IN THE COURT OF APPEAL OF BELIZE, A.D. 2010

CIVIL APPEAL NO. 25 of 2009

BETWEEN:

THE ATTORNEY GENERAL OF BELIZE	**Appellant**
AND	
FLORENCIO MARIN **JOSE COYE**	**Respondents**

BEFORE:

The Hon. Mr. Justice Mottley	**-**	**President**
The Hon. Mr. Justice Sosa	**-**	**Justice of Appeal**
The Hon. Mr. Justice Morrison	**-**	**Justice of Appeal**

Lois M. Young SC for appellant.
Edwin Flowers SC and Magali Marin Young for first respondent.
Dr. Elson Kaseke for second respondent.

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16 March, 14 June 2010.

MOTTLEY P

[1] This appeal raises a short but discrete point as to whether the Attorney General is competent to institute an action against former ministers claiming damages for misfeasance in public office.

[2] On 11 January 2009 the Attorney General instituted an action against Florencio Marin former Minister of Natural Resources and Jose Coye former Minister of Health (together referred to as the respondents). In the statement of claim, the Attorney General alleged that between December 2007 and the February 2008 the first respondent caused 10.02 acres of land situate at the Caribbean Shores Registration

section, Block 20, Parcel 4690 being National Land to be wrongfully transferred to the second respondent in breach of the National Lands Act Cap. 191 (the Act).

[3] It is alleged that the respondents "arranged for and procured the transfer of 56 parcels of the National Land" owned by the Government of Belize to the second respondent for a price which the respondents knew was less than the value of the land and with knowledge that the consequence of disposing of the land at such a price would cause damage to the Government. It is further averred that the respondents were reckless as to the consequences of their actions and that the respondents jointly and severally acted in bad faith and that such behaviour constituted misfeasance in public office.

[4] In the particulars supplied in the statement of claim, it is stated that the first respondent signed the transfer forms for the sale of the 56 parcels of land without first fixing the price for the sale of land and that he instructed the Acting Registrar of Lands to issue land titles in respect of these parcels knowing that he did not have power to issue such instructions. It is further alleged that the first respondent knew or was recklessly indifferent to the fact that the issuance of the titles without payment would cause damage to the Government. Another particular alleged that the first respondent acted arbitrarily in directing the Commissioner of Lands and Survey that the price at which each parcel of land was to be sold was $4,000. In so doing, it is alleged the first respondent acted in violation of section 13 of the National Lands Act by not obtaining the advice of the Land Administration Advising Committee or the Valuation Department. Land Certificates for 56 parcels were processed and issued to Cheop Enterprises Limited (Cheop), at the price of $4,000 at a time when the first respondent "knew or did not care to discover" that other parcels of land in the same area and in the same condition had been transferred at an average of $19,460 per parcel. Cheop is beneficially owned and/or controlled by the second respondent.

[5] The particulars of claim in respect of the second respondent include an allegation that he, "on behalf of or through" Cheop knowingly engaged in a scheme to sell National Land which would result in a sizable profit to Cheop and a loss to the Government. It is also alleged that the second respondent used his position as a Minister of Government for private gain by colluding with the first respondent to fix a price of $4,000 for each

parcel of National Land when he knew that the land was valued at far more and that Cheop would receive between $40,000 to $60,000 for each parcel of land if it were sold at the market price.

[6] The Attorney General claimed special damages in the sum of $924,056.60 being the sum which the Government lost and exemplary damages.

[7] In his defence the first respondent denied the allegations contained in the statement of claim and asserts that the sales and manner of sales of Parcels 4711 to 4770 and 4880 (formerly 4748 to 4881) Block 16 (formerly 4749) Caribbean Shores Registration Section to persons of the Caribbean Shores Constituency were done by in his capacity lawfully as Minister of Lands and pursuant to Section 6 of the Act. The first respondent further asserts that, at all material times, he acted in the honest belief that he had lawful authority to transfer the property in the manner which he adopted. The first respondent states that, from the latter part of November 2007, he had taken the decision that the price for each undeveloped lot was $4,000 and that there was a need for residential lots in the Caribbean Shores Constituency. He indicated that the Advisory Committee under section 5 of the Act had not been appointed and therefore could not be consulted as required by the Act. In addition, the first respondent states that the sales were not in violation of section 13 of the National Lands Act. The first respondent alleges that he had no knowledge that Cheop was owned by the second respondent. He denies that the Government of Belize suffered any damage.

[8] The second respondent denied that his conduct was in breach of the Act and pleaded that at no time did he "arrange for or procured" the first defendant to transfer the 56 parcels of land below the market value. He denied that he owns or ever owned Cheop or is its agent and never colluded with the first respondent in any scheme to fix the parcels of land.

[9] At the hearing on 19 June 2009, the Chief Justice informed counsel for the parties that he wanted to hear them on the preliminary issue viz whether the Attorney General was the correct claimant in an action for the tort of misfeasance in public office against defendants who were former ministers of government. At para 11 of his judgment the Chief Justice identified the issue as being whether and action for

> "11. … 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."

could properly be brought by the Attorney General.

He formulated the question which he had to determine as being: "who can maintain an action for the tort of misfeasance in public office?"

[10] The Act essentially contains a scheme for the management of what was formerly known as Crown Lands. The Act contains inter alia provisions establishing an Advisory Committee to advise the Minister responsible for land generally on all matters relating to the administration of National Lands (section 6(2)). Provision is made that national lands are not to be dealt with or disposed of except in accordance with the Act (section 6(1)). The Minister is empowered to prescribe the prices at which such lands may be sold. However, this is to be done after consultations with the Advisory Committee. He has power in selling such land to set out the terms and conditions for improvement. The requirement for consultation with the Advisory Committee before the Minister prescribed the price at which the land is to be sold was obviously intended to prevent any abuse in relation to the sale of national lands.

[11] Complaint is made by the Attorney General that the first respondent deliberately and knowingly ignored the provisions of the Act to the detriment of the Government.

[12] In his judgment, the Chief Justice indicated that the tort of misfeasance in public office is "pre-eminently actionable at the suite (sic) of some private individuals or entity as a claimant against the exercise by the defendant as a public officer." The Chief Justice later held:

> "65……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 by the abuse or misuse of public power by a public officer."

The Chief Justice went on to find:

> "….that a claim for tort of misfeasance in public office is not one of the claims the Attorney General on behalf of the Crown may bring pursuant to section 21 of the Crown Proceeding Act……"

13. Later the Chief Justice found:

> "67. From the nature and rationale of the tort of misfeasance in public office it is eminently rational why the tort should not be 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…
>
> 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 be in disciplinary proceedings against the dis-credited public officer and, if necessary, recourse to the criminal offence in public office. I think policy and reason would require that the tort of misfeasance should be left in the field where it properly belongs: as a remedy by way of a course of action on the tort, available to the citizen 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."

[14] In **Three Rivers D.C. v Bank of England (No. 3) (H.L.E) [2000] 2 W.L.R. 1230** at p. 1233 Lord Steyn approved the observation made by Clarke J who presided over the trial which is to be found at [1996] 3 All E.R. 558, 584:

> "If an officer deliberately does an act which he know is unlawful and will cause economic loss to the plaintiff, I can see no reason in principle why the plaintiff should identify a legal right which is being infringed or a particular duty owed to him beyond the right not to be damaged or injured by a deliberate abuse of power by a public officer."

A plaintiff in an action for misfeasance in public office must show that the holder of the office deliberately does an act which he knows is unlawful and will cause economic loss to the plaintiff. The plaintiff need not show any duty is owed to him other than the duty not to be injured by the deliberate abuse of power by a public office. The economic loss suffered was by the Government of Belize.

[15] In **Common Cause, A Registered Society v Union of India** (1996) 3 SC.J 432 the Court at p. 456 stated in para 11:

> "11. … It is high time that the public servants should be held personally responsible for their mala fides in discharge of their functions as public servants. The Court in Lucknow Development Authority versus M K Gupta (1994) 1 Supreme Court Cases 2 & 3, approved "Misfeasance in public offices" as a part of the Law of Tort. Public servants may be liable in damages for malicious, deliberate injurious wrong doing. According to Wade
> "There is, thus, a tort called misfeasance in public office and which includes malicious abuse of power, deliberate maladministration and perhaps also other unlawful acts causing injury" With change in socio-economic outlook, the public servants are being entrusted with more and more discretionary power even in the field of distribution of government wealth in various forms. We take it to be perfectly clear, that if a public servant abuses his office either by acts or omission or commission, and the consequence of that is injury to an individual or loss of public property an action may be maintain against such public servant. No public servant can say "you may set aside an order on the ground of mala fide but you cannot hold me personally liable. No public servant can arrogate to himself the power to act in a manner which is arbitrary."

The property allegedly lost in this matter is in fact public property in the sense that it was national land and that the Government was deprived of the market price of the land as it was sold at a price which it is being alleged is below the market value.

[16] Assuming, but not deciding, that the Government of Belize sustained loss as a result of the sale of the land at a price which is said to be below the market price, as alleged in the statement of claim, "the all important question is what is required to be done to undo the wrong and how the wrong doer is to be dealt with within the parameters known to the law". (See **Hansaria J in Shivasagar Tiwari v Union of India (1996) 6 SCC p. 562**).

[17] **Tiwari**'s case concerned what the judge identified as the "alleged motivated, arbitrary and high handed action of a Minister" in the allotment by the Minister of Shops/Stalls" to her own relatives/employees/domestic servants of her family members and family friends.

[18] Having pointed out that the world of jurisprudence has thus accepted misfeasance in public office as a species of tortious liability and that in order to prevent the misuse, different courts have been awarding exemplary damages, Hansaria J stated at p. 563 at para 16:

> "16. We are conscious that the aforesaid cases dealt with injury to a third party (following misuse of power) who had sought damages for the loss caused, whereas in this present case there is no injury as such to a third person. Even so, the aforesaid cases have been referred to for two purposes. Firstly and primarily to bring home the position in law that misuse of power by public officials is actionable in tort. Secondly, to state that in such cases damages awarded are exemplary. The fact that there is no injury to a third person in the present case is not enough to make the aforesaid principle non-applicable inasmuch as there was injury to the high principle in public law that a public functionary has to use his power for bone fide purpose only and in a transparent manner. Insofar as the aspect of loss is concerned, it deserves to be pointed out that there was loss in the present case also, and this was to the State Exchequer

> resultant upon giving allotments without calling tender as required by the policy. Needless to say that if tender would have been called, higher revenue would have been earned by the State on giving the allotments. For these reasons, we are of the view that the mere fact that in the present case there is no injury to a third person and has not come forward to claim damages, has no sequester insofar as the tortuous liability following misfeasance of public office is concerned."

The Attorney General alleges that the price was deliberately fixed at $4,000.00 when the respondents knew or ought to have known that land was being sold at a much higher price. Indeed the Attorney General alleged that as a result of the conduct of the respondents, the Government lost $924,056.60 which is the amount which the Government would have received if the sale of the land was conducted in accordance with the Act.

[19] In **Common Cause, A Registered Society v India & Others** [1999] INSC 240, S. Saghir Ahmad J made observations as to who is the proper plaintiff in an action for tort of misfeasance which I adopt. The judge, speaking of Common Cause said:

> "It was a registered society. It was not one of the applicants for allotment of petrol outlet. Had the "Common Cause" approached the Civil Court for damages on account of tort of misfeasance in public office, its suit would have been dismissed on the ground that it was not one of the applicants for a petrol outlet; its own interest was not injured in any way nor had the petitioner made allotment in favour of one of the applicants maliciously or with knowledge that the allotment would ultimately harm the "Common Cause … It is this aspect which we are examining and it is in this context that we say that "Common Cause" not being an applicant for allotment of a petrol outlet could not obtain a finding in the civil suit that the petitioner had committed the Tort of Misfeasance in Public Office."

The judge went on to indicate that:

> "Having regard to the definition of tort of misfeasance in public office … and having regard to the ingredients of that tort, it is obvious that there has to be an identifiable plaintiff or claimant whose interest was damaged by the public officer maliciously or with the knowledge that the impugned

action was likely to injury the interest of that person. It is in favour of that specific identifiable plaintiff or claimant that relief could have been granted and damages awarded to him as the whole gamut of the Law of Tort is compensatory in nature and damages are awarded to compensate the losses caused on account of violation of the interest of one person by another. In other words, obtaining compensation for a tortuously inflicted loss is generally perceived as the aim of the law of tort by the plaintiff. Judgment in favour of the plaintiff can be given and the loss suffered by him can be redressed only when a finding of a breach of an obligation by the tort-feasor is recorded. It is the compensatory function of tort which is invoked by the plaintiff in a Court and unless there is an identifiable plaintiff there cannot be any order for compensation or damages to redress the loss caused to that plaintiff."

[20] These cases all show that the plaintiff in an action for tort of misfeasance in public office must be the person who suffered loss or damages. The rationale is that the damages in the law of tort are awarded as compensatory for loss suffered. The Supreme Court of India recognised that public servants are not only liable for injury caused to an individual but for "loss of public property". The authorities all show that the plaintiff must establish that he suffered loss. The Attorney General alleges that the Government suffered economic loss as a result of the respondents deliberately abusing their office. Who then is entitled to institute an action to recover damages for the loss suffered?

[21] The Attorney General as the guardian of public rights is the person entitled to institute proceedings where a public right has been infringed. In **Gouriet v Union of Post Office Workers [1977] 3 All ER 70** Lord Wilberforce said:

"It can properly be said to be a fundamental principle of English Law that private rights can be asserted by individuals, but that public rights can only be asserted by the Attorney General as representing the public. In terms of constitutional law the rights of public are vested in the Crown and the Attorney General enforces them as an officer of the Crown."

For the Attorney General to be the proper plaintiff, it is necessary to establish that a public right as opposed to a private right had been breached.

[22] The National Lands Act contains a statutory regime for the disposition of national lands. The first respondent as Minister of Lands was charged with the responsibility for disposing of national lands but this must be done in accordance with the provisions of the Act. As the national lands are owned by the Government of Belize the Minister with the responsibility for national lands, in my view, owes a duty to the Government of Belize to act in accordance with the provisions of the Act when disposing of national lands. In respect to the second respondent it is alleged that he was the beneficial owner and controller of Cheop and colluded with the first respondent in obtaining national land in breach of the regime set out in the Act.

[23] Even though the respondents are no longer Ministers of Government and members of the public service, the conduct about which complaint is made occurred when they held their respective portfolios as Ministers of Government. The allegations are that the respondents knowingly abused their office as Ministers and as such caused the Government of Belize to lose revenue by the land being sold below market value. The land involved being national lands, the proceeds of the sale would be paid into the consolidated fund for the benefit of the Government and the people of Belize.

[24] In the action, the Attorney General is claiming that as a result of the misfeasance of the Respondents the Government of Belize has suffered a loss of $924,056.60. In addition, the Attorney General is claiming exemplary damages against the Respondents. These claims while made against the respondents for misbehavior in public office are essentially against them personally for abusing the office they had. Whether exemplary damages ought to be awarded against them for “injury to the high principle in public law” in the sense that they did not use their power for bone fide purposes and did not exercise it in a transparent manner would be a question for a judge to determine at trial of this action.

[25] Not being in a position to claim loss, no individual member of the public possess the locus standi to institute proceedings against the respondents. This was made clear

by the observation by Lord Hobhouse in **Three Rivers District Council v Governor and Company of the Bank of England (No. 3) [2003] 2 AC 1** at p. 231:

> “The plaintiff must have suffered special damages in the sense of loss or injury which is specific to him and which is not suffered in common with the public in general……The plaintiff has to be complaining of some loss or damage to him which completes the special connection between him and the official’s .”

The special connection in this case is that it alleged that the Ministers abused their power and thereby cause loss or injury to the Government of Belize as the owner of the national land.

[26] The Attorney General is alleging that the Government has suffered loss as a result of the abuse of their office by the respondents. That loss the Attorney General avers arises as a result of the tort of misfeasance in public office. Assuming without deciding that the respondents were guilty of misfeasance in public office and, as a result, the Government suffered loss and damage, it is my opinion that the Government is entitled, as any other body, to recover damages for the tortious conduct of the respondents. As stated above the first respondent as Minister responsible for National Lands when purporting to dispose of those lands owed the owner of those lands, the Government, a duty to act within the parameters established by the Act. If he abused his office and acted mala fides and the Government as the owner of the land suffered loss or damage the Government is entitled as the owner to recover the loss or damage sustained. And if the Government as owner suffered loss as a result of the failure of the Ministers to exercise their duty under the Act and acted in bona fide and transparent manner the issue arises whether exemplary damages may be recovered against them in their personal capacity. Such action on behalf of the owner, the Government, may only in law be instituted by the Attorney General. Without such action, the Government as owner would suffer irreparable harm. For these reasons I do not agree with the conclusion reached by the Chief Justice that the Attorney General has no locus standi to institute an action for the tort of misfeasance in public office.

[27] The Chief Justice felt justified in coming to the conclusion which he reached because he was unable to find any case in the older Commonwealth countries such as England, Australia, Canada and New Zealand in which such action was brought by the Attorney General against a Minister of Government. I am not surprised that no such case or precedent was found. In jurisdictions where parliamentary democracy has existed for many years, in some cases for hundreds of years, if a Minister acts in the manner which it is alleged that the respondents acted, a variety of remedies would be open to the ruling party. Should the ruling party refuse to take immediate steps to ensure that the appropriate step be taken against the Minister. The party would no doubt be subject to a resolution of no confidence in the Government or in the particular Minister. Remedies which would be available include referring the matter to prosecuting authorities for the appropriate criminal action to be taken: Consequently, I am of the view that the Chief Justice placed too much reliance on the fact that he was unable to find any case in which the Attorney General took action on behalf of the Government.

[28] I hold that the Attorney General on behalf of the Government as the owner of national lands has locus standi to institute an action against the respondents claiming damages in tort for misfeasance leading to the loss which it is alleged that the Government suffered by the land being sold at below market price.

[29] Even if I am wrong in the conclusion which I have reached, in my view for the reasons set out below, the Chief Justice ought not to have dismissed the action. The Chief Justice dismissed the action on the basis that the Attorney General was not the correct plaintiff. This action concerned allegations that former Ministers of Government had abused their office by acting in a manner that they knew was detrimental to the Government or they were reckless in their conduct. This Court does not in these proceedings have to determine the truth of these allegations but merely whether the action can be maintained by the Attorney General. These allegations are being made against the former Ministers of Government. By their very nature, they are serious and need full investigation by a Court of law, in **Common Cause (1996)**, the Supreme Court of India, speaking of the role of a Minister in a developing Society, had this to say:

> "… A Minister who is the executive head of the department concerned distributes these benefits and largesses. He is elected by the people and

> is elevated to a position where he holds a trust on behalf of the people. He has to deal with the people's property in a fair and just manner. He cannot commit breach of the trust reposed in him by the people."

[30] This conduct if true could amount to conduct which was characterized by Hansaria J in Tiwari's case as "injury to the high principle in public law that a public functionary has to use his powers for bona fide purposes only and in a transparent manner."

[31] To this end the Chief Justice, in my view, ought to have had regard to the objectives of the Civil Procedure Rules which stipulates that the overriding objective of the Rules is to enable the Court to deal with cases justly. (Part 1.1 of Civil Procedure Rules). In pursuit of this objective the Court is required to deal justly with cases. In so doing, the Court must, inter alia, save expenses and deal with the cases in ways which are proportionate to the amount of money involved. It must consider the importance of the case and its complexities of issues, at all times ensuring that the case is dealt with expeditiously.

[32] Before dismissing the Claim, the Chief Justice, in my view, ought to have afforded the plaintiff an opportunity of making any necessary amendments to his Claim Form to ensure the overriding objective of the rule is met. This is particularly so in as much as the issue of whether the Attorney General was the correct plaintiff in an action for misfeasance was raised by the Chief justice himself.

[33] The issue of whether the former Ministers acted male fide and abused their office and as a result caused injury to the Government and as such offended a high principle of law is, in my view, a matter which ought to engage the attention of the Court.

[34] For the reasons stated above, the appeal is allowed and the Claim Form is re-instated with immediate effect. The appellant is to have the costs of the appeal and the costs below to be taxed if not agreed.

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MOTTLEY P

SOSA JA

[35] I have read, in draft, the judgment of Mottley P and concur in the reasons for judgment given, and orders proposed, in it.

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SOSA JA

MORRISON JA

[36] I have read the judgment of the President and I agree.

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MORRISON JA