[2011] CCJ 9 (AJ)

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BELIZE

CCJ Appeal No CV 5 of 2010
BZ Civil Appeal No 25 of 2009

BETWEEN

FLORENCIO MARIN
JOSE COYE **APPELLANTS**

AND

THE ATTORNEY GENERAL OF BELIZE **RESPONDENT**

Before The Rt. Honourable: Mr Justice Michael de la Bastide, President
And the Honourables Mr Justice A. Saunders
Mme Justice D. Bernard
Mr Justice J. Wit
Mr Justice W. Anderson

Appearances

Ms Magali Marin Young attorney-at-law for the 1st Appellant and Dr Elson Kaseke, attorney-at-law for the 2nd Appellant

Ms Lois Michelle Young SC and Mr Nigel Ovid Hawke for the Respondent

JOINT JUDGMENT
of the Rt Hon Mr Justice Michael de la Bastide and the Hon Mr Justice Adrian Saunders
and
JUDGMENTS
of the Hon Mme Justice Désirée Bernard,
the Hon Mr Justice Jacob Wit and
the Hon Mr Justice Winston Anderson
Delivered
on the 27th day of June 2011

Joint dissenting Judgment of de la Bastide PCCJ and Saunders JCCJ

Introduction

[1] The Attorney General of Belize filed this claim against two former Ministers of government alleging that, during their respective terms of ministerial office, they arranged the transfer of 56 parcels of State land to a company beneficially owned and/or controlled by one of them. It is further alleged that the consideration paid by the purchasing company was almost $1 million below market value and that this transaction was undertaken deliberately, without lawful authority and in bad faith. The claim is premised on a single cause of action, namely, the common law tort of misfeasance in public office (at times referred to by us in this opinion simply as "misfeasance").

[2] Chief Justice Conteh entertained misgivings about the viability of misfeasance as a cause of action at the instance of the State. At a case management conference he invited counsel to make submissions on the issue. After hearing the submissions he ruled that the tort did not avail the Attorney General. He dismissed the action. The Attorney General appealed.

[3] The decision of the Chief Justice was reversed by the Court of Appeal. That court held that the former Ministers could be held liable in misfeasance for loss of public property and that the Attorney General, as the guardian of public rights, was the person entitled to institute proceedings. The Court of Appeal based its decision on a line of Indian cases[1] and also on the case of *Gouriet v Union of Post Office Workers*[2]. The former Ministers have appealed the Court of Appeal's decision to this Court. The central question for us is this: Assuming to be true all the allegations made by the Attorney General, does the tort of misfeasance encompass actions by the Attorney General, acting on behalf of the State, against its own officers, or former officers as in this case?

[4] The former Ministers do not deny the capacity of the State or the competence of the Attorney General to sue in tort, generally speaking. But they maintain that tortious

[1] *Common Cause, A Registered Society v Union of India* (1996) 3 SCJ 432*; Common Cause, A Registered Society v India & Others* [1999] INSC 240*; Shivsagar Tiwari v Union of India* (1996) 6 SCC 558.
[2] [1978] AC 435; [1977] 3 All ER 70

misfeasance at the instance of the central government is a creature unknown to the common law. For the reasons that follow we agree with this view. It is also our opinion that as a matter of policy this Court should not now extend the tort to accommodate actions by the State. We therefore dissent from the decision of the majority on these issues. We are also not persuaded that the Indian cases cited by the Court of Appeal provide a proper basis for the view taken by that court. In each of those cases entitlement to relief was premised on Article 32 of the Indian Constitution which gives redress for *constitutional* violations and in any event, none of those Indian cases was instituted by the State.[3] The case of *Gouriet* is similarly irrelevant to the question posed by this case. *Gouriet* was a case that had to do with public law. Here we are not concerned with principles of constitutional or public law. We are concerned with tort law. The question for decision has to do with the nature and scope of the tort of misfeasance and with the appropriate manner in which the State must protect its interests when it suffers loss in the manner here alleged.

The tort of misfeasance in public office

[5] The law of Belize, inherited as it is from English law, does not have a holistic unified law of obligations as exists in civil law States. What obtains is *a law of torts* comprising a series of discrete torts linked more by marriage than by blood[4]. To be entitled to relief in tort a claimant must be able to fit his allegations of wrongdoing under the head of a recognizable tort. Each separate tort has its own peculiar characteristics in terms of the conduct which it targets and the interests it protects. Each tort requires its own exposition[5]. A court may not give relief in tort unless it first satisfies itself that the particular tort has been established. In so satisfying itself a court may be called upon to examine the historical origins of the tort, its rationale, the fundamental interests it protects, its ingredients, its legal parameters, the relationship between the alleged wrongdoer and the victim, the existence or absence of alternative means open to the injured party to obtain adequate redress and the dictates of public policy. When, for the

[3] See: *Common Cause, A Registered Society v India & Others* [1999] INSC 240
[4] Clerk & Lindsell on Torts, (2006) Nineteenth ed. London: Sweet & Maxwell at para 1-19
[5] Clerk & Lindsell on Torts, (2006) Nineteenth ed. London: Sweet & Maxwell at para 1-19

first time, a question arises for decision such as the one raised here, a consideration of these factors is sometimes critical to providing the right answer.

[6] Misfeasance has evolved over the centuries. In particular, two critical features of the tort have undergone evolution. The first deals with the state of mind of the defendant and the second, the question whether there should necessarily exist some specific relationship between the wrongdoer and the victim. As to the former, i.e. the mental element, in some of the earlier cases, it had previously been held that what was required for commission of the tort was malice in the sense of spite or ill-will on the part of the defendant towards the claimant. See for example, *Ashby v White*[6] and the Canadian case of *Roncarelli v Duplessis*[7].

[7] As to the relational aspect, in the older cases the tort was also premised on the invasion of some antecedent right of the claimant or the breach by the defendant of some duty owed to the claimant or to a class of persons of which the claimant was a member. There had to be shown "a direct and proximate relationship between the plaintiff and the public officer responsible for the acts or omissions complained of"[8].

[8] More recent cases have seen a tendency towards a relaxation of each of these features of the tort. In *Brayser v Maclean*[9] for example, the Privy Council specifically rejected the contention that the claimant had to show that the defendant was actuated by malice.[10] In the decision of the House of Lords in *Three Rivers District Council v. Bank of England [No.3]*[11] (referred to throughout this opinion as *"Three Rivers"*) it was generally agreed that the defendant's state of mind may take one of two forms. The defendant may deliberately set out to injure the claimant, or a class of persons of which the claimant forms part, or it must be established that the defendant is aware that he had no power to

[6] (1703) 2 Ld. Raym.938; 92 E.R. 126
[7] (1959) 16 D.L.R. (2d) 689
[8] See for example the opinion of Hirst LJ in *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 A.C. 1 at 55.
[9] (1875) L.R. 6 P.C. 398
[10] In this connection see also: *Pickering v James*(1873) L.R. 8 C.P. 489, *Wood v Blair* The Times, 3rd and 5th July, 1957 and *Bourgoin v Ministry of Agriculture Fisheries and Food* [1986] QB 716
[11] [2003] 2 A.C. 1

engage in the impugned conduct and that he was also aware that the probable consequence of his behaviour was injury of the type complained of. In each case, there is an element of dishonesty or bad faith on the part of the defendant.

[9] The House of Lords in *Three Rivers* also upheld the decision of Clarke J at first instance that the tort did not require a breach of some antecedent right or duty[12]. Clarke J had held that if a public officer was guilty of an abuse of power, in circumstances in which the officer knew that what he was doing was unlawful and also that a class of persons would probably suffer damage, any member of that class could claim in misfeasance once it could be established that the abuse of power was an effective cause of loss suffered.[13]

[10] The desirability of the trend towards a relaxation of these elements of misfeasance has been the subject of some academic discussion[14]. But this case does not require us to comment on this trend. It is sufficient to note that the overwhelming consensus throughout the entire Commonwealth, as we shall shortly see, is that the tort protects the peculiar interests of a private entity or a member of a class. The notion that the House of Lords in *Three Rivers,* by a side wind, radically altered the common law so as to confer on the State a right of action for misfeasance is a startling one. *Three Rivers* was a case where thousands of depositors in the Bank of Credit and Commerce International SA ("BCCI") were claiming in misfeasance against the Bank of England for financial losses they incurred when BCCI had to be liquidated. The depositors alleged that officials at the Bank of England were liable to them in misfeasance for failing properly to regulate BCCI. The principal issues argued, and hence the judgments rendered, focused on the mental element of the tort; whether misfeasance required "an antecedent legal right or interest" or an element of "proximity" as between alleged wrongdoer and victim; and the appropriate test for holding consequential losses to be recoverable. These issues were ventilated in the context of the enormity of the class in question, the relational distance

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12 *Three Rivers DC v Bank of England* [2003] 2 AC 1 at 193 per Lord Steyn and [1996] 3 All E R 558 at 583-*4 per Clarke J.*

13 [1996] 3 All E R 558 at 632 per Clarke J.

14 See for example, Erika Chamberlain, "*The Need for a 'Standing' Rule in Misfeasance in a Public Office",* (2008) 7 O.U.C.L.J. 215.

between the Bank of England officials and the depositors and the fact that some of the claimants were merely potential depositors at the time of the occurrence of the lapses attributed to the Bank of England. *Three Rivers* was not remotely concerned with actions in misfeasance by the State. Such a possibility was never even discussed. On the contrary, in their respective opinions all the judges proceeded on the firm premise that the tort protected the interests of members of the public. Lord Steyn, for example, noted that the basis for the tort lies "in the defendant taking a decision in the knowledge that it is an excess of the powers granted to him and that it is *likely to cause damage to an individual or individuals*".[15] Lord Hutton's opinion was that an essential ingredient of the offence was "the unlawful exercise of a power by a public officer with knowledge that it is *likely to harm another citizen*, when the power is given to be exercised *for the benefit of other citizens*".[16] Lord Millett stated that "[T]he tort is concerned with preventing public officials from acting beyond their powers *to the injury of the citizen*".[17] Lord Hobhouse explained that misfeasance "is not generally actionable by any member of the public. The plaintiff must have suffered special damage in the sense of *loss or injury which is specific to him and which is not being suffered in common with the public in general*".[18]

[11] These were all carefully worded expressions of principle. They are fully consistent with the essentially private character of the tort, so far as the victim or claimant is concerned. This feature of the tort can be traced back to its roots. Misfeasance has its origins in public law. An action in public law used to be the only means of impugning abuse of public office. But in the early days, a public law suit could not yield any monetary recompense to an individual who had suffered at the hands of a public officer who abused his powers. The aggrieved claimant might have obtained a writ of *certiorari* or of *mandamus* but this provided only a Pyrrhic victory in the absence of any award of damages.[19] A suit in negligence may not have been open to the injured party because the loss or injury may have been experienced in circumstances where no duty of care was

[15] [2003] 2 A.C. 1 per Lord Steyn at 192 C
[16] [2003] 2 A.C. 1 per Lord Hutton at 227 B
[17] [2003] 2 A.C. 1 per Lord Millett at 236 H
[18] [2003] 2 A.C. 1 per Lord Hobhouse at 231 D-E
[19] See: *Powder Mountain Resorts Ltd v The Queen* (2001) BCCA 619 at [1].

owed by the wrongdoer. Misfeasance was created to offer the citizen in such a situation a head of liability under which to recover compensation.

[12] The tort is not complete unless the claimant can establish that he has suffered "material damage". This expression embraces a wide variety of detriments. Economic loss is perhaps the most common but economic loss is not essential for material damage to be proved.[20] A successful party is entitled to be compensated in keeping with the settled principle that compensation should seek to put the claimant, so far as money can, in the same position as if the tort had not been committed.[21] In exceptional circumstances, a claimant may also be awarded exemplary damages which may be granted in order to punish the wrongdoer both for the oppressive, arbitrary nature of the wrongdoing and its calamitous impact upon the victim.

[13] Apart from the Antiguan case of *Southern Developers v The Attorney General for Antigua and Barbuda*[22], where the point did not arise for discussion, we have seen no reported case in which the State has been a claimant in a civil suit founded on tortious misfeasance or where the courts have entertained a suit in misfeasance by a public authority against its own officer. Neither of these possibilities is discussed or alluded to in any text or other legal material that has been cited to us.

[14] On the contrary, the common law is replete with references to the type of claimant who falls within contemplation of the tort. We have taken the liberty to highlight passages from a number of judgments given both before and since the decision of the House of Lords in *Three Rivers*. Take for example, the case of *Henly v Lyme Corpn*[23]. In that case Best CJ regarded it as "perfectly clear, that if a public officer abuses his office, either by an act of omission or commission, and the consequences of that, is *an injury to an individual*, an action may be maintained against such public officer". (Our emphasis).

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[20] In *Karagozlu v Commissioner of the Police of the Metropolis* [2007] 1 W.L.R. 1881 and in *McMaster v. The Queen* (2008) FC 1158, (2008), 336 F.T.R. 92 (Prothonotary) [*McMaster*], aff'd 2009 FC 937, [2009] F.C.J. No. 1071 (QL) [*McMaster* appeal] loss of liberty and pain and suffering respectively were sufficient.
[21] *See*: *Haines v. Bendall* (1991) 172 CLR 60
[22] *Civil Appeal, HCVAP 2006/020A, unreported*
[23] (1828) 5 Bing 91

[15] In *Jones v Swansea City Council*[24], Nourse LJ found it "unthinkable that the holder of an office of government in this country would exercise a power thus vested in him with the object of injuring *a member of the public* by whose trust alone the office is enjoyed".

[16] In *Watkins v Secretary of State for the Home Department*[25], Lord Walker of Gestinghope described the tort as "deliberate abuse of public office *directed at an individual citizen*". In the New Zealand case of *Garrett v The Attorney General*[26], Blanchard J. stated that "[t]he purpose behind the imposition of this form of tortious liability is *to prevent the deliberate injuring of members of the public* by deliberate disregard of official duty".

[17] In *Re Attorney General's Reference*[27], Pill LJ, in contrasting the tort with the crime of misconduct in public office, noted that "the crime is committed upon an affront to the Crown, that is in this context the public interest, whereas *the tort requires a balancing of interests as between public officers and individual members of the public or organisations seeking private remedies* having asserted a loss which must be proved".

[18] In *Odhavji Estate v Woodhouse*[28], Iacobucci J writing for a unanimous Supreme Court of Canada stated that "*the underlying purpose of the tort is to protect each citizen's reasonable expectation* that a public officer will not intentionally injure *a member of the public* through deliberate and unlawful conduct in the exercise of public functions". (Our emphasis). The tort was cast in terms of "the exercise of public power for an improper purpose, such as deliberately harming *a member of the public*."[29] (Our emphasis).

[19] In another Canadian case, *Gershman v Manitoba Vegetable Producers' Marketing Board*[30] O'Sullivan JA stated that in Canada since the landmark case of *Roncarelli v*

[24] [1990] 1 W.L.R. 54 at 85
[25] [2006] 2 A.C. 395 at [75]
[26] [1997] 2 NZLR 332 at 350
[27] (No.3 of 2003) [2005] Q.B. 73 at [48]
[28] [2003] 3 S.C. 263 at [30]
[29] [2003] 3 S.C. 263 at [23]
[30] (1976) 69 D.L.R. 114 at page 123

Duplessis: "… it is clear that *a citizen* who suffers damage as a result of flagrant abuse of public power *aimed at him* has the right to an award of damages in a civil action in tort".

[20] References to the victim of the tort as being "a member of the public" are also to be found in the Australian cases beginning with *Farrington v Thomson and Bridgland*[31] in which case Smith J referred to knowing abuse that "thereby causes damage to *another person*". See also: *Tampion v Anderson*[32] where Smith J indicated that to be able to sustain an action, "a plaintiff must not only show damage from the abuse; *he must also show that he was the member of the public, or one of the members of the public*, to whom the holder of the office owed a duty not to commit the particular abuse complained of". The very same sentiment is repeated by the Victorian Full Court in *Cannon v TAHCHE*[33].

[21] These judicial pronouncements do not purport to confine themselves to the particular facts that gave rise to the case with which the court in question was at the time concerned. These are statements of general application. Like those quoted at [10] above, they constitute authoritative expressions of principle. They exclude the possibility of a suit in misfeasance by the Central Government and instead point unequivocally to the private nature of the interests protected by the tort. The claimant in misfeasance is "an individual", "a citizen" (private or corporate), "a member of the public", "a member of a class of persons" in which latter category the claimant District Council in *Three Rivers* found itself.

[22] The State, generally speaking, is of course entitled to seek and obtain civil remedies. And, provided there exists a cause of action on which the claim can be based, no one can dispute the Attorney General's competence to institute civil proceedings to recover loss sustained by the State whether as a result of tortious conduct or otherwise. Section 42(5) of the Constitution is clear on that issue. The fact that the State may sue in some or even most torts does not dispose of the question of whether misfeasance avails the State.

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[31] [1959] VR 286
[32] [1973] VR 715 at 720
[33] [2002] 5 VR 317 at 328

[23] For the Attorney General to bring proceedings in tort he must sue to protect interests of the State that are protected by a right of action in the particular tort. So, for example, an action may be brought by the State against a public officer for the negligent driving of a government vehicle. To take another example, since the State, or the Crown, is a landowner, just as any private landowner may, the Attorney General can sue in torts that protect the rights of owners of land. It was primarily on that latter basis, i.e. the Crown's entitlements *as a landowner*, that the Crown recovered damages in *British Columbia v Canadian Forest Products Ltd*[34], the case cited in the judgment of Anderson J.

[24] Misfeasance is not a tort that was fashioned for the protection of landowners. Nor is it a tort specifically designed to protect against economic loss. The fact that economic loss is suffered by a landowner as a result of corrupt dealings is not by itself sufficient to establish misfeasance. It is not the nature of the loss suffered that gives misfeasance its distinctive character. It is rather, the abuse of public office and the infliction of damage on a relatively defenceless citizen (corporate or otherwise) or class of persons. The simple explanation for the telling absence of reported cases of tortious misfeasance at the instance of the State is that in every case of abuse of office where the State suffered loss, the State has had effective alternative means available to it to deal with the situation. The tort provides a remedy to individuals who have no other avenue for obtaining damages for deliberate and dishonest abuse of office. As Conteh CJ pointed out in his judgment at first instance, the tort covers a situation in which an entity (or a class) is asymmetrically powerless against a public official abusing his office. Inherent in the relationship between wrongdoer and victim is inequality in power, status and authority. The tort captures an interface between those who are entrusted with the task of exercising executive or governmental powers and those who must conduct their affairs subject to the exercise of such powers. As Blanchard J explained in *Garrett v Attorney General*[35], the tort has at its base conscious disregard for the interests of those who will be affected by official decision making.

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[34] [2004] 2 S.C.R. 74
[35] [1997] 2 NZLR 332 at 349

[25] It is impossible for the State to situate itself within this paradigm. Unlike an individual member of the public, in the face of abuse of office by its servants, the State has the means, the right and, indeed, *the duty* at any time to check the abuse, exercise discipline over its servants and hold them accountable. The State may do so by way of internal disciplinary regimes, the criminal law, integrity and anti-corruption legislation or by civil suit for breach of fiduciary duty or breach of trust. With the State as claimant the asymmetry in misfeasance is turned on its head and the scope and function of the tort are radically altered.

[26] To regard the Crown or the State as a *corporation sole* does not confer automatically on such a "corporation" rights of action in all respects comparable to those of a private entity. It cannot entitle the State, for example, to sue in defamation even though a corporate entity such as a company may do so. The Crown Proceedings Act also offers no assistance here. The Crown or the State may be subject to *liabilities* in tort as any person may be, but it is a mistake to suppose that the State may *in all cases* institute civil proceedings "as if it were a private person of full age and capacity". There simply are rights available to private citizens which institutions of central government are in no position to exercise unless they can show that it is in the public interest for them to do so.[36]

Civil causes of action open to the State

[27] This does not of course mean, again assuming that the facts alleged by the Attorney General can be established, that the State is without recourse. The State has a variety of options open to it. The former Ministers in this case, when they were in office, occupied a fiduciary position. Neither could have entered upon the duties of the office of Minister unless he had first taken and subscribed the oath of allegiance and office[37]. By section 2

[36] See: *Derbyshire County Council v Times Newspapers Ltd and Others* [1993] AC 534 at 549B per Lord Keith
[37] See section 46 of the Belize Constitution

of the Oaths Act[38] each of them swore to bear true faith and allegiance to Belize, to uphold the Constitution and the law and to discharge conscientiously and impartially his duties as a Minister.

[28] If the allegations made against the defendants are true they disclose an egregious dereliction of that fiduciary duty, a breach of trust and a substantial conflict between private interests and public duty. In such a case the Attorney General is entitled to call in aid equitable principles. Equity would regard all personal profits and advantages gained by any use or abuse of the men's status as public servants to be for the benefit of the State. *See*: *Reading v Attorney General*[39], especially the judgment of Asquith LJ in the Court of Appeal[40]. *See* also: *Attorney General v Goddard*[41]. A cause of action in equity also has the added advantage that it is much easier to establish in court than one founded in tortious misfeasance, even assuming the latter was available. Moreover, as pointed out by Mummery LJ in *Swindle v Harrison*[42], the equitable remedies that can be obtained from such an action are "more elastic" than damages recoverable from a suit brought in tortious misfeasance.

[29] It is true that the respective cases of *Reid*, *Goddard* and *Reading*, cited above, dealt with persons who had taken bribes. But the principles espoused in those cases are equally applicable to allegations of the sort pleaded here. If anything, those principles have even greater force in a case like this where it is alleged that the profit of the former Minister and his company was gained at the direct expense of the State. The general principle is well set out by the United States Supreme Court in *U.S. v. Carter*[43] where it was said that

> "The larger interests of public justice will not tolerate, under any circumstances, that a public official shall retain any profit or advantage which he may realize through the acquirement of an interest in conflict with his fidelity as an agent. If he takes any gift, gratuity or benefit in violation of his duty, or acquires any interest adverse to his principal without a full disclosure, it is a betrayal of his

[38] Chapter 130 of the Laws of Belize
[39] [1951] A.C. 507
[40] reported at [1949] 2 KB 232
[41] (1929) 98 L.J.K.B. 743
[42] See *Swindle v Harrison* [1997] 4 All ER 705 CA per Mummery LJ at 732C and also *Nocton v Lord Ashburton* [1914] AC 932 at 952 per Viscount Haldane LC
[43] (1910) 217 US 286

trust and a breach of confidence, and he must account to his principal for all he has received".

The undesirability of pursuing misfeasance in a case of this nature

[30] In holding that misfeasance avails the State, the majority has opted to depart from the common law and extend the tort in a profound way. There are powerful policy reasons militating against any such extension or departure. In the first place it is a foundational common law principle that when a court consciously must determine whether, for the first time, to permit or disallow a claim under the head of a particular cause of action, it is usual first to have regard to whether the same claim can be brought under some other existing head. This principle is adhered to with particular scrupulousness in cases concerning public authority defendants. So it has been said, for example, that the availability of the tort of misfeasance was one of the reasons justifying the denial of a claim in negligence where there is an act of maladministration[44]. Every conceivable remedy that is open to the State in misfeasance here is also available to it in equity. The equitable causes of action are actually tailor-made for a case like this where Ministers of Government are alleged to have flouted their solemn responsibilities.

[31] More significantly, however, the conduct alleged against the defendants constitutes criminal acts. While the tort of misfeasance protects private interests, the crime of misconduct in public office protects the very interests the Attorney General seeks here to advance, i.e. those of the State. If the objective in commencing these proceedings is to obtain the punitive, denunciatory or deterrent effect that is sometimes also sought when a member of the public sues in tortious misfeasance, there can be little doubt that the appropriate course of action here is for the State to institute criminal proceedings against these former Ministers.

[32] There is authority for the view that as between the Crown/the State/the public at large/the government (they are all the same in this context) and a public officer, the common law

[44] *See Three Rivers*, per Lord Steyn at page 190 E.

treats misfeasance in public office as a crime and never as a tort. The line of cases supporting this view may be traced back to *R v. Bembridge*[45]. In that case, a public official was accused of corruptly concealing from his superior his knowledge that certain sums of money, which would have appeared in a final account, had, in fact, been omitted. He argued that his conviction for misbehavior in public office should be quashed because his misdeeds and omissions should be treated as a civil and not a criminal matter. The response of Lord Mansfield C.J. was emphatic. He stated:

> "Here there are two principles applicable: first that a man accepting an office of trust concerning the public, especially if attended with profit, is answerable criminally to the king for misbehaviour in his office … Secondly, where there is a breach of trust, a fraud, or an imposition in a matter concerning the public, though, as between individuals, it would only be actionable, yet as between the king and the subject, it is indictable. That such should be the rule is essential to the existence of the country".[46]

[33] The words attributed to Lord Mansfield in the report of *Bembridge* contained in *(1783) 22 State Tr. 1* are even clearer[47]. *Bembridge* may have been decided in the Eighteenth Century but Lord Mansfield's pronouncements have echoed down through the years and stood the test of time. They were adopted in trenchant language by Lord Goddard CJ in *R v Hudson*[48] and they have also been relied upon in other cases in the latter half of the last century[49]. They were cited as authority for the proposition stated in *Volume 11(1) Paragraph 291 of Halsbury's 4th edition Reissue* to the effect that:

> "Any public officer who commits a breach of trust or fraud in a matter affecting the public is guilty of an indictable offence at common law even though the same conduct if in a private transaction would, as between individuals, have given rise to a civil action."

[34] It is suggested, on behalf of the Attorney General, that proceeding here by way of criminal action is inconvenient; that a higher standard of proof is required in criminal proceedings; that the fundamental objectives of the criminal law are different from those

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[45] 3 Doug KB 327
[46] *R v Bembridge* 3 Doug KB 327
[47] That report records Lord Mansfield as stating that "if a man accepts an office of trust and confidence, concerning the public, especially when it is attended with profit, he is answerable to the King for his execution of that office; *and he can only answer to the King in a criminal prosecution, for the King cannot otherwise punish his misbehaviour, in acting contrary to the duty of his office…*"(Emphasis added)
[48] [1956] 1 All E.R. 814
[49] See for example *R v Dytham* [1979] 2 QB 722

of the civil law; that the focus and range of the inquiry in this suit are not possible in a criminal action; that, in particular, the State's objective here is really to recover its material loss and the criminal process is not directed to that end; that, in any event, for a criminal action to be prosecuted the Attorney General has to rely on the Director of Public Prosecutions ("DPP") to institute proceedings and the DPP for his own reasons may choose not to do so.

[35] None of these arguments persuades us that we should on its account treat as tortious what the common law has always deemed to be a crime and not a tort. Each of the arguments is unconvincing. For a start, a claimant in tortious misfeasance must meet a very high standard in pleading. Particularising and establishing both the dishonest motive of the defendant and the causation issues involved in proving misfeasance are no less formidable challenges than those that must be overcome in securing a conviction for corruption or for misconduct in public office. It is impossible to conceive of any circumstance where corrupt acts occasioning serious material loss to the State would suffice to ground an action in tortious misfeasance but be insufficient to make out a *prima facie* case establishing the commission of a criminal offence. If all the elements of the tort exist, then the crime has occurred.[50] And, so far as the standard of proof is concerned, where criminal acts are being established in a civil case, courts are entitled to require a higher degree of probability than that which they would seek when considering whether negligence, for example, were established.[51] So onerous are the challenges faced by claimants in misfeasance that most cases are actually struck out, withdrawn or dismissed *before* they even get to trial. The rate of success for misfeasance suits is notoriously low. In Australia, for example, between 2002 and 2010, of 79 cases filed only five appear to have succeeded.[52] The difficulty in establishing the tort has prompted judges at times to sound a note of caution that the bar ought not to be placed at a higher level for the tort than for the crime of misconduct.[53]

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[50] See Robert Sadler, "Liability for Misfeasance in a Public Office", (1992) 14 Sydney L.R. 158 at 162

[51] See Bater v Bater (1950) 2 A.E.R. 458 at 459B per Denning LJ

[52] Professor Vines, "Misfeasance in public office: old tort, new tricks?" Unpublished Paper presented at a Conference in New South Wales 17-18 December 2010

[53] See for example *Attorney-General's Reference (No 3 of 2003)* (2004) 3 WLR 451 at [53]; *Three Rivers* [2000] 2 W.L.R. 15 at page 102; *Powder Mountain Resorts v British Columbia* [2001] 94 B.C.L.R. (3d) 14 at [7] – [8]

[36] Criminal proceedings were instituted against a former Minister in St Vincent and the Grenadines and against the Permanent Secretary in The British Virgin Islands. *See*: *Williams v R*[54] and *Wheatley v Commissioner of Police*[55]. In *Williams*, the allegation was that the defendant, while performing the duties of a Minister, had improperly retained for his own benefit the sum of $40,000 mistakenly paid to him by the State. At all material times the former Minister was the owner of several commercially operated ocean going ships. The likelihood is that he was more than capable of satisfying the sum in question if ordered to do so by a civil court. The State did not sue him in misfeasance to recover the funds. He was prosecuted and subsequently convicted for the common law crime of misbehavior in public office.

[37] On the 29th March 1996 the countries comprising the Organisation of American States adopted the Inter-American Convention Against Corruption. The States Parties agreed that "corruption undermines the legitimacy of public institutions and strikes at society, moral order and justice, as well as at the comprehensive development of peoples".[56] Belize ratified this Convention on 2nd August, 2002. Article VII of the Convention urges the States Parties that have not yet done so to adopt the necessary legislative or other measures to establish acts of corruption as criminal offences under their domestic law. Parliament has been faithful to Belize's international commitment. Title XVI of the Belize Criminal Code[57] prescribes a range of such criminal offences including section 284 which renders liable to imprisonment for two years every public officer who is guilty of corruption in respect of the duties of his office. The Belize legislature has also enacted the Prevention of Corruption Act[58] which establishes an Integrity Commission and prescribes criminal liability for corrupt activity and various other forms of misconduct by public officers. These Acts of Parliament are buttressed by the Ombudsman Act[59] which

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[54] (1986) 39 W.I.R. 129
[55] [2006] 1 W.L.R. 1683
[56] See preamble to Inter-American Convention Against Corruption, http://www.oas.org/juridico/english/treaties/b-58.html, accessed 21st June, 2011
[57] Chapter 101 of the Revised Edition 2003
[58] Act No. 21 of 2007
[59] Chapter 5 of the Revised Edition 2000

creates the post of Ombudsman[60] who has jurisdiction to investigate corruption, wrongdoing or injury/abuse to any person or body of persons as a result of any action taken by a public authority[61]. If it is found that there is evidence of a breach of duty, or misconduct, or of a criminal offence on the part of an officer, the Act authorises the Ombudsman to report the matter to the National Assembly[62]. If the report discloses the commission of a criminal offence, the National Assembly may then report the matter to the DPP. If the Ombudsman's report discloses conduct that has caused damage to any person or his property, the victim may be facilitated in instituting proceedings for the recovery of damages[63].

[38] Ratification by Belize of the Inter-American Convention and the adoption by parliament of the above-mentioned legislative measures help us to understand and appreciate better public policy on the matter of abuse of public office. The policy that emerges is consistent with *Bembridge* and the cases that follow *Bembridge*. As a matter of public policy, serious infractions by a public servant such as misbehaviour in office, neglect of duty and breach of trust, are to be treated as crimes, subject to the right of any person or body of persons to recover damages for injury flowing from such misconduct.

[39] The yardstick for measuring the appropriateness of suitable proceedings by the State against those who have engaged in corrupt acts ought not, in our view, to be relegated merely to the degree to which the State's financial loss was recoverable through those proceedings. But it is interesting to observe that courts often impose massive fines upon persons convicted of misbehaviour in public office. Indeed, in *Bembridge*, the sentence handed down was six months imprisonment *and* a fine of £2,650. This was no trifling sum in 1783 but it was imposed because it represented the amount of the loss to the King's coffers arising from the defendant's misconduct. In *Williams* the State recovered its loss and some without having to institute civil proceedings. On conviction the former Minister was fined $100,000, a figure well in excess of twice the amount of the money

[60] Section 3
[61] Section 12
[62] Section 22(1)
[63] Section 22(2)

misappropriated. In *Attorney General for Hong Kong v Reid*[64], in addition to being sentenced to prison the defendant was fined a mammoth HK$12.4 million, an amount that was equivalent to the sum he had corruptly gained from bribes and secreted away while he held public office.

[40] The fact that criminal actions are instituted by the DPP and not by the Attorney General is irrelevant to the fundamental question at hand. We are considering here not what steps should be taken by the Attorney General as such, but what measures should be taken by the State. If in a given set of circumstances the law and the public interest required action to be taken by the DPP or some other official(s) not under the control of the Attorney General, courts should not for that reason feel compelled to fashion some novel recourse purely to afford the Attorney General a bite of the cherry. It may be regarded as preferable to vest in an independent officer the decision whether or not to pursue, whether criminally or civilly, an allegation of misfeasance in public office given the political advantage that might be anticipated from the very making of such an allegation.

[41] It is true that criminal and civil proceedings are not mutually exclusive. Some misdeeds do give rise simultaneously both to criminal and civil recourse. But even when we discard entirely the rule in *Smith v Selwyn*[65], that in such instances the criminal action should first be prosecuted, in a case such as this one, in the absence of some plausible explanation for eschewing criminal and equitable proceedings, it is not in the public interest that this Court should extend the common law in order to facilitate an action *in tort* against those who are alleged to have engaged in criminal acts.

[42] As a final court, in building our own jurisprudence we are of course empowered to extend or depart from received common law. Indeed, there *must* be instances when this Court should consider itself obliged to do so. Departure is justified, however, when its purpose is to improve the law; when the departure is consistent with public policy; in instances, for example, when there is a *lacuna* in the existing law that must be filled; or when the peculiarities of our social, political, cultural or economic landscape so dictate, or when

[64] (1993) 3 WLR 1143
[65] [1914] 3 KB 98, disapproved in *Panton v Financial Services* [2003] UKPC 86

evolving principles of equity and good conscience prompt the development. The radical departure offered here does not respond to any of these imperatives. It is unwarranted. There is nothing so peculiar about the Belizean or Caribbean context that justifies it and we cannot see how it improves the law in any way.

Conclusion

[43] Allowing the State to pursue tortious misfeasance in cases such as alleged here has the effect of ascribing the same legal consequence to qualitatively different violations. The corrupt acts of a public officer that cause material damage to the State are placed on the same level, weighed in the same scales and afforded the same redress as abuse of office causing material damage to private entities. It is not unusual for the law to assess obligations to and by the State differently from those between citizens. The similar treatment accorded here reduces the gravity of the fiduciary obligations owed by public servants toward the State, flies in the face of the resolve of parliament and undermines the international commitments undertaken by the State of Belize.

[44] Public wrongs should normally attract public sanctions. Corrupt acts ought to be dealt with by punishing the perpetrator. When allegations are made that a Minister has misbehaved in office and the misbehaviour occasions significant and foreseen economic loss to the State and corresponding personal gain to the Minister and/or his company, it is in the public interest that criminal proceedings be instituted. The failure to detect, investigate, prosecute and punish corruption has a corrosive impact on democracy and the rule of law. We underestimate at our peril the degree to which such failure affords encouragement to the criminal element in society and contributes to burgeoning crime rates. Extending the tort of misfeasance unnecessarily to give the Attorney General another choice of civil remedies does not strike a blow for the maintenance of probity by public officials. Quite the contrary, it has the opposite effect. It offers the miscreant the softer option of civil liability. In countries where the Attorney General is an active politician it may even open the door to actions inspired by the hope of political gain. In the result, it is our view that this extension will serve to erode rather than promote

integrity in public life. Neither the interest of the State of Belize nor the state of Caribbean jurisprudence is enhanced by it. We would have allowed this appeal.

Judgment of the Honourable Madam Justice Bernard, JCCJ

[45] The facts of this appeal have been described in greater detail in other judgments, hence I shall make only brief reference to them. Succinctly, this appeal stems from the judgment of the Court of Appeal of Belize and involves two ministers of the former Government of Belize who were sued by the present Attorney General of Belize for misfeasance in public office arising out of purported sale of national lands at an undervalue resulting in financial loss to the State and alleged benefit to the Appellants during their tenure as Ministers.

[46] During the hearing of the claim at first instance a preliminary point arose concerning the Attorney General's ability to utilise the tort of misfeasance in public office for the purpose of recovering from the former ministers loss which the State had suffered having regard to the history of the tort which had only been utilised by individuals who had suffered personal loss due to misfeasance by public officers. The Honourable Chief Justice at first instance found against the Attorney General who appealed to the Court of Appeal of Belize, and enjoyed the benefit of a finding in his favour, the appeal having been allowed. The former ministers of Government (now the Appellants) appealed to this Court seeking a reversal of the Court of Appeal's ruling.

The Tort of Misfeasance in Public Office

[47] The tort of misfeasance came into being as an action on the case and developed into a tort with its own special characteristics. It has a long history dating back to the 17th century or even earlier, but attracted attention in the case of *Ashby v White*[66] which involved the prohibition by an elections officer of an individual's right to vote, and has since been utilised almost exclusively by individuals seeking redress for infringement of a variety of

[66] (1703) 92 E.R. 126

rights by public officials misusing and abusing powers vested in them for improper reasons. The main ingredient of the tort being proof of malice by the public officer and the difficulties in proving such malice may have resulted in the tort lying dormant for several years. Lord Diplock, however, in *Dunlop v Woollahra Municipal Council*[67] described the tort of misfeasance as being well established, a view which was later endorsed by Brennan J in the Australian case of *Northern Territory of Australia v Mengel*[68].

[48] The first case to define comprehensively the ingredients of the tort was *Three Rivers District Council and Others v Governor and Company of the Bank of England*[69] which became the *locus classicus* wherever it was sought to utilise the tort. Lord Steyn in delivering the opinion of the House of Lords traced the history of the tort, and concluded that its rationale was that in a legal system based on the rule of law, executive or administrative power may be exercised only for the public good and not for ulterior and improper purposes. Similar sentiments were expressed earlier by Nourse, L.J in *Jones v Swansea City Council*[70] who emphasised that whatever the nature or origin of the power, it is the office on which everything depends.

Although *dicta* of Lord Steyn in the House of Lords decision in *Three Rivers* is widely recognised and cited as the final authority on the tort of misfeasance, Clarke, J. at first instance[71] had analysed earlier decisions on the required mental element of the tort which was upheld by both the Court of Appeal and the House of Lords.

[49] Of particular relevance to the issue which this Court has to decide, this being whether the tort is actionable only at the suit of a private individual or entity, is the conclusion of Clarke, J. that where the plaintiff established that the defendant intended to injure the plaintiff or a person in a class of which the plaintiff was a member, or that the defendant knew that he had no power to do what he did and that the plaintiff or such a person would

[67] [1982] A.C. 158, 172
[68] (1995) 69 ALJR 527
[69] [2000] 2 WLR 1220
[70] [1990] 1 WLR 54 at 85
[71] Three Rivers District Council and others v Bank of England (No. 3) [1996] 3 All E.R. 558

probably suffer loss or damage, that of itself was sufficient to establish that the plaintiff had a sufficient right or interest to maintain an action for misfeasance in public office at common law. This finding was endorsed by Lord Steyn in the House of Lords.

[50] In arriving at this conclusion Clarke, J. reasoned that the purpose of the tort as he saw it was to compensate those who suffered loss as a result of improper abuse of power; therefore knowledge that the relevant person will probably suffer damage was sufficient. In this regard he referred to the case of *Bourgoin S.A. and Others v Ministry of Agricultur*e, *Fisheries and Food*[72] which he had considered in relation to the mental element of the tort, and which concerned a number of different plaintiffs (the first five of whom were companies incorporated in France, the sixth, a company incorporated in England and the seventh, an association formed in France comprising the first five plaintiffs); yet there was no suggestion that their claims might have failed because they did not have a sufficient legal right. He conceded that the point about the plaintiffs not establishing a relevant legal right had not been argued before the judge at first instance or the Court of Appeal, but thought it surprising that no one had mentioned it if it was a simple answer to their claims.

[51] In endorsing this view Lord Steyn in the House of Lords concluded that

> "what can be said is that, of course, any plaintiff must have a sufficient interest to found a legal standing to sue. Subject to this qualification, principle does not require the introduction of proximity as a controlling mechanism in this corner of the law . . . There is no reason why such an action cannot be brought by a particular class of persons, such as depositors at a bank, even if their precise identities were not known to the bank".[73]

[52] Arguments against this have centred around *dicta* from Lord Hobhouse of Woodborough in the House of Lords to the effect that the tort is not generally actionable by any member of the public, and the plaintiff must have suffered loss specific to him and which is not suffered in common with the public in general.

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[72] [1985] 3 WLR 1027
[73] Ibid, 1233

I understand this to mean that the plaintiff as an individual must prove economic loss suffered by him personally even though the public officer's abuse of power resulted in loss to other persons generally. Each plaintiff has to prove his own loss for which he is seeking compensation.

[53] In the appeal before this Court Chief Justice Conteh in his judgment at first instance, conceded that although in all of the reported cases on the tort the claimants were individuals or some other entity, in an appropriate context a public authority could claim on the tort against a defendant's exercise or failure to exercise power or function as a public officer, and made reference to *Three Rivers* (supra) where the claimant was a local council (a public authority). He pointed out, however, and it is agreed that the local council was like other plaintiffs in the case, being depositors and clients of BCCI.

[54] All of the cases on the tort of misfeasance brought in the jurisdictions where it has been utilised have been at the instance of individuals, defining over the years the essential nature of the tort. It was never conceived as being available to or created for any entity or group. *Bourgoin* (supra), however, decided in 1985, stands out as an exception to this traditional development with the plaintiffs being companies as mentioned earlier. This may have been the first departure from the sole individual claiming under the tort. Significantly it does not seem to have attracted comment on whether the tort of misfeasance was available to the plaintiffs in that case. What seems to be of paramount importance is the abuse of power by a public official against someone or an entity with a sufficient interest to claim compensation for loss suffered by that abuse of power. This was made pellucidly clear by both Lord Steyn and Clarke, J. in their judgments.

[55] There has emerged no case in any commonwealth jurisdiction where governments or States have sought to utilise the tort against public officials abusing powers conferred on them for their own financial gain. We find ourselves in virgin territory in deciding the discrete point which has arisen in this appeal. The objective is to make a public officer personally liable for misuse and abuse of power intended to be used for the public good but which was used for his own benefit.

Admittedly the criminal offence of misfeasance in public office has always been available to a State and may have been the preferred option for punishing corrupt public officials, hence the total absence of any precedent where the tort was used. Of course, if the objective is to recover economic loss due to the public officer's abuse of his power, the tort of misfeasance would be the appropriate remedy.

[56] It is beyond dispute that corruption is increasing exponentially in our world economies thereby imposing on governments the need to take firm action against public officers who abuse their office for personal enrichment. Lord Bingham in *Watkins v Home Office*[74] in adopting the submission of the respondent expressed the view that

> "if a public officer knowingly and deliberately acts in breach of his lawful duty he should be amenable to civil action at the suit of anyone who suffers at his hands, and there is an obvious public interest in bringing public servants guilty of outrageous conduct to book ... Those who act in such a way should not be free to do so with impunity".

Functions of the Attorney General

[57] It is apposite at this juncture to discuss the position of the Attorney General of Belize (the Respondent). Section 36 of the Belize Constitution vests the executive authority of Belize in the Crown which is defined in the Constitution as "the Crown in right of Belize". More frequently today the expression "the Crown" is used primarily to refer to the executive or the government, and not to the monarch in whose name acts of the executive are carried out.[75] The Crown on sound judicial authority has been appropriately described as a corporation sole or a corporation aggregate.[76] Section 42(1) of the Constitution of Belize stipulates that the Attorney General shall be the principal legal adviser to the Government, and he is empowered under Section 42(5) to initiate legal proceedings for the State.[77]

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[74] [2006] UKHL 17, para. 8
[75] See *M v Home Office* [1993] All ER 537 at 540 per Lord Templeman
[76] Ibid per Lord Woolf at p 566d; *Town Investments Ltd* v *Department of the Environment* [1977] 1 All ER 813 per Lord Diplock at p 820g, and Lord Simon at p. 833d
[77] See Section 1 of the Belize Constitution where Belize is defined

[58] The Crown Proceedings Act, Chapter 167, section 19(1) confers jurisdiction on the Supreme Court to make any order in relation to civil proceedings by or against the Crown as could be made between subjects and to give appropriate relief. Under section 21 any reference to civil proceedings by the Crown shall be construed as a reference to proceedings for the enforcement or vindication of any right or the obtaining of any relief which, but for the Act, might have been enforced or obtained by proceedings for the recovery of chattels or money by way of damages or otherwise.

[59] The combined effect of the relevant provisions of the Belize Constitution and the Crown Proceedings Act is to vest in the Attorney General the right to institute civil proceedings on behalf of the State for the recovery of damages or economic loss suffered by the State, hence the Attorney General's right to take action against the former public officials cannot be disputed. What is in dispute is whether the tort of misfeasance in public office is one which is available to the State having regard to its nature and historical development.

[60] The State of Belize through the Attorney General seeks to recover damages for loss suffered due to the alleged abuse of power by the Appellants (former ministers of government) and which it is claimed constitute misfeasance in public office. The loss involved the sale of national lands at an undervalue from which the Appellants allegedly obtained financial benefits. If the premise that the State in the context of the Constitution is akin to the Crown, based on judicial *dicta*, it can be regarded as a corporation sole or aggregate whichever nomenclature one applies. Reasoning logically from this premise the State as a corporation similar to the companies in *Bourgoin* (supra) or the district council in *Three Rivers* with a sufficient interest to found legal standing, ought to be able to sue under the tort of misfeasance provided it can prove that it suffered economic loss and that the public officials abused powers which were granted to them to use for the public good.

[61] The abundance of judicial *dicta* reflected in the cases on the tort of misfeasance demonstrates unequivocally its special nature and characteristics. Strict proof of its

ingredients is required, these being establishing that a public officer abused power vested in him by virtue of his office whereby some person or entity with a sufficient interest to sue suffered consequential loss or damage. Brennan J in *Northern Territory of Australia v Mengel* (*supra*) expressed the view, with which I concur, that there was no additional element which requires the identification of a plaintiff as a member of a class to whom the public officer owes a particular duty though the position of the plaintiff may be relevant to the validity of the public officer's conduct. What has been repeatedly stressed is that it is the office in a wide sense on which everything depends.

[62] Lord Steyn in the House of Lords concluded that the test adopted by Clarke J at first instance in *Three Rivers* represented a satisfactory balance between two competing policy considerations, these being enlisting tort law to combat executive and administrative abuse of power, and not allowing public officers who must always act for the public good to be assailed by unmeritorious actions. These competing policy considerations are just as relevant in the instant appeal as they were in *Three Rivers* particularly where the State is seeking to recover damages for the unauthorised sale of State lands by former public officials who allegedly abused power entrusted to them. On the other hand, this Court must be acutely concerned about the tort being utilised indiscriminately for the settling of scores in a political environment and exposing public officers to actions that cannot be judicially sustained. It will be the duty of the courts to keep a watchful eye on this tort in order to avoid wanton use by a State seeking to combat the executive and administrative abuse of power by public officials.

[63] Closely allied to the tort of misfeasance is the criminal offence of misconduct in public office both having as their focus the abuse of power by a public officer, but with different elements and different thresholds of fault. The criminal offence requires wilful neglect by a public officer of a common law or statutory duty without reasonable excuse or justification, the misconduct being calculated to injure the public interest. In *R v Dytham*[78] Lord Widgery CJ concluded that the element of culpability "must be of such a

[78] [1979] QB 722, 727

degree that the misconduct impugned is calculated to injure the public interest so as to call for condemnation and punishment".

[64] The opinion of Pill J, in *Attorney General's Reference (No. 3 of 2003)*[79] was that although the required mental elements of the tort and the criminal offence may differ, the approach in the *Three Rivers* case appeared to be consistent with that in the criminal cases and with the conclusions arrived at demonstrating the many-faceted nature of the tort as well as the crime; further, the threshold for the crime was a high one "requiring conduct so far below acceptable standards as to amount to an abuse of the public's trust in the office holder". Persuasive views have been expressed that the criminal offence may be more effective in curbing corruption among public officials which seems to be spiraling out of control involving as it does sentences of imprisonment or imposition of heavy fines calculated to have a salutary effect on others contemplating similar conduct.

[65] There is no doubt that criminal prosecution will send a strong message to public officers who utilise powers entrusted to them for their own benefit, and which result in financial loss to the State. These options of criminal prosecution, however, are not within the remit of the Attorney General, but solely the function of the Director of Public Prosecutions as provided for in section 50 of the Belize Constitution, and which shall not be subject to the direction or control of any other person or authority. In any event, the Attorney General may be more concerned with recovering loss to the public purse which in this case is the economic value of the national lands amounting to $924,056.00.

[66] The tort of misfeasance being a tort with special characteristics has developed over the years in different directions although maintaining its core element being abuse of power by a public officer. In this appeal as mentioned earlier we are being asked not to stray from the established elements of the tort, but to introduce a new dimension making it possible for the State to be granted the option of ensuring that public officials are held accountable when they abuse the power conferred on them for their own benefit instead of for the public good.

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[79] [2004] 3 WLR 451, 466

[67] In relation to this novel innovation of the tort an opinion expressed by Lord Bingham springs to mind in relation to new aspects of this same tort to the effect that "novelty is not in itself a fatal objection". This was said when the respondent in *Watkins v Home Office (supra)* contended that the importance of the right in question which was invaded by a public officer required or justified the modification of the rule that material damage need not be proved to establish a cause of action. Lord Bingham, however, quite rightly, declined the invitation to introduce this innovation. The question of proof of material damage in the tort of misfeasance is one of the main ingredients to ground liability without which no action on the tort can succeed; in fact this being absent in *Watkins* it was doomed to fail, and was in that instance a fatal objection.

[68] In the instant appeal, the novelty of the State being capable of suing under the tort is by no means fatal, but just widens the category of those entitled to sue for abuse of power by a public officer as has been done before provided there is a sufficient interest to found standing, and economic loss has been established.

At the end of the day it is the duty of the Attorney General to preserve the patrimony of Belize by recovering financial loss from those allegedly responsible for undervaluing national lands in their quest for personal financial gain.

[69] To answer concerns about the abuse of this tort in our jurisdictions, one has to be mindful of the fact that as far as can be ascertained the tort of misfeasance has not been utilised in our region to any degree by individuals or any entity; no doubt recourse has been had to criminal proceedings where public officials abused power or misappropriated government funds. Apart from the present appeal one other case has been filed[80] but has not been concluded except for a ruling on a preliminary issue.

[80] *Southern Developers Ltd. and Others* v *Attorney General of Antigua and Barbuda* HCVAP 2006/020A (2007)

As mentioned earlier it will rest on the shoulders of the courts to provide the necessary brakes on any attempt at misuse of the tort for ulterior motives.

For all of the aforementioned reasons I would dismiss the appeal and affirm the decision of the Court of Appeal to reinstate the Claim Form of the Respondent. I would also grant costs to the Respondent in this appeal.

Judgment of the Honourable Mr Justice Jacob Wit, JCCJ

The issue

[70] As I see it, the only question before us is whether the State can sue a public officer (in this case two former ministers from a political party other than the one now in government) in the tort of misfeasance in public office, which, it is understood, underlies the cause of action in this case. The issue is not what else the State could or ought to have done. That is an entirely different matter.

[71] It is clear that the State can and does own property, make contracts or suffer damages. It is equally clear that it can and does initiate civil proceedings against others. It can sue these others in tort, in contract and in equity just like anyone else. The State can do this because of its corporate structure *sui generis* (the State, being the repository of sovereignty, is of course much more than a "corporation"). This corporate structure, however, sometimes limits the State in the actions it can take. For example, the State cannot sue for assault or battery because it has no physical body. And it cannot claim aggravated damages as it has no feelings. But clearly, the State as land owner can claim private law remedies for trespass or nuisance. The State as the owner of assets can sue for negligence and conversion. The State can also suffer economic loss (which it claims it has suffered in this case). And, finally, the State can sue anyone in tort including its own public officers; for example, if the public officer drives a state-owned car in a reckless manner and causes the car to crash, he can be sued by the State for negligence and when he steals or embezzles the car he can be sued for conversion.

[72] So, why then would it not be possible for the State to claim damages from its former ministers in this particular tort if it could be proved that they have indeed abused their powers and position as public officers and by so doing have caused economic loss to the State?

The arguments

[73] The arguments that have been advanced against this proposition are that the tort has been designed to offer the citizens or the members of the public some form of protection against abuse of power by public officers and that this *raison d'être* has been expressed in many cases and by many judges; that in all the known misfeasance cases the claimants have always been citizens, natural persons, and private or sometimes even public corporations but never the State whom these public officers are supposed to serve, and that there is no judicial authority to be found which establishes that the State can be a claimant in a misfeasance case. A determination that the State could indeed sue in this tort would therefore effectively create an extension of the tort as it has been developed up to now. There are, however, so the argument goes, no good policy reasons to support such an extension or, stronger even, there are policy reasons which militate against it.

[74] In this context it has been submitted, first, that the State does not need the tort because it can protect itself against its own officials if they abuse their powers. The State can prosecute them or take disciplinary action against them, measures which are practically unavailable to the ordinary citizen. Second, allowing the State to sue former ministers who will usually be, like in this case, of a different political colour than the current government might open a Pandora's Box of political vindictiveness and persecution of political opponents of the government given the fact that the initiator of such an action is the Attorney General who like almost all his colleagues in the Commonwealth Caribbean is primarily a politician. It is submitted that criminal proceedings are less likely to open such a box as they are initiated by an apolitical and independent official, the Director of Public Prosecutions, and as the criminal law offers more safeguards against the improper use of State power than the civil law.

The determination of the issue

[75] The tort of misfeasance in public office is still developing. It is sometimes said to be a public law tort as it can only be committed by a public officer but in my view it is *au fond* a private law tort with private law remedies. The tort has been comprehensively described in the seminal House of Lords decision *Three Rivers District Council v Governor and Company of the Bank of England (No 3)*[81]. This is an important and highly authoritative decision although it is certainly, at least in my view, not the final word on the matter. In order not to complicate an already complicated issue any further, however, I will take the *Three Rivers* judgment as the starting point of my analysis.

[76] If I may borrow the words of Sedley LJ in *Akenzua v Home Secretary (CA)*[82], the issue of whether the State can sue a public officer in the tort of misfeasance "was not before their Lordships' House; nor was it before any of the courts deciding the analogous cases to which our attention was drawn. The question for us is whether the logic of *Three Rivers* includes or excludes it".

[77] Lord Steyn, who wrote the leading judgment in *Three Rivers*, made it clear from the outset of his judgment that the "coherent development of the law" required the House of Lords "to consider the place of the tort of misfeasance in public office against the general scheme of the law of tort". Although he did not mention it, it is obvious as Lord Bingham observed in the later case of *Watkins v Secretary of State for the Home Department*[83] "that the primary role of the law of tort is to provide monetary compensation for those who have suffered material damage rather than to vindicate the rights of those who have not". I do not deny that deterrence and the marking of societal norms could also play a role, as they often do, but that is clearly on a secondary level.

[81] [2003] 2 AC 1
[82] [2003] 1 WLR 741 at 747D
[83] [2006] 2 WLR 807 at 812D

[78] The rationale of the tort of misfeasance, Lord Steyn stated[84], is that in a legal system based on the rule of law executive or administrative power may be exercised only for the public good and not for ulterior and improper purposes. He also stated that "bad faith in the exercise of public power … is the *raison d'être* of the tort". In the end, Lord Steyn said, there has to be "a satisfactory balance between two competing policy considerations; namely enlisting tort law to combat executive and administrative abuse of power, and not allowing public officers, who must always act for the public good, to be assailed by unmeritorious action". In the same vein, Lord Bingham said in *Watkins (supra)* that "(t)here is great force in the … submission that if a public officer knowingly and deliberately acts in breach of his lawful duty he should be amenable to civil action at the suit of anyone who suffers at his hand".

[79] Nothing these two judges have said about the rationale and *raison d'être* of the tort of misfeasance in public office indicates that the State cannot claim in this tort. On the contrary, a*nyone* who suffers damages in a legal system based on the rule of law caused by public officers, who have exercised the powers of their office and have abused their position for ulterior and improper purposes, should have a civil action. And if "anyone" means anything it must include the State.

[80] Indeed, Lord Steyn in answering the specific question of who can sue in respect of an abuse of power by a public officer, stated that it would be unwise to make general statements on a subject which may involve many diverse situations: "What can be said is that, of course, any plaintiff must have a sufficient interest to found a legal standing to sue". *Any* plaintiff includes the State.

[81] The objection raised against this line of reasoning is or will undoubtedly be that all four Law Lords who dealt with the tort of misfeasance in *Three Rivers*, Lord Steyn included, made specific references to damage or harm caused to "an individual or individuals", "(an)other citizen(s)", "a member of the public", "persons", "a particular class of persons" or "a person of a class of which the plaintiff was a member".

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[84] Citing Nourse LJ in *Jones v Swansea City Council* [1990] 1 WLR 54, 85F

[82] Although it is clear from those references that none of their Lordships had the State in mind as a possible claimant in the tort of misfeasance, it is obvious that their remarks have to be seen in the light of the fact that they were dealing with a case with more than 6000 claimants who were all (natural and juridical) persons. The fact that some of these "persons" were public authorities shows that the choice of words was somewhat loose; public bodies are usually not described as individuals or citizens. The whole purport of these and other formulations, however, was not so much as to define who *can* sue in this tort but rather, given the large number of claimants and the judges' intention "not to allow public officers to be assailed by unmeritorious actions", to devise a legal mechanism to prevent the tort from becoming uncontrollable and to keep it "within reasonable bounds".

[83] This is especially clear from the speech of Lord Hobhouse in *Three Rivers* where he stated:

> "*The tort is … not generally actionable by any member of the public*. The plaintiff must have suffered *special damage* in the sense of *loss or injury* which is *specific to him* and which is *not being suffered in common with the public in general*…. The plaintiff has to be complaining of some loss or damage to him which completes the *special connection between him and the official's act*…. The act of the official may have a *widespread economic effect, indirectly affecting to some extent a wide range of persons*. This does not suffice to give any of them a cause of action."

[84] These *dicta* are unmistakably inspired by the case law on public nuisance and their purpose is clearly to avoid a multiplicity of actions in the courts. In the case before us, however, there is no such danger. The State has basically alleged that it has suffered special damage being an economic loss felt in its Consolidated Fund and therefore specific to the State. There is, so one is compelled to deduce from the State's submissions, this special connection between the State and the acts of the Appellants. Only the State therefore can sue the Appellants for the damages.

[85] The Appellants, of course, do not agree with this reasoning. Their point is that it would follow from the State's submissions that the alleged damages are being suffered in common with the public in general. As I understand them, they are suggesting that any

substantial economic loss for the State's coffers is in fact an economic loss for the public as a whole. That, however, would in my view be a wholly untenable proposition.

[86] Although the State embraces the People, it cannot be equated with the general public or the citizenry. The fact that Belize is a democratic State does not change that. However democratic the State might be, it has to be distinguished from the people themselves. Democracy means, among other things, that the people of the country have an important say in how and by whom they will be governed but in the end they have to be governed. The State has been created to do just that. In order to govern, however, the State needs, and has, not only sovereign powers but also its own prerogative and other rights and "ring-fenced" assets. The public officers who exercise these powers and rights and who manage these assets of the State have to do so "for the common good of the people". They are both rulers and servants (although they usually prefer to emphasise the latter). National lands are assets owned by the State. One might call them "public lands" but that does not necessarily mean that they are open to the public or that any member of the public could claim any legal right to them. If somebody causes a nuisance to State-owned property specifically targeting that "public property", he commits a private nuisance and not a public nuisance. The State will have to sue that person for the tort of private nuisance; it cannot sue or prosecute him for public nuisance despite the fact that the property is "public". Likewise, the money in the Consolidated Fund is owned by the State; it is not in a legal sense "the people's money", although it could be said that it is held in trust for the people.

[87] Given the State's corporate structure (although being much more than that) a comparison could be made with economic loss suffered by corporations. Although in the end the consequences of such a loss could be felt by the shareholders, any action for compensation of that loss vests in the corporation, not in the shareholders. So it is with the State. The action vests in the State, not in its subjects, the members of the general public.

[88] Another argument which came up was that if the State could sue its own public officers for misfeasance, it would be eventually suing itself as the State is vicariously liable for damages caused by public officers abusing their power and position. If this were true it would clearly show the absurdity of a State suing in this tort. But the absurdity is, I am afraid, in the argument itself which has no logic whatsoever. Vicarious liability can only exist in a case where a third party is suing the State for the misfeasance committed by the State's public officer. It is a form of strict liability which simply enhances the possibilities for a victim of the public officer's abuse of power to "get his money", that is compensation for damages suffered by him. The law on vicarious liability may make the State a joint *tortfeasor*[85] but it does not make it necessarily a *wrongdoer*. On the contrary, once the (innocent) State has compensated the third party victim, it would seem just and reasonable to allow the State to sue the public officer in order to be fully indemnified[86].

[89] A final argument advanced by the Appellants was that there is no judicial authority for the proposition that the State can sue in the tort of misfeasance in public office and, in fact, no case can be found in which a State did claim damages under this tort except for a recent Caribbean case, *Southern Developers Ltd, Lester Bryant Bird, Robin Yearwood, Hugh Marshall Snr v The Attorney-General of Antigua and Barbuda*[87], where it was only assumed but not decided that a State could bring the action.

[90] I understand the appellants to be saying here, in the words of Powys J in *Ashby v White*, that the action of the State is not maintainable for "never the like action was brought before" which would prove that the action did not lie "for if it had lain, it would have sometimes put in use".[88]

[91] I would answer that point in the same manner as Powys' colleague, Justice Powell did: "As to the novelty of this action, I think it no argument against the action; for there have been actions on the case brought, that have never been brought before, but had their

[85] *Racz v Home Office* [1994] 2 AC 45
[86] *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555
[87] HCVAP 2006/020 A (2007)
[88] (1703) 1 Smith's LC (13th edition) at 261

beginning of late years; and we must judge upon the same reason as other cases have been determined by".[89]

[92] Another judge, Ashhurst J in *Pasley v Freeman* made a distinction between cases new *in their principle* and those new *in the instance*. "Where the case is only new *in the instance*", he said, "and the only question is upon the application of a principle recognized in the law to such new case, it will be just as competent to courts of justice to apply the principle to any case which may arise two centuries hence as it was two centuries ago". [90]

[93] It will be clear from the reasons I have given in this judgment that enlisting or allowing the State as one who can sue public officers in the tort of misfeasance is in no way creating a new principle but is simply the logical application of the principles which have already been developed by the common law if not centuries ago then at least within the last decade or so. The logic and the principles of *Three Rivers* include the case before us and accepting the State as a claimant against its own (former) public officers is therefore, although a *novelty*, not an *extension* of the tort of misfeasance in public office.

[94] This conclusion relieves me of the duty to deal with the arguments that go to the point of whether it is necessary for the State to be able to avail itself of the tort of misfeasance in deserving cases or why it would be better if the State could not avail itself of such an action. I will nevertheless briefly deal with these important issues.

Does the State need the tort of misfeasance?

[95] My view is that the State can avail itself of this cause of action and that it is fair, just and reasonable that it can do so. I do not think, however, that it is absolutely necessary for the State to have the tort of misfeasance as a tool available in cases of allegedly corrupt public officers in order to get compensation from them.

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[89] Ibid at 264
[90] (1789) 3 TR 63

The criminal law

[96] It is not for a moment that I would wish to suggest that the criminal law or criminal prosecution would be an appropriate *alternative* for the tort of misfeasance. It is not, even though misconduct or misfeasance in public office constitutes a common law crime in many ways comparable to the tort. Although the criminal law provides one of the instruments for the State to "govern for the common good of the people" and the prosecution and sentencing of criminals is one of the State's sovereign powers, it is clearly meant to be used by unleashing the force of the law, the power of the sword if one wishes, or, simply put, to punish the wrongdoer in order to maintain law and order or the peace of the land. If it felt that that is the best way to deal with corruption in public office, I do not disagree. The point is, however, that criminal law should not be used by the State with the *main* objective of getting compensation for damages suffered by the State even though it is clear that such a result could be obtained through the backdoor of high fines or, where legislation allows it, through the side door of compensation orders. Apart from that, as Justice Anderson has pointed out, the prosecution and sentencing of criminals is, for very good reasons, not in the hands of the government of the day which functions as the political-executive managing branch of the State. Proper alternatives to the tort of misfeasance must therefore be found in the realm of the private law. Such an alternative has indeed been available for a long time[91].

Equity

[97] A public officer is supposed to use his powers for the common good of the people and not for his own selfish purposes. He is not allowed to use the office he holds or the powers he has to obtain any improper private advantage for himself.[92] "The larger interests of public justice will not tolerate, under any circumstances, that a public official

[91] See P.D. Finn, *Public Officers: Some Personal Liabilities*, in The Australian Law Journal Vol 51 at 316-318: Civil suits by the Crown [the English surrogate for the State] to recover profits from Crown servants were brought by way of English information for equitable relief on the Revenue side of the Exchequer

[92] Finn, oc at 316

shall retain any profit or advantage which he might realize through the acquirement of an interest in conflict with his fidelity as an agent".[93] Indeed, the relationship between the State and its public officers is comparable to that of principal and agent. The public officer is a fiduciary and has fiduciary duties.

[98] The fiduciary position of ministers in Belize is clearly reflected by their oath of office, as prescribed in Schedule 3 of the Constitution: "I do swear that I will bear *true faith and allegiance to Belize* [meaning the Sovereign State of Belize], and will uphold the Constitution and the law, and that I will conscientiously, impartially and to the best of my ability discharge my duties … and do right *to all manner of people* without fear or favour, affection or ill-will. So help me God".

[99] The duty to loyalty or allegiance is at the heart of any fiduciary relationship. "Broadly speaking … a fiduciary relationship is imposed by law in any case where the professional owes an exclusive loyalty to his principal's interests, and must put these above all others, including his own".[94] Equity proscribes the fiduciary not only from accepting bribes but also from any other unauthorized gain. Remedies for breach of fiduciary duty include compensation for any loss suffered (a so-called reparation claim) and disgorgement of gains wrongfully made. Equity goes even further than that: if the wrongfully obtained gains have been used to buy property the original claim for money can be converted into a proprietary claim (tracing)[95].

[100] In my view, the equity route will in most cases be the preferable private law approach for the State as equity can tackle all possible forms of corruption committed by public officers (even those that did not cause damage) and it would seem arguable that the burden of proof for deliberate breaches of fiduciary duty might be less heavy than the one in the tort action. And, clearly, the equity approach would seem to offer very effective

[93] *US* v *Carter* [1910] US 286 at 306
[94] *Clerk & Lindsell on Torts* (20th edition) at 627-628
[95] *Attorney General for Hong Kong v Reid* [1994] 1 AC 324; see also *Clerk & Lindsell on Torts* (20th edition) at 631-632 and Underhill and Hayton *Law of Trusts and Trustees* (18th edition) at 1128-1131

remedies, such as tracing, which are not available when the State sues in the tort of misfeasance.

[101] I do not agree with Justice Anderson where he suggests that in some cases the tort of misfeasance might be more effective because of the possibility that the courts will award exemplary damages. I do agree that the courts can indeed award such damages in misfeasance cases especially "when the wrongful conduct by the defendant which has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff".[96] But I do not think that that makes the tort more effective than an action in equity for the breach of the public officer's fiduciary duty; in equity any ill-gotten profit or gain can be taken away from the wrongdoer.

[102] It is interesting to note that Lord Millet in *Three Rivers,* describing the abuse of power necessary to establish the tort of misfeasance, made a comparison between the position of the public officer and that of the trustee. He remarked:

> "The analogy is closer than may appear because many of the old cases emphasise that the tort is concerned with the abuse of a power granted for the benefit of and therefore held in trust for the general public…. Every power granted to a public official is granted for a public purpose. For him to exercise it for his own private purposes, whether out of spite, malice, revenge, or merely self-advancement, is an abuse of the power."

[103] It would seem, then, that the tort of misfeasance and the breach of the public officer's fiduciary duty are not that far apart at least not when the State is involved. As both may give rise to compensation for damage, a claim for breach of fiduciary duty may very well lie in parallel with a claim in the tort of misfeasance. An overlap between equity and tort is however nothing new or unusual.[97] In modern times it regularly happens that claims are anchored on both the common law and equity. In this respect I share the view expressed by Scott VC in *Medforth v Blake*: "I do not, for my part, think it matters one jot

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[96] *Rookes v Barnard* [1964] AC 1129, 1226 and *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122

[97] Lord Browne-Wilkinson in *Henderson v Merritt Syndicate Ltd* (No.1) [1995 2 AC 145 at 205

whether the duty is expressed as a common law duty or as a duty in equity. The result is the same". [98]

Is the tort in good hands with the State?

[104] Then a few words on the submission that accepting the possibility of the State suing its own public officers, which action in accordance with the Constitution will be pursued by and in the name of the Attorney General, a politician, might open a Pandora's Box of witch hunts against political opponents of the government of the day when the independent Director of Public Prosecutions cannot be persuaded to bring criminal charges against them.

[105] I do appreciate that there seems to be a rather negative perception of politics in general and politicians in particular (not limited to this region). That is no secret; it is a well known fact. Be that as it may, the State and its officials, most of them politicians, have to govern. And they have to do so, as they undoubtedly generally seek to do, for the common good of the people. It would be naïve, however, to assume that government officials do nothing else but be good to the people. Earlier generations clearly did not think so. They did not assume that public officers will always act in the best interest of the people and never in that of their own or their political party. That is why we have a Constitution with fundamental rights for the people and the separation of powers. That is why we have laws with civil and administrative remedies and punishments. And that is why we have independent courts to enforce those laws. But on the other hand, we also cannot view the State and its officers as a Leviathan constantly lurking around and invariably eager to trample the rights and interests of anyone who stands in their way. If that has to be our perspective on the State, nothing positive would or could ever be done by it. There has to be a proper balance in how we view the State. Yes, the State has to be fair and it must be seen to be fair but it must also be able to function properly!

[98] [2000] Ch 86 at 102

The position of Attorney General

[106] It is true that the Attorney General is a politician. But he is also a lawyer. His role is a difficult one and requires him, as it is said, to adopt a schizophrenic approach within his overall public role.[99] He has to serve "two masters, the government and the law, and thus to combine the role of a politician with that of a lawyer. As a result he is sometimes expected to exhibit partisanship and to pursue the government's interest and at other times to be independent, impartial, upholding the public interest".[100] There are no firm boundaries between these two roles. "The difficulty lies in the fact that, within our pluralist political culture, the content of the public interest or even the means by which it might be ascertained is often deeply contested."[101] This uncertainty "poses a *problem* to the law officer who genuinely seeks to act in the public interest and provides an *opportunity* for the law officer who is minded to let party political interests intrude into areas where the public interest should prevail".[102]

[107] Having said all that, however, "the image of 'hired gun' can never entirely displace that of the 'high priest'".[103] Despite the doubts one might have in general about the motives of a government of the day to sue its political opponents, I do not think that there is anything improper in entrusting the Attorney General with seeking compensation for damages caused by allegedly corrupt or abusive public officers, current or former. The alternative (where there is no criminal prosecution) would be to do nothing. In my view, that is not an alternative at all. Moreover, far from creating or introducing "the softer option of civil liability" for "miscreants", as the minority puts it, today's majority ruling merely adds a common law layer to an option that, also in the opinion of the minority itself, already exists in equity. What the ruling in fact "offers", if one wants to use that word, is an extra tool for the State to fight corruption, to be used not instead of but in

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[99] Neil Walker, 'The Antinomies of the Law Officers', Chapter 6 of Maurice Suskind and Sebastian Payne (eds.), *The Nature of the Crown: A Legal and Political Analysis* (Oxford, Oxford University Press (1999) at 148
[100] Walker oc at 145 citing D. Woodhouse, 'The Attorney General' (1997) 50 *Parliamentary Affairs* 98
[101] Walker oc at 150
[102] Ibid
[103] Walker oc at 158

addition to other available tools. That that "will serve to erode rather than promote integrity in public life" is to me, I modestly confess, a rather perplexing conclusion.

[108] At the end of the day, the State has, as it should have, all the tools it needs to govern "for the common good of the people". It can make use of the criminal law through the independent Director of Public Prosecutions, it can use administrative law through the proper authorities and it can make use of the private law through its Attorney General. These legal tools can, depending on the circumstances of the case, properly be used either cumulatively or alternatively.

[109] All of this could be frightening in a State without the rule of law. But Belize is not such a State. Every Attorney General knows that. Equally, every Attorney General knows that an overzealous approach to political opponents merely based on spite, vindictiveness and political partisanship might one day bring him on the other side of the law. After all, the Attorney General too is a public official.

Conclusion

[110] Like Justices Bernard and Anderson, I agree with the final conclusion of the Court of Appeal that the State can sue the Appellants for misfeasance in public office. I have not dealt with the Indian case law which the Court of Appeal found helpful. I agree with the Appellants that that case law is irrelevant to the issue at hand. I have also not dealt with the State or its representative, the Attorney General, in its or his role as *parens patriae*. The public law powers flowing from that position as the guardian of the public interest cannot be used as a reason why the State can avail itself of the private law tort of misfeasance. The *parens patriae* powers of the State are part of its function as a repository of sovereignty and have in my view nothing to do with, and are separate from, the powers of the State in its corporate emanation.

Decision

[111] The appeal should be dismissed and the orders proposed by Justices Bernard and Anderson should be given.

Judgment of the Honourable Mr Justice Winston Anderson, JCCJ

Introduction

[112] For the purposes of this appeal it is necessary only to give a brief outline of the facts of the case. The Appellants are two former Ministers of the Government of Belize and the Respondent is the Attorney General of Belize. In a civil claim instituted in the High Court on 11 January 2009, the Attorney General alleged that within the last six months of being voted out of office in 2008, the first named Appellant, who was then the Minister with responsibility for State lands, signed and issued the necessary certificates to enable the sale of some 56 parcels of State lands to a private development company. The sale was procured by the second named Appellant who was then the Minister of Health and who had a beneficial interest in the company. The Attorney General further claimed that the sale price was significantly below market value thereby occasioning a loss of some $924,056.60 to the Government of Belize and that the two Appellants had acted with knowledge or were reckless that the transfer would cause that loss. He alleged that by these actions they had committed the tort of misfeasance in public office.

[113] Following on from the trial of certain preliminary issues before the Chief Justice and the Court of Appeal of Belize, it may be assumed for the purposes of this appeal, but only for these purposes, that the Appellants by virtue of the acts alleged, committed misfeasance in public office and that the Government of Belize suffered damage and loss as a consequence of that misfeasance. The only preliminary issue that remains to be settled concerns the competence of the Attorney General to sue. Conteh CJ ruled against, whilst the President of the Court of Appeal, Mottley P, in a judgment in which his brothers Sosa

JA and Morrison JA concurred, held in favour of entitlement to sue. It is from this judgment of the Court of Appeal that the Appellants appeal to this Court.

The Issue

[114] Accordingly, the issue on this appeal concerns a short and discrete point of law: is the Attorney General of Belize, acting on behalf of the State, competent to sue two former Ministers of Government for the tort of misfeasance in public office?

[115] It appears that the issue of whether an Attorney General may bring proceedings of this nature has never before been argued before a court in Belize, or in the Caribbean Community, or indeed in the Commonwealth. The recent unreported decision of the Court of Appeal of the Eastern Caribbean Supreme Court in *Southern Developers Ltd, Lester Bryant Bird, Robin Yearwood, Hugh Marshall Snr v The Attorney-General of Antigua and Barbuda*[104] assumed that the Attorney General could bring such an action but the point seems not to have been the subject of argument by Counsel or any analysis by the Court.

[116] Several decisions, most of which are of a vintage older than *Southern Developers Ltd,* could be read as implying that an Attorney General cannot bring such a suit because the tort was fashioned to avail individual members of the public injured by the abuse of power at the hands of a public officer. However, none of these cases involved the precise issue in dispute in this appeal and they are therefore of doubtful or at best limited assistance. *Dicta* suggesting that only individual citizens may sue in the tort of misfeasance are only helpful to the extent that they are intended to indicate the rationale for the existence of the tort and thereby to delimit its proper boundaries and effects.

[117] In fact there are *dicta* in the most authoritative English decision on the subject which could be taken to suggest that the tort has the broader purpose of providing "compensation to those who have suffered loss as a result of improper abuse of power":

[104] HCVAP 2006/020A (2007) ("*Southern Developers Ltd*").

Three Rivers District Council and Others v Bank of England (No 3)[105] per Clarke J whose analysis was upheld by the Court of Appeal and the House of Lords. On the precise question of competence to sue in respect of such abuse of power and responding to submissions which argued for a narrowing of the class of possible plaintiffs, Lord Steyn in the House of Lords warned that it "would be unwise to make general statements on a subject which may involve diverse situations. What was critical was that *any* plaintiff must have a sufficient interest to found legal standing to sue": *Three Rivers*[106]. However, it must equally be conceded that none of the judges in *Three Rivers* had to mind the precise point for decision in this appeal.

Guiding Principles

[118] Where any court, but particularly a court of final appeal, is faced with a novel point of law on which there is no controlling authority, the matter must be approached from the point of view of the guiding principles of logic, doctrine, and legal policy. In this case the guiding principles may best be examined by considering whether there is a preliminary or *prima facie* case for competence in the Attorney General to sue and, if so, whether there are nonetheless sufficiently strong reasons in logic, doctrine or legal policy arising from the peculiar nature of the tort of misfeasance in public office that would yet bar him from doing so.

***Prima facie* entitlement of the Attorney General**

[119] As I have earlier alluded, this case is proceeding on the basis that financial loss was sustained by the State of Belize as a result of the tortious abuse of public power by the Appellants. The Attorney General is clearly the proper official to bring civil proceedings to recover loss sustained by the State as a result of tortious conduct. Section 42 (5) of the Constitution (Chapter 4) requires that legal proceedings *for* or against the State must be taken, in the case of civil proceedings, in the name of the Attorney General. Section 19 (1) of the Crown Proceedings Act (Chapter 167) confers jurisdiction on the Court to

[105] [1996] 3 All ER 558 at p. 583 ("*Three Rivers*")
[106] [2000] 2 WLR 1220 at p. 1233 (emphasis added).

make any order and to give appropriate relief in any civil proceedings *by* or against the Crown as could be made between subjects.

[120] The civil proceedings alluded to in the Constitution and legislation clearly include claims in tort. Tort claims are in the legislative language, proceedings to obtain relief by recovery of money or by way of damages: Section 21, Crown Proceedings Act (Chapter 167). In the Jamaican case of *Attorney-General v Desnoes & Geddes, Ltd*[107] the competence of the Attorney General to sue in negligence for damage to a State vehicle was stated in very emphatic terms by Fox JA: "The Attorney-General is entitled, and indeed is under a duty, to sue any person whose negligence has caused damage to a vehicle of the public works department. ... If the negligence alleged was established, he would be entitled to a judgment".[108]

[121] Further, the State, acting through the Attorney General, clearly has a sufficient interest in the subject-matter of the litigation to found legal standing to sue. The injury was caused to the State by the deliberate and wrongful underselling of State lands. In its corporate aspect the State in Belize is a corporation sole with its own legal personality and with capacity to own land and to sue in contract and in tort in respect of injury to that land. The Attorney General as representative of the State, has standing to sue in respect of damage caused by tortious injury to State lands: See *British Columbia v Canadian Forest Products Ltd*[109] where the Supreme Court of Canada allowed for recovery of damages in civil proceedings for negligence and public nuisance on the basis that the Crown's entitlement was that of a private landowner of a tract of forest. This case is a clear indication of judicial acceptance that the State, as *parens patriae*, may sue in tort to recover economic loss for harm caused to State property.

[122] Given that the primary purpose of the law of torts is to provide compensation for loss sustained by the unlawful conduct of others, the position of the Attorney General as representative of the State in actions in tort combined with the legal personality of the

[107](1970) 15 WIR 492.
[108] *Ibid*. at p. 496.
[109] (2004) 240 DLR (4th) 1.

State in relation to State lands tends to suggest that the Attorney General, *prima facie*, has competence to sue in this case. However, this is by no means the end of the matter. Not all injuries caused by wrongful acts are compensable by tort law: *Lonrho Ltd and Another v Shell Petroleum Co Ltd and Another (No 2)*[110]. This may be a fact to be bemoaned rather than celebrated but it is still a fact. The critical question must therefore be faced: are the peculiar characteristics of the tort of misfeasance in public office a bar to suit by the Attorney General?

Nature and purpose of the tort of misfeasance

[123] The first argument proffered against the competence of the Attorney General to sue is that the tort was never intended for use by the State. Rather, it was said, the tort was developed to provide a remedy to private persons and other entities who, to use the graphic words of the Honourable Chief Justice in this case, "are asymmetrically powerless against public officials and officialdom": see *Attorney-General v Marin & Coye*[111]. Related to this is the "intentional" nature of the tort; misfeasance in public office is only established where it is shown that in abusing power the public official was actuated by "malice" or "bad faith" towards the private persons or other entities resulting in the loss or damage sustained.

[124] There can be little doubt that the tort owed its origin to such considerations. Although misfeasance in public office is traceable to the 17th century the tort appears to have been placed on a solid footing in the classic case of *Ashby v White*[112] which established that an action would lie by an elector who had been willfully denied a right to vote by a returning officer. Lord Holt CJ, with whom the House of Lords agreed, deemed the injury to the elector to be an invasion of his right for which the law was bound to provide a remedy.

[110] [1982] AC 173, at p. 187G
[111] Claim No. 41 of 2009, at para. 67
[112] (1703) 92 ER 126

Furthermore, to allow the action would "make publick officers more careful to observe the constitution of the cities and boroughs".

[125] During the intervening 300 hundred years the tort, though intermittent in its visibility, has been used to provide recourse and relief to citizens damnified by the misuse of power by a public official. The diligence of counsel for the Appellants has unearthed an impressive array of these authorities but for reasons I shall come to presently it suffices to make reference to only a few of them. In *Henly v Lyme Corpn*[113], Best CJ said: "Now I take it to be perfectly clear, that if a public officer abuses his office, either by act of omission or commission, and the consequences of that is an injury to an individual, an action may be maintained against such public officer". Maurice Kay L.J., in *Hussain v Chief Constable of West Mercia*[114] opined that misfeasance was a tort of obloquy and an intentional tort of considerable gravity; it was meant to redress the shame felt by a member of the public as a result of the abuse of power by the public official.

[126] There are cases from Australia, Canada and New Zealand to similar effect. In *Tampion v Anderson*[115] the Full Court of the Supreme Court of Victoria held that counsel assisting a Board of Inquiry was not liable for the tort of misfeasance in public office as he did not exercise a "public office". However Smith J went on to say that "to be able to sustain an action … a plaintiff must not only show damage from the abuse; he must also show that he was the member of the public or one of the members of the public, to whom the holder of the office owed a duty not to commit the particular abuse complained of". In the Canadian case of *Gersham v Manitoba Vegetable Producers' Marketing Board*[116] it was taken as settled law that "a citizen who suffers damage as a result of the flagrant abuse of public power aimed at him has the right to an award of damages in a civil action in tort".[117] And in *Garrett v The Attorney General*[118] the Court of Appeal of New Zealand

[113] (1828) 5 Bing 91.
[114] [2008] EWCA Civ 1205 at para. 20.
[115][1973] VR 715.
[116] (1976) 69 DLR 114.
[117] Per O'Sullivan JA at p. 123.
[118] [1997] 2 NZLR 332 at p. 350.

stated: "The purpose behind the imposition of this form of tortious liability is to prevent the deliberate injuring of members of the public by deliberate disregard of official duty".

[127] It is not necessary to pursue these pronouncements because it is conceded on all sides that the question of the competence by the Attorney General to sue was not in issue in any of these cases and because, more importantly, it is generally agreed that the characteristics and requirements of the tort of misfeasance in public office were, as far as English common law is concerned, systematically considered and authoritatively settled in *Three Rivers*[119]. Given that this Court attaches significant persuasive value to relevant decisions of the House of Lords as indeed we do the decisions of the Privy Council, (*Attorney General v Joseph and Boyce* CCJ Appeal No CV 2 of 2005; BB Civil Appeal No. 29 of 2004), it becomes necessary to examine the *Three Rivers* case in some detail.

[128] In *Three Rivers* some 6,000 investors who lost deposits when the fraudulently run Bank of Credit and Commerce International ("BCCI") collapsed, brought an action against Bank of England ("the Bank") for misfeasance in public office. They claimed that senior officials of the Bank had acted in bad faith in licensing BCCI in 1979 when they knew it was illegal to do so, and in failing to revoke BCCI's licence when they knew, believed, or suspected that it would probably collapse. Following an extensive examination of the relevant authorities the trial judge, Clarke J, decided as a preliminary issue that the Bank was not capable of being liable to the plaintiffs for misfeasance in public office since the plaintiffs' alleged losses were not in law capable of being caused by the Bank's acts or omissions.

[129] In the course of his judgment, Clarke J summarized his conclusions as to the ingredients of the tort thus:

> "1. *Misfeasance in public office*. (1) The tort of misfeasance in public office is concerned with a deliberate and dishonest wrongful abuse of the powers given to a public officer. It is not to be equated with torts based on an intention to injure,

[119] [1996] 3 All ER 558 (Clarke J); [2000] 2 WLR 1220 (House of Lords).

although, as suggested by the majority in *Northern Territory v Mengel*, 69 A.L.J.R 527, it has some similarities to them.

(2) Malice, in the sense of an intention to injure the plaintiff or a person in a class of which the plaintiff is a member, and knowledge by the officer both that he has no power to do the act complained of and that the act will probably injure the plaintiff or a person in a class of which the plaintiff is a member are alternative, not cumulative, ingredients of the tort. To act with such knowledge is to act in a sufficient sense maliciously: see *Menge*l 69 ALJR 527 at 554, per Deane J.

(3) For the purposes of the requirement that the officer knows that he has no power to do the act complained of, it is sufficient that the officer has actual knowledge that the act was unlawful or, in circumstances in which he believes or suspects that the act is beyond his powers, that he does not ascertain whether or not that is so or fails to take such steps as would be taken by an honest and reasonable man to ascertain the true position.

(4) For the purposes of the requirement that the officer knows that his act will probably injure the plaintiff or a person in a class of which the plaintiff is a member it is sufficient if the officer has actual knowledge that his act will probably damage the plaintiff or such a person or, in circumstance in which he believes or suspects that his act will probably damage the plaintiff or such a person, if he does not ascertain whether that is so or not or if he fails to make such inquiries as an honest and reasonable man would make as to the probability of such damage.

(5) If the states of mind in (3) and (4) do not amount to actual knowledge, they amount to recklessness which is sufficient to support liability under the second limb of the tort.

(6) Where a plaintiff establishes (i) that the defendant intended to injure the plaintiff or a person in a class of which the plaintiff is a member (limb one) or that the defendant knew that he had no power to do what he did and that the plaintiff or a person in a class of which the plaintiff is a member would probably suffer loss or damage (limb two) and (ii) that the plaintiff has suffered loss as a result, the plaintiff has a sufficient right or interest to maintain an action for misfeasance in public office at common law. The plaintiff must of course also show that the defendant was a public officer or entity and that his loss was caused by the wrongful act".[120]

[130] Both the Court of Appeal and the House of Lords upheld the essential elements of the judge's definition of the tort. In the House, Lord Steyn[121] outlined these requirements in logical sequence: (1) the defendant must be a public officer; (2) there must be the exercise of power as a public officer; (3) the public officer must either have acted out of malice i.e., specifically intending to injure a person or persons ("targeted malice"); or acted knowing that he had no power to do the act complained of and that the act would

[120] [1996] 3 All ER 558 at pp. 632-633.
[121] [2000] 2 WLR 1220 at pp. 1230-1234.

probably cause injury to the plaintiff ("untargeted malice"); (4) any plaintiff with a sufficient interest to found a legal standing to sue was competent to bring the action; (5) the plaintiff must prove that his loss was caused by the abuse of power; and (6) the damage must not be too remote.

[131] It will be seen that *Three Rivers* represented a significant departure from the origin and early development of the tort in several particulars that are relevant to the case before this Court. Most significant, the notion that the public officer must have acted with intentional malice towards a particular citizen or group of citizens thereby causing injury to the citizen or citizens was laid to rest. The tort was no longer one of obloquy in the sense of being meant to redress the infliction of intentional humiliation as a result of the abuse of power which feelings would, admittedly, be difficult to ascribe to the State. It was expressly stated that the essence or *raison d'être* of the tort was simply bad faith in the exercise of power by a public official which occasioned loss to the plaintiff, and that this could be equally evidenced through targeted malice as through an unlawful act done with improper motive i.e., where the public officer acts knowing that he has no power to do the act complained of and that the act would probably injure the plaintiff. Untargeted malice suffices. Read at face value, the criteria outlined by Lord Steyn for the bringing of an action in misfeasance, and which I accept, would appear to be satisfied in this case.

[132] Lord Hutton went further. Relying on the cases of *Tozer v Child*[122], and *Bourgoin SA and Others v Ministry of Agriculture, Fisheries and Food*[123], he agreed that damages could be recovered for misfeasance in public office where the defendant acted deliberately, not with the intent to harm the plaintiff but rather to benefit another, knowing that his action would injure the plaintiff. He quoted with evident approval the following statement by Mann J in *Bourgoin SA and Others v Ministry of Agriculture, Fisheries and Food*:

> "There is no sensible distinction between the case where an officer performs an act which he has no power to perform with the object of injuring A (which the defendant accepts is actionable at the instance of A) and the case where an officer performs an act which he knows he has no power to perform with the object of

[122] (1857) 7 E. & B. 377.
[123] [1986] QB 716.

> conferring a benefit on B but which has the foreseeable and actual consequence of injury to A (which the defendant denies is actionable at the instance of A). In my judgment each case is actionable at the instance of A…"[124]

[133] The preceding outline of what conduct is actionable has relevance to the case at bar. The mere fact that the Appellants may not have been actuated by malice towards the State of Belize or that the State of Belize could not be humiliated or shamed by the abuse of power seems to be immaterial. It is likewise of no consequence that the plaintiff is not an individual or group of individuals since it is perfectly possible for corporate entities such as companies and public authorities to sue: see *Three Rivers*; *Calveley and Others v Chief Constable of the Merseyside Police*[125]; *Bourgoin S.A. and Others v Ministry of Agricultur*e, *Fisheries and Food*[126]. Accordingly, all that appears necessary for the State to take action is that the Appellants intentionally undertook the unlawful act of underselling State lands with the improper motive of conferring a benefit on the development company knowing that the State of Belize would suffer injury as a consequence. All that is required, to repeat the words of Lord Steyn in *Three Rivers*, is that *any* plaintiff must have a sufficient interest to found legal standing to sue.

[134] There remain two important and interrelated strands to this first objection based on the nature of the tort. First, it is the case that the property of the State is unique or *sui generis* in that it belongs to all the citizens of the State for in this regard there can be no meaningful distinction between the State and the public at large. In *Three Rivers*, Lord Hobhouse noted that the tort was not generally actionable by any member of the public; "the Plaintiff must have suffered special damage in the sense of loss or injury which is specific to him and which is not being suffered in common with the public in general".[127]

[135] To press this point into service in order to deny competence in the State to sue, with respect, proves too much. It overlooks the critical fact that the State is a multilayered concept possessed of different legal facets. In particular contexts the State may, in

[124] [1986] QB 716 at p. 740.
[125] [1989] AC 1228.
[126] [1985] 3 WLR 1027.
[127] *Ibid*., at p. 1270.

addition to its other components, possess the legal personality of a private landowner able to sue and be sued in respect of nuisance and other tortious conduct: *British Columbia v Canadian Forest Products Ltd*[128]. On the facts of the present case, the State in Belize is a corporation sole with its own legal personality and with capacity to own the land in question and to sue in contract and in tort in respect of tortious infringement of its rights in respect of that land. The Attorney General as the entity constitutionally entitled to represent the whole of the public, must necessarily be in a different position to sue for the infringement of those rights than would an individual member of the public who would have suffered in common with the rest of society. As Lord Wilberforce put the matter in *Gouriet v Union of Post Office Workers*, "in terms of constitutional law, the rights of the public are vested in the Crown, and the Attorney General enforces them as an officer of the Crown".[129]

[136] The second suggestion is that the omnipotent State cannot, as such, be equated to the powerless individual and that infringement of the State's legal interests is therefore not to be protected in the ways that those of an individual are protected. This is an apparently persuasive viewpoint but it does not give due regard to evolution in the law of torts as partially evidenced by the passage of the Crown Proceedings Act (Chapter 167). It is widely agreed that this Act renders the Crown, within the categories and to the extent therein prescribed, subject to liabilities in tort "as if it were a private person of full age and capacity". This was revolutionary in 1947 inasmuch as it swept away the earlier common law regarding the immunity of the Crown from suit in tort. To this day, what is emphasized in judicial precedents and the legal literature is Crown liability in tort almost to the exclusion of the competence of the Crown to sue in tort.

[137] But the Crown does possess the entitlement to sue in order to protect its rights and this competence is recognized in and largely controlled by common law. Under the earlier law, the Crown had a number of prerogative remedies uniquely available to it but could waive the prerogative remedies and adopt the remedies which were available to subjects:

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[128] (2004) 240 DLR (4th) 1.
[129] [1978] AC 435 at p. 477 E-F.

Chitty, *Prerogatives of the Crown*[130]. The old remedies have now either been abolished or have fallen into desuetude and tort actions by the Crown are now brought in accordance with the ordinary procedures available to citizens: Hogg & Monahan, *Liability of the Crown*[131]. In short, in contemporary society, in proceedings by and against the Crown, the rights of the parties are to be as nearly as possible the same as in a suit between individual persons.

[138] The competence of the State to resort to civil law as any ordinary person in order to enforce its rights is emphasized in Belize and other Member States of the Caribbean Community. The bifurcation in the civil and criminal law facets of the legal personality of the State is represented by the constitutional vesting in the Attorney General of the competence to take civil proceedings and in the Director of Public Prosecutions of the power to pursue criminal prosecutions. Whilst in England the office of the Attorney General retains its original supervisory jurisdiction over both criminal and civil proceedings the transplant of that office into the Westminster style constitutions of the Caribbean divested the Attorney General of that jurisdiction, with limited exceptions in Antigua and Barbuda, and Barbados.

[139] Thus, as a general rule, the Attorney General has no control over the initiation of criminal prosecutions; the decision of the Director of Public Prosecutions on whether to prosecute is based upon a wide range of policy considerations including his independent judgment of whether there exists evidence to prove the case to the requisite criminal standard and whether prosecution would be in the public interest. The Attorney General has no authority to direct the Director of Public Prosecutions on this matter; even in the two Commonwealth Caribbean States where the Attorney General retains limited supervisory functions over criminal proceedings (Antigua and Barbuda Constitution, Section 89; Barbados Constitution, Section 79A) this competence does not cover the present case. The decision of the Director of Public Prosecutions on whether to prosecute is, in general

[130] (1820), at p. 245.
[131] (3rd edition, 2000) at p. 49.

terms, beyond the scope of judicial review: *Leonie Marshall v DPP*[132]; *Millicent Forbes v Attorney-General*[133].

[140] This means that the Attorney General is confined to taking civil proceedings to seek redress for harm done to the corporate rights of the State in circumstances where the Director of Public Prosecutions does not undertake criminal prosecution. In instances where there are concurrent proceedings by virtue of a decision of the Director of Public Prosecutions to bring a criminal prosecution the Court in furtherance of practical justice and to prevent abuse of process, will consider any application from a party to the litigation to stay the civil proceedings.

[141] In sum, there is nothing in the nature and purpose of the tort that would displace the *prima facie* case of competence in the Attorney General to sue. There is no requirement that the bad faith or malice of the Appellants be directed at the State or that the State should suffer humiliation as a result. There is nothing in the nature of the State property in question that would prevent suit. On the other hand there are in the present circumstances, good reasons for equating the position of the State with that of any plaintiff who has suffered loss as a consequence of the tortious action of another.

Relationship of Ministers to the Crown

[142] During the course of this litigation a second line of argument was advanced to proscribe suit by the Attorney General. It was said the relationship of Ministers of Government to the Crown is such as to preclude the Attorney General, himself a Minister, from suing in the tort of misfeasance in public office. Implicated in this line of reasoning are the notions of collective Cabinet responsibility and of ministers being representatives of the Crown. It was said that the relationship of the Crown to its functionaries is such that any breach by the functionary must be vindicated in other ways.

[132] [2007] UKPC 4.
[133] [2009] UKPC 13.

[143] With respect this argument again misses the fundamental point of the dual nature of the State. In its political character as Sovereign, the State is the supreme "authority" within a defined territory which in the monarchical system of the United Kingdom gave rise to the maxim, "The Queen can do no wrong": see further Professor Dicey, *Introduction to the Study of the Law of the Constitution*[134]. Those through whom the Sovereign acts can and do commit wrongs against the law and the State may in its corporate character, be vicariously liable for such wrongs. However, the actual wrongdoer is the offending official of the State and this person, in relation to the State, continues to bear personal responsibility for his wrong: *Lister v Romford Ice and Cold Storage Co Ltd*[135]; *Boyle v Kodak*[136].

[144] There is therefore nothing to prevent a current chief law officer from bringing proceedings on behalf of the State against present or former ministers, including a former chief law officer, for abuse of public power affecting State interests. As the Sovereign can do no wrong, the State could not have instructed or required an abuse of power; the abuse was a personal failing on the part of the public officer. In my respectful opinion Thomas JA speaking for the Court of Appeal of the Eastern Caribbean Supreme Court was entirely correct in surmising in litigation similar to the one before us that, "it is reasonable to infer that the actions of the former Attorney General cannot be binding on the current Attorney General if it established, as alleged, that he acted in misfeasance or in breach of his fiduciary duties": *Southern Developers Ltd v The Attorney-General of Antigua and Barbuda*[137].

[145] It is important that it be emphasized that whilst the individual public official remains personally liable for his wrongful act, the individual plaintiff who suffers injury or damage as a result of that wrongful act may in addition or as an alternative to proceeding against the public official, also be entitled to proceed against the State in vicarious liability. This is on the premise enunciated in the Crown Proceedings Act adopted in

[134] (1965), at pages 24-25.
[135] [1957] AC 555.
[136] [1961] 1 WLR 661 (House of Lords).
[137] HCVAP 2006/020A at paragraph 35.

England and reproduced in Belize that the proceeding is: "in respect of torts committed by its servants or agents"[138]. However, given that the primary liability is that of the public official and that the liability of the State is of a vicarious nature, it follows that an award of exemplary damages against the State is likely to be exceedingly rare.

Alternative remedies

[146] A third argument has been urged upon us namely, that the State has other avenues available to it to deal with dishonest abuse of power which causes it loss and that this answers any need for the Attorney General to be able to sue for misfeasance. In the High Court proceedings in this case the Honourable Chief Justice referred to the taking of disciplinary proceedings and the bringing of criminal prosecutions. I am not persuaded by this line of argument for two reasons.

[147] First I have serious doubts that genuinely alternative actions avail the State in the circumstances before us. Disciplinary proceedings do not necessarily address the question of recovery for loss and may not even be available in a case such as this where the relevant public officials are no longer ministers of Government or members of parliament. Criminal prosecution is obviously not an alternative *in kind* to civil proceedings: the criminal law is intended to protect fundamental public interests and to punish wrongdoers whereas the primary purpose of tort law is to vindicate civil rights and compensate the plaintiff for loss. In consequence the elements that must be proved and the standard to which proof is required differ significantly between tort and criminal proceedings.

[148] It may be the case that the State is able, on facts as those assumed in this case, to bring proceedings for breach of contract or for breach of fiduciary duty: see, generally, *Garrett v Attorney-General*[139]. However, the availability of multiple causes of action in respect of a single unlawful act is by no means an unfamiliar feature of civil proceedings: *Clerk &*

[138] Section 4 (1).
[139] [1997] 2 NZLR 332.

Lindsell on Torts[140]. Each cause of action will have its own peculiar requirements and measure by which recovery can be awarded. For example, it is possible that damages for breach of contract may not be measured in the same way as damages for breach in tort; exemplary damages may be awarded in the tort of misfeasance in public office but may not be available in action for breach of fiduciary duty. An injunction may be sought rather than damages for breach of fiduciary duty where the State wishes to enlist the assistance of the civil courts in order to restrain commission of misfeasance: *Attorney-General v Bastow*[141]. Where the State desires to trace property purchased by bribes taken by a public official, an action in breach of fiduciary duty may be more useful than suing in the tort of misfeasance: *Attorney-General for Hong Kong v Reid*[142].

[149] In the end, the cause of action preferred by the Attorney General will be a function of his assessment of the relevant facts, the remedy desired, and the likelihood of success in taking one kind of proceeding as against another. In circumstances such as those before us, for instance, an Attorney General could quite reasonably decide to initiate an action for the tort of misfeasance in public office if he considers that an award of exemplary damages was appropriate even though this might mean having to satisfy a heavier evidential burden than would have been the case had he proceeded for breach of fiduciary duty. For my part I am content to leave the decision of the type of civil proceedings to be taken to vindicate the State's corporate interests in the hands of the Attorney General where it properly belongs.

[150] Secondly, the question of availability of alternative causes of action cannot logically be determinative of the competence of the Attorney General to sue in misfeasance. Such competence is a function of the nature and *raison d'être* of the tort of misfeasance in public office. If the intrinsic essence of the tort is such that the Attorney General has no competence to sue, such a fact must logically be impervious to the question of whether he has other causes of action available to him. On the other hand the mere fact that other

[140] (19th edition, 2006) at pp. 1-6.
[141] [1957] 1 QB 514.
[142] [1994] 1 AC 324.

causes of action are available cannot rob the Attorney General of any competence he has to bring proceedings in tort. In short, the arguments regarding alternative remedies would appear as an exercise in strict logic to be immaterial to the question before this Court.

Political vendettas

[151] Finally, I do not share the view of counsel for the Appellants that recognition of a right in the Attorney General to sue in the tort of misfeasance would lead to the unleashing of political vendettas in Belize. Attempts at political vindictiveness are much more likely through the use of the criminal law system or indeed through the use of other civil law actions that no one doubts are available to the State. Indeed, the high standards of proof required to show malice and bad faith will necessarily act as internal constraints against an overzealous Attorney General eager to bring unmeritorious proceedings in the tort against his political opponents. But it must not be assumed, and certainly this Court cannot proceed on the assumption that an Attorney General sworn to uphold the law and Constitution of Belize will necessarily abuse his office in the way contemplated. If an Attorney General were shown to be engaging in such abuse I apprehend that the law has the means to confront him.

Conclusion

[152] I concede that an action of the kind initiated by the Attorney General in this case is to all intents and purposes unprecedented and that from one perspective centuries of forensic thought and assumptions could be taken to lean against his proceeding. I equally admit that to allow this suit could have significant implications for the role of the State in the law of torts. To recognize competence in the Attorney General to bring this suit naturally raises the prospect of the Crown suing, possibly as *parens patriae*, in a host of other torts including trespass, nuisance and negligence. However these are matters for another day. What to my mind is presently obvious is that none of these concessions can be a sufficient reason to deny the logic of the developments in the tort of misfeasance in public office which have in this case converged with the evolution of the corporate nature

of the State in the law of torts. To the contrary these developments may well portend the welcome emergence of a new matrix of causes of action hitherto frozen in their historical crypts and now animated by judicial imprimatur.

[153] In fine, I am of the opinion that the Attorney General is competent to bring this action in the tort of misfeasance on behalf of the Crown against the Appellants in order to recover compensation for the loss sustained as a consequence of their alleged misfeasance in public office. Accordingly, I would dismiss this appeal and affirm the decision of the Court of Appeal to reinstate the Claim Form of the Respondent. I would also grant costs to the Respondent in this appeal.

[154] I am grateful to the sterling industry of counsel which has rendered significant assistance to the Court in this case.