[2023] JMCA Civ 14

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA

SUPREME COURT CIVIL APPEAL NO 56/2012

BETWEEN	**WESTERN CEMENT COMPANY LIMITED**	**APPELLANT**
AND	**NATIONAL INVESTMENT BANK JAMAICA LIMITED**	**1ST RESPONDENT**
AND	**CLARENDON LIME COMPANY LIMITED**	**2nd RESPONDENT**
AND	**LIMESTONE CORPORATION OF JAMAICA LIMITED**	**3RD RESPONDENT**
AND	**DR VINCENT LAWRENCE**	**4TH RESPONDENT**
AND	**KIRBY CLARKE (Representative of the Estate of Horace Clarke, dec'd)**	**5TH RESPONDENT**

Lord Anthony Gifford QC, Mrs Tana'ania Small Davis and Ms Sidia Smith instructed by Livingston Alexander and Levy for the appellant

Charles Piper QC, Miss Petal Brown and D'Angello Foster instructed by Charles Piper and Associates for the 1st respondent

Garth McBean QC and Jonathan Morgan instructed by DunnCox for the 2nd, 3rd and 5th respondents

B St Michael Hylton QC and Miss Melissa McLeod instructed by Hylton Powell for the 4th respondent

9, 10, 11 and 12 December 2019 and 17 March 2023

F WILLIAMS JA

Background

[1] On 27 April 2012, the appellant, Western Cement Company Limited ('Western Cement') filed an appeal against the judgment of Sykes J (as he then was, and hereinafter referred to as 'the learned trial judge') dated 16 March 2012. That judgment is reported under neutral citation [2012] JMSC Civ 32. In its notice of appeal, Western Cement challenged several findings of fact and law made by the learned trial judge and sought to have this court set aside his decision whereby he had granted judgment to the respondents in both the claim and counterclaim which had been filed in the Supreme Court.

The claim below

[2] In the court below, Western Cement was one of four claimants that, on 19 May 2006, filed a claim against seven defendants. By the time of trial, however, Western Cement was the only claimant that remained; and, of the seven defendants, only five participated in the trial (two not having been served). Those five defendants are the respondents named in this appeal.

[3] The further amended particulars of claim, filed on 19 March 2010, set out the nature of the claim. In that pleading, Western Cement is described as a company in receivership, notice of appointment of receiver and manager having been issued on 6 June 2003, by the 1st respondent, National Investment Bank Jamaica Limited ('NIBJ'). It was averred that, at the material time, Western Cement owned and operated an industrial plant for the manufacture of metallurgical grade calcium oxide, (more commonly known as, and hereinafter referred to, as 'quicklime').

[4] The NIBJ is stated to be a government-owned entity incorporated under the Jamaican Companies Act. In the court below, NIBJ was also described as carrying out its functions by providing loans to applicants that met certain criteria. It also provided loans by taking shares in the company obtaining the loan. At the time of the trial in the Supreme

Court, NIBJ's assets and liabilities had been acquired by the National Development Bank of Jamaica Limited ('NDB'). Both the 2nd respondent, Clarendon Lime Company Limited, ('CLCL') and the 3rd respondent, Limestone Corporation of Jamaica ('Licojam') are also stated to be incorporated under the Companies Act. CLCL was formed in August 1995 with the object of producing quicklime. Its original shareholders and investors comprised Licojam, NIBJ, Jamaica Venture Fund Limited, Construction Developers Associates Limited, Clarendon Alumina Production Limited ('CAP') and NDB.

[5] The 4th respondent, Dr Vincent Lawrence ('Dr Lawrence') was stated to be, at the material time, a government representative and a director or officer of the NIBJ; CLCL; Rugby Jamaica Lime and Minerals Limited ('Rugby'); CAP; Jamalcan; Windalco; Bauxite and Alumina Trading Company of Jamaica Limited ('BATCO') and an ex-officio member of the boards of directors for Alpart, Alcan and Jamalco.

[6] Mr Horace Clarke ('Minister Clarke') was stated to have been, between 1995 and 1997, the Minister of Agriculture and Mining in the government of Jamaica. He was also named as a director or officer of CLCL, Licojam and Rugby. He died before the trial had commenced in the Supreme Court but was represented then by Ms Kirby Clarke, his sister and personal representative, who also represented him in this appeal.

[7] Western Cement alleged that it had disclosed critical operational and marketing information to the NIBJ in its bid to obtain a loan facility from the NIBJ. Western Cement also claimed that the NIBJ owed to it a fiduciary duty, by virtue of article 5 of NIBJ's subscription agreement, whereby it was empowered to appoint its representative to Western Cement's board of directors. Western Cement alleged that that fiduciary duty was breached due to the NIBJ's involvement in (by way of lending to and/or investing in) several other companies with competing interests to that of its own. Further, that it was the victim of a conspiracy, whereby, due to the influence of Dr Lawrence, its second loan application was deferred in 1997 and 1998, at a critical time in its operations, which caused it to suffer loss. Consequently, Western Cement averred that the NIBJ was liable

for breach of a fiduciary duty which also amounted to the tort of misfeasance in public office, since the NIBJ was a public entity.

[8] Western Cement claimed that it had also disclosed its operational and marketing information to Alpart, Alcan and Jamalco in its bid to establish "long term off-take" contracts for the supply of quicklime to those entities. It was contended that, as a result of Dr Lawrence's involvement in the several companies and his directorship at NIBJ, he became aware of this information. A similar allegation was made against Minister Clarke, whereby it was said that the information would have come to him by virtue of his role as Minister of Agriculture and Mining. It was contended by Western Cement that both Dr Lawrence and Minister Clarke were liable in the tort of misfeasance in public office as they had used the information so obtained, with the aid of public funds, to form CLCL and Licojam. Those companies, it was contended, unfairly competed with Western Cement, dominating the quicklime market to secure a long-term supply contract with Jamalco that Western Cement was hoping to receive.

[9] Western Cement claimed that the respondents ought to have known that the unauthorised use of its operational and marketing information for their personal gain would have caused Western Cement financial ruin. Western Cement claimed that its financial losses flowing from its downturn in sales and its inability to obtain additional funding undermined its economic viability, to the extent that the company was unable to service its debt and clear its operational expenses.

[10] Western Cement further alleged that NIBJ failed to pay over to it funds that were paid out under its insurance policy, which would have enabled it to make repairs to its Saint Elizabeth plant. The money had been paid to NIBJ in its capacity as debenture holder. There were also allegations of mishandling of a lease agreement dated 13 August 2004, by NIBJ, in relation to certain properties. This mishandling was alleged to have been in breach of its fiduciary duties.

Findings of the learned trial judge

Minister Clarke

[11] In relation to Minister Clarke, the learned trial judge found that:

(i) Western Cement had failed to establish that its financial losses had been caused by Minister Clarke's actions in public office; and

(ii) although it had been proven that Minister Clarke had committed one aspect of the tort of misfeasance in public office (failure to disclose to cabinet or the Prime Minister his interest in CLCL, which had benefited from public funds), there was insufficient evidence to establish the other element of the tort: that is, that Minister Clarke knew or was reckless as to whether his misfeasance would have injured Western Cement or the class of persons to which it belonged.

NIBJ

[12] Concerning the NIBJ, the learned trial judge held that:

(i) Western Cement failed to establish causation between its loss and the alleged acts or omissions of the NIBJ;

(ii) no fiduciary duty existed at the time of the first loan and the NIBJ did not have a duty to advise Western Cement of anything until the appointment of the NIBJ's representative to its board;

(iii) by the time NIBJ became a fiduciary to Western Cement, Western Cement was already suffering from the effects of incorrect decisions;

(iv) the evidence was insufficient for the court to draw the inference that Dr Lawrence and the NIBJ had knowingly or recklessly assisted or conspired with Minister Clarke to commit misfeasance in a public office;

(v) there was no evidence that NIBJ knew of Dr Lawrence's shareholding. Neither could Dr Lawrence's knowledge be attributed to the NIBJ; and

(vi) the matter before the court concerned a banker/customer relationship. That relationship is not one to which a fiduciary relationship is ordinarily, and without more, imputed, and so there was no obligation on the NIBJ to have informed Western Cement that its pricing strategy was incorrect.

Dr Lawrence

[13] With regard to Dr Lawrence, the learned trial judge concluded that: (i) he did not have the necessary *mens rea* to be liable for misfeasance in a public office; (ii) Dr Lawrence honestly believed on reasonable grounds that there was enough room in the market for two quicklime suppliers and therefore had no intention of harming Western Cement; (iii) the size of the quicklime market was such that it was under-supplied: that factor made it even more difficult to prove the tort of misfeasance in public office; and (iv) Dr Lawrence had not exercised any influence over Jamalco's commercial decision on the awarding of the contract.

The notice and grounds of appeal

[14] In its notice of appeal, Western Cement set out 28 grounds of appeal, which, despite their length, it is necessary to set out in full. These grounds, in the main, take issue with the learned trial judge's appreciation and treatment of the evidence and the law. These are the grounds advanced:

"1. The learned trial judge erred in law and on the facts in that he failed to appreciate that [Minister Clarke's] act of misfeasance necessarily involved the displacement of market share of competitors or some part thereof and therefore the requirement that [NIBJ] knew that his actions would possibly injure [Western Cement] or was reckless as to whether his action would injure [Western Cement] or a class of persons to which [Western Cement] belonged, was made out.

2. The learned trial judge erred in law in that he failed to appreciate that the size and capacity of a market cannot be separated from the supply the demand and the price at which product is sold and at which purchasers are prepared to buy.

3. The learned trial judge failed to appreciate that the only viable market for lime available to [Western Cement] at the price and in the quantity necessary for its survival was the JAMALCO market.

4. The learned trial judge failed to appreciate that the effect of [Minister Clarke's] misfeasance in public office was to cause the loss of the JAMALCO market and to depress the price projected by [Western Cement] as well as to deprive [Western Cement] of the possibility of a long term off take contract.

5. The learned trial judge failed to appreciate that it was a reasonable [sic] foreseeable result of [Minister Clarke's] misfeasance in public office that JAMALCO's exclusive long term off take contract would be unavailable and to deprive any other competitor and in particular [Western Cement] of it.

6. The learned trial judge failed to pay any or any sufficient regard to the evidence of [Minister Clarke] in which by letter dated June 17, 1998 he stated that [CLCL] had yielded too much ground to the competition. The learned trial judge failed to appreciate that this clear reference to [Western Cement] indicated that [Minister Clarke] and those conspiring with him were well aware of the effect that act of misfeasance would have and on whom.

7. The learned trial judge paid no or not enough regard to the evidence of David Wong Ken and Elworth Williams.

8. The learned trial judge failed to appreciate that having found [Minister Clarke] guilty of misfeasance in public office it necessarily followed that [CLCL and Licojam] were conspirators in that they actively joined in the lime producing venture which to their knowledge secured a private profit to [Minister Clarke] and was thus unlawful.

9. The learned trial judge erred in law and in his analysis of the evidence when concluding that there was no evidence to support the fact that [Mr Lawrence] was also liable for misfeasance in public office and for conspiracy.

10. The learned trial judge paid no or no sufficient regard to [Mr Lawrence's] admitted knowledge of the Minister's involvement and personal gain and also his failure to disclose the Minister's personal involvement.

11. The learned trial judge also failed to appreciate that the only inference to be drawn from [Mr Lawrence's] presence on the several boards and his interventions in certain meetings was that he aided and abetted and/or was guilty of misfeasance in public office and was a co-conspirator in that regard.

12. The learned trial judge erred in his failure to appreciate that if, as he found a fiduciary duty existed when the [NIBJ] appointed Directors to the Board of [Western Cement] then it necessarily meant that a fiduciary relationship existed from the moment [NIBJ] obtained the right to appoint directors to the Board of [Western Cement].

13. The learned trial judge therefore erred in law when he decided that no fiduciary duty arose prior to the actual appointment of directors to the Board of [Western Cement].

14. The learned trial judge failed to appreciate the distinction between a commercial bank involving the usual lender borrower relationship on the one hand and an investment bank which was publicly owned and which provided funding by way of an investment in return for redeemable preference shares on the other.

15. The learned trial judge erred in his application of the law in that he failed to appreciate that the circumstances of the instant case displaced the general rule that a banker

customer relationship did not result in [a] fiduciary relationship.

16. The learned trial judge failed to appreciate that the special circumstances in this matter arose from the uncontradicted evidence that:

a. The [NIBJ] was a publicly funded investment bank, one of whose purposes was the fostering of the development of industry in Jamaica.

b. The [NIBJ] participated in the preparation of the [Western Cement's] project document and its projections prior to the grant of the first and second loans.

c. The project document and projections were therefore a joint effort of [Western Cement] and [NIBJ].

d. The [NIBJ] was an investor in [Western Cement's] venture because the loan was by way of purchase of redeemable shares in [Western Cement].

e. [Western Cement] had therefore relied upon the [NIBJ] and was also entitled to expect loyalty and uberima fides by virtue of the fact that the [NIBJ] was partnering in the venture when it purchased [Western Cement's] shares.

17. The learned trial judge failed to appreciate that the overwhelming weight of the evidence supported a finding of a breach of fiduciary duty at the time of the first and second loans because:

a) [Western Cement] relied on the [NIBJ] for the preparation of its project documentation and projections.

b) [Western Cement] was entitled to assume that the [NIBJ] would not put any fact in that project document which it had reasonable cause to suspect were not accurate.

c) The important facts as to the price available and the available market at that price were aspects of

the project document which the [NIBJ's] technocrats put forward as accurate at a time when the [NIBJ's] directors knew that they were not likely to be achieved.

d) The [NIBJ's] loan was by way of an investment in [Western Cement] in return for shares which also gave the [NIBJ] a right to appoint two (2) directors.

e) This right to appoint directors demonstrates the basis of the expectation in [Western Cement] that a relationship of trust and confidence existed.

f) The [NIBJ] failed to disclose to [Western Cement] that it had already invested in a project in the same industry which was targeting the same market and which intended to offer a better price and the principals of which were highly placed and well connected in the industry.

18. The learned trial judge erred in law when he concluded that there was no evidence to support the fact that the [NIBJ's] breach of fiduciary duty caused [Western Cement's] loss.

19. The learned trial judge ignored and/or overlooked and/or failed to take into account the unchallenged evidence of [Western Cement's] Managing Director that had he been aware of the nature of the competition facing [Western Cement] he would have cut his losses and sold out or he would have sought a joint venture partner.

20. The learned trial judge failed to appreciate that the disbursement of the second loan occurred after a director had been appointed by the [NIBJ] to the Board of [Western Cement].

21. The learned trial judge erred in law and fact in that he failed to appreciate that the grant of the second loan in circumstances where a long term contract at a viable price from JAMALCO was impossible meant that the [NIBJ] was increasing [Western Cement's] debt burden whilst knowing that its prospect of ever repaying that debt was very remote. To the [NIBJ's] knowledge JAMALCO was already committed or about to be committed to a long term contract with the

Minister's venture, and at a price which was lower than that at which [Western Cement] could offer with any reasonable prospect of remaining viable.

22. The learned trial judge failed to appreciate therefore that even on his own erroneous finding that a breach of fiduciary duty occurred only when Directors were appointed, the failure to disclose the existence of a relationship with the competitor by the [NIBJ] deprived the Appellant of the opportunity to either,

a) cut its losses and sell; or,

b) seek a joint venture partner; or

c) not take the [NIBJ's] loan and therefore not increase its liabilities.

23. The learned trial judge erred in law and his analysis of the evidence in that he failed to appreciate that the other factors such as (a) incorrect information about the size material Windalco needed, (b) industrial disputes, (c) dust control, (d) absence of an engineer; all made the reliance on the [NIBJ's] integrity and honesty all the more important.

24. These factors made the need for the acquisition of the JAMALCO market at the price projected all the more important if [Western Cement] was to remain viable and this to the knowledge of the [NIBJ].

25. The learned trial judge erred in law and fact and failed to appreciate that when the [NIBJ] granted the second loan without disclosing its involvement in a venture which had or was about to secure the JAMALCO market and which was promising a price below that offered by [Western Cement], it ensured that [Western Cement] would fail and plunged it further into debt. The [NIBJ] deprived [Western Cement] at the very least of the possibility of cutting losses and exiting the industry with a reduced liability.

26. The learned trial judge ought therefore to have awarded damages consequent on his finding that a breach of fiduciary duty occurred and that there had been misfeasance in public office.

27. The learned trial judge erred in his failure to hold that a fiduciary relationship existed from the time of the first loan and to award damages and grant a remedy to [Western Cement].

28. The learned trial judge erred in his failure to award damages for conspiracy, misfeasance in public office and for breach of fiduciary duty."

The issues

[15] The issues raised in the various grounds of appeal overlap to a significant extent, which is reflected in Western Cement's grouping of the grounds in its submissions. In this judgment, for the sake of convenience, the grounds of appeal, have been grouped and respectively considered under the following issues:

a) Did the learned trial judge err in fact and/or law in his treatment of the issue of misfeasance in a public office in relation to Minister Clarke? (Grounds 1, 4, 5 and 6)

b) Did the learned trial judge, having found that Minister Clarke had committed one element of the tort of misfeasance in a public office, correctly address his mind to whether CLCL and Licojam had conspired with Minister Clarke in the lime-producing venture and to their knowledge secured a private profit? (Ground 8)

c) Did the learned trial judge sufficiently consider whether there was a correlation between the size and capacity of the market and the supply and demand and price of the product? (Ground 2)

d) Did the learned trial judge have sufficient regard to whether Jamalco was the only viable option for Western Cement? (Grounds 3 and 4)

e) Did the learned trial judge have due regard to the evidence of David Wong Ken and Elworth Williams? (Grounds 7 and 19)

f) Did the learned trial judge err in his conclusion that there was no evidence to support a finding that Dr Lawrence was liable for misfeasance in public office and for conspiracy? (Grounds 9, 10 and 11)

g) Did the learned trial judge err in his determination of whether a fiduciary duty existed between Western Cement and the NIBJ, the commencement of any such duty and whether there had been a breach of a fiduciary duty? (Grounds 12, 13, 14, 15, 16, 17, 18, and 27)

h) Did the learned trial judge err in respect of his finding as to the extent of the NIBJ's duty and legal obligation to Western Cement? (Grounds 19, 20, 21, 22, 23, 24 and 25)

i) Whether the learned trial judge erred in failing to award damages to Western Cement? (Grounds 26 and 28)

Issue a): Did the learned trial judge err in fact and/or law in his treatment of the issue of misfeasance in a public office in relation to Minister Clarke? (Grounds 1, 4, 5 and 6)

Submissions for Western Cement

[16] Lord Anthony Gifford QC, for Western Cement, relied on revised written submissions filed on 22 November 2019, in addition to his oral submissions advanced before this court. At the core of his argument is the submission that, while the learned trial judge had correctly set out the law in this area, he erred in his ultimate finding that the evidence against Minister Clarke did not meet the required standard of the second

mental element necessary to constitute misfeasance in a public office. Queen's Counsel submitted that, contrary to the findings of the learned trial judge, Minister Clarke had acted recklessly. He further argued that the correct test was "whether Mr Clarke knew that his unlawful promotion would probably cause some loss to a rival such as [Western Cement] or was reckless as to whether such loss would be caused". In that regard, Queen's Counsel submitted that the letter of 17 June 1998 presented direct evidence to support the argument that Minister Clarke must have had Western Cement, or the class of persons to which Western Cement belonged, in his contemplation.

Submissions for Minister Clarke

[17] It was the submission of Queen's Counsel, Mr Garth McBean, that the evidence failed to show that any "misfeasance" or action by Minister Clarke caused Western Cement to lose the Jamalco contract or depress the projected price of Western Cement's quicklime, with the result of depriving Western Cement of the possibility of a long-term contract. Queen's Counsel listed several reasons, based on the evidence, which, he said, revealed that Western Cement's losses were not attributable to the respondents, but, instead, were due to: (i) the problems with the plant (inclusive of the shutdown of the kiln, fuel-line leak, injury to an employee, lack of proper work equipment, Western Cement being in violation of the Factories Act and strike action taken by workers); (ii) loan issues, such as evidence supporting the contention that Western Cement was insolvent up to when Rugby started manufacturing; and (iii) inability to meet the market demand.

Discussion

[18] In order to succeed on this issue and these grounds of appeal, Western Cement, of necessity, would have to demonstrate (in keeping with **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21) that the learned trial judge had been plainly wrong, such as by making findings that were not supported by the evidence or by making mistakes in his analysis, which significantly undermine his conclusion.

The law relating to misfeasance in a public office

[19] There is no dispute as to the law relating to misfeasance in a public office. In **Three Rivers District Council v The Bank of England (No 3)** [2003] 2 AC 1 (referred to by the learned trial judge) Lord Hope of Craighead set out, at para. 42, the ingredients necessary to be proven to establish the tort of misfeasance in a public office. These, in summary, were as follows:

> 1. There must be an unlawful act or omission done or made in the exercise of power by the public officer.
>
> 2. The act or omission must have been done or made with the required mental element.
>
> 3. The act or omission must have been done or made in bad faith.
>
> 4. The claimants must demonstrate that they have a sufficient interest to sue the defendant.
>
> 5. The act or omission must have caused the claimants' loss.

[20] At para. 44, Lord Hope explained the need for these elements to exist when he said that:

> "44. The first, second and third requirements lie at the heart of the argument. No further explanation is required as to the test which must be met to satisfy the first requirement. As to the second and third requirements, the claimants do not allege that the Bank did or made the acts or omissions intentionally with the purpose of causing loss to them. The allegation is that this is a case of what is usually called 'untargeted malice'. Where the tort takes this form the required mental element is satisfied where the act or omission was done or made intentionally by the public officer (a) in the knowledge that it was beyond his powers and that it would probably cause the claimant to suffer injury, or (b) recklessly because, although he was aware that there was a serious risk

> that the claimant would suffer loss due to an act or omission which he knew to be unlawful, he wilfully chose to disregard that risk. In regard to this form of the tort, the fact that the act or omission is done or made without an honest belief that it is lawful is sufficient to satisfy the requirement of bad faith. In regard to alternative (a), bad faith is demonstrated by knowledge of probable loss on the part of the public officer. In regard to alternative (b), it is demonstrated by recklessness on his part in disregarding the risk. The claimants rely on each of these two alternatives."

[21] Here, Lord Hope was in fact setting out the delineation of the law by Lord Steyn in the House of Lords in **Three Rivers District Council and others v Governor and Company of the Bank of England** [2000] UKHL 33. Lord Steyn there set out the ingredients of the tort in what he said was "a logical sequence of numbered paragraphs" as follows:

> "(1) The defendant must be a public officer:
>
> (2) The second requirement is the exercise of power as a public officer:
>
> (3) The third requirement concerns the state of mind of the defendant."

[22] In considering liability under the tort, Lord Steyn said:

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

[23] Also helpful (although dealing with cases of targeted malice) is the dictum of the Ontario Court of Appeal in the case of **Pikangikum First Nation v Nault** (2012) ONCA 705, 298 OAC 14, at para. 77, where that court explained that:

> "The tort of misfeasance of public office is difficult to establish. The plaintiff must prove more than mere negligence, mismanagement or poor judgment. To succeed, the plaintiff must demonstrate that the defendant knowingly acted illegally and in bad faith chose a course of action specifically to injure the plaintiff." (Emphasis added).

[24] In this case, a perusal of what was a careful judgment shows that the learned trial judge was alive to the various elements composing the tort. At paras. [25] to [45] of his judgment, he set out the elements and carried out a comprehensive review of the law relating to the tort of misfeasance in a public office. Thereafter, at paras. [46] to [94] of the judgment, the learned trial judge carefully conducted an evidence-based assessment of each element of the offence and of the evidence adduced before him in support of them, arriving at findings in relation to each respondent. I will look, first, at his finding regarding Minister Clarke.

Minister Clarke

[25] His main finding in relation to Minister Clarke's conduct is to be seen at para. [71] of the judgment where he observes:

> "[T]he court finds that it was unlawful for Mr Clarke to use his company, Licojam, to solicit and receive public funds for his private economic gain without disclosure, at the very least, to the Prime Minister or Cabinet."

[26] However, in relation to a part of the mental element necessary to be established for the tort of misfeasance in a public office to be proved, the learned trial judge found that there was insufficient evidence. This can be seen in paras. [74] and [75] of the judgment, the relevant parts of which read as follows:

> "[74] It seems to this court that it cannot be said on a balance of probability that the second aspect of the double mental element of the second form of the tort has been satisfied because the evidence on the size of the market which I have accepted is that the quicklime market was always undersupplied and was expected to expand. In other words, once there is a market sufficient in size to accommodate two

> or more producers it becomes increasingly difficult to succeed in the tort because it would be hard to show that the public official, while promoting his private interest, knew that the claimant would be harmed or was reckless as to whether he would be harmed. In this type of situation it is not a zero sum game where one producer must eliminate the other to survive and so must necessarily bring about the demise of the claimant. It seemed to this court that Mr Clarke did not even address his mind to eliminating WCC but rather devoted his energies to promoting his company. All the reliable evidence from knowledgeable persons pointed to an ever expanding market. In this regard, Mr Norman Davis, a witness for the second, third and fifth defendants, spoke of the demand for quicklime for Windalco. His evidence is most telling. Not only did he say that the demand for quicklime was increasing but gave a sound scientific basis: Jamaica's bauxite now had increasing levels of phosphorous which needed to be extracted by quicklime. He said quicklime is used to extract phosphorous from the bauxite. Up to the 1990s Jamaican bauxite had 0.2% phosphorous but since that time the percentage had climbed to over 1%. This meant that the demand for quicklime would necessarily have had to increase. His evidence was that between 1999 and mid 2002 Windalco had a shortfall in production of quicklime and therefore imported as well as relied on local supplies. In addition, there is evidence to show that the bauxite/alumina companies were expanding production. Thus increase in demand for quicklime was spurred by two things: the increased phosphorous content of the bauxite ore and the increased production of bauxite. All this took place in the context of the three bauxite plants having old quicklime plants which needed to be replaced.
>
> [75] It follows from what the court has said that WCC's action against Mr Clarke founders on the inability to satisfy the second aspect of the double intent requirement of the second form of the tort."

[27] The above reasoning of the learned trial judge demonstrates that he perceived that there was a strong correlation between Minister Clarke's possible liability by having the mental element so as to constitute misfeasance in public office and the size and capacity of the market. As such, I will proceed to review the issues relating to the learned trial judge's findings on the size and capacity of the bauxite market.

Issue c): did the learned trial judge sufficiently consider whether there was a correlation between the size and capacity of the market and the supply and demand and price of the product? (Ground 2)

Issue d): did the learned trial judge have sufficient regard to whether Jamalco was the only viable option for Western Cement? (Ground 3)

Submissions for Western Cement

[28] Another contention of Lord Gifford was that the learned trial judge, in drawing conclusions from Mr Davis' evidence, failed to appreciate the pivotal importance to Western Cement of pricing and the long-term supply contract with Jamalco. Queen's Counsel argued that the respondents had caused Western Cement to lose a supply contract for which it was bidding, when it was a known fact that, without that contract, it would have been unable to enter the quicklime market. It was contended that CLCL was formed through the tort of misfeasance in a public office and that Western Cement would have been in a better position to survive its start-up issues had it been able to maintain its position of monopoly.

[29] Queen's Counsel argued that the learned trial judge failed to recognise that the NIBJ's decision to finance Western Cement was predicated on Western Cement's alleged ability to market its product at US$120.00 per metric ton. Queen's Counsel further submitted that the NIBJ knew that Western Cement was attempting to secure a long-term supply contract with JAMALCO and yet it promoted a serious competitor, allowing it to secure the contract that Western Cement had been vying for.

Submissions for Minister Clarke, CLCL and Licojam

[30] Written submissions for Minister Clarke, CLCL and Licojam are contained in a document headed "Skeleton Arguments On Behalf Of The Second, Third and Fifth Respondents" filed on 23 June 2014. Additionally, Queen's Counsel, Mr McBean, in oral submissions, argued that the evidence revealed that the losses incurred by Western Cement were due to its own fault, and further, in the circumstances of the case, Western Cement had failed to demonstrate that the respondents caused the losses it suffered.

[31] In relation to the monopoly position, it was submitted that, on the totality of the evidence, the learned trial judge was correct to have accepted the position that the demand in the market for quicklime was greater than the amount of quicklime Western Cement and CLCL could have cumulatively supplied. Further, it was argued, Western Cement had itself confirmed the large market size. It was also argued that there was no evidence of Western Cement ever having enjoyed a monopoly as there was evidence of overseas suppliers as well as the local bauxite companies producing some amount of their quicklime requirement. It was also submitted that Western Cement had Rugby in its contemplation up to a year before the competition from Rugby actually materialised.

[32] In relation to Western Cement's argument that the learned trial judge had failed to appreciate the importance of the size of the market, Queen's Counsel argued that there was no cogency in those grounds. He pointed to the fact that, in the judgment, at para. [74], the learned trial judge adequately demonstrated that he had appreciated the size and capacity of the market in relation to the supply and demand and the price at which the product was sold.

[33] Queen's Counsel also put forward the argument that, as Western Cement had not enjoyed a monopoly in the market, it could not properly have attributed its loss to CLCL's entry into the market. Furthermore, it was contended, Western Cement was not at liberty to charge any price it wanted, but rather was compelled to adjust its price in accordance with the market competition.

[34] In evaluating the reasons for judgment, Queen's Counsel concluded that Western Cement had failed to highlight any mistake or error in the learned trial judge's findings, which were sufficient to undermine his conclusion and permit the interference of this court.

Discussion

[35] From a review of the evidence, it is apparent that Western Cement had a number of problems which made it less efficient and unable to supply quicklime at a price that

was competitive and that would be financially viable for Western Cement. These problems (which were also considered by the learned trial judge) included the fact that:

(i) Western Cement's plant was constructed based on information as to the size specification of the product that was needed by the bauxite/alumina industry that proved to be erroneous. This error necessitated design modifications and the construction of a bagging plant (the latter with the aim of supplying the sugar industry). The issue also necessitated Western Cement attempting to encourage the bauxite/alumina companies to install receiving facilities capable of taking Western Cement's product. (In this regard, see letter from Western Cement to the NIBJ dated 24 November 1997, in which Western Cement describes itself as being "in a rather disturbing situation". That "disturbing situation" included the fact that it was seeking a loan of US$350,000.00 to attempt to address a number of issues that it was facing);

(ii) It's price for quicklime of US$145.00 /mt proved to be unrealistic – especially in relation to Alcan – by November of 1997;

(iii) It suffered a fire at its kiln on 2 May 1997 (the day after it commenced operation) and the kiln was not able to be recommissioned until 8 August 1997;

(iv) because of the high temperatures at which quicklime has to be produced, some of its workers suffered injuries, as a result of being improperly outfitted with safety equipment,

and it was found to have been in breach of the Factories Act;

(v) as a result of another worker being injured on the job and other workers becoming restive, its plant was shut down on 9 September 1997, resulting in a loss of US$14,000.00;

(vi) by late 1997, the management of Jamalco (the only entity which Western Cement could supply) indicated its intention to suspend taking quicklime from it for an indefinite period;

(vii) It was servicing a high debt and whilst doing so, was forced to contemplate reducing its price from US$145/mt to US$100/mt as the entities it was hoping to supply with quicklime on a long-term basis, could source it for much less;

(viii) there was a closure of the kiln in May 2000; and

(ix) the plant manager, Mr Bruno Marrama, had to be away from work due to injuries sustained in a motor-vehicle accident in July 2000, and it is doubtful that he ever returned to the job (in one part of his testimony - in volume A, at page 294, lines 12-13, Mr Wong Ken testified that Mr Marrama "did come back for a short time, but it was not very effective". Later, at page 16 of volume c, he said: "He never came back".)

[36] These problems were a very important part of the backdrop to the interaction between Western Cement, on the one hand, and the respondents, on the other. So that the allegations made against the respondents in the trial below and the evidence

adduced, cannot be viewed in isolation or in a vacuum. In addition to the paucity or, in some instances, the complete lack of evidence to support the allegations made in the pleadings, the case for Western Cement also failed due to these several problems that confronted it over a period of time. The learned trial judge took all of them into account in his examination and analysis of the competing claims; and, at the end of the day, found in favour of the respondents on the ultimate issues. He cannot, fairly, be faulted for the way in which he resolved the issues and certainly cannot be said to have been palpably wrong on these issues.

[37] It is important to note that the problems outlined above that were being experienced by Western Cement, affected and have to be considered, not only in its claim based on misfeasance in public office; but in every aspect of the case. This should be borne in mind when the other issues and grounds of appeal are being considered. In particular, the discussion reflected in this judgment at paras. [36] to [37] also address and resolve in favour of the respondents, issues c and d.

[38] In relation to these issues, I accept the submissions of Queen's Counsel Mr Hylton, Mr McBean and Mr Piper that the learned trial judge's findings were all based on his acceptance of the parts of the evidence that, after careful analysis, he chose to accept and that Western Cement's contentions on these issues have not been made out.

Issue b: Did the learned trial judge, having found that Minister Clarke had committed one element of the tort of misfeasance in a public office, correctly address his mind to whether CLCL and Licojam had conspired with Minister Clarke in the lime-producing venture and to their knowledge secured a private profit? (Ground 8)

Submissions for Western Cement

[39] Lord Gifford submitted that, in finding that the evidence was insufficient to draw the inference that Dr Lawrence acted improperly in a way to further Minister Clarke's private interest, without the necessary disclosure, the learned trial judge had wrongly disregarded the evidence that Dr Lawrence had discussed partnering CLCL with another

entity and that there was communication between the NIBJ and Rugby, when negotiations with Western Cement were at a standstill.

[40] Queen's Counsel contended that it had been sufficiently demonstrated that a conflict of interest arose between Minister Clarke and the various boards of the companies on which he served.

Submissions for the respondents

[41] Queen's Counsel all submitted, among other things, that the conspiracy theory put forward by Western Cement was unsupported by the facts. Further, the evidence as led, failed to give credence to the allegation that acts done purportedly in the execution of the alleged conspiracy had resulted in injury to Western Cement. Queen's Counsel submitted that the evidence before the learned trial judge did not support a finding that Minister Clarke was liable for conspiracy to injure. Furthermore, the learned trial judge, having properly considered the elements of the tort of conspiracy to injure as outlined in **Crofter Hand Woven Harris Tweed Company Ltd v Veitch and Another** [1942] AC 435, was correct to have found, at para. [215], that there was no causal connection between the respondents' conduct and Western Cement's loss.

Discussion

[42] The learned trial judge gave consideration to this issue at paras. [212] to [215] of the judgment. He took the position (in my view, quite correctly) that, as the alleged conspiracy consisted of an agreement to do a lawful act (the construction of a quicklime plant) by unlawful means (misfeasance in public office and breach of fiduciary duty) then, since no misfeasance in public office or breach of fiduciary duty had been proven, it followed that the alleged conspiracy had not occurred. In addition to taking this position (which, by itself, was enough to have disposed of the point), the learned trial judge nonetheless went on to give further consideration to the allegation of conspiracy. He did so with reference to the cases of **Crofter v Veitch** and **Lonrho plc v Fayed and others** [1991] 3 All ER 303. He concluded that neither Dr Lawrence nor NIBJ was a part of any conspiracy to injure Western Cement. Importantly, the learned trial judge also concluded

that there was no causal connection between the respondents' conduct and Western Cement's loss.

[43] In **Crofter v Veitch**, the House of Lords (per the Lord Chancellor) addressed the difference between the crime of conspiracy, on the one hand, and the tort, on the other, and the elements of each, in the following terms:

> "The crime consists in the agreement, though in most cases overt acts done in pursuance of the combination are available to prove the fact of agreement. But the tort of conspiracy is constituted only if the agreed combination is carried into effect in a greater or less degree and damage to the Plaintiff is thereby produced. It must be so, for, regarded as a civil wrong, conspiracy is one of those wrongs (like fraud or negligence) which sounds in damage, and a mere agreement to injure, if it was never acted upon at all and never led to any result affecting the party complaining, could not produce damage to him. The distinction between the essential conditions to be fulfilled by the crime and the tort respectively are conveniently set out by Lord Coleridge C. J. in his judgment in *Mogul Steamship Co.* v. *McGregor, Gow & Co.* 21 Q.B.D. 544 at p. 549. ' In an indictment it suffices if the combination exists and is unlawful, because it is the combination itself which is mischievous, and which gives the public an interest to interfere by indictment. Nothing need be actually done in furtherance of it. In the *Bridge-water* case, referred to at the Bar, in which I was counsel, nothing was done in fact; yet a gentleman was convicted because he had entered into an unlawful combination from which almost on the spot he withdrew, and withdrew altogether. No one was harmed; but the public offence was complete. This is in accordance with the express words of Bayley J. in *Rex* v. *de Berenger,* 3 M. & S. 67 at p. 76. It is otherwise in a civil action: it is the damage which results from the unlawful combination itself with which the civil action is concerned..."

[44] In keeping with the finding of the learned trial judge, I find that he was on a firm footing in taking the view that there was no evidential basis for holding that either Dr Lawrence nor NIBJ was a part of a conspiracy to injure Western Cement. In addition to this, the factors mentioned at para. [36] of this judgment, relating to the circumstances

that were negatively affecting Western Cement's finances, make it clear that Western Cement has failed to prove causation – that is, a link between its losses, on the one hand, and any act on the part of any of the respondents, on the other. For the avoidance of doubt, the above conclusion also holds true for CLCL and Licojam, in that no sufficient basis has been demonstrated on which this court can set aside the learned trial judge's conclusion.

[45] Western Cement, therefore, has not made out a case on this issue.

Issue e): did the learned trial judge have due regard to the evidence of David Wong Ken and Elworth Williams? (Grounds 7 and 19)

Submissions for Western Cement

[46] It was the contention of Queen's Counsel for Western Cement that the learned trial judge had disregarded Mr Williams' evidence which supported the premise that the respondents had conspired against Western Cement. Queen's Counsel submitted that there was direct evidence that Minister Clarke had Western Cement or at least that class of persons in his contemplation, in the letter dated 17 June 1998, from Minister Clarke to Mr Williams. Specific reference was made to the portion reading: "Our mission is to proceed as with all due haste. We have already yielded too much ground to the competition".

[47] Further, it was submitted, the learned trial judge erred in not demonstrating the basis on which that evidence had been rejected. Queen's Counsel relied on the cases of **Flannery v Halifax Estate Agencies Limited** [2000] 1 WLR 377 (page 381) and **English v Emery Reimbold and Strick Limited** [2002] 1 WLR 2409.

Submissions for Dr Lawrence

[48] It was submitted that the learned trial judge, having provided a well-reasoned judgment, was not obligated to give extensive reasons as to why he had rejected the evidence of the witnesses for Western Cement. Queen's Counsel also sought to distinguish the cases of **Flannery v Halifax Estates Agencies Limited** and **English v**

Emery Reimbold and Strick Limited, by arguing that those cases related to the need for reasons where (which is not the case here) there was conflict between the expert evidence on both sides.

[49] Queen's Counsel took issue with Western Cement's assertion that the learned trial judge had not taken into account the evidence of Elworth Williams, based on the contents of a letter dated 23 March 1998 from Tricon Investment Corporation (signed by Mr Williams) to Dr Lawrence. It was submitted that that letter did not support the proposition that Dr Lawrence had improperly influenced the award of the Jamalco contract. In the face of such evidence, it was submitted, the findings of the learned trial judge that Dr Lawrence did not exercise any influence over Jamalco's commercial decision on the award of the contract and that the tort of misfeasance in public office was not made out, were correct and unassailable.

[50] Mr Hylton also submitted that it was evident from the judgment that the learned trial judge had considered the evidence and made a decision as to which evidence to accept. Queen's Counsel sought to distinguish the two cases put forward by Western Cement. It was argued that, in both cases, the parties had had opposing expert witnesses, and the judge had preferred the evidence of one expert over the other without providing reasons. In the instant case, counsel submitted, the distinction lay in the fact that there was no conflict of expert evidence and that Mr Williams was certainly not an expert witness.

[51] Queen's Counsel averred that, moreover, in the instant case, the learned trial judge had fulfilled his duty by stating which witness he found to be credible and as such no extensive reasons were required. It was also submitted that an appeal based on the lack of reasons can only be justified and be successful where it is impossible to say where the judge has gone wrong. In this case, where the judge's reasoning on each issue is clearly evident, Western Cement would be unable to successfully complain that the reasons are inadequate, the submission continued.

[52] On behalf of CLCL, Licojam and Minister Clarke, it was submitted that the learned trial judge, having provided a well-reasoned judgment, was not obligated to give extensive reasons as to why he had rejected the evidence of the witnesses for the appellant. (Queen's Counsel also sought to distinguish the cases of **Flannery v Halifax Estates Agencies Limited and Emery Reimbold and Strick Limited**.)

[53] On behalf of the NIBJ, similar submissions were made.

Discussion

[54] The learned trial judge's duty was to assess matters of law and questions of fact. It is apparent that, at the end of the day, having heard the *viva voce* evidence and perused the documentary evidence, he accepted the evidence of the witnesses for the respondents in preference to that of the witnesses for Western Cement. In my view, there was a sufficient evidentiary basis for him to have done so. In the light of that, I agree with the submissions of counsel for the respondents that there was no necessity for the learned trial judge to have given extensive reasons for the findings of fact at which he clearly arrived in accepting the cases for the respondents and rejecting that for Western Cement.

[55] I accept the submissions of counsel for the respondents that there is a distinction to be drawn between the facts and circumstances of the instant case and the facts and circumstances of the cases of **Flannery & Anor v Halifax Estate Agencies Ltd** and **English v Emery Reimbold & Strick Ltd**.

[56] In **Flannery & Anor v Halifax Estate Agencies Ltd**, each side had called an expert valuer and expert engineer to give evidence. In that case, the central question was whether a property was or was not suffering from foundation subsidence at the time of inspection by a valuer. Lord Justice Henry, delivering the judgment of the court, made the following observation:

> "It is not a useful task to attempt to make absolute rules as to the requirement for the judge to give reasons. This is

> because issues are so infinitely various. For instance, when the court, in a case without documents depending on eye-witness accounts is faced with two irreconcilable accounts, there may be little to say other than that the witnesses for one side were more credible (see DeSmith, Judicial Review of Administrative Action, 5th Edition, 9-049). But with expert evidence, it should usually be possible to be more explicit in giving reasons…"

[57] In **English v Emery Reimbold & Strick Ltd** in which three appeals were dealt with, two of the appeals dealt with expert evidence and one dealt with an award of costs. The main principle to be gleaned from that decision (which followed **Flannery & Anor v Halifax Estate Agencies Ltd**), is the need for the giving of reasons for a court's decision.

[58] In this case, although there might not have been a lengthy discussion of the evidence of Mr Williams and Mr Wong Ken, from a reading of the rest of the judgment and the detailed discussion of the issues raised, there can be no genuine doubt about how the most important issues in the trial were resolved and of the reasons for them being resolved in that way.

[59] Additionally, in presenting its case, Western Cement made reference to two letters: one from Mr Elworth Williams to Dr Lawrence dated 23 March 1998; and the other from Minister Clark to Mr Elworth Williams dated 17 June 1998. The latter letter reads thus:

> "Dear Mr Williams,
>
> **VALUATION OF QUARRY**
>
> I am responding to your letter 9 June 1998 to Rugby, and copied to Clarendon Lime. The subject it purports to address seems inappropriately all-inclusive. It is necessary that there is a clear understanding of the matters addressed in your letter.
>
> Regarding valuation to the quarry, I copied you a letter I sent to American Appraisal Associates (AAA) because, I have not seen any Terms of Reference or understanding in your

> contract with them. Your Mr Vinroy Gordon called on your behalf to enquire whether, in that regard it was OK for either of you to call AAA or Rugby to elucidate the understanding in the assumptions given or used in the AAA appraisal.
>
> Clearly, the result of such a discussion should have been communicated to me after; and not for anyone to proceed to write on behalf of Clarendon Lime, setting out such an arbitrary approach. Furthermore, you stated that you were representing the company. The Board nor I has [sic] not given you such authority.
>
> In my view the route you proposed is expensive, time consuming and would effectively postpone the project indefinitely. I intend to pursue a path less onerous, less divisive and more in keeping with an immediate time table.
>
> Our mission is to proceed with all due haste. We have already yielded too much ground to the competition. Therefore, I find your proposal unacceptable."

[60] The letter of 23 March 1998, makes numerous allegations. It runs to six pages and was written in response to a letter from Dr Lawrence dated 10 March 1998. In it Mr Williams denies wanting to be compensated for carrying out the duties of chairman. It alleges the existence of a conflict of interest arising from the several boards on which Dr Lawrence sat; it accuses Dr Lawrence of attempting to engineering his dismissal; it alleges that Dr Lawrence used his power to interfere in the management of CLCL to such an extent as to "bring the company to a virtual state of paralysis" and poses several questions. The learned trial judge would have considered these within the context of the overall evidence in the case, before arriving at his decision. In my view, this letter does not take the claimant's case any further.

[61] In relation to the letter dated 17 June, the reference by Minister Clarke of having "already yielded too much to the competition", although interpreted by Western Cement as directly referring to itself, is, in my view, equivocal, and could also just as easily be an expression, by the head of a company, of a desire to have earned more and to maximize its earnings, thus claiming for itself a greater share of the market. The tone of the letter and the background set out therein, also suggest the existence of a certain amount of

tension in the relationship between the two men (the writer and the addressee), calling for caution in deciding what evidence from them to accept and what to reject.

[62] In relation to the evidence of Mr Wong Ken, it was wide-ranging and extensive, with detailed cross-examination by counsel for each of the respondents. This feature of the evidence makes it difficult to summarize. It is unclear exactly what aspect or aspects of Mr Wong Ken's evidence Western Cement wishes to place emphasis on. The broad terms of ground of appeal seven is that: "The learned trial judge paid no or not enough attention to the evidence of David Wong Ken and Elworth Williams". However, if it is ground of appeal 19 on which emphasis is being placed, that ground reads as follows: "19. The learned trial judge ignored and/or overlooked and/or failed to take into account the unchallenged evidence of [Western Cement's] Managing Director that had he been aware of the nature of the competition facing [Western Cement] he would have cut his losses and sold out or he would have sought a joint venture partner".

[63] It is important to note that this was but one small part of Mr Wong Ken's extensive testimony. What is clear is that Mr Wong Ken's wide-ranging testimony contained elements that Western Cement's counsel would no doubt wish to emphasize and characterize as beneficial to Western Cement. At the same time, however, there can be no denying that the testimony also contains elements that would support the positions taken by the respondents. For example: at pages 146-148 of volume A, a clearer picture of Western Cement's financial state (even before it obtained the loan from the NIBJ) is revealed, where it is indicated that Western Cement "had borrowed large sums of monies from a consortium of banks led by Trafalgar Development Bank" (pages 146-147). At the time it approached the NIBJ for assistance, it had "an urgent need for cash" (page 148, lines 6-13; and page 162, lines 21-24).

[64] The circumstances in which the loan facility was granted to Western Cement is also of some significance. For example, it is apparent from a reading of page 159 of the record of appeal that Western Cement was granted a facility within two months of applying for it, despite the fact that NIBJ had concerns about Western Cement's proposed

marketing and pricing of its product and, at a time when Western Cement had no contract with any buyer. In fact, a reading of para. [123] of the judgment of the learned trial judge would seem to suggest that much of the information there is based on Mr Wong Ken's testimony. Additionally, at page 174 of the record of appeal, it is shown that, at the time it started operations, Western Cement was the beneficiary of significant incentives under the Industrial Incentives Act, such as a tax holiday for 10 years; exemption from the payment of customs duty, General Consumption Tax, and withholding tax on dividends. At page 340, Mr Wong Ken agreed in cross-examination by Mr Hylton, that, between the time Western Cement had applied to the NIBJ for the facility and up to about the middle of 1998, Western Cement faced problems that had nothing to do with Dr Lawrence or the NIBJ. There are many more examples in the evidence that show, among other things, that, despite the NIBJ being "facilitative" (Mr Wong Ken's word) in processing and granting the facility, Western Cement faced numerous problems (including financial ones) from the start of its operations, that had nothing to do with any of the respondents.

[65] Western Cement therefore fails on this issue.

Issue f): did the learned trial judge err in his conclusion that there was no evidence to support a finding that Dr Lawrence was liable for misfeasance in public office and for conspiracy? (Grounds 9, 10 and 11)

Submissions for Western Cement

[66] Western Cement sought to rely on revised written submissions filed on 22 November 2019. At the core of its argument is the submission that the learned trial judge erred in his ultimate finding on the issue of misfeasance in public office in relation to Dr Lawrence. It was submitted that Dr Lawrence was in a unique position and wielded considerable influence in the bauxite/alumina sector as director of CLCL, CAP, NIBJ and Jamalco. It was further submitted that Dr Lawrence, who was a public officer, knowing that Minister Clarke (his friend) had made no public disclosure of his substantial interest in Licojam, played an active role in initiating and promoting the CLCL project. From this project, Minister Clark stood to benefit substantially, it was argued.

[67] It was also submitted that Dr Lawrence also knew that the CLCL project would probably cause damage to Western Cement, as it was clear from the outset that CLCL would have been seeking a contract from Jamalco. Alternatively, Dr Lawrence was at least reckless as to whether Minister Clarke had acted unlawfully.

[68] Counsel submitted that, in finding that the evidence was insufficient to draw the inference that Dr Lawrence acted improperly to further Minister Clarke's private interest without the necessary disclosure, the learned trial judge had wrongly disregarded the evidence that Dr Lawrence had discussed partnering CLCL with another entity and that there was communication between the NIBJ and Rugby when negotiations were at a standstill.

Submissions for Dr Lawrence

[69] The overarching submission advanced for Dr Lawrence, by Mr Hylton, relying on the case of **Paymaster Jamaica Limited v Grace Kennedy Remittance Services Limited** [2017] UKPC 40, was that the learned trial judge had the benefit of seeing and hearing the witnesses, and so his assessment of the evidence on the various issues, ought not to be disturbed.

[70] Queen's Counsel submitted that the learned trial judge's finding that Dr Lawrence had lacked the necessary mental element to commit the tort of misfeasance in public office was supported by the evidence. Queen's Counsel submitted that the evidence, as given by the witnesses, demonstrated that Dr Lawrence's involvement was limited to his presence at the NIBJ's board meeting held on 22 June 1995, at which CLCL's submission to the board was discussed. Further, the improvements to the project were not discussed until the next board meeting, when Dr Lawrence was absent. It was pointed out that Dr Lawrence was only one of 12 directors of the NIBJ and that he never acted independently or without the agreement of the other members of the board.

[71] Queen's counsel sought to refute Western Cement's argument that Dr Lawrence was actively and knowingly promoting Minister Clarke's interest at board meetings, on

the basis that Dr Lawrence attended only eight of the 31 meetings held. It was submitted that at four of those meetings Dr Lawrence attended as an invitee, and that he did not participate as a director of CLCL until he was appointed to the board by CAP on 31 March 1998, which was about three years after the formation of CLCL. Further, the minutes of the meetings demonstrated that Dr Lawrence was not actively involved in the award of the Jamalco contract. It was further submitted that Dr Lawrence represented CAP in those meetings, CAP having been an investor in CLCL.

[72] Queen's Counsel submitted that the evidence before the learned trial judge did not support a finding that Dr Lawrence was liable for misfeasance in public office or conspiracy to injure.

[73] Furthermore, the learned trial judge, having properly considered the elements of the tort of conspiracy to injure as outlined in **Crofter Hand Woven Harris Tweed Company Ltd v Veitch and Another**, was correct to have found, at para. [215] of the judgment, that there was no causal connection between this respondent's conduct and any losses suffered by Western Cement. Queen's Counsel also relied on the case of **Target Holdings Limited v Redferns** [1995] 3 All ER 785 in submitting that, in its claim, as in this appeal, Western Cement has failed to establish causation: that is, that any act or omission on the part of Dr Lawrence caused Western Cement to suffer loss or damage.

Discussion

[74] The law in relation to the issue of misfeasance has already been set out and so need not be repeated here. So far as the case against Dr Lawrence is concerned, the learned trial judge's reasoning and findings can be seen mainly at paras. [81] and [82] of the judgment, where he makes the following observations:

> "[81] Dr Lawrence's role in the claim does not rise to the level where this court finds it possible to conclude that he committed the tort of misfeasance in public office. It was said that he furthered the private interest of Mr Clarke knowing that it was unlawful for Mr Clarke to further his interest

> without disclosure and also unlawful for Dr Lawrence to assist Mr Clarke in doing this. The evidence is simply not cogent enough to draw the inference sought by WCC. It is true that Dr Lawrence was a director of CAP and NIBJ. He admitted during cross examination that he appreciated at some point that Mr Clarke had shares in Licojam but he said that his primary focus was on supporting any investment that could lead to an increase in quicklime production. The impression the court formed was that Dr Lawrence never addressed his mind to the permission issue. Dr Lawrence was not a member of Cabinet. What the evidence shows is that he was a public official with skills that the government of the day felt could be of great value. This tort requires a mental element which is either knowledge that neither he nor Mr Clarke had the power to [do] what they did or was reckless as to whether he or Mr Clarke had the power. If he never thought about it, how can it be said that he had either states of mind?
>
> [82] The claim against Dr Lawrence also fails on another ground: there is no evidence that Dr Lawrence wanted to harm WCC. On the contrary, the evidence from Dr. Lawrence is that he always honestly believed that there was enough room in the market for two producers because Jamaica's total quicklime requirements could not be met even if WCC was producing at full capacity. He said that even with the combined production of CLCL, WCC and the bauxite/alumina companies, there would still be a shortfall."

[75] The judgment of the learned trial judge demonstrates that he accepted that Dr Lawrence did not have the necessary mental element to constitute the offence of misfeasance in public office since, as the learned trial judge put it: "neither he nor Mr Clarke had the power to [do] what they did or was reckless as to whether he or Mr Clarke had the power. If he never thought about it, how can it be said that he had either states of mind?" Further, the learned trial judge found that it was not demonstrated that Dr Lawrence wanted to harm Western Cement, but rather, as he had testified, which was accepted by the learned trial judge, he supported investments to increase quicklime production.

[76] On a review of the evidence, it would be a fair conclusion to say that the claim against Dr Lawrence is far-fetched and, without evidence to support it, was doomed to

failure. There simply is no or not enough evidence to show that he acted unlawfully in any respect – either in relation to the alleged misfeasance in a public office or a conspiracy to injure. Western Cement has also failed to prove that the learned trial judge erred in finding that Dr Lawrence did not, on the evidence, have the mental element necessary to prove misfeasance in a public office. Neither was there any proof of any conspiracy involving Dr Lawrence. In fact, the theory of the conspiracy to injure is difficult to understand. It is not clear why the NIBJ would have given to Western Cement more than one loan, and how it would have benefitted by doing so, if its desire was to see Western Cement fail.

[77] The matter of the lack of proof of causation in respect of any act or omission of Dr Lawrence is also a ground for upholding the findings of the learned trial judge. It is also difficult to understand the causing of injury or loss in circumstances in which there was a competitive environment with several players and Western Cement never enjoyed a monopoly. Further, the matters raised in para. [36] of this judgment must again be taken into account. Western Cement's shaky financial state was again brought to the fore in the cross-examination recorded in volume A, at, for example, page 371, lines 6-24, as follows:

> "Q. And the balance sheet for 1998, shows current assets of two hundred thousand and current liability of two million?
>
> A. Correct.
>
> Q. So, that in June 1998, Western Cement was also, massively insolvent, massively?
>
> A. Subject to renegotiating loans, we did.
>
> Q. That is your signature on that page?
>
> A. Correct.
>
> Q. At any time, prior to the company's receivership, was the situation reversed?

A. No.

Q. So, we now gone up Mr. Wong Ken to June 2000, and we have established that Western Cement was insolvent from 1998, continues to 2000 in June or July, 2000, Rugby starts manufacturing.

A. Yes.

Q. And in August they have a break-down?

A. Yes."

(Emphasis added)

[78] In these circumstances, Western Cement has failed to show that the findings and conclusion of the learning trial judge on this issue are such that they should be disturbed.

Issue g): did the learned trial judge err in his determination of whether a fiduciary duty existed between Western Cement and the NIBJ, the commencement of any such duty and whether there had been a breach of a fiduciary duty? (Grounds 12, 13, 14, 15, 16, 17, 18, and 27)

Issue h): did the learned trial judge err in respect of his finding as to the extent of the NIBJ's duty and legal obligation to Western Cement? (Grounds 19, 20, 21, 22, 23, 24 and 25)

Submissions for Western Cement

[79] Lord Gifford submitted that the learned trial judge erred in his application of the law in this area. It was argued that the five respondents had combined to commit a lawful act through unlawful means: that is, to form CLCL and build a quicklime plant by the participation of a company owned by Minister Clarke, who had abused his office and failed to make the relevant disclosure. Counsel proffered that the learned trial judge erred in his finding in this respect because:

a) The NIBJ had invested in two entities with competing interests and so placed itself in a position where its duties and interests to Western Cement conflicted with its duties and interests owed to Western Cement's competitors.

b) The NIBJ had directors on the boards of each of those competing entities. The NIBJ's appointee to the Western Cement board took effect prior to the approval and disbursement of the second loan.

c) The NIBJ had financed Western Cement's competitor.

d) The NIBJ had a 34% interest in CLCL and as such CLCL had no obligation to make repayments to the NIBJ.

e) The NIBJ was a public institution dispensing public funds.

f) NIBJ owed Western Cement a duty of trust and confidence. The NIBJ had assisted in the formulation of Western Cement's project, and preparation of board submissions which contained marketing strategies, pricing plans and cash flow needs and projections. It was submitted that Western Cement had, in that context, shared private information critical to its production, marketing and sales.

g) Being a member of Western Cement's board and being involved in the preparation of the board submissions, the NIBJ had a duty to point out that there were critical assumptions in the board submission which were faulty or unrealistic.

[80] It was submitted that the acts or omissions of the NIBJ with respect to Western Cement amounted to increasing Western Cement's debt burden while knowing that its ability to repay was remote. Accordingly, it would follow that damages should flow from the breach of fiduciary duty.

[81] It was submitted that fiduciary duties can arise even where there is a contractual relationship and in the financial-services industry where an institution may act for more than one client in the same business. Queen's Counsel for Western Cement argued that,

as the NIBJ is a public institution acting as financier and director in both CLCL and Western Cement projects and was part owner of the CLCL project, it was wrong for the NIBJ to have financed Western Cement without divulging its participation in the Minister's project, and that that amounted to a breach of its fiduciary duty. It was further argued that the NIBJ knew or ought to have known that the awarding of the contract to the respondents would likely have resulted in Western Cement's inability to compete and thus the inability to service its loan, likely resulting in failure.

[82] Queen's Counsel additionally averred that the learned trial judge wrongly applied the principles in **National Commercial Bank Limited v Hew** (2003) 63 WIR 183, in that he failed to give due regard to the importance of the NIBJ's position as investor with the knowledge that the success of the venture depended on a particular state of affairs. As such, the eventual submission was that the learned trial judge erred in concluding that there was no special relationship over and beyond a simple one of banker and customer.

[83] Queen's Counsel further argued that the learned trial judge erred in finding that the fiduciary duty Western Cement contends existed, was not triggered until the appointment by NIBJ of Diane Wynter to Western Cement's board of directors. Queen's Counsel submitted that the fiduciary relationship had arisen from the onset of Western Cement's dealings with the NIBJ.

[84] It was submitted that the circumstances of the case were such as to take the relationship outside the scope of a regular banker/client relationship.

Submissions for NIBJ

[85] On behalf of the NIBJ, Mr Piper, for his part, relied, as far as applicable, on the submissions of Mr Hylton for Dr Lawrence. Learned Queen's Counsel sought to have the court accept as correct the learned trial judge's treatment of the law, as a basis for submitting that the NIBJ was under no duty to give to Western Cement advice as to its financial viability.

[86] He likewise submitted that there was no basis upon which the learned trial judge could have concluded that there was a breach of a fiduciary duty by the NIBJ. Moreover, he averred, the learned trial judge was correct in his finding that Western Cement did not suffer loss as a result of any breach of a fiduciary duty by NIBJ.

Discussion

[87] The learned trial judge's findings on this aspect of the matter might be seen in paras. [106], [107], [113], [121], [123] and [132] of the judgment. It is useful to set them out in full as follows:

> "[106] WCC submitted that NIBJ had 'a fiduciary duty to disclose to Western prior to disbursement and at the time of the application for the first and/or second loans that the premises on which it placed its hopes to repay the loans and to be profitable viz: a long-term contract with Jamalco and a price of US$120.00 per ton [sic] were unrealistic' (para 81 of written submissions). The failure to do this amounted to a breach of fiduciary duty. WCC also submitted that 'NIBJ also breached its fiduciary duty to Western by placing itself in a position where its duty to the CLCL project and to Western conflicted with its interest in the CLCL project and Western (para 82 of closing submissions). WCC submitted further that 'the failure of NIBJ to disclose material facts, the placement of NIBJ of itself in a position where its duties and interest were in conflict and the encouragement to Western by participating as an equity partner in a joint venture whose key assumptions to NIBJ's knowledge were unlikely to materialize, all amount to an egregious breach of fiduciary duty' (para 86 of written submissions).
>
> [107] It is important to observe that WCC did not plead that NIBJ undertook to advise it on the wisdom of the investment. There is no assertion that there was any contractual obligation on the part of NIBJ to give such advice.
>
> [113] These discussions about possible prices preceded or were contemporaneous with WCC's first application to NIBJ. It should be noted that Rugby's proposed price to Jamalco, as will be seen, was well below WCC's lowest possible price.

[121] Although NIBJ had the right to appoint a director to the board of WCC, there is no evidence that this right was exercised before the application for the second loan was made. In respect of the first loan, an examination of the extensive documentation does not reveal that NIBJ undertook to advise WCC on the viability of the project. Neither is there evidence that NIBJ had any contractual duty to become a financial adviser to WCC. There is no evidence that NIBJ 'coached' or became a 'trusted advisor' or 'trusted confidante' of WCC. The oral testimony of Mr Wong Ken did not show that NIBJ did anything that moved it across the line from pure lender to adviser. What the court sees in respect of the first loan is simply a debtor/creditor relationship. At the time of WCC's first loan, NIBJ had already invested in CLCL and had board representation.

[123] There is a further context to this first loan. According to the board submission, WCC indicated that the plant would be completed within five weeks with commissioning taking place nine weeks later. The proposed production commencement date was January 18, 1997 (exhibit 2 p 25). The implication of this is that WCC had already calibrated its plant and decided what size quicklime it was going to produce. There is no evidence that NIBJ gave WCC any advice in this regard or undertook to do so. This also means that even before the first loan application to NIBJ, WCC had already made all the important decisions about markets and calibration of plant. These decisions were made without any input from any of the defendants. From the evidence, WCC was quite pleased with the alacrity with which NIBJ processed and disbursed the loan. In fact, no complaint is made about the approval period and disbursement of this first loan. The complaint is that NIBJ had a duty to tell WCC that the foundation premises of its pricing strategy was incorrect. This proposition has no legal and factual foundation once Hew's case is the guiding light.

[132] This court has gone into great detail in respect of the first loan in order to show that between September 1996 when WCC made its first contact with NIBJ and February 21, 1997, there is absolutely no evidence to show that during that time NIBJ undertook or actually advised WCC in relation to any of its activities. There is nothing in NIBJ's conduct to show that it intended or planned or conspired with anyone to harm WCC. All of its dealings with WCC were above board. The final

> disbursement of funds in fact occurred on September 17, 1997 when a cheque for JMD$46,563.78 was made payable to the Collector of Customs (exhibit 2 pp 203, 204)." (Emphasis added)

[88] The reference by the learned trial judge to "Hew's case" is a reference to the case of **National Commercial Bank (Jamaica) Ltd v Hew & Ors** ('**NCB v Hew**'). In that case, Lord Millett, at paras. 13 and 22 of the Board's advice, made the following observations:

> "13. The legal context in which this question falls to be decided is well established. In *Banbury v Bank of Montreal* [1918] AC 626 Lord Finlay LC said at p 654:
>
> > 'While it is not part of the ordinary business of a banker to give advice to customers as to investments generally, it appears to me to be clear that there may be occasions when advice may be given by a banker as such and in the course of his business … If he undertakes to advise, he must exercise reasonable care and skill in giving the advice. He is under no obligation to advise, but if he takes upon himself to do so, he will incur liability if he does so negligently.'
>
> In relation to a failure to advise a customer, Warne & Elliott *Banking Litigation* (1999) states at p 28:
>
> > 'A banker cannot be liable for failing to advise a customer if he owes the customer no duty to do so. Generally speaking, banks do not owe their customers a duty to advise them on the wisdom of commercial projects for the purpose of which the bank is asked to lend them money. If the bank is to be placed under such a duty, there must be a request from the customer, accepted by the bank, under which the advice is to be given.'
>
> 22. It may well have been foolhardy of Mr Hew to embark on the project without obtaining estimates of the likely costs and cash flow forecasts; but the Bank was under no duty to advise him against such a course. It may have been unwise of Mr Cobham to have lent the money without insisting on being provided with such estimates and forecasts and without

> having conducted a feasibility study of his own. But as Mr Cobham explained, any such study would have been for the Bank's protection, not Mr Hew's. The reason he did not call for such a study is that he did not think that the Bank's interests required it; the Bank had sufficient security to support a much larger loan than anything that was contemplated at the time. This is a useful illustration of the truism that the viability of a transaction may depend on the vantage point from which it is viewed; what is a viable loan may not be a viable borrowing. This is one reason why a borrower is not entitled to rely on the fact that the lender has chosen to lend him the money as evidence, still less as advice, that the lender thinks that the purpose for which the borrower intends to use it is sound." (Emphasis added)

[89] Accepting the learning from **NCB v Hew**, it is apparent that the learned trial judge took the correct approach in assessing and analysing the evidence, in this case, and in arriving at his finding that Western Cement had failed to make out a case against the respondents on this issue.

[90] A perusal of the documentary evidence in the case shows that there is evidence to support the learned trial judge's findings in relation to this issue. Exhibit 2, in particular, shows that there is no evidence whatsoever indicating that NIBJ gave or assumed any undertaking to advise Western Cement or actually advised it. (Exhibit 2 – being volume 4 of the record of appeal - is an agreed bundle of some 141 documents, such as letters, memoranda and security documentation, passing among the parties between 4 July, 1996 and 21 December 2000). This is so in particular with respect to the first loan. The position is similar with the second loan. In relation to that loan, around the time that it was given, there was already in operation the adverse effects of the same factors previously discussed (at para. [36]) that severely affected Western Cement's profitability.

[91] To take yet another example of the documentary evidence (in addition to exhibit 2, mentioned in the preceding paragraph), there is the letter dated 28 April 2000 from Western Cement to NIBJ, which is important to this issue in two main respects. For one, at para. 7, it acknowledges an issue with Western Cement's bagging plant which was unable to handle the grain size of its lime. The second matter is in respect of Mrs Dianne

Wynter, who was NIBJ's appointee to Western Cement's board, who sat on the said board between 1997 and 2000 and in respect of whose appointment Western Cement now claims a breach of fiduciary duty. At para. 3 of the said letter, Western Cement states: "We have the highest regard for Mrs. Wynter and Ms. Gayle and believe that they discharge their duties in a highly ethical and professional manner". Of significance too is the letter from Western Cement to NIBJ dated 21 December 2000, in which, Western Cement, although earlier raising some queries about a conflict of interest on the part of NIBJ, ends its letter thus: "We would be pleased if you could attend the scheduled Board Meeting".

[92] Western Cement has also sought to distinguish the case of **NCB v Hew** from the instant case. It has done so on the basis that, in **NCB v Hew**, the lending institution was a commercial bank. That, it contends, makes that case different from the instant case, where the lending was secured by the issuing of preference shares, making the NIBJ an investor in Western Cement, with the right to appoint a member to Western Cement's board of directors. Is there any merit in this contention?

[93] The learned trial judge, based on **NCB v Hew,** rejected the contention that a fiduciary duty arose; and found that, if any such duty arose, it arose only after the NIBJ's representative was in fact appointed to Western Cement's board. In the course of the trial, the learned trial judge heard evidence from, among other persons, Mr Milverton Reynolds, Managing Director of the DBJ (which had taken over operations of the NIBJ in 2006). In answering questions in the session of the trial of 26 July 2011 (volume B), he stated that, in certain circumstances, an organization such as the DBJ may support, financially, two companies which are in the same field competing against each other. In answer to questions from the learned trial judge, he further stated:

> "[W]e would not divulge as part of our loan agreement, we are not at liberty to divulge to [a] competitor the fact that we have lent money to another competitor…"

[94] For my part, I can discern no difference between the position of a commercial bank and that of NIBJ. They are both engaged in the business of lending. The fact that the NIBJ chose to secure its investment by way of preference shares does not carry with it an obligation or suggest that it was giving an undertaking to give advice. It is perhaps not without significance that Western Cement, while seeking to distinguish **NCB v Hew**, and citing several authorities, has not itself cited an authority with facts similar to the instant case in which a fiduciary duty has been found to exist. To my mind, the principles enunciated in **NCB v Hew** will be applicable whether the entity involved is a commercial bank in the strict sense, or another type of bank, such as the NIBJ, engaged in the business of lending. Additionally, I find myself in agreement with the learned trial judge's alternative position that, if such a duty arose, then it did so only when the representative was appointed to the board.

[95] In the light of all these circumstances, one could understand if an objective observer were to conclude that many of the issues raised in the trial in the court below and which are now being raised on appeal, are relatively insignificant matters being amassed and inflated to create a case, when the true cause of Western Cement's demise was a convergence of unfortunate circumstances and erroneous business decisions.

[96] Western Cement, therefore, fails on these issues.

issue i): whether the learned trial judge erred in his failure to award damages? (Grounds 26 and 28)

[97] Western Cement having failed in its bid to make good on any of the grounds of appeal raised herein, it follows that a complaint that the learned trial judge erred in failing to award damages, as claimed, to Western Cement, is without merit. Ground 26 is especially lacking in merit, being framed as it is thus:

> "26. The learned trial judge ought therefore to have awarded damages consequent on his finding that a breach of fiduciary duty occurred and that there had been misfeasance in public office." (Emphasis added)

[98] Suffice it to say that, from the previous discussion herein, it should be clear that the learned trial judge did not in fact find that there was a breach of fiduciary duty or misfeasance in public office.

Counter-notice of appeal for CLCL, Licojam and Minister Clarke

[99] In the counter-notice of appeal filed by these respondents, there was a single ground of appeal raised. The written submissions in support thereof contained in "Further Skeleton Submissions On Behalf Of Second, Third and Fifth Respondents", filed 29 November 2019, state as follows:

> "While the learned judge was correct in finding in favour of the Defendants the learned judge erred in law in considering the issue of disclosure by Mr. Clarke to the Prime Minister or Cabinet that he was a significant investor in CLCL and that his company, Licojam, was used to solicit and receive public funds for his private economic gain when the issue of such disclosure did not arise on the pleadings filed by the Claimants, nor were the pleadings amended during the course of the trial to include the issue."

[100] The contention on which the counter-notice is grounded is that the learned trial judge erred in law in considering the issue of disclosure by Minister Clarke to the Prime Minister or Cabinet that he was a significant investor in CLCL and that his company, Licojam, was used to solicit and receive public funds for his private economic gain. The basis of the submission is that the issue of such disclosure did not arise on the pleadings filed by the Claimants, nor were the pleadings amended during the course of the trial to include the issue. In that regard, counsel submitted, it would not have been open to the learned trial judge to find that Minister Clarke had failed to make the disclosure that was said to have been required.

[101] To my mind, the exploration of this matter by the learned trial judge was not necessary for examining the various elements of the tort of misfeasance in a public office, in relation to Minister Clarke. I agree with Mr McBean's submissions that the issue did not

clearly arise on the pleadings. I am of the view, therefore, that the counter-notice of appeal on behalf of CLCL, Licojam and Minister Clarke has merit and ought to succeed.

Conclusion

[102] In this case, there is no evidence that the respondents, or any of them, used, without authorisation or otherwise, Western Cement's operational and marketing information for their personal gain or at all.

[103] Additionally, no causation was established by Western Cement between its losses and any act or omission on the part of the respondents or any of them. At paras. [204] to [211] the learned trial judge considered most of the figures and prices that were important for a resolution of the case and, in my view, made the correct decisions. It is clear, therefore, that the learned trial judge sufficiently considered whether there was a correlation between the size and capacity of the market and the supply and demand and price of the product.

[104] Although Western Cement, in the course of the appeal, sought to lay emphasis on the obtaining of the Jamalco contract on a long-term basis as all-important to its success, in seeking to obtain the first loan, Western Cement spoke of several potential sources of earnings. The possible sources of earnings were given as Jamalco; Alcan, the sugar industry and export of the product to Trinidad and Tobago and St Croix. The latter never materialized. In fact, in a letter from Western Cement to the NIBJ dated 6 December 1996, written in answer to queries about markets and pricing, Western Cement's then Managing Director, Mr Robert Cartade, concluded thus:

> "In conclusion, I feel that we can amply demonstrate that the total short fall for the alumina companies will be approximately 100,000 metric tons in 1997. In addition, there is also a need for 20,000 tons to the sugar industry with an unlimited export potential."

[105] All in all, apart from these more-important parts of the case, Western Cement has not demonstrated any way in which the learned trial judge fell into error or could be

regarded as being palpably wrong. In the event, it is my view that the appeal should be dismissed, with costs to the respondents both here and below, to be agreed or taxed. I would also allow the counter-notice of appeal and order costs of the counter-notice of appeal to CLCL, Licojam and Minister Clarke to be agreed or taxed.

A previous hearing

[106] I will say, in passing, that an appeal in this matter, based on the same notice of appeal which came on for hearing before us, had previously been heard by a differently-constituted panel of this court on 10 June 2015. A written judgment dated 31 July 2017, was delivered by that panel. However, that judgment was declared to be a nullity on a notice of motion (motion # 9/2018) by order of another panel by this court dated 29 October 2018. The main reason for that other panel doing so was the fact that, at the time of the delivery of the first judgment in 2017, two of the three learned judges of appeal who constituted the panel were retired and had not obtained the permission of His Excellency, the Governor-General of Jamaica, to continue in office beyond the age of retirement. Consequently, it was ordered that the appeal and counter appeal were to be heard *de novo*. This judgment is a result of that order for a new hearing.

[107] Finally, I wish to extend my apologies to counsel and the parties for the length of time that has passed between the hearing of the appeal and the delivery of this judgment.

P WILLIAMS JA

[108] I have read in draft the judgment of my brother F Williams JA. I agree with his reasoning and conclusion and have nothing to add.

EDWARDS JA

[109] I too have read the draft judgment of my brother F Williams JA and agree with his reasoning and conclusion. There is nothing that I wish to add.

F WILLIAMS JA

ORDER

(i) The appeal is dismissed.

(ii) Costs of the appeal and in the court below to the respondents, to be agreed or taxed.

(iii) The counter-notice of appeal is allowed.

a. The aspect of the judgment relating to the issue of Minister Clarke's non-disclosure to the Prime Minister or Parliament ought not to have been considered by the learned trial judge and is hereby set aside; but the judgment is affirmed on the other bases on which it was arrived at.

(iv) Costs of the counter-notice of appeal to the CLCL, Licojam and Minister Clarke, to be agreed or taxed.