informed the parties that that hearing was a case management hearing and that pursuant to Part 26 Order 26.1(2) of the Supreme Court (Civil Procedure) Rules 2005, in particular, paragraphs (f) and (g), I would like to hear them on a preliminary issue in their statements of case, and I directed a separate trial of the following issue as a preliminary matter, viz:

> *"In the circumstances of the claim and the particulars of the claimant as the Attorney General of Belize, and the defendants being former ministers in the Government of Belize, can the tort of misfeasance in public office be maintained at the suit of the claimant against the defendants?"*

8. Despite my dictating this preliminary issue to the learned attorneys for the parties at the case management hearing, it was urged by Ms. Lois Young SC for the claimant, the Attorney General, and Mr. Francis Fonseca for the first defendant, that they did not quite understand the issue at the hearing on 14th July 2009. I however, was satisfied that from their submissions both written and in oral arguments, that they had got the

import of the preliminary issue. I however granted the parties further time to make additional submissions. Thereafter oral arguments were made by all the attorneys on 17th and 20th July 2009.

9. The parties tried to ventilate as well a further preliminary issue regarding the limitation of the claim: it was argued for the defendants that the claim against them was in any event barred by the lapse of time; while it was argued for the claimant that the claim was within the limitation period. I have decided however that the issue of limitation would, in the circumstances, require evidence which is best left for determination at trial after all the evidence is in. That is, if that stage is reached after the preliminary issue is decided. There are however, the provisions of both The Limitation Act – Chapter 170 of the Laws of Belize and The Public Authorities Protection Act – Chapter 31. They may impact on the liability of public officers. But this is a matter of evidence.

10. Therefore, this decision is concerned only with the preliminary issue of the maintenance of the claim for the tort of misfeasance in public office by the present Attorney General against the defendants, former ministers of government and the reach of the tort. That is for whom does the tort lie and against whom?

11. The nub of the issue itself stems from the cause of action, the tort of misfeasance in public office, being advanced by the present Attorney General, on behalf of the State, against ***former*** ministers of government for things allegedly done by them when they were ministers of government.

12. I should, for the avoidance of doubt, say that in this area of the law, there is good judicial authority for the court itself raising the preliminary issue as to the cause of action: see **Bourgoin SA v Ministry of Agriculture, Fisheries and Food (1986) QB 716; (1985) 3 All ER 585 CA**. In that

case, it was the trial court itself that raised the preliminary issue of the tort of misfeasance in public office on the claimant's pleadings. It ordered this issue to be tried first. Indeed, in the **Three Rivers District Council and Others v The Governor and Company of the Bank of England (No. 3) (1996) 3 All ER 958**, it was the trial judge Clarke J himself, who ordered the trial as a preliminary issue whether the Bank was capable of being liable to the plaintiffs for misfeasance in public office and whether the plaintiffs' alleged losses were caused in law or capable of being caused by the Bank's acts or omissions.

The decisions of the Courts, including the House of Lords' decision in this case **(2000) 3 All ER 1** are today regarded as seminal and defining judgments on the tort of misfeasance in public office. This case featured prominently at the hearing before me. Clarke J's judgment on the preliminary issue was affirmed by the English Court of Appeal – **(2000) 2 WLR 15**.

13. Both sides (the claimant on the one hand and the two defendants on the other side), have, not unnaturally, taken diametrically opposed positions on the preliminary issue.

Rival Contentions of the Parties

14. Ms.. Young SC for the claimant was emphatic in her arguments and submissions that the tort of misfeasance in public office could lie against the defendants. She submitted further that a claim for the tort can lie against persons who were public officers (such as the two defendants) at the time of the alleged misfeasance, but have ceased to be public officers. She relied on Clarke J's judgment in **Three Rivers District Council and others v Bank of England (No. 3) (1996) 3 All E.R. 558** and the case of **Jones v Swansea City Council (1990) 3 All ER 737; (1990) 1 WLR 1453**

for the essence of the tort and the proposition that it is the abuse of public office that founds the tort. She urged that the focus should be on when the defendant was a public officer and he exercised or purported to exercise public functions which has given rise to the claim.

15. Ms. Young SC further submitted that the tort is growing in scope and that it is aimed at curbing abuse of public office by officers who had that status when the tort was allegedly committed: every public officer is, she reasoned, susceptible to liability for the tort of misfeasance in public office. She relied in this regard on the decision of Lindsay J in the Chancery Division of the English High Court in **Weir and others v Secretary of State for Transport and others (2005) EWHC (Ch.) 2192**. In that case, the claimants brought a claim against the current Minister of Transport claiming damages for the tort of misfeasance in public office allegedly committed by a former Minister of Transport in connection with the movement of assets and business away from Railtrack plc, in which the claimants held shares. The claim however failed; but Lindsay J stated that the defendants, the present Secretary of State and the Department of Transport, had accepted that they would be accountable on behalf of the former Minister if liability was found.

16. Ms. Young SC was also insistent that the present case was however, not one of vicarious liability, but rather of the personal liability of the two defendants. She relied on the House of Lords' decision in **Racz v Home Office (1994) 1 All ER 97 (HL)** for the proposition that the question of the vicarious liability of the employer of the public officer for his tort of misfeasance in public office, is one that can be best be determined at full trial at which the court would receive evidence in respect of the authority of the public officer (the defendant) to do the acts complained of as giving rise to the claim. She also urged that vicarious liability is a tripartite

concept - the tortfeasor employee or agent, the employer or principal and the party suffering the loss or damage.

17. I accept this as correct, but say however, that vicarious liability may apply, depending on the circumstances of the tort of misfeasance in public office, it is not however an issue that can be determined **a priori**. As Lord Steyn said in **The Three Rivers supra** at p. 6:

> *"... it is not disputed that the principles of vicarious liability apply as much to misfeasance in public office as to other torts involving malice, knowledge or intention:* ***Racz v Home Office*** *(1994) AC 45."*

18. The issue of vicarious liability for the alleged misfeasance of the defendants in public office is however, a central part of the arguments for the defendants in this case. It is argued on their behalf that, if on the facts, the tort is maintainable, then as former public officers, it is the Attorney General, the claimant in this case, who should really be the defendant. It is therefore submitted on their behalf, that the claim by the Attorney General is misconceived as he is suing himself. (I shall return to this point later).

19. Finally, Ms. Young SC pressed on the Court the case of **Southern Developers Ltd and Lester Bryant, Robin Yearwood, Hugh C. Marshall Snr. v The Attorney General of Antigua and Barbuda** (unreported) from the Court of Appeal of the Eastern Caribbean States, dated 7th April 2008 as authority for the proposition that indeed, the Attorney General can successfully maintain an action for the tort of misfeasance in public office against former Ministers, including a former Attorney General himself as in that case.

20. I must say that the facts of that case are instructive for the purposes of the instant case before me and they bear some analogy to the latter. I should say more on this case in the light of the preliminary issue under consideration here.

21. In October 2005, the Attorney General of Antigua and Barbuda commenced proceedings against the appellants in which it was alleged that the sale in 1987 of 25 acres of Crown Land to the first-named defendant (the actual appellant only), Southern Developers Ltd., at a time when the second to the fourth-named defendants were cabinet ministers was tainted with illegality. It was also alleged that the second to fourth-named defendants also had a vested interest in the first-named defendant, Southern Developers Ltd., which was not disclosed to the Cabinet. This is an allegation not dissimilar to the one being made in the instant case that the second defendant knew that Cheop Enterprises Ltd. who is alleged to have bought the 56 parcels of land in question, was beneficially owned and controlled by the second defendant a Minister of government at the time and that he knowingly engaged on behalf of Cheop Enterprises Ltd. or through it in a scheme to sell national land at a price which would result in a sizeable profit to Cheop and in a loss to the claimant, that is, the Government of Belize. The second defendant has of course denied this allegation.

The Attorney General (as the claimant) in **Southern Developers Ltd.** sought a number of declarations and a rescission of the transfer of the land to the first-named defendant, Southern Developers Ltd.

22. Among the declarations sought was that the second to fourth-named defendants were guilty of the tort of misfeasance in public office when they as cabinet ministers, participated, without disclosing to the cabinet, their interest in Southern Developers Ltd., in the decision to transfer the 25

acres to the company and that this transfer was done at an undervalue as the company immediately proceeded to mortgage the land for far more than it was transferred to it for.

23. Against the Master's refusal to strike out the claim on an application by the first-named defendant only because of insufficiency of the pleadings of the facts and particular of facts to support the claim and her finding that misfeasance in public office was sufficiently pleaded and that the office of Attorney General was continuous and that it was the Attorney General who effected the transfer of the lands to it, therefore a later Attorney General could maintain an action for the rescission of the transfer, the first-named defendant then appealed to the Court of Appeal.

24. The Eastern Caribbean Court of Appeal in its judgment delivered on 7th April, 2008, dismissed the appeal of Southern Developers Ltd. Ms. Young S.C. for the claimant accordingly has put much premium on this case for the purposes of the preliminary issue as to whether or not the Attorney General can maintain a claim against the two defendants, former Ministers, for the tort of misfeasance in public office. (More on this case later).

25. On the other hand, on behalf of both defendants, Mr. Francis Fonseca and Dr. Elson Kaseke were equally categorical in their arguments and submissions that in the circumstances of the instant case, in the light of the preliminary issue, the tort of misfeasance in public office could not be maintained by the claimant, the Attorney General, as against the two defendants former ministers.

26. In short, they contend principally that the claim for the tort of misfeasance in public office cannot lie against the defendant at the suit of the claimant

Attorney General. They submitted that the tort lies only against sitting public officers, or the offices held by former public officers.

27. They drew support for their principal contention from the ingredients of the tort itself as analyzed by Lord Steyn in **Three Rivers District Council and others v The Governor and Company of the Bank of England (2000) UKHL 33; (2000) 3 All E.R. 1; (2000) 2 WLR 1220** when he stated that

> *"... the requirements of the tort* (can be stated) *in a logical sequence of numbered paragraphs:*
>
> *(1) The defendant must be a public officer.*
>
> *It is the office in a relatively wide sense on which everything depends. Thus a local authority exercising private-law functions as a landlord is potentially capable of being sued: Jones v Swansea City Council.*
>
> *(2) The second requirement is the exercise of power as a public officer*
>
> *... the conduct of the officials* (should be) *in the exercise of public functions ... it is not to be disputed that the principles of vicarious liability apply as much to misfeasance in public office as to other torts involving malice, knowledge or intention: Racz v Home Office [1994] 2 A.C. 45.*

(3) The third requirement concerns the state of mind of the defendant

The case law reveals two different forms of liability for misfeasance in public office. First there is the case of targeted malice by a public officer, i.e. conduct specifically intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive. The second form is where a public officer acts knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff. This involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful."

28. I have taken the opportunity to quote from Lord Steyn's statement of the ingredients of the tort at some length, convinced that his judgment still represents a masterly analysis of the tort, its early history, matrix and ingredients and its rationale. On the latter he stated:

> *"The rationale of the tort is that in a legal system based on the rule of law executive or administrative power may be exercised only for the public good and not for ulterior and improper purposes:* Jones v Swansea City Council (1990) 1 WLR 54, 85F, *per Nourse LJ* ... ***The tort bears some resemblance to the crime of misconduct in public office: Reg v Bowden (1996) 1 WLR 98."*** (Emphasis added).

29. It is further argued for the defendants that from the analysis of the ingredients of the tort, it is clear that the defendant in an action for the tort of *misfeasance in public office*, **must be a public officer** and that the misfeasance complained of must occur contemporaneously with the holding of office by the defendant. Therefore, it is submitted for the defendants, once they ceased to be Ministers (as a result of the results of the General Elections of 7th February 2008) they were no longer amenable to the claim for the tort of misfeasance in public office. Rather, it is urged on their behalf, it is the **current** holders of their former offices that are now amenable to liability and not the defendants personally; reliance is sought to be placed on **Weir and Another supra** for this proposition.

30. It is also urged for the defendants that there is no judicial precedent establishing that the tort of misfeasance can lie against former Ministers (such as the defendants). Both Mr. Fonseca and Dr. Kaseke for the defendants argued and submitted that the decision of the Eastern Caribbean Court of Appeals in **Southern Developers Ltd. supra**, cannot be taken as a judicial precedent on this point because the issue in that case was not whether the former Ministers (the second to fourth defendants) were liable for the tort and they did not in fact raise it, but rather the issue was the sufficiency of the particulars of the pleadings of the tort of misfeasance in public office, raised before the Master by the first-named defendant, Southern Developers Ltd. only. It is also argued that that judgment does not address the **scope** of the tort of misfeasance in public office, particularly whether it lies against former Ministers.

31. It was also contended, with some vigour by both Mr. Fonseca and Dr. Kaseke, that in all the decided cases on the tort beginning with **Ashby v White (1703)** best reported in **Smith's Leading Cases (13th edition 1929) 253**, the principle of law which can be discerned is that misfeasance in public office is a tort that is available to an aggrieved private person or

persons against the Crown in its various manifestations as a public authority or public officers for willful abuse of public office. It is therefore, the submission ran, not a tort which lies at the instance of the Attorney General who is himself an agent of the Crown in virtue of section 42(5) of the Belize Constitution, against other agents of the Crown for acts done in public office. In the circumstances, it was urged for the defendants, the remedy available to the Crown is not the tort of misfeasance in public office since the Crown will ultimately be held vicariously liable, but rather the common law offence of misfeasance in public office which is not unlike the tort, pinned to the office,

32. Finally, there was urged on behalf of the defendants what they called a "discrete point of law" as to who is a public officer under the Belize Constitution. Reference was made to the definition of "public office' in section 131 of the Belize Constitution to mean "any office of emoluments in the public service", and that because sub-section (4) of section 131 provides that the office of Minister, among others, does not unless the context otherwise requires, make it an office in the public service the defendants were not public officers. This elliptic definition is sought to be relied upon as authority for the proposition urged for the defendants that the office of Minister is not an office in the public service or for the purposes of this case, a public office.

33. This "discrete point" does not need or deserved to be elaborated upon in my view. The proposition is wholly unsustainable. Section 131(4) is only for the purposes of the Constitution in terms of contextual reference to the offices therein specified for the purpose of the public service. It does not establish or disestablish the various officers mentioned in it as **public offices**, which term itself is defined as meaning any office of emolument in the public service. Surely, it beggars belief that the office of "Minister" is not a public office. And this I am confident would surprise the defendants

themselves. The offices they occupied as Ministers were clearly public offices and not private offices. Therefore nothing turns on this so-called "discrete point". There is nothing that warrants further consideration that the offices the defendants held were not public offices.

34. I am satisfied that they were public officers for the purposes of the tort of misfeasance in public office.

The Tort of Misfeasance in Public Office – an Analysis

35. Before I turn to a determination of the preliminary issue in this case, it would perhaps be necessary if I say something, even if only briefly, on the tort of misfeasance itself without attempting an essay on the tort. It is the cause of action relied upon by the claimant which has given rise to the preliminary issue for determination. Misfeasance in public office consists of the purported exercise of some power, authority or function by a public officer otherwise than in an honest attempt to perform the functions of his office which results in loss to a claimant: per Brennan J in **Northern Territory of Australia v Mengel (1995) 185 CLR 307** at-p. 357. For a thorough analysis of the tort of misfeasance in public office, I find the judgments of Clarke J in **Three Rivers** at first instance, the English Court of Appeal in the same case **(2000) 2 WLR 15** and the House of Lords' decision **(2000) 3 All ER 1**, extremely helpful and instructive, as I did the decision of the High Court of Australia in **Mengel supra**, the New Zealand case of **Garrett v The Attorney General (1997) 2 N.Z.L.R. 332** and the earlier decision of the Canadian Supreme Court in **Roncarelli v Duplessis (1959(15t DLR (2d) 689**.

36. There are two types of misfeasance in public office, one is a **crime** and the other is **a tort**. Both are however creations of the common law. For the crime of misfeasance in public office see **R v Bowden (1995) 4 All**

ER, 505. For the ingredients of this offence, see **Attorney General's Reference (No. 3 of 2003) (2004) EWCA Crim 868, (2005) QB 73.**

37. However, it is the tort of misfeasance in public office with which the case is concerned which has given rise to the preliminary issue under consideration.

38. The tort itself is of some vintage, the first clear reported case of it dating back to 1703 is the case of **Ashby v White supra**, also reported in **(1703) 1 Bro. Parl. Cas. 62 1 ER 417**. It was described by Lord Diplock by 1981 in the Privy Council in **Dunlop v Woolhana Municipal Council (1981) 1 All ER 1202** at 1210 as "well established". By 2000, the English House of Lords confirmed in **Three Rivers supra** that the tort has two separate limbs viz, a **targeted malice limb**, where intent to injure a particular claimant is essential, and an **illegality limb** where the defendant's conduct that has given rise to the complaint on which it is founded, is unlawful is central. Lord Steyn in the **Three Rivers** case however was clear in emphasizing that there is only one cause of action and that this cause of action has several unifying features, including its special nature as a tort directed against the conduct of public officers alone, and the element of an abuse of public power in bad faith. The two limbs of misfeasance in public office are therefore merely two manifestations of a more generally underlying wrong committed by public officers in exercise or purported exercise of their public functions or power.

Position of Defendant in a claim for misfeasance in public office - whether current or former public officer

39. In considering the scope of the tort it is manifest from all the decided and reported cases, that the defendant in an action for misfeasance in public office must be the holder of a public office. This much is clear, but what is not clear and has been agitated as a part of the preliminary issue in this

case is: can a ***former*** public office holder who is no longer in office be amenable to a claim for an action alleged to have constituted the tort?

40. I am satisfied that in principle, liability for the tort attaches to the office, but it is not the inanimate and incorporeal office itself that can commit the tort. The tort can only be committed by the human persona holding the public office who, in the purported exercise of the functions, powers or authority of the office, does or fails to do an act which may found the tort.

41. Indeed, in the Canadian case of **Roncarelli v Duplessis (1959) 16 D.L.R. (2d) 689**, it was no less than the Prime Minister of Quebec who was held personally liable for the tort in causing the liquor licence of the claimant to be revoked because of his support for his fellow Jehovah Witnesses.

42. But it is the law I venture to think, that the tort of misfeasance in public office is concerned with the deliberate and dishonest abuse of office or the purported exercise of official power otherwise than in an honest attempt to perform the relevant duties of his office, resulting in loss or damage to the claimant: **Three Rivers supra**. As Lord Steyn said in that case: *"It is the office in a relatively wide sense on which everything depends."*

43. I have at para. 28 above stated what is generally regarded as the rationale for the tort of misfeasance in public office as enunciated by Lord Steyn in **Three Rivers** crediting Nourse LJ in **Jones v Swansea City Council** supra as the source:

> *"The rationale of the tort is that in a legal system based on the rule of law, executive or administrative power may be exercised only for the public good and not for ulterior and improper purposes."*

The essence of the tort as a cause of action as a whole is, therefore, the deliberate and wrongful abuse of the powers given to a public officer. It acts as an antidote to maladministration and affords a remedy to a claimant who alleges and proves that he has suffered loss by the deliberate and wrongful action of a public officer.

44. The question therefore arises: is liability for the tort of misfeasance in public office personally or exclusively fixed on the miscreant public official or there can be also vicarious liability for his employers or superiors?

However, Lord Steyn did state as well in **Three Rivers**, on the issue of liability for the tort that:

> *"... it is not disputed that the principles of vicarious liability apply as much to misfeasance in pubic office as to other torts involving malice, knowledge or intention ..."*

45. Therefore, in my view, liability for the tort can be both personal and vicarious. Liability can be personal of the public officer tortfeasor if he is still in office and it can be vicarious, if his superiors accept or are deemed responsible for his tort. The latter form of liability comes to the fore in most claims for misfeasance in public office. The facts and circumstances of a particular case would, no doubt, determine the extent to which liability for the public officer's action would attach. In fact, in **Three Rivers** supra, it was the alleged failure of the officials of the Banks Supervising Department of the defendant, Bank of England, to properly supervise banking in the United Kingdom that facilitated the collapse of the BCCI Bank and the resulting loss to its depositors such as the claimant and others. The claim was therefore against the Bank of England as the employer and authority for banking.

In **Racz v Home Office (1994) 2 WLR 24**, for example, the absence of authority to render the prison officers' conduct in that case tortuous did not automatically exclude vicarious liability for those acts on the part of the Home Office, so the issue was ordered to go to trial where it would be determined. This judgment implicitly recognized the possibility of the Home Office for the prison officers' treatment of the claimant.

46. As Clarke J said on this issue of vicarious liability in **Three Rivers (1996) 3 All ER 558** quoting Mann J in **Bourgoin supra**:

> *"So far as policy is concerned, it is to be borne in mind that although the tort is that of a public officer, he or she is liable personally and unless there is a de facto authority, there will ordinarily only be personal liability. And principle suggests that misfeasance in public office is a counterpart to, and should be confined in the same way as, those torts which impose liability on private individuals for the intentional infliction of harm."*

47. In my opinion, therefore, both policy and principle would require that liability for the tort does not cease or come to an end by the mere vacation of public office by the defendant, however so this is occasioned. This I think, will reinforce the principle of the rule of that that the tort is an antidote to the abuse of public office by affording victims of that abuse recourse to relief. It would also reinforce the policy of open, transparent and accountable governance: public office should be used only for public purpose as it is the basis of public trust. In the ordinary run of cases where the defendant is still in public office, there would, of course, be no problem as he or his employers would be personally or vicariously liable.

48. Problems may however arise, as in the instant case, when the defendant is no longer in public office.

49. It is, however, the office that is the matrix of the tort and in particular the improper or unlawful action of public officers therein that causes loss or damage to a claimant that grounds the torts. As Lord Steyn stated in **Three Rivers** (which I think bears repetition):

> *"The rationale of the tort is that in a legal system based on the rule of law executive or administrative power may be exercised only for the public good and not for ulterior and improper purposes."*

50. I am therefore satisfied that the status of the public officer, whether former or current, whose conduct is impugned in a claim for the tort of misfeasance in public office, is not determinative of liability. It is the occupation of the public office at the time when the act alleged to constitute the tort that is important and critical as in the purported exercise of the powers of the office. As Lord Steyn stated in **Three Rivers:**

> *"It is the office in a relatively wide sense on which everything depends."*

51. The tort is committed through or by virtue of the public office by the primary tortfeasor, the public officer, whether former or current. In my view, therefore, both policy and principle would require that liability for the tort is not extinguished by the mere fact that the errant public officer, the actual tortfeasor, has vacated or relinquished office. This conclusion, I venture to think, would reinforce the principle of the rule of law that at bottom, the tort is an antidote to abuse of office. It would also, I think, reinforce the policy of open, transparent and accountable government:

public office should be used only for public purpose and not for improper or ulterior purpose. This is the foundation of public trust.

52. On this point, I therefore conclude that in a claim on the tort of misfeasance in public office, it is immaterial that the actual public officer tortfeasor is no longer in office. There is no logic in restricting the ambit or reach of the tort in this way as this would have a potentially limiting effect on the availability or operation of the tort. For all it would take to obviate liability or even stultify a claim for misfeasance in public office is simply to remove the errant tortfeasor officer, by whatever means, from office. This simply cannot be right.

Who may maintain a claim for the tort of misfeasance in public office?

53. I now turn to the other question underlying the preliminary issue in this case: who can maintain an action for the tort of misfeasance in public office?

54. In my view, this question can best be answered by an appreciation of the origins, development, operation and rationale of the tort. I have in the preceding sections of this decision, I hope, attempted to sketch out these considerations in relation to the tort. The tort itself had its origins in an action on the case and its broad outlines were first sketched in **Ashby v White supra**.

55. The essence of the tort is that it provides a fetter on the abuse of public office or power by affording a remedy to persons demnified by the improper or illegal exercise of that power by a public officer. The tort is therefore preeminently actionable at the suit of *any person* or *entity* who can claim and prove loss or damage flowing from the improper exercise of public function or powers. This much is evident from all the reported

cases in which the tort of misfeasance in public office was claimed as the cause of action, from **Ashby v White supra**; **Roncarelli v Duplessis supra**; **Dunlop v Woolhara Municipal Council supra**; **Bourgoin SA v Ministry of Agriculture, Fisheries and Food supra** on to **Jones v Swansea City Council supra** and **Three Rivers supra**.

In all of these cases, the claimant/s was a ***private person or non-governmental entity*** claiming on the tort for loss or damages allegedly suffered as a result of the improper or unlawful exercise or failure to exercise, some public power or function by a public officer or body.

56. The operation and rationale of the tort undoubtedly show, from the reported cases, that the tort inheres to the benefit of the ***private*** citizen or entity against the improper and wrongful exercise of some public power by a public officer resulting in loss or damage to the claimant, thus acting as a deterrent to maladministration and affording relief to the affected claimant. There is therefore, some similarity between the tort of misfeasance in public office and the remedy of judicial review. But as Lord Slade observed in **Jones v Swansea City Council supra** at p. 174 – 5:

> *"I think the boundaries of the respective remedies of judicial review and … misfeasance in public office are by no means necessarily coterminous. I see no reason why a decision taken by the holder of a public office, in his or its capacity as such holder … should be incapable of giving rise to an action in tort for misfeasance in public office merely because the decision is taken in the exercise of a power conferred by a contract and in this sense has no public element … it is not the juridical nature of the relevant powers but the nature of the Council's office which is the important consideration."*

That case was about a local Council's resolution not to renew the claimant's lease, a decision that was motivated by political differences.

57. There is, of course, no permission necessary to bring a claim for the tort of misfeasance in public office unlike for judicial review. Both forms of action however aim to deter and remedy improper or unlawful official action or decision resulting in detriment to a claimant. In both forms of action, it is invariably some ***official conduct or decision*** that is sought to be impugned; and the claimant invariably is a ***private person or entity*** or some such group. And the defendant would be a public authority or official. It would be very strange if not unthinkable for the Attorney General to bring, for example, a claim for judicial review!

58. In all the reported cases on the tort of misfeasance in public office, it is an individual private claimant or some such other entity that is complaining about the execution or failure to do so of some official action or functions or the exercise of public power by the defendant, as a public officer. This of course is not to say that, in an appropriate context, a public authority cannot claim on the tort against a defendant's exercise or failure to exercise power or function as a public officer. Indeed, in **Three Rivers supra**, the claimant from whose name the case derives its popular reference – was a local council (a public authority) who together with other investors sought to impugn what they regarded as the failure of the Bank of England (another public authority) to properly supervise the collapsed BCCI, which they claim resulted in the loss of their deposits with the latter. But it is to be noted that Three Rivers District Council was, like the other plaintiffs in the case, depositors with BCCI licensed by the Bank of England and was therefore a client of BCCI.

59. From the origins, history, development and rationale of the tort of misfeasance in public office, it is, I find, preeminently actionable at the

suite of some ***private*** individual or entity as a claimant against the exercise of power by the defendant as a public officer. But I am however not confident or satisfied with the choice of cause of action in this case by the claimant, the attorney General, and that he should maintain it.

60. I am also, mindful of the need to ensure that the tort of misfeasance is kept within reasonable bounds (a need expressly recognized by their Lordships in **Three Rivers supra** at p. 10 by Lord Steyn and at p. 42 by Lord Hutton). The tort in its legal context and underpinning rationale is meant to ensure that public officials vested with governmental authority and the exercise of powers, do not exercise that power improperly or unlawfully to the detriment or loss of ordinary citizens. A case in which the claimant in an action for the tort of misfeasance in public office is itself a public body or authority, such as the Attorney General in the instant case, is complaining about the exercise of public power or function by a defendant, another public authority, is, I find, almost non-existent. I taxed both sides with this point. They were able later to unearth the recent unreported decision of the Eastern Caribbean Court of Appeals in **Southern Developers Ltd. & others v The Attorney General** (April 2008), in which the Attorney General of Antigua and Barbuda was the claimant and the second to fourth named defendants were former ministers of government, including a former Attorney General. I have set out the facts of this case at paras. 19 to 24 above of this decision.

61. Ms. Young SC, has, accordingly, put much store on this case as authority for the proposition that the Attorney General, the present claimant, can indeed pursue a claim for misfeasance in public office, even against former ministers.

62. Both Mr. Fonseca and Dr. Kaseke however, understandably, deny this thesis and instead, they sought to distinguish and downplay **Southern**

Developers Ltd. as a relevant or helpful judicial authority for the proposition.

63. I have briefly noted the facts and outcome of **Southern Developers Ltd.** at paras. 19 to 24 of this decision which are special to that case. I have carefully read that judgment and after some anxious reflection, I am not, with respect, however, convinced that it can be relied upon as a precedent for the proposition that the Attorney General as claimant, can maintain an action for the ***tort*** of misfeasance in public office against a public officer, whether current or former. This in my view, would be counter-intuitive to the **raison d'etre**, rationale and operation of the tort, which is a **civil** claim by **citizens** or **other private entities** against abuse of power by public officials.

64. In deference to the court in **Southern Developers Ltd.**, I now attempt to state the reasons why I am unable to draw much sustenance from that decision. In the first place, from my reading of the judgment, it would appear that though the claim sounded in the tort of misfeasance in public office against the second to fourth-named defendants (former Ministers), it was in fact seeking several **declarations**; and no coercive relief, against the individual second to fourth-named defendants was sought. The coercive relief of recession of the transfer of the land would affect only the first-named defendant. Secondly, it is not clear from that judgment if any issue as to the maintenance of the claim by the Attorney General in that case was even taken by the concerned defendants or considered. Although, the judgment quotes Lord Steyn in **Three Rivers** and Nourse LJ in **Jones v Swansea**, its reliance on **Gouriet (1978) AC 435** as authority for the Attorney General's standing to espouse the claim is, I think, not helpful in the context of a claim for the tort of misfeasance in public office **Gouriet** was a relator action in which it is undoubted that the Attorney General is always a proper party. Thirdly, that judgment was on an appeal

against the refusal of the Master to strike out the claim for alleged insufficiency of particulars of the tort of misfeasance in public office and not on the status of the former ministers as defendants and the maintained liability by the Attorney General of a cause of action for the tort of misfeasance in public office. There was no detailed analysis of this point by the Court.

65. Therefore, I conclude that in almost every case on the tort of misfeasance in public office there is, I find, a constant motif and consistent theme that the claimant is always a **private** person or entity in contradistinction to a public authority, such as the Attorney General in this case. This no doubt stems from the nature and essence and rationale of the tort, namely to provide recourse and relief to **citizens** damnified by the abuse or misuse of public power by a public officer: See **Jones v Swansea City Council supra** at p. 173 per Slade LJ and Nourse LJ at p. 186; and **Elguzouli – Daf v Commissioner of Police of the Metropolis, McBrearly v Ministry of Defence (1995) 1 All ER 833** at 840 per Steyn LJ as he then was with whom Rose and Moritt LJJ agreed:

66. I find as well that a claim for the tort of misfeasance in public is not one of the claim the Attorney General on behalf of the Crown may bring pursuant to section 21 of the Crown Proceedings Act – Chapter 167 of the Laws of Belize, 2000 Revised Edition, and the definition of "civil proceedings" in this Act. It cannot, of course, be doubted that the present claim is in civil proceedings. I should say however, that I did not have the benefit of arguments or submissions by the attorneys in this case.

67. From the nature and rationale of the tort of misfeasance in public office, it is, I find, eminently rational why the tort should not lie at the suit of the Attorney General. This is so when it is realized that the claimant on the tort, from the host of cases on it, is always a private person or similar

entity who has suffered loss or damage resulting from the wrongful or illegal exercise of public power. The tort is at bottom, abuse of power by a public officer and it is against this abuse that the tort is intended to afford redress. In a case where the Attorney General, a quintessentially public officer, complains of abuse of power by another public officer, the remedy should not be recourse to the tort in civil courts. The remedy may lie in disciplinary proceedings, against the miscreant public officer and, if necessary, recourse to the criminal offence of misfeasance in public office. I think policy and reason would require that the tort of misfeasance should be best left in the field where it properly belongs: as a remedy by way of a cause of action on the tort, available to the citizens against public officers who abuse their power with resultant loss or damage to the citizen. The tort is, at the end of the day, a ***civil wrong*** against ***private*** persons and other entities who are asymmetrically powerless against public officials and officialdom. The same cannot be said of the Attorney General who has at his disposal the common law offence of misfeasance in public office to call into play, if necessary, against miscreant public officers generally.

Determination

68. I now turn to a determination of the nub of the preliminary issue in this case in the light of the preceding analysis of the tort of misfeasance in public office.

69. First, on the amenability of the defendant to a claim for the tort of misfeasance in public office. As I have stated at paras. 33 and 34 above, I am satisfied and convinced that the defendants were public officers. Underlying this conclusion is the question: does it matter or make any difference that when the claim for the tort of misfeasance in public office is made against them they no longer hold public office? I, with respect, do not think it does. This conclusion is supported in my view by the first

ingredient of the tort itself. This requires that the **defendant in a claim for the tort must be a public officer** (See: **Three Rivers supra**). It is only as a public officer in exercise of a public function or power or purported exercise of that function or power can the tort be committed. This, in my view, is the basis of liability for the tort.

70. The fact that a particular defendant is no longer in public office does not, I think, obviate liability for the tort. Liability arises the moment the act complained of is done. The fact that the particular public officer is no longer in office raises only the issue of vicarious liability. The principles of this type of liability, as Lord Steyn stated in **Three Rivers supra** "(cannot) *be disputed* ... (as applying) *as much to misfeasance in public office as to other torts involving malice, knowledge or intention.*" Indeed, in **Weir and others supra**, especially as mentioned at para. 16 of this judgment, it was accepted by the current Secretary of State and Department of Transport that they would be accountable on behalf of a former Secretary of State. And in **Racz supra**, the prospect of the vicarious liability of the Home Office for the prison officers' treatment of the claimant was allowed by the House of Lords to go to trial.

71. I therefore find and hold that as former public officials, the defendants may be amenable to a claim for a tort of misfeasance in public office. Much however may depend on the operation and effect of section 27 of The Limitation Act and the provisions of The Public Authorities Protection Act. This, as I have said, at para. 9 of this decision, is a matter of evidence, especially in the light of the one-year limitation prescribed in section 27.

72. I have, however, been concerned in this decision only with the issue of the liability of public officials, whether former or current, for the tort of misfeasance in public office.

73. In the second place, on the issue of the maintainability of the claim for the tort of misfeasance by the Attorney General as claimant against the defendants, I am unable to find or hold that he can or should be allowed to do so. I have arrived at this conclusion based on my analysis of the original purpose, operation and rationale and the place of the tort in a legal system. As a tort, it is a civil wrong for which persons affected may bring claim for the redress of any loss or damages they suffered as a result or consequences of the defendants' illegal or improper actions in their public offices.

74. The tort is actionable by those persons effected by the improper and unlawful exercise of power by public officials. It is my view that the tort enures for the benefit and protection of the citizens against abuse of public office by public officials to the detriment of any affected person, if that person can allege and prove the loss or damages he has suffered as a result of the abuse or misuse of public office.

75. I do not, with respect, take the reference by Lord Steyn to "any plaintiff" when he said in **Three Rivers supra**:

> *"What can be said is that of course, any plaintiff must have a sufficient interest to found a legal standing to sue"*

to mean in the context of a claim for the tort of misfeasance in public office to include the Attorney General, as urged by Ms. Young SC. As is made clear in the next sentence following, His Lordship was speaking about the requirement of proximity, which the Court of Appeal in the same case had thought was necessary to found the claim. His Lordship continued after the reference to "any plaintiff with sufficient interest"

"Subject to this qualification principle does not require the introduction of proximity as a controlling mechanism in this corner of the law."

76. I am therefore not convinced that the Attorney General as a claimant can maintain a claim for the tort of misfeasance in public office.

77. It is my view that in the case of the state or government, as in the instant case through the Attorney General, alleging abuse or misuse of public office by public officials or wrongfully exercising official powers entrusted to them, there is the criminal offence of misfeasance in public office. This common law offence in still vibrant and extant – see **R v Bowden (1996) 1 WLR, 98; (1996) 1 Cr. App. R. 104 CA.**

78. However, in so far as the ***tort*** of misfeasance in public office is concerned, there is as I am presently advised, no reported judicial authority (with the sole exception of the unreported decision in **Southern Developers Ltd.** from the Eastern Caribbean Court of Appeals), that a public authority, quintessentially the government through the Attorney General, can claim on the tort as against a public official, either current or former.

79. To conclude on this issue, I think it is important to confine the tort of misfeasance in public office within its proper boundaries: the protection of members of the public by way of affording them redress against abuse of public office. The government, represented in these proceedings by the Attorney General as claimant, can, I am confident, protect itself against abuse of office by public officials, whether current or former, without the need to have recourse to the civil claim for misfeasance in public office.

Conclusion

80. In the light of all the foregoing, I conclude on the preliminary issue in this case as follows:

1. Subject to any limitation of action, that may apply and the provisions of the Public Authorities Protection Act, the defendants as public officials are amenable to a claim for the tort of misfeasance in public office.

2. The Attorney General as claimant cannot maintain this claim for the tort of misfeasance against the defendants in the circumstances of this case.

A. O. CONTEH
Chief Justice

DATED: 29th September 2009.