THE EASTERN CARIBBEAN SUPREME COURT

ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCV2005/0512

BETWEEN:

THE ATTORNEY GENERAL OF ANTIGUA AND BARBUDA

Claimant

and

[1] SOUTHERN DEVELOPERS LIMITED
[2] LESTER BRYANT BIRD
[3] ROBIN YEARWOOD
[3] HUGH MARSHALL, Snr.

Defendants

Appearances:

Mr. Reginald Amour S.C and with him Ms. Karen De Freitas-Rait for the Claimant
Ms. Rika Bird for the 1st Defendant
Mr. Hugh Marshall Jr. for the 2nd 3rd and 4th Defendants

2012: January 17, 18,19
2013: August 12

JUDGMENT

[1] **REMY, J.:** The Claimant in this case is the Attorney General of Antigua and Barbuda. The First Defendant is a Company incorporated under the laws of Antigua and Barbuda. The Second Defendant is the former Prime Minister of Antigua and Barbuda, and in that capacity is a former Cabinet Member. The Third and Fourth Defendants are former Cabinet Members.

[2] The purchase of twenty five acres of sea front Crown land at Cades Bay, Antigua (hereinafter referred to as "the Cades Bay Land") by the First Defendant is at the centre of this claim.

[3] By Claim Form and Statement of Claim filed on the 12th October 2005, the Claimant issued proceedings against the Defendants for the following:-

i). A declaration that the purchase by the First-named Defendant on or about February 1987 of Crown lands, to wit parcel 35 of Block : 55 1382A in Registration Section: South West in consideration of the sum of $250,000 was tainted with illegality and therefore voidable at the instance of the Crown;

ii). A declaration that the purchase by the First-named Defendant of the said Crown lands was effected at a gross undervalue to the knowledge and approbation of the Second , third and fourth-named Defendants in their capacity as persons in public office and servants of the Crown;

iii). A declaration that the second third and fourth-named Defendants severally and jointly as former Ministers of Government are guilty of misfeasance in public office and breach of public trust in relation to the sale of the said Crown lands in their capacity as servants and agents of the Crown;

iv). Rescission of the sale / purchase agreement made on or about the 19th day of February 1987 between the Crown of the one part and the first-named Defendant of the other part of the said Crown lands to wit parcel 35 of Block: 55 1382A in Registration Section: South West;

v). An order that the first-named Defendant deliver up the Land Certificate in respect of the said parcel of land to the Registrar of Lands to be cancelled;

vi). Alternatively to subparagraphs (iv) and (v), an order for payment to the Crown by the first-named Defendant of the market value of the said parcel of land as at February 1987 with interest thereon at such rate as the Court may determine from February 20 1987 until judgment or payment;

vii). Damages against the second, third and fourth named Defendants whether severally and/or jointly in respect of the tort of misfeasance; and

viii). Such further or other consequential relief as to the Court seems just and equitable.

PLEADINGS

[4] In his Statement of Claim filed on the 12th October 2005, the Claimant pleaded as follows:- the First named Defendant was incorporated on the 22nd July 1985, with the object, among others, to erect, construct, develop and sell condominiums on any land of the company or upon other lands or property. At all material times, the Second, Third and Fourth Defendants were Members of Cabinet. The First named Defendant was incorporated on the instructions of the Second, Third and Fourth Defendants. The First Defendant is 80% owned by Antigua Aggregates Limited (AAL) and the Third and Fourth Named Defendants are Directors of the First Named Defendant. The Claimant avers that at its meeting on 4th September, 1985, Cabinet agreed to the purchase by the First named Defendant of 25 acres of land at Cades Bay (the Cades Bay Land) at $10,000.00 per acre for a total price of $250,000.00 along with certain concessions and exemptions in respect of the establishment and operation of a condominium project on the said lands by the First Named Defendant. The Fourth Named Defendant was present at that meeting and participated in the decision. The Claimant further alleges that the Cades Bay lands were sold to the First named Defendant at a "gross undervalue" whereby the Second to Fourth Defendants "have obtained an unfair benefit from the Crown".

[5] The Claimant further pleaded that the First Named Defendant was registered as the proprietor of the Cades Bay Land on the 19th February 1987 in place of the Crown pursuant to the Cabinet decision made on 4th September, 1985. The said parcel of land was sold to the First-Named Defendant at a price well below its market value and no valuation was done or directed to be done on its true market value and no valuation prior to the sale notwithstanding the fact that three members of Cabinet as Ministers of the Crown had a substantial beneficial interest in the transaction. Alternatively and / or additionally, the Second, Third and Fourth-named Defendants failed to disclose their respective interests. The said purchase transaction between the First Defendant Southern Developers Limited and the State of Antigua & Barbuda was effected with the knowledge and approbation of Defendants, Nos. 2, 3 and 4 in their capacity, qua members of the Cabinet, as persons in public office and servants of the Crown and when (undisclosed to the Cabinet) they were the beneficial owners of Southern Developers Limited.

[6] The crux of the claim against the Second, Third and Fourth Named Defendants is contained in paragraphs 14 and 15 of the Statement of Claim, namely:-

> Paragraph 14 – " By the sale of the said land to the first-named defendant at the gross undervalue of $250,000.00, the second, third and fourth-named defendants have obtained an unfair benefit from the Crown to the detriment of the public interest."
>
> Paragraph 15 - "In the premises and by reason of the second, third and fourth-named defendants' breach of their respective fiduciary and public duties as Ministers of the Crown, the Crown as custodian of the public's interest and assets has suffered loss and the first-named defendant has gained an unfair advantage and benefit."

[7] In Defence of the Claim, the First named Defendant has alleged that it was not incorporated on the instructions of the Second to Fourth named Defendants. The First named Defendant was incorporated on 22nd July, 1985 on the instructions of one Anthony Michael, who is now deceased. Further , Cabinet approved the proposal that Mr. Michael submitted to the Cabinet for a condominium development on the said lands in April of 1985, before the First-named Defendant Company was incorporated. The Second to Fourth named Defendants became involved in the said purchase some time after, when Mr. Michael approached a representative of the company Antigua Aggregates Ltd., a company in which the Second to Fourth named Defendants have substantial interest, for financial assistance. The First Named Defendant denies that the lands were sold to it at a price well below market value or at a gross undervalue as alleged or at all. At no time did the First named Defendant apply to Cabinet for the purchase of Crown lands. The said lands were sold to Joe Mikes and Associates in April 1985.

[8] In their Defence, the Second, Third and Fourth Defendants admit that they were substantial shareholders of AAL, but deny that they or AAL gave instructions for the incorporation of the First Named Defendant. They aver that the First Named Defendant was incorporated on the instructions of Mr. Anthony Michael, deceased. They state that these proceedings are frivolous, vexatious and / or an abuse of the process of the Court.

[9] The Claimant filed no Reply to the Defendants' Defence.

[10] The issues for the determination of the Court are:

1) Whether the Attorney General can maintain an action for misfeasance in public office against former Ministers?
2) Whether the sale of the Cades Bay Land to the first-named Defendant was tainted with illegality.
3) Whether the Second, Third and Fourth named Defendants are guilty of misfeasance in public office in relation to the sale of Cades Bay Lands by the Crown to the First Defendant?
4) Whether the Second, Third and Fourth Defendants as public officers owe a fiduciary duty to the Crown and to the Government and people of Antigua and Barbuda as Cabinet Ministers and whether with respect to the purchase by the First Defendant, namely Southern Developers Limited , of the Cades Bay lands they have failed so to do?
5) Whether the Second, Third and Fourth Defendants are guilty of breach of public trust?
6) Whether the Second, Third and Fourth Defendants are liable to the Crown for damages?

THE CLAIMANT'S CASE

[11] Several witnesses were called to give evidence on behalf of the Claimant. These witnesses included Mr. Hazel Spencer; Miss Ricki Camacho; Miss Cecile Hill; Mr. Charlesworth Tabor; Mr . Lesroy Samuel, all of whom filed Witness Statements. Mr. Radford Hill was called to give evidence on behalf of the Claimant. Mr. Hill did not file a Witness Statement, but a Witness Summary was filed on his behalf.

[12] In his Witness Statement, Mr. Hazel Spencer stated that he is Secretary to the Cabinet ; he manages the business of the Cabinet office and that his duties include maintaining custody and control of Cabinet Minutes, keeping Cabinet minutes, preparing and maintaining a record of an Agenda for each scheduled Cabinet meeting . He states that he is very familiar with the procedures for making applications to Cabinet or seeking to have a matter addressed by Cabinet. Mr. Spencer stated that , upon the request of the Ministry of Legal Affairs, he reviewed the Minutes of Cabinet Meetings held on the following dates: 29th April 1985; 4th September 1985; 26th September, 2001; 31st October 2001; 18th April 2002. He added that he made true copies of any decisions in or around those dates related to the companies Southern Developers Limited and

Antigua Aggregates Limited or related to Joe Mikes & Associates or Mr. Anthony Michael as well as true copies of certain relevant agendas and the list of those persons present at the relevant meetings. Mr. Spencer added that there is no indication in any of the various Cabinet Minutes referred to above that any of the Second, Third or Fourth Defendants ever declared or otherwise disclosed to Cabinet any beneficial or legal interest in Antigua Aggregates Limited or Southern Developers Limited during any of the said Cabinet meetings. He further stated that there is no indication in any of the above Cabinet Minutes that any valuation of the Cades Bay land was ever performed.

[13] Under cross-examination, Mr. Spencer testified that he became Cabinet Secretary in November, 2005. He added that in 1985, from his own knowledge, he knew nothing of the procedures for the sale of Government lands for investment purposes.

[14] Miss Ricki Camacho, the Registrar of Companies, was the next witness for the Claimant. In her Witness Statement, Miss Camacho detailed the history of the shareholding and directorship of Southern Developers Ltd. (SDL) between the 22nd day of July 1985, (the day it was incorporated) and 2003; as well as that of Antigua Aggregates Ltd. (AAL) between 1st February 1983, (the day AAL was incorporated) and 1987.

[15] According to Miss Camacho, SDL was incorporated on the 22nd day of July, 1985 with an authorized share capital of $ 100,000.00 divided into 10,000 shares with a nominal value of $10.00 each. The object of the company was, among other things, to erect, construct, develop and sell condominiums on any land of the company or other land. At the end of 1985, only two shares had been issued, one to Alithea Proctor and one to Roselyn Bennett, both secretaries by occupation. The directors were Anthony Michael, William Strickland and Pat Zalinkas. This information remained unchanged between 1985 and 1988. In 1989 there was one change; William Strickland was removed as director and replaced with Reuben Wolff. In 1990 Proctor and Bennett's shares were transferred and the shareholders were now Anthony Michael with 2000 shares and AAL, holding 8000 shares. The directors remained unchanged. In 2002 and 2003 the directors changed and were then Pat Zilinkas, Robin Yearwood and Hugh C Marshall SR.

[16] Miss Camacho further stated that AAL was incorporated on the 1st day of February 1983. The shareholders were William David Strickland of Barbuda holding 9,800 shares, Patricia Zilinkas of Barbuda holding 100 shares and Radford Hill of Campsite, holding 100 shares. Annual corporate returns filed by AAL for the year ending 31 December, 1983 indicate that the company then had a nominal share capital of five hundred thousand dollars ($500,000) divided into 500,000 shares of $1.00 each with 252,500 shares issued to three shareholders, namely Radford Hill holding 130,000 shares, Joseph Jeffrey holding 112,700 shares and Eudlyn Jeffrey holding 9,800 shares. William Strickland and Patricia Zilinkas were no longer shareholders. However, there was no indication as to whom their shares had been transferred to. In 1983, the Directors of AAL were listed as William David Strickland, Radford Hill and J.B. Benjamin.

[17] Corporate returns filed by AAL for the year ending 31 December, 1984 indicate that there was no change in directors of the company but the total number of shares issued had increased to 255,000 shares held as follows: Radford Hill continued to hold 130,000 shares, while the shareholding of Joseph Jeffrey had increased to 115,000 shares and the shareholding of Eudlyn Jeffrey had changed to 10,000 shares. Share Transfer documents filed at a Companies Registry further indicate that on 14th August, 1985 Radford Hill transferred his shareholding in AAL, a total of 375,000 shares as follows:-

a) 2500 shares and a further 122,500 shares all transferred to Lester Bird

b) 2500 shares and a further 122,500 shares all transferred to Robin Yearwood

c) 2500 shares and a further 122,500 shares all transferred to Hugh Marshall, Sr.

[18] Thereafter, corporate returns filed by AAL for the year ending 31st December 1985 confirm that shareholders of AAL in 1985 were:

a. Lester Bird with 125,000 shares
b. Robin K.M. Yearwood with 125,000 shares
c. Hugh Marshall with 125,000 shares
d. Joseph Jeffrey with 115,000 shares; and
e. Eudlyn Jeffrey with 10,000 shares.

[19] According to the 1985 Return, the directorship of AAL remained unchanged from previous years. Annual returns on file for AAL for the years ending 31 December, 1986 and 31 December, 1987 indicate that the shareholding in AAL remained unchanged while the directors of both these returns are named as William David Strickland, Radford Hill and Patricia L. Zilinkas.

[20] Ms. Camacho was not cross-examined by Counsel for the Defendants.

[21] Mrs. Cecile Hill, the Registrar of Lands, next gave evidence on behalf of the Claimant. In her Witness Statement, Mrs. Hill stated that up until 19th February 1987, the Cades Bay Land was registered as Crown Lands. On that date, the said parcel of land was transferred from the Crown to Southern Developers Limited, and that to date, SDL remains the registered proprietor of Parcel 35. On 17th July 1987, the land was encumbered by a Charge in favour of Swiss American National Bank of Antigua to secure repayment of one million dollars (EC) plus interest. On 23rd May 2005, the Second Named Defendant Lester Bird claimed an interest in the said parcel 35 as the beneficial owner of the same, and lodged a Caution on the Register of Lands to forbid the registration of any dealings and the making of any entries in the Register without his consent with respect to the said land. As required by the Registered Land Act, (RLA) the Caution was supported by a Statutory Declaration dated 23rd May 2005. signed, sealed and delivered by Mr. Bird. On 25th August 2005, she received a Minute dated the 24th August 2005, from the Honourable Attorney General along with an application for a restriction to be placed on the Register in respect of the said Parcel 35. The application was supported by a Statutory Declaration by Justin L. Simon, Q.C., Attorney General. Pursuant to the RLA, she ordered a restriction to be placed upon the Register in respect of the land as of 25th August 2005. By letter dated 2nd September, 2005, she wrote to SDL advising the company of the restriction that she had placed on the Register.

[22] Mrs. Hill was not cross examined by Counsel for the Defendants.

[23] Mr. Charlesworth Tabor, the Registrar of the High Court was the next witness for the Claimant. In his Witness Statement, Mr. Tabor stated that sometime in the early part of 2006 the Honourable Attorney General sought to obtain copies of court records filed in High Court Civil Suit Number 181

of 1999; Hugh C. Marshall, Snr. v Antigua Aggregates Ltd., Pat Zilinkas, Robin Yearwood, Lester Bird and Eudlyn Jeffrey. Even after a diligent search by the Registry staff, the said court file could not be found. Mr. Tabor stated that his search of the Registry revealed that on the 20th December, 1999 the decision of the High Court in Suit 181 of 1999 was appealed by the Plaintiff/Appellant Hugh Marshall Snr by way of Notice of Appeal filed in Civil Appeal No.23 of 1999. In that civil appeal case, a Record of Appeal was filed, which record contains copies of the pleadings and certain affidavits filed in the court below (Suit No. 181 of 1999.)

[24] Mr. Tabor was not cross examined by Counsel for the Defendants.

[25] Mr. Lesroy Samuel was the next witness for the Claimant. In his Witness Statement, Mr. Samuel stated that he is the Chief Valuation Officer in the Inland Revenue Department, Ministry of Finance for the Government of Antigua and Barbuda. He has been engaged in the business of property appraisals for approximately 25 years and has performed numerous property appraisals as a qualified valuation officer for the government since 1990. He stated that he has detailed knowledge of land and property sales in Antigua and Barbuda and from time to time has been called upon to provide expert testimony on property valuation to Courts in Antigua and elsewhere. He states that on or about 29th September, 2005, he was asked by the Honourable Attorney General to assess the value of certain land, more particularly land located at Cades Bay, Antigua. On 23rd. November 2005, he carried out an inspection of the Land which at the time was vacant. He then wrote and signed a valuation report detailing his findings as (sic) 23rd November 2005. Paragraphs 5, 10, and 11 of his Witness Statement of Mr. Samuel were excised upon objection by Counsel for the Defendants Mr. Hugh Marshall Jr. that Mr. Samuel could not testify as an expert witness since there had been no compliance with rule 32 of the Civil Procedure Rules 2000 (CPR).

[26] The next witness for the Claimant was Mr. Radford Hill. As previously stated, a Witness Summary was filed on behalf of Mr. Hill. In his examination-in-chief, Mr. Hill testified that he has been in practice for 33 years. As an attorney in practice, he has developed something in the nature of a corporate practice and has incorporated certain companies from time to time. Mr. Hill testified that from 1983 to 1986, while he was a Director of Antigua Aggregates Ltd., he continued to be the

Company's Attorney; however, he was not sure at what point he ceased to be a director of the company; that to the best of his recollection, he continued to be the company's attorney from 1983 to 1986. When shown the document showing his shareholding (page 104 of the Trial bundle) , Mr. Hill stated that he did not recall whom he held the shares for; he may have held them on behalf of someone, but he did not remember. Mr. Hill stated that he did not recall who instructed him to form Southern Developers Ltd. He added that it was a very common practice at the bar at the time for solicitors or their Secretaries to hold shares (taking a share each) to incorporate companies and those shares would be transferred. With reference to the two secretaries whose names appeared on the document, Mr. Hill stated that he would imagine that he would have instructed them to hold the shares. He stated that he did not remember on whose behalf he would have asked them to hold the shares.

[27] Under cross-examination, Mr. Hill was questioned about the practice of holding shares on behalf of third parties. He stated that as, he recalled, the cases in which the shares were held on behalf of a client was to facilitate the incorporation of the company.

THE CASE FOR THE SECOND, THIRD AND FOURTH DEFENDANTS

[28] Witness Statements were filed for the Second, Third and Fourth Defendants Lester Bryant Bird, Robin Yearwood and Hugh Marshall Snr. However, at the trial, only Robin Yearwood and Hugh Marshall Sr. gave evidence. The Second Defendant, Lester Bryant Bird elected not to give evidence at the trial.

[29] In his Witness Statement, Mr. Yearwood deposed that he is an Elected Member of the House of Representatives, which is currently in Opposition to the Government. He was appointed a Government Minister in 1980 and remained a member of the Cabinet until 2004. He states that the current Attorney General Justin Simon is a member of the U.P.P. and since he took office in 2004, has filed at least one other civil case against him alleging misfeasance. He states that he has always acted in the best interest of the Government and people of Antigua and Barbuda. In or about 1983, himself and two friends Mr. Lester Bird and Mr. Hugh Marshall Sr. who were also Members of Parliament and Cabinet Members, formed a company called Antigua Aggregates Ltd

(AAL) . AAL , in which he is a shareholder, holds 80% in another private limited company, namely Southern Developers Limited (SDL) , the First Named Defendant.

[30] According to Mr. Yearwood, SDL conducted business with the Government prior to AAL acquiring the 80% shares. At no time did AAL conduct any business with the Government or any of its statutory bodies or agents/agencies. This was a company policy in order to avoid the actuality or appearance of conflict of interest by its shareholders, and that policy was complied with. In 1985, he was a member of the Cabinet. Neither he nor AAL made an application on behalf of AAL for the purchase of Crown lands situate at Cades Bay. SDL was not incorporated on the instructions of either AAL or himself. To the best of his knowledge, SDL was incorporated on the instructions of one Anthony Michael, now deceased. Sometime in 1985, and prior to the incorporation of SDL, Mr. Michael submitted to the Cabinet a proposal for a condominium development. He applied for the purchase of 25 acres of Crown lands at Cades Bay.

[31] Mr. Yearwood further states that according to the Cabinet Minutes disclosed in the matter before the Court, Mr. Michael returned to Cabinet later in that year (1985) for approval for the lands he was buying to be transferred into the name of SDL. He states that he was not present at that meeting. Furthermore, Cabinet had the benefit of the presence among its members of its legal adviser, the then Attorney General. Mr. Yearwood states that neither he nor AAL dealt with or negotiated the purchase of the Crown lands (the Cades Bay Lands). He acknowledges that it is a fact that selling Crown lands to developers at concessionary rates was the policy of the then Government. AAL became involved in SDL sometime after the application and Cabinet decision when Mr. Michael approached the shareholders/directors (including himself) in AAL for financial assistance since his partner for the proposed project had absconded and he could not raise the necessary financing.

[32] Mr. Yearwood states that neither Lester Bird, Hugh Marshall Sr. or himself are the individual holders of the shares in SDL. He contends that, in fact, 80% of the shares are held in the name of AAL, while the other 20% are held in the names of the beneficiaries of the Estate of Anthony Michael, deceased. He states that neither AAL nor the 20% shareholders have been sued in this matter. According to Mr. Yearwood, SDL paid for the land at the concessionary rate of $10,000.00

per acre for 25 acres, in keeping with Government policy at the time. All investors were afforded the same opportunity to purchase and invest in Antigua. He avers that , at the material time, he held the portfolio of Minister of Lands, among other portfolios. It was ordinarily the procedure then and now that the Government and the Ministry of Lands dealt with and still deals with the processing of applications for the purchase of Crown lands. The applications were then sent to the Cabinet Secretary so that the matter would be tabled for discussion at the Cabinet meeting, and decided upon. Once the Cabinet decision was made, the minute arising therefrom would be sent back to the Ministry from which the matter originated for processing and implementation.

[33] Mr. Yearwood further states that it was for the Crown as the seller, through the Cabinet and the Officers responsible in the Ministry to set the consideration for the sale and purchase of lands. He states that the onus was at no time on SDL to determine the price and/or secure a valuation prior to purchasing same. Mr. Yearwood said that he was not aware of any loss suffered by the Government, as the Government policy was such that the Cabinet would look at the potential long –term benefits for the country when discussing whether or not to approve proposed projects, particularly those involving the sale of Crown lands. He adds that whenever matters in relation to AAL arose at Cabinet meetings, Lester Bird, Hugh Marshall and himself excused themselves from the Cabinet discussion. In the case of the acquisition by Anthony Michael in the name of SDL, this would not have been necessary anyway, since neither AAL nor himself had any personal interest in the transaction. During the time that he held office, at no time did the Attorney General advise that there was any illegality involved in Anthony Michael/Southern Developers Limited purchasing Crown lands. In fact, it has always been his understanding that the Executive is the entity charged with the responsibility for the economic development of the country and by and large it is the body to determine how it is to be charted.

[34] During a very lengthy and intense cross examination by Senior Counsel Mr. Reginald Armour, Mr. Yearwood testified that he is an elected Member of Parliament, but has no other occupation. He admitted that he participated in the decision in which Cabinet agreed to allow to be established a condominium project on 25 acres at Cades Bay. Mr. Yearwood's attention was drawn to Page 3 of Volume 1 of the Trial Bundle, dealing with a copy of a Cabinet meeting dated 4th September 1985 at 9.30 a.m; he stated that he was recorded as having been absent from that meeting . He

agreed that he attended a Cabinet meeting on 29/4/85; after being shown page 34 of Trial Bundle 3, he agreed that he was not present at the meeting on 4/9/85 . He agreed that SDL was incorporated as a company on 22/7/85. He also accepted that SDL has been the registered owners of the lands at Cades Bay from 19/2/87.

[35] Mr. Yearwood testified that he could not recall if he was present at a meeting of the Board of Directors of AAL which occurred on 24/6/89 at 4.30 p.m. at Heritage Quay Hotel. He stated that himself, Mr. Bird and Mr. Marshall Sr. invested in the Company AAL to provide an income for the three of them if they left the Government , i.e. if they were voted out, so they would have an income. The company would operate at "arm's length" from them. By that , he meant, that the company was not to do business with the Government. The business of the company was to sell aggregates, and other people in the country were selling aggregates; they did not want the company to be in competition with the locals. The company was not to sell any of its products to the Government. He stated that the "arm's length" policy applied to the subsidiaries of AAL.

[36] Mr. Yearwood testified that at no time did he have any knowledge when SDL was formed. Under persistent questioning by Learned Senior Counsel Mr. Armour, Mr. Yearwood replied that whenever AAL earned monies and they declared a dividend, he expected his dividend. When asked whether he made it his business to know in what companies they invested the money of AAL, Mr. Yearwood replied " I was busy running Government, so I did not go into what I call trivial details." He agreed that Mr. David Strickland was hired to look after the business of AAL and to look for new business prospects. He stated that it is only on the morning of the trial , before he came into Court, that he found out that he took shares in AAL in 1985 and not in 1983. When asked about whether the application to purchase the Cades Bay lands which was decided on the 4/9/85 was dealt with by his Ministry, Mr. Yearwood stated that, to the best of his knowledge, SDL did not apply for lands; it was Anthony Michael , also known as Joe Mikes.

[37] Mr. Yearwood denied knowledge of any law suit filed by Hugh Marshall Sr. against the other two defendants, or that the matter went on appeal. He stated also that , in 1985, he did not know the physical location and attributes of the property known as Cades Bay. He never visited the lands. He stated that on 29/4/85, when Cabinet was considering the application, he had no interest in

Cades Bay through his shareholding in AAL. In responding to suggestions put to him by Learned Senior Counsel Mr. Armour, Mr. Yearwood testified that on the 29/4/85, he had no interest in developing a condominium project at Cades Bay. He denied the suggestion that he deliberately absented himself from the Cabinet meeting of 4/9/85 because of that alleged interest and further denied the suggestion that he deliberately absented himself from the meeting of the Cabinet on that day because he knew that the application of Southern Developers Ltd. was going to be considered by the Cabinet. He objected to the suggestion of Learned Senior Counsel that he violated his duty as a member of the Cabinet to the people of Antigua and Barbuda by not disclosing to the Cabinet his interest in Cades Bay. He further objected that he violated his duty as a member of Cabinet when the price of $250,000.00 was fixed, that price being a gross undervalue for the property.

[38] Under re-examination, Mr. Yearwood testified that he was absent from the Cabinet meeting on 4th September, 1983 because he was away on Government business in China.

HUGH MARSHALL SR.

[39] In his Witness Statement, Mr. Hugh Marshall Sr. (Mr. Marshall) stated as follows:- that since the current Attorney General Justin Simon took office in 2004, he has filed at least three civil cases against him, alleging misfeasance in public office and has proved none of these cases. He states that he has always acted in the best interest of the Government and people of Antigua and Barbuda. It is his recollection that matters decided by Cabinet makes the Cabinet collectively responsible for its decisions. AAL holds 80% shares in SDL, which conducted business with the Government prior to AAL acquiring the said shares. Neither AAL nor himself made an application on behalf of AAL for the purchase of any Crown lands and in particular the Cades Bay Lands, the subject land of the suit. SDL was not incorporated on the instructions of either AAL or himself. Selling Crown lands to developers at concessionary rates was the policy of the then Government and the involvement of AAL was only subsequent to the acquisition of lands by SDL and Mr. Michael. At all material times, the management of AAL was carried out by Dave Strickland and Pat Zilinkas, who were shareholders themselves. The company became involved in SDL approximately 2 or 3 years later when Mr. Michael approached Mr. Strickland and Ms. Zilinkas first,

then the other shareholders/directors (including himself) in AAL for financial assistance as his partner for his proposed project had absconded and he could not raise the necessary financing.

[40] According to Mr. Marshall, neither AAL nor the 20% shareholders of AAL have been sued. At no time did he hold the portfolio of Minister of Lands. He therefore does not know whether or not a valuation was done by the seller (the Crown) at the time of sale to SDL. He is not aware of any loss suffered by the Government . Without limitation, the public of Antigua and Barbuda and the Cabinet had full knowledge that he was a shareholder in AAL. It was not a secret. Further, he had made the disclosure to the Speaker of the House and the Cabinet Secretary in or around 1985 when he had disclosed his assets. His obligation to disclose his interest in AAL was therefore fully discharged. Its assets then and now are a matter of public record. Mr. Marshall stated that whenever matters in relation to AAL arose, Robin Yearwood, Lester Bird and himself excused themselves from the Cabinet room. In the case of the acquisition by Anthony Michael in the name of SDL, this would not have been necessary since AAL nor himself, had any personal interest in the transaction at the time of its presentation to Cabinet. Neither was it foreseen at the time that they would have such an interest down the road.

[41] A Witness Statement had been filed on behalf of the Second Defendant Mr. Lester Bird. However, as previously stated, Mr. Bird did not give evidence at the trial. Accordingly, his Witness Statement was struck out.

[42] Learned Counsel for the Claimant state that the Second Defendant chose not to give evidence and, no explanation has been given for his failure to do so. According to Counsel, this was " a strategic decision taken by him having regard to the unfolding of the evidence as the trial progressed through days 1 to 4." Further, that it was "a decision made by way of damage containment". They invite the Court to draw adverse inference from this election of Mr. Bird. They cite the following cases:-

> "**Herrington v British Railway Board** - [1972] A.C. 877 at 930
> **TC Coombs v IRC** [1991] 2 AC 283 at 3000.
> **Mc Queen v Great Western Railway Company** (1875) LR 10 QB 569 at 574"

[43] It is the submission of Learned Counsel for the Claimant that " the reasonable and adverse inferences available to the Court on that election and on the evidence are damning as against all the Defendants, and , particularly damning against the Second Defendant." They further submit that it is the Claimant's case that the Second Defendant Mr. Lester Bird:-

(a) Was the Controlling Mind behind AAL and SDL.

(b) He has an admitted interest on a sworn Statutory Declaration before this Court " as one of the beneficial owners of the Cades Bay Lands".

(c) Those companies (AAL and SDL) were mere fronts to conceal the truth of his admission in having an interest as a beneficial owner in the Cades Bay Lands.

(d) This interest was being manipulated by him from even before AAL came to own shares in SDL.

(e) This concealed interest existed from as early as April 1985.

(f) That his absence from the Cabinet meeting of the 4th September 1985 was contrived, to conceal his interest and to provide a plausible excuse for his failure to disclose that interest to the Cabinet.

(g) That he benefitted financially through his control of AAL and SDL from the acquisition by SDL of the Cades Bay Lands, and that,

(h) The sale of the Cades Bay Lands to SDL to his knowledge would and did cause loss to the Government and people of Antigua and Barbuda.

[44] At paragraph 13 of their Closing Submissions, Learned Counsel for the Claimant contend that the entirety of the case outlined against the Second Defendant above, "applies equally to the Third and Fourth Defendants, save for the Controlling Mind point and has been put to them". The Court will return to this issue later in the Judgment.

SUBMISSIONS OF COUNSEL

Issue # 1

[45] The Court will now address the first issue, namely:- "Whether the Attorney General can maintain an action for misfeasance in public office against former Ministers. "

[46] Learned Counsel for the Defendants submit that "the tort of misfeasance is a private law remedy designed to afford compensation to persons who have suffered material loss as a result of bad faith or dishonesty or with full knowledge of the illegality of the acts that harm was likely. It is therefore doubtful whether the Crown is a person contemplated by the tort."

[47] Learned Counsel for the Claimant, on the other hand, submit that the Claimant brings this action in his representative capacity "representing and seeking to protect the public interest." They contend that "this legal capacity is judicially accepted as being that of the State's jurisdiction, as parens patriae."

[48] It is the further submission of Learned Counsel for the Claimant that "the issue of the Attorney General's right to bring this action is , for the purposes of this case res judicata by reason of the Court of Appeal decision dated 7th April 2008 in this very case;, namely **Southern Developers Ltd. v Attorney General of Antigua and Barbuda** [Civil Appeal No HCVAP 2006/020A] ". They state that, in that case, the Court of Appeal ruled, inter alia, that :-

> "The rights of the public are vested in the Crown and the Attorney-General enforces these rights as an officer of the Crown.....Notwithstanding the continuity of the office of the Attorney-General therefore, the Attorney-General cannot ignore a wrong that offends the public good. The action by the Attorney-General was properly constituted."

[49] Learned Counsel for the Claimant cite the case of **Florencio Marin et al and The Attorney General of Belize** [2011] CCJ 9 (AJ) (the **Marin** case), a decision of the Caribbean Court of Justice (Appellate Jurisdiction). They contend that the specific issue of whether the Attorney General is a proper claimant in an action for misfeasance in public office was considered and determined definitely by the **Marin** case, as the Court of final appeal for Belize. They contend further, that in the **Marin** case, by a majority decision, (de la Bastide P and Saunders JCCJ dissenting) the CCJ held that an Attorney General is competent to bring an action in the tort of misfeasance on behalf of the Crown against former Ministers of the Crown, in order to recover compensation for loss sustained as a consequence of their alleged misfeasance in public office.

[50] It is apposite to set out the facts of the **Marin** case. Briefly stated, these as are follows:- The Attorney General of Belize filed a claim against two former Ministers of Government alleging that, during their respective terms of ministerial office, they arranged the transfer of 56 parcels of State land to a company beneficially owned and/or controlled by one of them. It is further alleged that the consideration paid by the purchasing company was almost $1 million below market value, thereby occasioning a loss of some $924,056.60 to the Government of Belize and that the Ministers had acted with knowledge or were reckless that the transfer would cause that loss. Further, that the transaction was undertaken deliberately, without lawful authority and in bad faith. The Attorney General alleged that by these actions, the Ministers had committed the tort of misfeasance in public office. Chief Justice Conteh, at a case management conference, invited counsel to make submissions on the issue. After hearing the submissions, he ruled that the tort (of misfeasance) did not avail the Attorney General and denied the action. The Attorney General appealed. The Court of Appeal reversed the decision of Chief Justice Conteh. The Court held that the former Ministers could be held liable in misfeasance for loss of public property and that the Attorney General , as the guardian of public rights, was the person entitled to institute proceedings. The former Ministers appealed to the Caribbean Court of Justice (CCJ). The CCJ (by a majority decision) dismissed the appeal and affirmed the decision of the Court of Appeal to re-instate the claim form of the respondent (the Attorney General.)

[51] In their joint dissenting judgment, de La Bastide P and Saunders J, expressed the view that the type of claimant contemplated by the tort of misfeasance is a member of the public ; an individual citizen. At paragraph 21 of the Judgment, the Learned Justices state: ".........The claimant in misfeasance is "an individual", " a citizen" (private or corporate), " a member of the public", " a member of a class of persons" in which latter category the claimant District Council in **Three Rivers** found itself." At paragraph 30 of the Judgment , they expressed the view , among other things, that " in holding that misfeasance avails the State, the majority has opted to depart from the common law and extend the tort in a profound way. There are powerful policy reasons militating against any such extension or departure." They contend , at paragraph 44 of the Judgment, that " when allegations are made that a Minister has misbehaved in office and the misbehavior occasions significant and foreseen economic loss to the State and corresponding personal gain to the Minister and/or his company, it is in the public interest that criminal proceedings be instituted."

[52] The Court notes that in the **Marin** case, the CCJ noted that the issue of the Attorney General's right to bring an action in misfeasance against former Ministers was not determined in the Court of Appeal decision of **Southern Developers Ltd. v Attorney General**. On that issue, Anderson J (at paragraph 115 of the Judgment) had this to say :-

> "..........The recent unreported decision of the Court of Appeal of the Eastern Caribbean Supreme Court in Southern Developers Ltd, Lester Bryant Bird, Robin Yearwood, Hugh Marshall Snr v The Attorney General of Antigua and Barbuda **ASSUMED THAT THE ATTORNEY GENERAL COULD BRING SUCH AN ACTION BUT THE POINT SEEMS NOT TO HAVE BEEN THE SUBJECT OF ARGUMENT BY COUNSEL OR ANY ANALYSIS BY THE COURT**." (my emphasis)

[53] In similar vein, de la Bastide P and Saunders J , in their joint dissenting judgment (at paragraph 13 of the Judgment) stated thus :-

> "Apart from the Antiguan case of Southern Developers v The Attorney General for Antigua and Barbuda, **WHERE THE POINT DID NOT ARISE FOR DISCUSSION**(my emphasis), we have seen no reported case in which the State has been a claimant in a civil suit founded on tortuous misfeasance or where the courts have entertained a suit in misfeasance by a public authority against its own officer......"

[54] I therefore respectfully disagree with the submission of Learned Counsel for the Claimant that the issue of the Attorney General's right to bring this action is, for the purposes of this case, res judicata by reason of the Court of Appeal decision dated 7th April 2008, (see paragraph 48 above.) What the Court of Appeal held , as stated in the head-note was that " given the pivotal nature of the office of the Attorney-General, it is reasonable to infer that the actions of the former Attorney –General cannot be binding on the current Attorney – General if it is established, as alleged, that he acted in misfeasance or in breach of his fiduciary duties." I am of the view , however, that on the authority of the decision of the CCJ in the **Marin** case, that the Attorney General is competent to bring the action in the instant case.

ISSUE # 2 - WAS THE PURCHASE OF THE CADES BAY LANDS BY THE FIRST-NAMED DEFENDANT TAINTED WITH ILLEGALITY?

[55] As stated in paragraph 3 above, the Claimant's claim against the First Defendant is for (i) a declaration that the purchase by the First-Named Defendant on or about February 19th 1987 of Crown lands, to wit parcel 35 of Block : 55 1382 A in Registration Section : South West in consideration of the sum of $250,000.00 (the Cades Bay Lands) was tainted with illegality and therefore voidable at the instance of the Crown, (ii) a declaration that the purchase by the First-named Defendant of the said Crown lands was effected at a gross undervalue to the knowledge and approbation of the Second, Third and Fourth-named Defendants in their capacity as persons in public office and servants of the Crown. The Claimant also seeks an order for rescission of the transaction, or in the alternative, compensation.

[56] In response to the Defendants' Request for Further Information of the Claim Form filed on February 10th 2006, the Claimant's Solicitor stated that the "illegality" consists of the following:

(i) The sale of 25 acres of Crown land at Cades Bay at a gross undervalue by the Defendants in their capacity as persons in public office and servants of the Crown to their company, the First-named Defendant.

(ii) Breach of public trust by the Second, Third and Fourth named Defendants in relation to the sale of 25 acres of Crown land in their capacity as servants of the Crown and members of the Executive arm of government.

(iii) Misfeasance in public office by the Second, Third and Fourth named Defendants in relation to the sale of 25 acres of Crown land in that they committed a breach of their public duty which was injurious to public interest.

[57] Since the issues of breach of public duty and misfeasance are at the heart of the claims against the Second , Third and Fourth Defendants and are the basis of the allegation of the illegality of the sale/purchase transaction in respect of the Cades Bay Lands, the Court will deal with these issues before returning to a discussion of the issue of the alleged illegality of the purchase of the lands by the First-named Defendant.

ISSUE # 3 - ARE THE SECOND, THIRD AND FOURTH DEFENDANTS GUILTY OF MISFEASANCE IN PUBLIC OFFICE?

[58] It is submitted by Learned Counsel for the Claimant that "critical to the resolution of these two primary issues of Fiduciary Duty and Misfeasance is an understanding of the formation and true beneficial ownership of Antigua Aggregates Limited (AAL) and Southern Developers Limited (SDL). They contend that the Third and Fourth Defendants admitted that AAL was formed by the Second, Third and Fourth Defendants. Learned Counsel invite the Court to find that:-

(i) AAL was formed by or on the instructions of the Second, Third and Fourth Defendants who amongst themselves constituted a de facto partnership;

(ii) The shares held by Radford Hill in the company AAL until 1985 were held by him for and on behalf of those Defendants who were at all material times the beneficial owners of those shares.

(iii) At all material times from or about the date of its incorporation on 1st February 1983 and at least through 31 December, 1987, the Second, Third and Fourth Defendants were the beneficial shareholders of Antigua Aggregates Limited and collectively controlled the majority shareholding in that company, indeed as a de facto partnership.

(iv) At some time prior to August in 1985 the amount of shares held by Mr. Radford Hill in AAL , for and on behalf of the Second, Third and Fourth Defendants, increased from 130,000 shares (a 51% majority) to 375,000 shares (~~a~~ 75% majority.)

(v) On 14th August, 1985 Lester Bird and Robin Yearwood each assumed legal ownership of 25% of the shares in AAL and on 10th September 1985, Hugh Marshall assumed legal ownership of 25% of the shares of that company;

(vi) At all material times from or about the date of AAL's incorporation on 1st February 1983, and at least through 31 December 1987, the Second, Third and Fourth Defendants met weekly with William David Strickland to make decisions and to give directions to the said Strickland concerning the management affairs of AAL.

(vii) At all material times the said William aka David Strickland on those instructions was the man responsible for implementation, including searching for new prospects.

(viii) At all material times the said Strickland gave instructions to Radford Hill, as the Company's Attorney and the ostensible shareholder of the majority of shares in AAL held on behalf of Defendants 2,3 and 4.

[59] Learned Counsel for the Claimant further submit that, with respect to the formation and ownership of the First Defendant Southern Developers Limited (SDL) , it is the case for the Claimant that SDL was incorporated on 22nd July 1985 and that this was done on the instructions of the Second, Third and Fourth Defendants as its promoters, either directly or through their de facto partnership in AAL and that as promoters, prior to or from its incorporation these Defendants had a beneficial interest in SDL. They base this on the Agreed Evidence that "Southern Developers limited was formed to and does still own 25 acres of beach front land....situate at Cades Bay in the parish of Saint Mary in the Island of Antigua." (Agreed Bundle; Vol. 111; Petition of Hugh Marshall Snr, para.16), as well as the sworn testimony of Hugh Marshall Snr and Robin Yearwood . They state that all the facts support a finding that SDL was, from its incorporation at least 80% beneficially owned and fully controlled by the Second, Third and Fourth Defendants whether directly or through their de facto partnership in AAL.

[60] Learned Counsel for the Claimant further submit that , in stark contradiction of the pleadings of the Defendants, the admissions contained in the many documents in the Agreed Bundle taken together with the oral evidence of both Mr. Hugh Marshall Snr. and Mr. Robin Yearwood, all support the Claimant's case that the Second, Third and Fourth Defendants were involved in the formation of SDL as promoters with the intention of owning the Cades Bay Lands and that they had a beneficial interest in that company from the date of its incorporation. They contend that the Defendants have pleaded that SDL was incorporated by one Anthony Michael, now deceased and whom they describe as " a prominent businessman, Rotarian and hotel owner". They submit that the burden was on the Defendants to prove this and that they have not.

Court 's Analysis and Findings With Respect to the Above Submissions.

[61] The law is settled that he who asserts must prove. According to Blackstone, " as to the incidence of the legal burden at common law, the general guiding principle is to be derived from the

precedents is that "he who asserts must prove, not he who denies". – per Lord Maugham in **Joseph Constantine Steamship Line Ltd. v Imperial Smelting Corporation Ltd**. [1942] AC 154 at page 174[1].

[62] In the instant case, the Claimants allege that SDL was incorporated on the instructions of the Second, Third and Fourth Defendants. This assertion is an essential part of their claim. The Second, Third and Fourth-named Defendants categorically deny that this is so. They aver that SDL was incorporated on the instructions of one Anthony Michael, now deceased. Learned Counsel for the Defendants submit that the burden of bringing evidence to this Court to prove that the Second, Third and Fourth Defendant gave Radford Hill instructions to incorporate the First Defendant remains at all times upon the Claimant.

[63] On the basis that "he who alleges must prove", the burden of proving that SDL was incorporated on the instructions of the Second Third and Fourth Defendants rests on the Claimant . In the event that in fact the burden is on the Second , Third and Fourth Defendants , the latter have to prove, on a balance of probabilities that which they had averred, namely that SDL was incorporated on the instructions of Mr. Anthony Michael . Mr. Michael unfortunately cannot assist the Court in determining the veracity of that claim as he is deceased. The next best evidence arguably should come from Mr. Radford Hill, the Solicitor who incorporated the First Defendant company. The evidence of Mr. Hill, who incidentally was called as a Witness for the Claimant, does not assist the Court. Mr. Hill's evidence in chief is that he "could not recall" on whose instructions he incorporated the First Defendant company.

[64] Blackstone (at page 700 paragraph 47.40) (Supra n.1) states that the case of **Reynolds v Metropolitan Police Commissioner** [1984] 80 CR App. R 125) " illustrates the point that " in the absence of a precedent , if it is unclear whether an assertion is an essential part of the claim of the claimant or the defence of the defendant, the Court must decide the matter. The authorities show that in these circumstances, the Courts decide the matter having regard to matters of policy,

[1] Blackstone's Civil Practice 2011
Oxford Press
Ed. Rt Hon Lord Justice Maurice Kay
2010

such as the ease or otherwise that the respective parties would encounter in seeking to discharge the legal burden, and whether the objective of the rule of substantive law in question, whether a common law or statutory rule, would be likely to be achieved better by placing the burden on the one party or the other." In the circumstances, and on the basis of the foregoing, the Court finds that the burden of proving that the First Defendant was formed on the instructions of the Second, Third and Fourth-named Defendants rests on the Claimant. The Court further finds that the Claimant has failed to discharge this burden on a balance of probabilities.

[65] Learned Counsel for the Claimant contend that it is reasonable to conclude that , notwithstanding the persons named as directors of the First Defendant on the company's annual returns for 1985, it was the Second, Third and Fourth Defendants who met weekly to make decisions about the management of the company. They further contend that it is therefore reasonable to conclude that they were at all material times the de facto directors of the First Defendant.

[66] Learned Counsel for the Claimant have also submitted that the Court should not only infer from the Agreed Documents that the First Defendant was incorporated on the instructions of the Second, Third and Fourth Defendants, but they (Learned Counsel) go one step further. They invite the Court to find that the First Defendant was incorporated on the instructions of **AND MANAGED AND CONTROLLED** (my emphasis) by the Second, Third and Fourth Defendants. In the view of the Court , this submission of Learned Counsel for the Claimant that the First Defendant was "managed and controlled" by the Second, Third and Fourth Defendants is at odds with their submission that the Second Defendant Lester Bird elected not to give evidence at the trial because, among other things, he :-

a) was **THE CONTROLLING MIND BEHIND AAL AND SOUTHERN DEVELOPERS LTD**.(emphasis added);
b) .....,
c) .....
d) that this interest (as one of the beneficial owners of the Cades Bay Lands) was being manipulated by him even before AAL came to own shares in SDL......
e) ....

f) ....

g) that he benefitted financially through his CONTROL OF AAL AND SDL from the acquisition by SDL of the Cades Bay Lands.

[67] Additionally, at paragraph 13 of their Submissions, Learned Counsel for the Claimant contend that :-

> " The entirety of the Case outlined against the Second Defendant at paragraph [11] above applies equally to the Third and Fourth Defendants, **"SAVE FOR THE CONTROLLING MIND POINT"** (my emphasis) and has been put to them."

[68] In light of the above , the Court is unable to infer that the First Defendant was managed and controlled by the Second, Third and Fourth Defendants, as contended by Learned Counsel for the Claimant.

[69] On the basis of the foregoing , the Court is of the view that the Claimant has not proved , on a balance of probabilities , that the First Defendant was incorporated on the instructions of the Second, Third and Fourth Defendants ; he has also not proved , on a balance of probabilities, that the First Defendant was managed and controlled by the Second, Third and Fourth Defendants; he has not proved that the Second, Third and Fourth Defendants were involved in the formation of the First Defendant SDL as promoters with the intention of owning the Cades Bay Lands and/ or that they had a beneficial interest in that company (SDL) from the date of its incorporation, as alleged. Therefore, the imposition of a duty of disclosure on the part of the Second, Third and Fourth Defendants at the Cabinet meetings either at the 29th April 1985, or at the 4th September, 1985 does not arise.

[70] It is the submission of Learned Counsel for the Claimant that "the Claimant has amply met its burden of proof to establish that each of the Second , Third and Fourth Defendants are liable for the tort of misfeasance in public office." They contend that, on the evidence, the tort of misfeasance in public office is alleged against the Second, Third and Fourth Defendants.

[71] Butterworths' "The Law of Tort " (Lexis Nexis- Butterworths; 2nd edition, page 926, paragraph 17.46)[2] notes that:-

> "The tort of misfeasance in public office consists of a purported exercise of some power or authority by a public officer otherwise than in an honest attempt to perform the functions of his office, whereby loss is caused to the claimant."

[72] In the leading case of **Three Rivers District Council v Bank of England** [2003] 3 ALL ER 1, (the **Three Rivers** case) , referred to by Counsel for both parties, the House of Lords confirmed that the tort of misfeasance in public office has two separate limbs; a "targeted malice" limb where intent to injure is central, and an "illegality limb" where the defendant's knowledge that his conduct is unlawful is central.. As stated by the learned writers of The Law of Tort (page 930, paragraph 17.51) (Supra n.2), there is a substantial overlap between the two limbs. In particular, since it is unlawful for a public officer to use his powers to inflict injury, and since he will generally be aware of this, most cases of targeted malice will also be actionable under the illegality limb.

[73] The facts of the **Three Rivers** case as stated in Clerk and Lindsell on Torts (page 972 , paragraph 14-104)[3], are as follows:-

> " Some 6000 investors who lost deposits when the fraudulently run Bank of Credit and Commerce International (BCCI) collapsed, claimed that the senior officials of the Bank of England acted in bad faith in :(a) licensing BCCI in 1979 when they knew it was unlawful to do so; (b) shutting their eyes to what was happening at BCCI after the license was granted; and (c) failing to close BCCI when the known facts cried out for action in the mid-1980s. The question was whether these allegations were sufficient to ground liability for

[2] The Law of Tort 2nd Edition
Lexis Nexis Butterworths
Ed. Andrew Grubb
2007

[3] Clerk and Lindsell On Torts
Sweet Maxwell
20. Edition
Ed. Michae; a. Jones
2010

misfeasance in public office on the part of the Bank of England. The Bank argued that for liability under the second limb it must be shown that the officials knew of the illegality of their acts and of the probability of resulting injury, and that recklessness as to the illegality and probable injury was not sufficient. The claimant argued that objective recklessness in the sense of there being an obvious risk to which the defendant had failed to give any thought, was sufficient. The House of Lords held that (i) the tort of misfeasance in public office had two forms, namely (a) cases where a public power was exercised for an improper purpose with the specific intention of injuring a person or persons, and (b) cases where a public officer acted in the knowledge that he had no power to do the act complained of and that it would probably injure the claimant. In the second category of cases, an act performed in reckless indifference as to the outcome was sufficient to ground the tort. Recklessness in that sense was subjective recklessness, and thus the claimant has to prove that the public officer acted with a state of mind of reckless indifference to the illegality of his act and its consequences."

[74] In the said **Three Rivers** case , Lord Steyn listed and analyzed six essential elements required to make out the tort against a defendant, namely, (i) the defendant must be a public officer; (2) there must be the exercise of power as a public officer; (3) the public officer must either have acted out of malice i.e., specifically intending to injure a person or persons ("targeted malice"); or acted knowing that he had no power to do the act complained of and that the act would probably cause injury to the plaintiff ("untargeted malice"); (4) any plaintiff with a sufficient interest to found a legal standing to sue was competent to bring the action ; (5) the plaintiff must prove that his loss was caused by the abuse of power, and (6) the damage must not be too remote."

[75] According to Lord Steyn, in both types of case , - namely, targeted malice or untargeted malice, - the defendant can be said to have acted in bad faith. Further, as stated by Clarke J , 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.

[76] In commenting on the **Three Rivers** case, Justice W. Anderson in the **Marin** case, at paragraph 130 of the said Judgment stated that :- "Both the Court of Appeal and the House of Lords upheld the essential elements of Lord Steyn's definition of the tort ." Justice Anderson emphasized the fact that the **Three Rivers** case "expressly stated that the essence or raison d'etre of the tort was simply bad faith in the exercise of power by a public official which occasioned loss to the plaintiff, and that this could be equally evidenced through targeted malice as through an unlawful act done with improper motive i.e., where the public officer acts knowing that he has no power to do the act complained of and that the act would probably injure the plaintiff."

[77] The Court has already found that the Claimant in the instant case is competent to bring the action against the Defendants. The Court agrees with the submission of Learned Counsel for the Claimant that there can be no doubt that at all material times, the Second, Third and Fourth Defendants were public officers. The Court is of the view that this is so, based on the facts and the evidence before it.

[78] The Court will now deal with the second limb of the **Three Rivers** case, namely:-

WAS THERE AN EXERCISE OF POWER BY THE SECOND, THIRD AND FOURTH DEFENDANTS AS PUBLIC OFFICERS?

[79] As stated above, the exercise of power as a public officer is one of the elements of the tort of misfeasance in public office. The exercise of power may be by positive act or omission, but in the case of an omission there must be a legal duty to act and a failure to act which amounts to an unlawful breach of that duty; mere inadvertence or oversight is insufficient - per Lord Hutton in the **Three Rivers** case.

[80] It is the submission of Learned Senior Counsel as follows:-

(a) The exercises of power complained of by the Claimant are the acts and omissions of the Second, Third and Fourth Defendants, in that they as Cabinet Ministers with the collective responsibility of Cabinet, and the Third Defendant also as Minister with responsibility for Lands, EACH :- (emphasis added) i). Participated in the Cabinet decisions of 29 April, 1985 (at Vol III Part 1 pg 2) and of 4 September, 1985 (at Vol. III Part 1 pg 5);

ii). Failed to disclose to Cabinet at those 1985 meetings their respective interests in the Cades Bay Land or in the condominium project thereon;

iii). Failed to disclose to Cabinet at those 1985 meetings their respective interests in the First defendant, Southern Developers Limited;

iv). Agreed to grant the benefit of Crown Land (the Cades Bay Land) to themselves as persons interested in the proposed condominium development at Cades Bay approved by Cabinet on 29 April, 1985;

v). Agreed to sell Crown land (the Cades Bay Land) to themselves as beneficial owners of the First Defendant, Southern Developers limited by Cabinet decision of 4 September, 1985;

vi). Set a price for sale of the Cades Bay Land to the First Defendant without first obtaining a valuation of the same or obtaining a recommendation as to price from the Ministry of Agriculture or otherwise determining the reasonable market price for which the land could be sold;

vii). Agreed to sell the Cades Bay Land at an undervalue or concessionary price without any or any sufficient regard for the best interests of the Crown or the Government or the people of Antigua and Barbuda;

viii). Personally benefited and made a profit from the sale of the Cades Bay Land to The First Defendant through their interests in the First Defendant and in Antigua Aggregates Limited.

[81] Learned Counsel further contend that, in the case at bar, the Second, Third and Fourth Defendants abused the powers of their respective public offices by acquiring through the First Defendant for their ultimate benefit, 25 acres of beach front Crown land (the Cades Bay Lands) at substantially less than one quarter of its market value. Counsel submits that there is ample evidence before the Court from which to reach this conclusion. They state that, in cases of this nature, it is not necessary to provide direct evidence of the Defendant's belief, foresight or motives but rather the Claimant is entitled to rely on and to ask the Court to accept reasonable inferences

arising from the direct evidence. They emphasize that in the case at bar, largely all of the evidence is agreed evidence.

[82] Learned Counsel further submit that the foregoing were all performed as part of the Second, Third and Fourth Defendants' public functions as Ministers of the Crown and Cabinet Ministers having "the general direction and control of the Government" and being "collectively responsible therefore to Parliament"; and therefore such acts and omissions were "public functions for which they would be liable in the tort of misfeasance once those functions, or any of them, were performed with the requisite state of mind and with the requisite foresight of damage or loss to the Claimant. "

[83] Since misfeasance liability is "limited to the deliberate and dishonest abuse of a public power" (page 21, The Law of Tort, supra n.2) , the Court will now address the Third Limb of the **Three Rivers** case, namely:-

WHETHER THE SECOND, THIRD AND FOURTH DEFENDANTS' ACTED OUT OF MALICE, i.e., EITHER TARGETED MALICE OR UNTARGETED MALICE?

[84] As stated in paragraph 75 above, in both types of case, namely targeted malice or untargeted malice, the defendant can be said to have acted in bad faith. Therefore, to ground an action in misfeasance, the claimant has to establish the essential ingredient of bad faith . The onus is on the claimant to properly plead and prove this essential ingredient . The importance of properly particularizing the elements of bad faith is illustrated by the case of **Carter v Chief Constable of the Cumbria Police** [2008] EWHC 1072 (QB). In that case, the claims related to disciplinary proceedings, which would be outside the reach of the tort of malicious prosecution. Claims in negligence had been discontinued. Tugendhat J. held that the claim should be "anxiously scrutinized" in case the defendant's immunity from a suit in negligence was being circumvented through the device of pleading misfeasance. On this basis, insufficient particulars in support of subjective recklessness had been pleaded, and the claims were struck out.

[85] The Learned author of Actions against Public Officials: Legitimate Expectations, Misstatements and Misconduct) – page 227, paragraph 5-081.)[4] states:- "Particulars of claim in an action for misfeasance in public office must be especially precise and detailed given the seriousness of the allegation."

[86] Although Saunders J and de La Bastide J in the **Marin** case wrote in dissent, in the view of the Court, their judgment (at paragraph 35,) is instructive on the standard of pleading required in the tort of misfeasance. The Learned Judges stated:-

> "..........A claimant in tortious misfeasance must meet a very high standard in pleading. Particularising and establishing both the dishonest motive of the defendant and the causation issues involved in proving misfeasance are no less formidable challenges than those that must be overcome in securing a conviction for corruption or for misconduct in public office...............So onerous are the challenges faced by claimants in misfeasance that most cases are actually struck out, withdrawn or dismissed before they even get to trial. The rate of success for misfeasance suits is notoriously low....."

[87] At paragraph 151 of the Judgment in the **Marin** case, Anderson J. speaks of the "high standards of proof required to show malice and bad faith for the tort of misfeasance."

[88] In similar vein, Madame Justice Bernard at paragraph 47 of the Judgment, stated :-

> "The main ingredient of the tort being proof of malice by the public officer and the difficulties in proving such malice may have resulted in the tort lying dormant for several years." The learned Judge continued, at paragraph 61:-

[4] Actions against Public Officials
Legitimate Expectations
Misstatements and Misconduct
Richard Moules
Sweet A. Maxwell
2009

"The abundance of judicial dicta reflected in the cases on the tort of misfeasance demonstrates unequivocally its special nature and characteristics. Strict proof of its ingredients is required, these being establishing that a public officer abused power vested in him by virtue of his office whereby some person or entity with a sufficient interest to sue suffered consequential loss or damage."

[89] Part 8.7 (1) of the Civil Procedure Rules (CPR) 2000 puts the requirement of particularizing the pleadings on a statutory footing. Part 8.7 (1) states:- "The claimant must include in the claim form or in the statement of claim a statement of all the facts on which the claimant relies." In a claim where the Claimant alleges misfeasance, like in an allegation of fraud, the allegation must be pleaded with full particulars, and established by clear, cogent and convincing evidence. A claimant will not succeed if he has not discharged this burden of proof.

[90] In paragraph 142 of their Closing Submissions, Learned Counsel for the Claimant submit that " the claims of breach of public trust and misfeasance in public office which form the basis of this action are serious allegations." In the view of the Court, this is a significant concession on the part of Learned Counsel that , in the instant case, it is not enough for the Claimant to simply invoke the general principles of tortious liability, but that it is incumbent on the Claimant to strictly plead and prove each and every ingredient of the tort of misfeasance.

[91] The authorities are replete with examples of what constitutes bad faith . In **R v Talbot BC** [1988] 2 All ER 207, Lord Nolan commented on the meaning of bad faith in these terms:-

"as Megaw LJ said in **Cannock Chase DC v Kelly** [1978] 1 ALL ER 152 at 156....bad faith means dishonesty: "It always involves a grave charge.."

[92] In the **Three Rivers District Council v Governor and Company of the Bank of England** (2001) 2 All ER 513 (at paragraph 161), Lord Hobhouse of Woodborough stated:-

"The tort of misfeasance in public office is a tort which involves bad faith and in that sense dishonesty. It follows that to substantiate his claim in this tort, **FIRST IN HIS PLEADING**

THEN AT THE TRIAL (my emphasis) a plaintiff must be able to allege and then prove this subjectively dishonest state of mind. The law quite rightly requires that questions of dishonesty be approached more rigorously than other questions of fault……."

[93] It is the submission of Learned Counsel for the Second, Third and Fourth Defendants that :-

(a) The burden of proof is on the Claimant. Pleading bad faith is critical. The Claimant was therefore required to plead and prove at the very least that the Second, Third and Fourth named Defendants acted in bad faith, or, dishonestly in that they knew they were acting illegally or unlawfully and/or were dishonest and/or reckless in not caring whether they were acting illegally or unlawfully.

(b) It is well established that the more serious the allegation in civil proceedings the greater the evidential burden on the party making the allegation. Misfeasance in public, like fraud, is a very serious allegation. It requires proof of bad faith or dishonest intent. Such a serious allegation cannot be established by a side wind or speculation. It must be firmly established by clear, convincing and probative evidence.

(c) It was incumbent on the Claimant to have properly pleaded, and produced clear, probative and convincing evidence to establish fraud, a dishonest intent and, an intent or reckless disregard as the probability of causing material harm to some person. The Second, Third and Fourth named Defendants contend that the Claimant has wholly failed to meet the required evidential threshold required to prove the serious allegation of misfeasance in public office.

(d) The Claimant has not pleaded bad faith or dishonesty nor, any material facts required to show the requisite dishonest state of mind required to establish misfeasance. First, there is no plea or evidence remotely capable of establishing that the Second, Third and Fourth named Defendants through the First Defendant, exercised or failed to exercise any statutory or public duty imposed on them by law.

(e) There is no plea or evidence that the Second, Third and/or Fourth named Defendants acted with the necessary dishonest intent. There is simply no proof of bad faith or evidence that the Defendants acted with knowledge that they acted illegally and, with the requisite knowledge that their acts would cause harm to anyone. In fact the Second, Third and Fourth named Defendants were not even present. Third, there is no plea against all the members of the Cabinet who discussed and voted for the Cabinet decision. With the exception of the Second, Third and Fourth named Defendants, the Cabinet Members are not even parties to these proceedings. There is absolutely no plea or evidence of bad faith or intentional misconduct giving rise to misfeasance in public office. See the **Attorney General of Antigua & Barbuda & National Parks Authority v Gaston Browne, Vere Bird Jr.** Claim No. ANUHCV2005/0351.

[94] Learned Counsel for the Defendants cite the case of **Dunlop v Woollahara Municipal Council** [1981] 2 WLR 693 . They state that, in this case, the Judicial Committee of the Privy Council, on page 703 (b) to (c) held that malice or bad faith or knowledge of invalidity are essential ingredients of misfeasance. Counsel states further that our Courts including the Court of Appeal have dealt with the tort of misfeasance. They too have held that bad faith is an essential ingredient of the tort, which must be properly pleaded and established if a claimant is to succeed in establishing misfeasance. See **Johnson Jno-Rose v The Dominical Broadcasting Corporation** CA No. 11 of 1999 at paragraph 29, page 11.

[95] According to Learned Counsel for the Claimant, (at paragraph.167):- " the requisite state of mind needed to commit the tort of misfeasance, that is, the threshold for establishing "bad faith", may be met by evidence that the Defendants knew that the actions they took were unlawful or beyond their powers; or knew that they had a duty to act but failed to do so. The contend that "this bad faith is demonstrated by several aspects of the evidence before the Court."

[96] Learned Counsel for the Claimant further contend that even if the primary evidence could point to some explanation other than an abuse of power, a finding of bad faith must still be found where the preponderance of the evidence supports such an inference. The proper test is not whether bad faith is the only possible explanation but rather whether bad faith, on the balance of probabilities is inferred by all the evidence, including testimony on cross-examination and documentary evidence before the court. They contend that the preponderance of the evidence in the case at bar leads inexorably to the conclusion that the Second, Third and Fourth Defendants were motivated in the acts and omissions by bad faith, more particularly, a self-serving desire to acquire land for their ultimate benefit from the Government at a concessionary price; and that this was the motivation behind their decision as part of Cabinet on 29 April, 1985 to approve the establishment of a condominium project on the Cades Bay Land and behind their further decision as part of Cabinet

on 4 September, 1985 to sell the Cades Bay Land at a concessionary price and grant concessions to the First Defendant.

[97] Their further contention (at paragraph 182) is that:-

> "On the preponderance of the Agreed Evidence and, having regard to the standing and sophistication of the Second Third and Fourth Defendants......... these Defendants must have known of, and were reckless as to the harm being inflicted by them on the people of Antigua and Barbuda, for whom they held Crown Lands in trust. Their actions evince cynicism in the extreme, in that it is submitted that they had no honest belief that their actions were lawful and, they were uncaring whether they were lawful or not.'

[98] I am guided by the dicta of Lord Hobhouse in the **Three Rivers** case to which I have referred in paragraph 92 above with respect to the requirement of pleading and proving the claimant's subjectively dishonest state of mind in order to substantiate a claim in misfeasance. I am also guided by the dicta of the learned Justices of the CCJ in the **Marin** case with respect to the high standard of pleading and the high standard of proof required for the tort. Persuasive though the above submissions and arguments of Learned Counsel for the Claimant may be, I am of the view that the Claimant has failed to adequately plead and particularize the dishonest motive or bad faith of the Second, Third and Fourth Defendants, and has also failed to establish and/or prove the said element of bad faith in the exercise of power on the part of the said Defendants.

[99] The Court has already discussed the Fourth Limb of the **Three Rivers** case and has found that the Claimant has a sufficient interest to found a legal standing to sue and is competent. The Court will now address the Fifth Limb of the **Three Rivers** case, namely, that the Plaintiff must prove that his loss was caused by the abuse of power; in other words, the Claimant in the instant case must prove that the **SECOND, THIRD AND FOURTH NAMED DEFENDANTS'** abuse of power **CAUSED THE LOSS OR DAMAGE COMPLAINED OF BY THE CLAIMANT**.

HAS THE CLAIMANT PROVED THAT HIS LOSS WAS CAUSED BY THE ALLEGED ABUSE OF POWER BY THE SECOND, THIRD AND FOURTH DEFENDANTS?

[100] The law is settled that the tort of misfeasance in public office is not actionable per se; it is not complete unless the Claimant can establish that he has suffered "material damage". The House of Lords in **Watkins v Secretary of State for the Home Department** [2006] UKHL 17, [2006] 2 ALL ER 353, held that misfeasance in public office is not actionable without proof of material damage, meaning financial loss, physical injury or mental injury amounting to a psychiatric illness. Referring again to the **Marin** case, Justice Bernard at paragraph 67 of the Judgment had this to say:-

> "The question of proof of material damage in the tort of misfeasance is one of the main ingredients to ground liability without which no action on the tort can succeed; in fact this being absent in Watkins (**Watkins v Home Office**) , it was doomed to fail, and was in that instance a fatal objection."

[101] Since misfeasance is a tort, a claimant, having proved material damage, also has to discharge the burden of proof as to causation. In order to succeed in his claim, the Claimant in the case at bar, must therefore first prove his loss or material damage, and must then prove that this loss was indeed caused by the abuse of power of the Second, Third and Fourth Defendants.

WAS THE LAND SOLD AT AN UNDERVALUE

[102] In his Statement of Claim filed on the 12th October 2005, the Claimant pleads:-

> At paragraph 8:- " At its meeting on September 4th 1985, Cabinet agreed to the purchase by the first-named defendant of 25 acres of Crown land at Cades Bay at $10,000.00 per acre for a total price of $250,000.00 along with certain concessions and exemptions in respect of the establishment and operation of a condominium project on the said lands by the first-named defendant. The fourth-named defendant was present at that meeting and participated in the decision."

At paragraph 14: - " By the sale of the said land to the first-named defendant at the gross undervalue of $250,000.00, the second, third and fourth-named defendants have obtained an unfair benefit from the Crown to the detriment of the public interest."

At paragraph 15:- " In the premises and by reason of the second, third and fourth-named defendants' breach of their respective fiduciary and public duties as Ministers of the Crown, the Crown as custodian of the public's interest and assets has suffered loss and the first-named defendant has gained an unfair advantage and benefit."

[103] Learned Counsel for the Defendants submit the following on the above issue:-

(a) The policy of the previous Antigua Labour Party Administration to sell Crown Lands at concessionary rates is not disputed in any way by the Claimant. The First, Third and Fourth named Defendants' witnesses and of, course the Third and Fourth named Defendants' Witness Statements speak definitively to the existence of this policy.

(b) An examination of the Claimant's exhibits of Cabinet minutes and agendas gives support to the existence of this policy. The said policy was in existence for decades.

(c) In determining concessionary rates, valuations of market value were not within the domain of the Cabinet. The evidence by the Third named Defendant is that it was ordinarily the procedure that the Government and Ministry of Lands dealt with the processing of applications for the purchase of Crown lands. Furthermore it was not the practice of the then Cabinet to micro-manage the Ministry. This is the evidence of the Third named Defendant Robin Yearwood which was reinforced on extensive cross-examination. In any event, it is submitted that this evidence/claim by the Claimant is unanswerable as the Cabinet was dealing with concessionary rates, and not the market value of the land. Furthermore and in any event, the claimant does not have any evidence of the market value of the land in order to sustain a claim of "undervalue".

(d) In any event, it is the evidence that the witnesses for the Second, Third and Fourth named Defendants as share holders of Antigua Aggregates Ltd. (which is not a party to this claim), the Second, Third and Fourth named Defendants excused themselves from any discussion pertaining to that company. However, it is the case at bar that the First named Defendant categorically denies that the First named Defendant was incorporated on the instructions of

Antigua Aggregates Limited or its shareholders. The First named Defendant was, in fact, incorporated on the instructions of one Mr. Anthony Michael, deceased who at the time desired to do a project in Antigua. The beneficiaries of Mr. Michael's Estate are currently the shareholders of twenty percent (20%) of the shareholding in the First named Defendant and are not parties to this claim. Nor is Antigua Aggregates Limited a party to this claim. There was no need for the Fourth Defendant (the Second and Third Defendants were not present) to excuse himself as the sale of lands to "Joe Mikes" aka Anthony Michael was not a matter in which he had an interest. It is important to recognize also that Mr. Robin Yearwood stated on cross-examination that [even if he were present at the said Cabinet meeting] he would not have excused himself as the Defendants had no personal interest at the time.

(e) Furthermore, the First Defendant brought 25 acres of Crown Land as a private company in pursuance of its objective to establish a condominium development. Cabinet approved the First Defendant's application on 29th April, 1985 in accordance with the government's longstanding policy, and followed the ordinary procedure set out wherein the sale/purchase was dealt with by the Ministry of Lands. This is the incontrovertible evidence of Robin Yearwood under extensive cross-examination.

(f) The Statement of Claim is pleaded in very general terms. At paragraph 8 the Claimant pleads the Cabinet decision. No plea or reference is made to the policy of selling Crown Lands at concessionary/developmental rates.

[104] As evidence of the fact that the Cades Lands were sold at an "undervalue", Learned Counsel for the Claimant submit the following :-

(a) There can be no doubt of the fact of the "gross undervalue" at which this beach front property was sold, by Cabinet decision made on the 4th September 1985.

(b) It is evident that ex facie the Cabinet Minute itself, that in making the decision on the 4th September 1985 to fix the price of the Cades Bay land at EC$ 250,000.00, Cabinet had the option as a responsible Cabinet charged by the Constitution and its Oath of office to refer the application of Southern Developers Ltd to the relevant Ministry, to assess the value of the property and to recommend a "selling price of the land for the approval of Cabinet." This was the methodology employed by Cabinet on that very day in respect of its decision to approve the purchase of another 25 acre parcel of land for another condominium facility project at the very same Cades Bay area for one Mr. Bradley Lewis. This methodology was spurned, in the case of the Southern Developers Limited's Cades Bay Lands approval. The evidence volunteered by Mr. Marshall Snr. that Cabinet had also sold Crown Lands to a Mr. Preudhomme and a Mr. Tonge at EC $10,000 per acre, even if accepted by the Court, and in the context of the further submissions made hereinafter, is evidence only for the perpetuating of an unlawful policy; it is NOT evidence of a lawful basis for the policy on which the Defendants all rely.

(c) In the face of prima facie evidence of a concessionary price or undervalue, the evidentiary burden shifted to the Defendants to prove any justification for such concessionary price, which they have failed to do. See Phipson on Evidence 11th Ed., para 103[5].

[105] Learned Counsel for the Claimant state that in this regard and in respect of the gross undervalue, the Court is referred to the preponderance of admitted and agreed evidence, as follows:-

a) The wording of the 4th September 1985 Cabinet Minute is, ex facie, indicative of a below market price because the price is listed as one of the concessions.

b) The Defendants all admit on their pleadings that the land was sold at a "concessionary" price.

c) The Claimants plea is admitted on the Defences that, on July 17th, 1987 – only five months after Southern Developers Limited's ownership of Cades Bay Land was registered – the First Defendant mortgaged the property to the Swiss American Bank to secure a loan for EC$ 1 million, a multiple of 4 times the price for which the Cabinet sold the property.

d) This EC$ 1 Million sum speaks for itself; it is legitimate for the Court to infer that a Bank would not lend a sum of money and accept as collateral a property valued less than the sum loaned. The inference therefore is that at the 17th July 1987, the vacant property was valued at least at EC $ 1,000,000.

e) This admission of value of at least EC $ 1,000,000 is to be viewed in the relevant context of there being no dispute that the Cades Bay Land was at all material times and has remained vacant land until at least 1997 and, to which no improvements had been made.

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[5] Phipson on Evidence
Sweet & Maxwell
16th Edition
Ed. Hodge M. Malek Q.C
2005

f) This vacant state is proved by the Defendants' own evidence forming part of the Agreed Bundle, that is to say, the Valuation of Mr. Oliver Davis prepared for Pat Zilinkas, Antigua Aggregates Ltd on July 25th, 1997 in which Valuation Report Mr. Davis describes the land; "Owner: Southern Developers limited; Location: Cades Bay; Property: Land only" and, further down on p. 1 of the Report under the rubic: "Site data: There is no building on the lot which is located on the south coast of the island. It is bounded by a public road on the north and the ocean on the south."

g) The foregoing also, as evidence of the benefit of EC$ 1,000,000 which, at 17th July 1987, the Second Third and Fourth Defendants have derived from the sale of the Cades Bay Lands, through their beneficial ownership of Southern Developers Limited.

[106] Learned Counsel for the Claimant submit the following as to the "loss "suffered by the Government and people of Antigua and Barbuda:-

1) There is no dispute as to the significant accretion in the value of the Cades Bay Lands and therefore, the corresponding loss to the people of Antigua and Barbuda. The Agreed Bundle speaks for itself and, in cross examination Mr. Marshall accepted that accretion in value in unequivocal terms. Counsel referred the Court to the following evidence :-

a) The Oliver Davis Valuation of the Cades Bay Lands for EC $ 10,800,000, dated 24th July 1997 and Commissioned by Antigua Aggregates Limited;

b) The Price Waterhouse Valuation of shares of Antigua Aggregates Limited. At page 190, the Price Waterhouse Valuation gives the appraised value of the Southern Developers Limited Cades Bay Lands as EC $ 8,640,000.

2) In answer to the Claimant's pleaded case at paragraph 8 of the Statement of Case, that "Cabinet agreed to the purchase by the First named Defendant of 25 acres of Crown Land at Cades bay at $ 10,000.00 per acre for a total price of $ 250,000 along with certain concessions and exemptions" the Defendants all plead justification for the sale of Cades Bay at the concessionary price of EC $ 250,000 and the concessions granted by Cabinet. The pleaded justification is that this concessionary transaction was effected in accordance with lawful

policy:- "[t]he concessions granted were under and pursuant to the Fiscal Incentives Act and government policy for the stimulation of investment within the State."

3) It is noteworthy that in their joint Defence, the Second, Third and Fourth Defendants plead that the so called policy on which they rely in this regard "was initiated by a report to the government in the 1960's by an Economist Ms. C. O'Laughlin and has remained in vogue..." Mr. Marshall Snr, giving evidence on behalf of himself and the Second and Third Defendants makes absolutely no reference to this so called "report". Mr. Robin Yearwood, giving evidence on behalf of Southern Developers Ltd and, Minister of Lands at the material time similarly makes absolutely no reference to this so called "report". Neither in the Agreed Bundle nor anywhere before this Court have these Defendants put this so called "report" into evidence.
4) The Fiscal Incentives Act, Chapter 172 of the Laws of Antigua and Barbuda (hereinafter referred to as the "FIA"), pleaded and relied on in evidence by all the Defendants as legitimizing a government policy to which they lay claim, has no application whatsoever to Crown Lands.
5) In the context of the absence of any evidence of the existence of this so called policy, the purported reliance by the Defendants on this Act, the FIA, is nothing more than a contrived cynical fiction which seeks to legitimize an otherwise unlawful policy.
6) On its true construction, the FIA applies to an "approved enterprise", carrying on an enterprise approved by the relevant Minister under section 7 and, in respect and "approved product" which is defined to mean "a product of manufacture approved by Cabinet under section 6 for manufacture by an approved enterprise." The sale of Crown Lands, or the development of those lands for a "Condominium Project at Cades Bay" does not fall within the definition, contemplation or intent of the FIA as a "a product of manufacture approved by Cabinet under section 6 for manufacture by an approved enterprise."

[107] Learned Counsel for the Claimant also submit that :-

(a) The Defendants all well know and the Second, Third and Fourth Defendant must have known at the material time in accordance with their oaths of office as Cabinet ministers, that in respect of the sale and development of Crown Lands such as the Cades Bay Lands, the applicable legislation is the Crown Lands (Regulation) Act, Chapter 120 of the Laws of Antigua and

Barbuda (hereinafter referred to as the "Crown Lands Act"). In point of fact, they plead the Crown Lands Act as being applicable in relation to "this action having to do with Crown Lands."

(b) The Crown Lands Act provides that, "It shall be lawful for the Cabinet to make regulations with respect to the terms and conditions on which Crown Lands may be ...sold or otherwise dealt with..." Where regulations are made, "All such regulations ...shall be published in the Gazette and when so published shall have the force of law."

(c) Knowing the Crown Lands Act to apply to Cades Bay, the Second, Third and Fourth Defendants have interestingly not pleaded that legislation as the foundation for the so called government policy on which they rely. They have cited no regulations made under that Act indicative of any such policy. Nor have they led any evidence in respect of any steps taken by Cabinet pursuant to this Act, referable to applicable terms and conditions or government policy thereunder, in respect of the sale of or concessions of Crown Lands generally and/or with respect to the Cades Bay Lands specifically.

(d) The research of the Claimant has produced no regulations made by Cabinet under the Crown Lands Act, referable to any concessionary terms and conditions under which the Cades Bay Lands may be sold. There are none.

[108] Learned Counsel for the Claimant ask the Court to find that that there exists no lawful policy such as that pleaded by the Defendants and purportedly spoken to by them in evidence, for the fixing of concessionary prices and terms and conditions in respect to the sale of Crown Lands. They further contend that the "so called policy of the Government," relied on by the Defendants in relation to the approval by Cabinet of the purchase of the Cades Bay Lands by First Defendant was and is self serving, arbitrary and without basis in law. Learned Counsel referred the Court to the decision of the Eastern Caribbean Court of Appeal of **Attorney General v Kenney D. Anthony** (unreported), Suit No. HCVAP2009/031; decision June 14 2010). They contend that, in that case, acts or omissions of members of the Cabinet of St. Lucia were reviewed. They state that , on facts far less egregious than these of the case at bar (in the face of what was found by the Court to amount to arbitrary unreasonable and irrational conduct by certain members of Cabinet), the Cabinet of St. Lucia was found to have committed acts of misfeasance in public office.

[109] Learned Counsel for the Claimant submit further that:-

"......in as much as the Cades Bay Land was sold at an admitted concessionary price and, in the absence of any justification for such concession, the Court must find that the land was sold at an undervalue thereby occasioning loss to the Crown. An unlawful sale at any amount less than market value must result in a loss of the difference between the sale price and the true market value at the time of sale. No valuation was done at the time of sale, however the evidence does indicate, and the Defendants have admitted that the land was mortgaged a mere five months after the sale on 17 July, 1987, to secure the sum of EC $1,000,000.00, four times the amount of sale price."

[110] Learned Counsel further submit that the only reasonable conclusion that may properly be drawn from this is that in 1987, the minimal value of the Cades Bay Lands was EC $1,000,000.00. They contend that, " the loss caused by the misfeasance of the Second, Third and Fourth Defendants (i.e. the difference between the value at the time of sale and the actual sale price) can reasonably be determined to be at least EC $750,000.00."

[111] With respect to the above submissions, the Court makes the following findings:-

(a) The Claimant has not pleaded in his Statement of Claim what the actual loss caused by the alleged misfeasance of the Second, Third and Fourth Defendants is or should be. The Claimant has pleaded that the Cades Bay Lands were sold "at the gross undervalue of $250,000.00", but never **PLEADED** (my emphasis) what the value of the land was at the date of sale at the alleged undervalue. It bears repeating that one of the items of relief claimed by the Claimant is an Order for (at Paragraph 4 of the claim):-

" Rescission of the sale/purchase agreement made on or about the 19th day of February 1987 between the Crown of the one part and the First-Named Defendant of the other part of the Crown lands to wit parcel 35 of Block: 55 1382A in Registration Section : South West;" and (at paragraph 5 of the claim) for " An Order that the First-Named Defendant deliver up the Land Certificate in respect of the said parcel of land to the Registrar of Lands to be cancelled."

(b) Part 8.7 (4) of CPR states that " if the claimant seeks recovery of any property, the claimant's estimate of the value of that property must be stated" .

At paragraph 10 of the Statement of Claim, the Claimant pleads:-

> " On July 17 1987 five months after the purchase the first-named defendant charged or mortgaged the said land to Swiss American National Bank of Antigua to secure the sum of $1,000,000.00 which said charge was discharged in 1997. ....."

At paragraph 11 :-

> " No condominium development was ever executed or constructed on the said parcel of land, and up until 1997 the Financial Statements of the first-named defendant noted the said land as an asset held for development with a value "at cost" of $263,000.00 . In June 1998 the said land was appraised at the request of the first-named defendant by Oliver Davis, a Real Estate Appraiser at $10,800,000.00 and was noted on the 1998 Financial Statements of the company at a revaluation surplus of $8,377,000.00."

(c) In the view of the Court, the above does not comply with the mandatory requirement on the part of the Claimant to state the "estimate of the value " of the Cades Bay Land.

(d) The Claimant seems to be contending that because the Cades Bay Land was sold at an "admitted concessionary price", then, in the absence of any "justification for such concession," the Court must find that the land was sold at an undervalue.

(e) Counsel for the Claimant concede that no valuation was done at the time of the sale; yet they wish the Court to infer that the amount for which the land was mortgaged "a mere five months after the sale on 17 July, 1987 " , namely the sum of $1,000,000.00 , should be the taken as the minimum value of the property for purposes of calculating the "loss" to the Claimant.

[112] With respect to (e) above, Learned Counsel for the Claimant submit that "the sum of $1 million EC speaks for itself.". They further contend that "it is legitimate for the Court to infer that a Bank would not lend a sum of money and accept as collateral a property valued at less than the sum loaned. The inference therefore is that at the 17th July 1987, this vacant property was valued at least at EC $1,000,000.00. " I am afraid that I must respectfully disagree with the rationale of this submission. There might be a multitude of reasons for a bank lending a greater sum to borrowers than the transfer price, such as a course of dealing, the character of the borrowers, the business plan presented and so on. The single reason proposed by Counsel for the Claimant is merely one of many that could be inferred.

[113] Learned Counsel's submission that there has been an accretion in value of the Cades Bay Lands and therefore a "loss " to the people of Antigua and Barbuda, is, in the view of the Court, flawed. The law is settled that , in the law of tort, "damages are measured by the plaintiff's loss, not by the defendant's gain." - per Lord Nicholls in **A-G v Blake** [2001] 4 All ER 385 at 391. Learned Counsel therefore cannot point to the accretion in value of the Cades Bay Land as a measure of the loss to the Claimant. The Claimant was required to plead the loss suffered as a result of the alleged misfeasance of the Second, Third and Fourth Defendants.

[114] The Court is therefore of the view that the above submissions of Learned Counsel for the Claimant lack merit. The Court is of the further view that the Claimant has failed to discharge its burden of proof, and has failed to prove the "material loss and special damage" suffered . In the absence of such proof, the nature of the "unfair benefit " purportedly obtained from the Crown by the Second, Third and Fourth-named Defendants cannot be objectively ascertained. Similarly, the nature of the "unfair advantage and benefit" obtained by the First Defendant cannot be ascertained.

[115] With respect to the Claimant's claim that the Second, Third and Fourth-named Defendants are guilty of misfeasance in public office, the Court concludes as follows:- The Claimant was required to discharge his burden of proving, on a balance of probabilities, all of the six essential ingredients adumbrated by Lord Steyn in the **Three Rivers** case in order to make out the tort against the said Defendants. In the instant case, the Court is of the view that the Claimant has made out only two of these ingredients, namely that the Defendants were at all material times public officers, and

secondly that the Claimant has sufficient interest and is competent to bring the action against the Defendant. The Court finds, however, that the Claimant has failed to prove the other ingredients. In particular, the Court finds , after "anxiously scrutinizing" the pleadings , that the Claimant has failed to meet the high standard of pleading necessary for a claim in tortuous misfeasance. He has failed to properly plead and establish the element of bad faith of the Defendants . This essential ingredient of the tort of misfeasance is therefore lacking . The Claimant has also failed to properly plead and strictly prove his loss. Since he has failed to do so, he therefore cannot prove that his loss was caused by the abuse of power by the Second, Third and Fourth-named Defendants.

[116] At paragraph 50 above, I reproduced the facts of the **Marin** case as contained in paragraph 112 of the said Judgment . At the risk of repetition, I again refer to certain portions of the said facts, which I have highlighted.

> "The Appellants are two former Ministers of the Government of Belize and the Respondent is the Attorney General of Belize. In a civil claim instituted in the High Court on 11th January 2009, the Attorney General alleged that within the last six months of being voted out of office in 2008, the first named Appellant, who was then the Minister with responsibility for State lands, signed and issued the necessary certificates to enable the sale of some 56 parcels of State lands to a private development company. The sale was procured by the second named Appellant who was then the Minister of Health and who had a beneficial interest in the company. The Attorney General further claimed that the sale price was significantly below market value **THEREBY OCCASIONING A LOSS OF SOME $924,056.60 TO THE GOVERNMENT OF BELIZE AND THAT THE TWO APPELLANTS HAD ACTED WITH KNOWLEDGE OR WERE RECKLESS THAT THE TRANSFER WOULD CAUSE THAT LOSS.** He alleged that by these actions they had committed the tort of misfeasance in public office."

[117] The highlighted portions in the above paragraph illustrate that the Claimant in the **Marin** case pleaded, among other things (a) the quantum of the loss and (b) the requisite state of mind of the

Appellants (the former Ministers.) In the instant case, as stated above, the Claimant did not comply with these requirements.

[118] In light of the above, the Court is of the view that the Claimant's claim that the Second, Third and Fourth –Named Defendants are guilty of misfeasance in public office , is unsustainable . The Court endorses the submission of Learned Counsel for the Second, Third and Fourth Defendants that "the Claimant has wholly failed to meet the threshold required to prove the serious allegation of misfeasance in public office.' Consequently, the Court respectfully rejects the submission of Learned Counsel for the Claimant that "the Claimant has amply met its burden of proof to establish that each of the Second , Third and Fourth Defendants are liable for the tort of misfeasance in public office."

[119] Accordingly, the following items of relief claimed in the Claim Form filed on the 12th October, 2005, namely:-

> "Item (iii) - A declaration that the second third and fourth-named Defendants severally and jointly as former Ministers of Government are guilty of misfeasance in public office.....in relation to the sale of the said Crown lands in their capacity as servants and agents of the Crown", and
>
> "Item (vii)- " Damages against the second , third and fourth-named Defendants whether severally and / or jointly in respect of the tort of misfeasance:'"

are refused.

ISSUE # 4 - WHETHER THE SECOND, THIRD AND FOURTH NAMED DEFENDANTS OWE A FIDUCIARY DUTY TO THE CROWN AND TO THE GOVERNMENT AND PEOPLE OF ANTIGUA AND BARBUDA AS CABINET MINISTERS AND WHETHER THEY ARE GUILTY OF BREACH OF THE SAID FIDUCIARY DUTY.

[120] At paragraph 15 of his Statement of Claim, the Claimant pleaded that "by reason of the second, third and fourth-named defendants' breach of their respective fiduciary and public duties as Ministers of the Crown, the Crown as custodian of the public's interest and assets has suffered loss and the first-named defendant has gained an unfair advantage and benefit." The Claimant further pleaded that " by the sale of the said land to the first-named defendant at the gross undervalue of $250,000.00 , the Second , Third and Fourth Defendants have obtained an unfair benefit from the Crown to the detriment of the public interest."

[121] The Claimant pleaded further that at its meeting on September 4th 1985, Cabinet agreed to the purchase by the First Named Defendant of the Cades Bay Land at $10,000.00 per acre for a total price of $250,000.00 along with certain concessions and exemptions in respect of the establishment and operation of a condominium project on the said lands . The Fourth Named Defendant was present at that meeting and participated in the decision. The Claimant further avers that on the 19th February 1987, the First named Defendant was registered as proprietor of the Lands in place of the Crown pursuant to the Cabinet decision. Further, on the 17th July 1987, five months after the purchase of the Lands, the First Named Defendant mortgaged the Lands to secure a sum of $1,000,000.00. The Claimant claims that the Lands were sold to the First Defendant (on the 19/2/87) at a price well below its market value and no valuation was done or directed to be done on its true market value prior to the said sale notwithstanding the fact that three members of the Cabinet (the Second, Third and Fourth Named Defendants) as Ministers of the Crown had a substantial beneficial interest in the transaction. Alternatively, and / or additionally, the Second, Third and Fourth Named Defendants failed to disclose their respective interests.

[122] One of the remedies sought by the Claimant in their Claim Form is a ".....declaration that the Second, Third and Fourth-named Defendants severally and jointly as former Ministers of Government are guilty of (misfeasance in public office) and breach of public trust in relation to the sale of the said Crown lands in their capacity as servants and agents of the Crown.' The Claimant has not sought a declaration that the Second, Third and Fourth-named Defendants are guilty of breach of fiduciary duty, even though the breach of fiduciary duty was pleaded in the Statement of Claim. However, the Court notes that the Claimant has claimed " such further or other consequential relief as to the Court seems just and equitable."

[123] The Court is of the view that the following words of Dickson J (as he then was) in **Guerin v The Queen** ([1984] 2 S.C.R . 335 at page 384) provide a good starting point for addressing the issue of breach of fiduciary duty:-

> "…….where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary………it is sometimes said that the nature of fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director and the like. I do not agree. It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed."

[124] According to Snell (page 172 , paragraph 7-003)[6], " a fiduciary is someone who owes fiduciary duties, and a fiduciary relationship is a relationship between two or more persons in which one, the fiduciary, owes fiduciary duties to the other (or others.) Again, at paragraph 7-004, " the paradigm example of a fiduciary relationship is the relationship between trustee and beneficiary……several other categories of relationships are well-settled as fiduciary relationships. In these relationships there is a strong , yet rebuttable , presumption that fiduciary duties are owed……..Crown servants have been held to owe fiduciary duties to the Crown."

[125] Based on the above authorities, the Court is of the view that , by virtue of their position as Members of Cabinet and therefore public officers, and in particular by virtue of their oath of office whereby they swore to "honour, uphold and preserve the Constitution of Antigua and Barbuda and the law", the Second, Third and Fourth Defendants each occupied a fiduciary position and can therefore be characterized as fiduciaries.

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[6] Snells Equity
Sweet & Maxwell
Ed. John McGhee
2010

[126] It is well settled that the distinguishing obligation of a fiduciary is the obligation of loyalty…" (Snell, page 179 paragraph 7-008] (Supra n.6). In **Bristol & West Building Society v Mothew, Millett L.J**. stated:-

> " A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal."

[127] According to Learned Counsel for the Claimant, on the facts of the present case, there was a clear duty of loyalty owed by the Second, Third and Fourth Defendants giving rise to a fiduciary relationship and a corresponding responsibility. They contend that, in the face of that fiduciary relationship, the Crown and the Government and people of Antigua and Barbuda had a legitimate expectation that the Second, Third and Fourth Defendants would not utilize their respective positions as Cabinet Ministers and public officers in any way that would adversely affect the interests of the Crown and the Government and people.

DID THE SECOND, THIRD AND FOURTH –NAMED DEFENDANTS BREACH THEIR FIDUCIARY DUTY AS ALLEGED?

[128] According to the learned writers of Underhill (page 3, paragraph 4)[7] :-

> " Any act or neglect of such a person (a fiduciary) in respect of a fiduciary power, which is not authorized or excused by the terms of the trust instrument or by law, may be called a breach of fiduciary duty."

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[7] Underhill and Hayton
Law of Trust and Trustees
14th Edition
David, HAyton
Butterworths
1987

The writers continue at page 35, paragraph 1.55:-

"......Not every breach of duty by a fiduciary is a breach of fiduciary duty......"

[129] In the view of the Court, it is apposite at this juncture, to briefly state the role of the Executive in a constitutional democracy . According to Eddy Ventose in his text Commonwealth Caribbean Administrative Law (at page 57)[8]:-

> " The Executive usually comprises the members of Cabinet who are responsible for various ministries. Cabinet usually makes decisions on behalf of the Government and makes policy that is generally followed by the civil servants. "

[130] Section 70 of the Antigua and Barbuda Constitution states:-

> " 70 (1) - There shall be a Cabinet for Antigua and Barbuda which shall have the general direction and control of the Government and shall be collectively responsible therefor to Parliament."
>
> (2) - The Cabinet shall consist of the Prime Minister and such number of other Ministers (of whom one shall be the Attorney-General) appointed in accordance with the provisions of Section 69 of the Constitution as the Prime Minister may consider appropriate."

[131] It is the submission of Learned Counsel for the Claimant that the Defendants breached their fiduciary duty in five separate ways: -

(a) They failed to make any effort to determine the market value of the Cades Bay land prior to setting a sale price, whether by obtaining a formal valuation or by referring the matter back to the technicians in the Ministry of Agriculture and Lands for a recommendation as to sale price;

(b) They sold the Cades Bay land at a concessionary price or at an undervalue, that is for an amount less than its fair market value;

[8] Commonwealth Caribbean
Administrative Law
Eddy Ventose Routledge
2013

(c) At the Cabinet meetings on 29th April, 1985 and 4th September, 1985, they failed to disclose to Cabinet the interest which they had in SDL, the first Defendant, and the proposed condominium project on the Cades Bay Land thereby placing themselves in positions where their fiduciary duty and their personal interests were in conflict;

(d) Knowing that they had the aforesaid interest, they failed to recuse themselves from the Cabinet discussions regarding the Cades Bay Land on 29th April, 1985 (2nd, 3rd and 4th Defendants) and on 4th September, 1985 (4th Defendant), thereby acting as Cabinet Ministers for their own benefit and for the benefit of the First Defendant;, and

(e) They obtained a benefit or profit out of the trust relationship by acquiring land at a concessionary price and other concessionary benefits from the Crown, the Government and people of Antigua and Barbuda.

[132] The Court will now address each of the factors alleged in paragraph 131 above. Firstly , that the Second, Third and Fourth –named Defendants:-

(a) Failed to make any effort to determine the market value of the Cades Bay land (the Land) prior to setting a sale price, whether by obtaining a formal valuation or by referring the matter back to the technicians in the Ministry of Agriculture and Lands for a recommendation as to sale price;

[133] At paragraph 13 of his Statement of Claim , the Claimant pleaded as follows:-

> "The said parcel of land whose southern boundary abounds the sea was sold to the first-named defendant at a price well below its market value and no valuation was done or directed to be done on its true market value prior to the said sale notwithstanding the fact that three members of Cabinet as Ministers of the Crown had a substantial , beneficial interest in the transaction........"

[134] It is undisputed that the decision to sell the Land was a decision of Cabinet. At paragraph 8 of the Statement of Claim, the Claimant pleaded that "at this meeting on September 4, 1985, **CABINET AGREED TO THE PURCHASE BY THE FIRST-NAMED DEFENDANT OF 25 ACRES OF CROWN LAND AT CADES BAY**........" (my emphasis).

[135] At paragraph 111 of their Submissions, Learned Counsel for the Claimant state :-

> " Whilst Cabinet has a discretion to determine the price at which Crown lands may be sold, it is submitted that that discretion may not be exercised recklessly or irrationally or without concern for what is lawful."" They state further that "......any such discretion may certainly not be exercised for the personal gain of some Cabinet members at the expense of the public whom they have sworn to serve 'conscientiously and impartially...without fear or favour, affection or ill-will, according to law."

[136] In the view of the Court, Learned Counsel for the Claimant have made a significant concession in the above submission. They acknowledge that the discretion to determine the price at which Crown lands may be sold is that of Cabinet. Assuming , (although not deciding) for the purposes of this argument, that the "three members of Cabinet" had the "substantial beneficial interest" as alleged, the Claimant has provided no cogent evidence that there was a duty imposed on the Second, Third and Fourth –named Defendants to determine the market value of the Land , or to "make any effort" so to do. It is arguable that the Second, Third and Fourth-named Defendants had a duty of care in the discharge of their duties, along with all the other members of Cabinet. However, as stated in Underhill (supra n.7) . ..."it is [similarly] inappropriate to apply the expression (breach of duty of a fiduciary) to the obligation of a trustee or other fiduciary to use proper skill and care in the discharge of his duties........." It is also arguable that the responsibility for ensuring that all the requirements for the sale of the Cades Bay Lands had been complied with would be that of the Attorney General who, by virtue of Section 82 of the Constitution of Antigua and Barbuda is " the principal legal adviser to the Government."

[137] According to Learned Counsel for the Claimant, the second way in which the Second, Third and Fourth-named Defendants breached their fiduciary duty is :- (b) that they sold the Cades Bay land at a concessionary price or at an undervalue, that is for an amount less than its fair market value. The Court notes further that this submission mirrors paragraph 14 of the Statement of Claim which states :- " By the sale of the said land to the First named Defendant at the gross undervalue of $250,000.00 , the Second, Third and Fourth named Defendants have obtained an unfair benefit from the Crown to the detriment of the public interest."

[138] The language of both the above submission as well as the pleadings, tends to suggest that it is the Second, Third and Fourth Defendants who sold the Lands to the First Defendant. In fact, as stated above, this is not the case. It is common ground that the sale of the Land was a transaction between the Government of Antigua and Barbuda (as Transferor) and Southern Developers Limited (as Transferee) , a transaction made pursuant to a Cabinet decision.

[139] Learned Counsel for the Claimant submit that the Fiscal Incentives Act pleaded and relied on in evidence by the Defendants as legitimizing a government policy to which lay claim, has no application whatsoever to Crown lands. They further submit that there exists no "lawful policy" such as that pleaded by the Second, Third and Fourth –named Defendants for the fixing of concessionary prices and terms and conditions in respect to the sale of Crown lands. They state further that the "so-called policy of the Government, relied on by the Defendants in relation to the approval by Cabinet of the purchase of the Cades Bay Lands by the First Defendant was and is self-serving, arbitrary and without basis in law." They refer the Court again to the decision of the Court of Appeal, namely **Attorney General v Kenny D. Anthony** (the Kenny Anthony case.) This case has been referred to in paragraph 108 above.

[140] I wish to make the following observations with respect to the above submissions of Learned Counsel for the Claimant, and in particular with respect to the **Kenny Anthony** case. The **Kenny Anthony** case dealt with an application for Judicial Review; it was not a claim against Cabinet Ministers (as in the instant case) with respect to breach of fiduciary duty, or with respect to misfeasance in public office. The subject of the claim for Judicial Review in the **Kenny Anthony** case, was a decision of Cabinet, on the grounds that it was irrational in the Wednesbury sense and/or made in bad faith for an improper purpose. On appeal to the Court of Appeal, the Court of Appeal dismissed the appeal (by the Attorney General) and held that the Cabinet decision was irrational in the Wednesbury sense in that it was so unreasonable that no reasonable Cabinet should have made it. The Court also held that the Cabinet decision was quashed on the additional ground that it was made in bad faith. It is to be noted that the Court of Appeal did not hold, as alleged by Counsel for the Claimant (paragraph 183 of the Claimant's submission) that "the Court of Appeal found the Cabinet to be liable for misfeasance in public office".

[141] The law is well settled that judicial review proceedings will lie against the decisions of public bodies where these decisions are illegal, irrational or procedurally unfair. The jurisdiction of the Court in judicial review proceedings is supervisory; that is, to ensure the integrity, not of the decision, but of the decision-making process. It is not the function of the Court in judicial review proceedings to take on an appellate jurisdiction as judicial review , as the name implies, is not an appeal against a decision. The Court therefore cannot question the decision on its merits. In the instant case, the Claimant alleges that the sale of the Cades Bay Lands was tainted with illegality; that the lands were sold at a concessionary price or at an undervalue. The Claimant did not institute judicial review proceedings against the Cabinet to declare the decision or policy of Cabinet unlawful, as in the **Kenny Anthony** case. The instant case can therefore be distinguished from the **Kenny Anthony** case in that regard.

[142] With respect to the submission of Learned Counsel for the Claimant that the Cades Bay land was sold at a concessionary rate and therefore at an undervalue, the Court has already dealt with the issue of the "undervalue".

[143] Learned Counsel for the Claimant submit that the third and fourth ways in which the Second, Third and Fourth-named Defendants breached their fiduciary duty are that :- (c) At the Cabinet meetings on 29th April, 1985 and 4th September, 1985, they failed to disclose to Cabinet the interest which they had in SDL, the first Defendant, and the proposed condominium project on the Cades Bay Land thereby placing themselves in positions where their fiduciary duty and their personal interests were in conflict; and (d) knowing that they had the aforesaid interest, they (2nd , 3rd and 4th Defendants) failed to recuse themselves from the Cabinet discussions regarding the Cades Bay Land on 29th April, 1985 , and on 4th September, 1985 (4th Defendant), thereby acting as Cabinet Ministers for their own benefit and for the benefit of the First Defendant;,

[144] The Court notes that what was pleaded (at paragraph 8 of the Statement of Claim) was that the Fourth Named Defendant was present at a meeting of Cabinet on September 4th 1985 and participated in the decision . No reference was made in the pleadings either to the Cabinet Meeting on 29th April 1985, or to the fact that any of the Defendants failed to recuse themselves at meetings on that day. Further, with reference to the meeting of 4th September 1985, there is no

mention of the Second and Third Defendants being present at that meeting. The Court is of the view that, notwithstanding the evidence contained in the agreed documents or at the trial, the Claimant is bound by its pleadings. In any event, the Claimant has pleaded that the Cabinet agreed to the purchase of the Cades Bay lands by the First-named defendant, along with certain concessions and exemptions in respect of the establishment and operation of a condominium project on the said lands at the Cabinet meeting of the 4th September 1985. The Claimant further pleads that only the Fourth-named Defendant was present at that Cabinet meeting of 4th September 1985. In the view of the Court, given that the Cabinet meeting of the 29th April 1985 was not pleaded and the Third and Fourth Defendants were not present at the Cabinet meeting of the 4th September 1985, the submission of Learned Counsel that the Second, Third and Fourth Defendants placed themselves in positions where their fiduciary duty and their personal interests were in conflict, is misconceived.

[145] In any event, the Court has already dealt with the issues of the alleged failure by the Second, Third and Fourth Defendants to disclose their interest in the Cades Bay lands to Cabinet and to recuse themselves at the Cabinet meetings .

[146] According to Learned Counsel for the Claimant, the fifth and final way in which the Second, Third and Fourth-named Defendants breached their fiduciary duty is that , (f) they obtained a benefit or profit out of the trust relationship by acquiring land at a concessionary price and other concessionary benefits from the Crown, the Government and people of Antigua and Barbuda. They submit that there is considerable evidence to demonstrate that breach of fiduciary duty by the Second, Third and Fourth Defendants resulted in an unfair transfer of the Cades Bay Land at a concessionary price.

[147] Since there is a great deal of overlap in the issues of breach of fiduciary duty and breach of public trust, the Court will deal with the issue of the alleged profit made by the Second, Third and Fourth Defendants from the purchase of the Cades Bay lands by the First Defendant in its discussion of Issue # 5, below.

ISSUE # 5 - WHETHER THE SECOND, THIRD AND FOURTH NAMED DEFENDANTS ARE GUILTY OF BREACH OF PUBLIC TRUST.

[148] The Claimant alleges that the Second, Third and Fourth Defendants are guilty of breach of public trust in relation to the sale of the said Crown lands in their capacity as servants and agents of the Crown. It appears to be well settled by the authorities that the law will impose a constructive trust where a fiduciary makes a profit from his position. The learned writers of Commonwealth Caribbean Law of Trusts , 3rd. edition (page 98)[9] state:-

> " The principle that a person in a fiduciary position is accountable as constructive trustee for any profit he makes from his position applies not only as between trustee and beneficiary but also to agents, partners and company directors, whose liability to account is not dependent on proof of fraud or bad faith. "

[149] According to Underhill (page 511, paragraph 27.29) (supra n.7):-

> " A fiduciary, as part of the wider rule that a fiduciary must not place himself in a position where his fiduciary duty and his private interest may conflict, is very strictly prohibited from obtaining any profit from his fiduciary relationship unless duly authorized."

Did the Second, Third and Fourth Defendants make a profit from the sale of the Cades Bay lands to the First Defendant; if yes, was the said profit obtained by virtue of their fiduciary position?

[150] An obvious instance of an abuse of power by a public official is that of taking bribes. The authorities are clear that: "Equity proscribes the fiduciary not only from accepting bribes but also from any other unauthorized gains."

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[9] Commonwealth Caribbean
Law of Trusts
3rd Edition
Gilbert Kodilinye
Trevor Carmichael
2013

[151] As stated earlier, the Claimant has pleaded that by the sale of the Cades Bay lands to the First Defendant, the Second, Third and Fourth Defendants "have obtained an unfair benefit from the Crown to the detriment of the public interest." At paragraph 15 of his Statement of Claim, the Claimant further pleads that, as a result of the Second, Third and Fourth-named Defendants' breach of their fiduciary and public duties, "the First-named Defendant has gained an unfair advantage and benefit."

[152] In the Response to the Request for Further Information filed on behalf of the Claimant pursuant to the Order of the Master dated 31st January 2006, "unfair benefit " was described in the following terms:-

> "Unfair benefit means a financial benefit obtained in breach of a fiduciary and public duty which is injurious to the public interest."

[153] The Court has made a finding that the Claimant has failed to prove, on a balance of probabilities, that the Second, Third and Fourth Defendants are guilty of misfeasance in public office in relation to the sale of the Cades Bay lands. The Court also finds that the Claimant has failed to prove, on a balance of probabilities, that the Second, Third and Fourth Defendants are guilty of breach of fiduciary duty in respect to the said sale. On that basis, the view of the Court is that any allegation that a "financial benefit" was obtained as a result of the alleged breaches cannot be sustained. Further, as stated in paragraph 114 above, in the absence of proof of the "material loss and special damage" allegedly suffered by the Claimant, the nature of the "unfair benefit" purportedly obtained from the Crown by the Second, Third and Fourth-named Defendants cannot be objectively ascertained.

DOES THE FIRST DEFENDANT HOLD THE CADES BAY LANDS AS CONSTRUCTIVE TRUSTEE FOR THE CROWN?

[154] Learned Counsel for the Claimant contend that the Claimant acknowledges that legal title to the Cades Bay Land was transferred to the First Defendant. They add that " unlike the Second, Third and Fourth Defendants, the First Defendant had no pre-existing fiduciary duty to the Crown or to the Government and people of Antigua and Barbuda at the time of the decision to sell or at the time

of the sale of the Cades Bay land. " They submit that the First Defendant holds the Lands on a constructive trust for the benefit of the Crown. They contend that the land is trust property that was wrongfully transferred and as such can be traced to the First Defendant's hands and the transaction with the First Defendant is thereby voidable. Counsel further submit that, if the Court finds that the First Defendant was incorporated on the instructions of and managed and controlled by the Second, Third and Fourth Defendants then, the Court should have no difficulty in imputing to the First Defendant the knowledge of the Second, Third and Fourth Defendants and of their breach of fiduciary duty to the Crown. Counsel further contends that the First Defendant is not a bona fide purchaser for value without notice and therefore should not be afforded the protections of such.

[155] The finding of the Court is that the Claimant has not proved, on a balance of probability, that the First Defendant was incorporated on the instructions of and managed and controlled by the Second, Third and Fourth Defendants. The Court therefore cannot endorse the submission of Learned Counsel for the Claimant that it should impute to the First Defendant any breach of fiduciary duty to the Crown.

[156] Learned Counsel submit that , in the alternative, the instant case is one in which the corporate veil of the First Defendant, Southern Developers Limited, may properly be lifted. They cite the case of **Trustor v Smallbone & Others** [2001] EWHC 703 (Ch) , [2001] 1 WLR 1177 , in which the English Court of Appeal stated:- " .... the court is entitled to 'pierce the corporate veil' and recognize the receipt of the company as that of the individual (s) in control of it if the company was used as a device or façade to conceal the true facts thereby avoiding or concealing any liability of those individual(s)." Learned Counsel invite the court to reasonably infer that the Second, Third and Fourth Defendants deliberately sought to conceal their interest in the First Defendant "through an intricate network of nominal directors and nominal shareholders." They further submit that the First Defendant would clearly be nothing more than the alter ego of the Second, Third and Fourth Defendants, " a mere façade concealing the true facts" of ownership and control by those Defendants."

[157] Based on its above findings, the Court is of the view that the above submission is unsustainable.

[158] Learned Counsel for the Claimant further submit that, even if the sale transaction itself could be deemed intrinsically fair (which they do not admit), the equitable rule against self-dealing by trustees is nevertheless applicable . This rule is " that if a trustee sells the trust property to himself, the sale is voidable by any beneficiary ex debito justitiae, however fair the transaction." - per **Megarry V-C in Tito v Waddell** (No.2) [1977] 3 All ER 129.

[159] The Court is of the view that the instant case is not one of a trustee selling trust property to himself. As stated above, the sale or transfer of the Cades Bay Lands was a sale by the Cabinet of Antigua and Barbuda to the First Defendant. In the **Marin** case, the allegation was that the two former Ministers arranged the transfer of 56 parcels of State land to a company beneficially owned and / or controlled by one of them. The further allegation was that the First Appellant, who was then the Minister with responsibility for State lands, signed and issued the necessary certificates to enable the said sale. The facts of the instant case are clearly distinguishable from those in the **Marin** case. The Court concludes that the Claimant has failed to prove, on a balance of probabilities, that (a) the Second, Third and Fourth Defendants are guilty of breach of fiduciary duty or, (b) that they are guilty of breach of public trust.

[160] The Court now returns to issue # 2 as stated in paragraph 10 above , namely :-

WAS THE PURCHASE BY THE FIRST-NAMED DEFENDANT OF THE CADES BAY LAND TAINTED WITH ILLEGALITY?

[161] As stated in paragraph 56 above, in response to the Defendants' Request for Further Information of the Claim Form filed on February 10th 2006, the Claimant's Solicitor stated that the "illegality" consists of the following:

(i) "The sale of 25 acres of Crown land at Cades Bay at a gross undervalue by the Defendants in their capacity as persons in public office and servants of the Crown to their company, the First-named Defendant.

(ii) Breach of public trust by the Second, Third and Fourth named Defendants in relation to the sale of 25 acres of Crown land in their capacity as servants of the Crown and members of the Executive arm of Government.

(iii) Misfeasance in public office by the Second, Third and Fourth named Defendants in relation to the sale of 25 acres of Crown land in that they committed a breach of their public duty which was injurious to public interest."

[162] With respect to the above, the Court has found that (a) the Claimant has not proved, on a balance of probabilities, that the Cades Bay land was sold at "a gross undervalue". The Court finds further that the sale was not " a sale by the Defendants to "their company" , the First Defendant " as alleged. The Court has also made a finding (b) that the Claimant has not proved , on a balance of probabilities, that the Second, Third and Fourth-Named Defendants were guilty of misfeasance in public office; and (c) the Claimant has not proved, on a balance of probabilities , that the Second, Third and Fourth Defendants are "guilty of breach of public trust in relation to the sale of the Cades Bay Lands in their capacity as servants of the Crown and members of the Executive arm of Government."

[163] Accordingly, the Court finds that the Claimant has not met its burden of proving , on a balance of probabilities, that the sale of the Cades Bay Lands to the First-named Defendant was tainted with illegality as alleged.

[164] In light of all of the above, the Court finds that the Second, Third and Fourth Defendants are not liable to the Crown for damages.

CONCLUSION

[165] It was not possible for me to comment on all the agreed documents and evidence contained in the voluminous trial bundles which were before the Court. I have referred to as much of it as was relevant and necessary when setting out the submissions and arguments advanced by Counsel. However, in making my findings and arriving at my conclusions, I have given considered thought to all the facts and circumstances of the case and have perused all the submissions of Counsel.

[166] Taking into account the totality of the evidence as well as the submissions of Counsel and having regard to the relevant authorities , I hold that the Claimant's case has not satisfied me on a balance of probabilities, and I hereby dismiss it.

[167] Accordingly, the following items of relief sought in the Claim Form against the First Defendant are refused, namely:-

Item # (i) - A declaration that the purchase by the First-named Defendant on or about February 1987 of Crown Lands, to wit parcel 35 of Block: 55 1382A in Registration Section : South West in consideration of the sum of $250,000.00 was tainted with illegality and therefore voidable at the instance of the Crown;

Item # (iv) - Rescission of the sale/purchase agreement made on or about the 19th day of February 1987 between the Crown of the one part and the First-named Defendant of the other part of the said Crown lands to wit parcel 35 of Block ; 55 1382A in Registration Section : South West.

Item # (v) - An order that the First-named Defendant deliver up the Land Certificate in respect of the said parcel of land to the Registrar of Lands to be cancelled.

Item # (vi) - Alternatively to sub-paragraphs (iv) and (v), an order for payment to the Crown by the First-named Defendant of the market value of the said parcel of land as at February 1987 with interest thereon at such rate as the Court may determine from February 20th 1987 until judgment or payment.

[168] With respect to the Second, Third and Fourth Defendants, the following items of relief sought are refused namely:-

Item # (ii) - A declaration that the purchase by the First-named Defendant of the said Crown lands was effected at a gross undervalue to the knowledge and approbation of the

Second, Third and Fourth-named Defendants in their capacity as persons in public office and servants of the Crown;

Item # (iii) - A declaration that the Second, Third and Fourth-named Defendants severally and jointly as former Ministers of Government are guilty of misfeasance in public office and breach of public trust in relation to the sale of the said Crown lands in their capacity as servants and agents of the Crown;

Item # (vii) - Damages against the Second, Third and Fourth-named Defendants whether severally and/or jointly in respect of the tort of misfeasance.

ACCORDINGLY, MY ORDER IS AS FOLLOWS:-

(a) The Claimant's case against the First –named Defendant is hereby dismissed.

(b) The Claimant's case against the Second, Third and Fourth-named Defendants is also dismissed.

(c) The Claimant is to pay to the First Defendant prescribed costs in accordance with Part 65 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 (CPR).

(d) The Claimant is to pay to the Second, Third and Fourth Defendants prescribed costs in accordance with Part 65 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 (CPR).

[169] I wish to express my appreciation and gratitude for the thorough and well-structured submissions made by Counsel for the Claimant and Counsel for the Defendants. I also wish to apologise for the inordinate delay in rendering this Judgment.

JRemy

Jennifer A. Remy

High Court Judge