

IN THE EASTERN CARIBBEAN SUPREME COURT  
IN THE HIGH COURT OF JUSTICE  
MONTserrat  
(CIVIL)  
A.D 2021



CLAIM NO: MNIHCV2018/0023

BETWEEN:

KESTON RILEY

and

HONOURABLE ATTORNEY GENERAL  
DIRECTOR OF PUBLIC PROSECUTIONS

Defendants

**Appearances:**

Mr. Warren Cassell for the claimant  
Mrs. Sherasmus Evelyn for the defendants

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2021: July 12  
2021: July 22  
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**Judgment**

**John, J. (Ag):** On the 22<sup>nd</sup> July, 2021 I dismissed the action brought by the Claimant and indicated that I would provide written reasons at a later date. This I now do.

1. This action began by the filing of a fixed claim form pursuant to Part 56.7 of the of the Civil Procedure Rules 2000 'CPR'. The claim is grounded in the tort of misfeasance in public office by a public official namely the Director of Public Prosecutions ("DPP").
2. In the claim the following remedies are sought:
  - i. A declaration that the claimant is entitled to damages pursuant to section 7(13) of the Montserrat Constitution Order 2010 ("the Constitution") for having suffered a punishment (i.e. 6 weeks in prison) due to a miscarriage of justice.

- II. An order that the defendants do pay compensation to the claimant who having been convicted of an offence and had that conviction reversed on the ground that there was a miscarriage of justice such compensation in the form of damages, and to include vindictory damages, to be assessed;
  - III. A declaration that pursuant to section 6(1) of the Montserrat Constitution Order 2010 ("the Constitution") that the claimant is entitled to compensation for breach of his right not to be deprived of his personal liberty.
  - IV. An order that the defendants do pay compensation to the claimant for breach of his right not to be deprived of his personal liberty such compensation in the form of damages, and to include vindictory damages, to be assessed;
  - V. A declaration that the second defendant as a public officer has been guilty of misfeasance in public office by sustaining and pursuing a charge against the claimant for which he had undertaken to withdraw and did in fact withdraw
  - VI. An order that the second defendant do pay damages to include exemplary damages to the claimant for the said misfeasance in public officer.
  - VII. Cost pursuant to CPR 2000 r. 56.13(5) or as otherwise agreed.
3. In support of his claim, the claimant swore an affidavit in accordance with CPR 56(7) on 12<sup>th</sup> June, 2018 and filed on 14<sup>th</sup> June, 2018. At the case management hearing on Friday 9<sup>th</sup> July, 2021 leave was granted to the claimant to file a supplemental affidavit. That supplemental affidavit was filed on the 12<sup>th</sup> day of July 2021.

4. By an indictment filed on the 24<sup>th</sup> October, 2016 under the hand of the second defendant as DPP, several charges were preferred against the claimant and one other person.

### The Factual Background

5. On the 22<sup>nd</sup> November, 2016 the claimant and his co-accused appeared before His Honour Justice Ian Morley. The trial was adjourned to the next sitting of the assizes. Prior to the adjournment, there was an exchange between Bench and Bar concerning the severed counts on the indictment. The result was a fresh indictment was filed by the second defendant on the 20<sup>th</sup> March, 2017. That indictment contained five counts whereas the earlier indictment contained nine counts. The first indictment "2016" contained three counts of conspiracy, four counts of fraudulent conversion and two counts of theft.
6. The "2017" indictment contained three counts of conspiracy and two counts of theft. The four counts of fraudulent conversion were not included in this new indictment. The claimant has asserted that he was forced to plead guilty to a charge of fraudulent conversion contrary to an undertaking given to the Court by the second defendant.
7. The claimant was sentenced to two (2) months imprisonment. He appealed against his conviction and sentence. A copy of the Court of Appeal's transcript was appended to his affidavit as exhibit 3.
8. The second defendant relied on two affidavits 6<sup>th</sup> July, 2018 and 12<sup>th</sup> November, 2019. In those affidavits the second defendant joined issue with most of the claimant's averments save and except to the extent of the matters deposed in paragraph 6,7 and 8 of his first affidavit where he deposed as follows:

*Paragraph 6.... 'There was never an undertaking given to Jervaine Greenaway, the Claimant or anyone else that the Crown was not proceeding with any charge(s).'*

*Paragraph 7....'Another indictment (the second indictment) was preferred which contained three counts of Conspiracy and two counts of Theft. It is denied that this in itself is evidence of an undertaking not to proceed.'*

*Paragraph 8... 'The second indictment was necessary so that the charges could be recorded. The second indictment was filed before the court on the morning of*

*the proposed trial. The counts of Fraudulent evasion were excluded from the second indictment. However, there was no action taken regarding the first indictment. There was no indication given to the Court that the Crown was offering no evidence in relation to any of the counts on the first indictment. At no time were any of the charges on the first indictment withdrawn at Court. Filing of the second indictment was merely a reordering of the Crown's case.'*

9. Section 46 of the Constitution of Montserrat provides as follows;
- i. There shall be a Director of Public Prosecution for Montserrat, whose office shall be a public office.
  - ii. The Director of Public Prosecution shall have the power, in any case in which he or she considers it desirable to do so-
    - a) to institute and undertake criminal proceedings against any person before any court in respect of any offence against any law in force in Montserrat;
    - b) to take over and continue any such criminal proceedings that have been instituted by any other person or authority; and
    - c) to discontinue at any stage before judgement is delivered any such criminal proceedings instituted or undertaken by himself or herself or by any other person or authority.
  - iii. ....
  - iv. The powers conferred on the Director of Public Prosecution by subsection (2)(b) and (c) shall be vested in him or her to the exclusion of any other person or authority; but where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority at any stage before the person against whom the proceedings have been instituted has been charged before the court.

**Right to sue the Crown**

**The Claim against the Honourable Attorney General**

10. The Attorney General is sued pursuant to the provisions of the Crown Proceedings Act CAP 0206.

### **The Hearing**

11. Both parties agreed that their affidavits would stand as evidence in chief subject to the right to be cross examined.
12. In response to a question from Ms. Evelyn, Counsel for the defendants, that the second defendant never told him that he was not proceeding with the counts of evasion of custom duties, the claimant asserted that the second defendant did tell him that he was not pursuing those counts.
13. In answer to Mr. Cassell, the claimant said that at the case management hearing on the 22<sup>nd</sup> October, 2016 it was his understanding that the fraudulent conversion charges were dropped.
14. The second defendant under cross-examination by Mr. Warren Cassell said *inter alia*;
  - I never gave an undertaking that the fraudulent evasion charges would be dropped.
  - Counsel then referred the second defendant to page 28 of the transcript of the Court of Appeal appended to the affidavit of the claimant.

### **Court of Appeal to DPP:**

- DPP, I am certain you are not submitting to the Court that you had intended to proceed with both the conspiracy and fraudulent evasion charges against Mr. Riley.

### **DPP to Court of Appeal:**

- Far from it but-
- The second defendant admitted that the '2017 indictment' did not contain any counts of fraudulent evasion and he intended to proceed on the second indictment, that is to say the '2017 indictment'.
- He further admitted that an application for leave to the Privy Council was refused but under re-examination explained that the application was made out of time.

- In answer to the Court the Second Defendant said that he did not proceed on the '2017 indictment' but that indictment was never withdrawn.

### Submissions

15. I have carefully considered the submissions of both parties which I have found to be very instructive. However, it is of paramount importance in a claim of this nature that the Claimant establishes misfeasance. I now set out the nature of the tort of misfeasance.

### Misfeasance

16. Misfeasance in public office ("MIPO") is an intentional tort based on proof of malice.<sup>1</sup> It is a rather obscure tort typically confined to public authority liability. 'The policy behind the existence of the tort seems to be a punitive one designed to ensure that the highest standard of conduct are maintained by public officials'.<sup>2</sup> MIPO consists of the purported exercise of some power, authority or function by a public officer otherwise than in an honest attempt to perform the functions of his office which results in loss to a claimant.<sup>3</sup> The peculiarities of the tort have been examined in a number of authorities dating as far back as the early eighteenth century<sup>4</sup>, and subsequently in a number of Commonwealth jurisdictions including the Caribbean.
17. Despite ambiguities as to whether the tort actually existed<sup>5</sup> Lord Diplock considered it to be 'well established' in *Dunlop v Woollahra Municipal Council*.<sup>6</sup> MIPO has been the cause of action in the landmark case of *Three Rivers District Council and others v Bank of England*. The *Three Rivers DC* case gave their Lordships an opportunity to 'comprehensively review the law'<sup>7</sup> and consider the requirements of the tort. This they did in an 'extremely helpful and instructive'<sup>8</sup> judgment taking account of the legal issues as to the correct test for MIPO.
18. In a more recent judgement from Belize, *Florencio Marin and Jose Coye v The Attorney General of Belize*, the Caribbean Court of Justice (CCJ) further examined the two limbs of the tort after a meticulous consideration of the findings in *Three Rivers DC*. In that case, the CCJ was required to determine whether the Attorney General of Belize could bring an action on behalf of the State for the tort of MIPO against two former government ministers.
19. In *Florencio Marin*, it was claimed against both defendants, former Ministers of Government, that they committed the tort of MIPO in relation to the sale and transfer of some 56 parcels of National

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<sup>1</sup> K.M. Stanton, *The Modern Law of Tort* (Sweet & Maxwell 1994) 469

<sup>2</sup> *Ibid* 469

<sup>3</sup> Brennan J in *Northern Territory of Australia v Mengel* [1995] at pg. 357

<sup>4</sup> *Ashby v White* [1703] 92 ER 126

<sup>5</sup> *Ashby v White*

<sup>6</sup> [1982] AC 158

<sup>7</sup> Winfield & Jolowicz on Tort, pg. 358

<sup>8</sup> Conteh J in *Attorney General v Florencio Marin & Jose Coye* [2009] at para 35

Lands being the property of the Government of Belize. Conteh CJ as he then was, referred specifically to the claim against both defendants that they wrongly and in breach of the National Lands Act – Chapter 191 of the Laws of Belize, Revised Edition 2000, arranged and procured the transfer of the said 56 parcels of National Land owned by the claimant for a price which the defendants knew was less than the value of the said land with knowledge that, or reckless that, the consequence of disposing of the National Land at the price would cause damage to the claimant. It was further claimed that the conduct of the defendants jointly and severally, was in bad faith and constituted MIPO.<sup>9</sup>

### **Ingredients of the Tort of Misfeasance in Public Office**

20. Misfeasance in public office has been described as 'a developing tort...the precise scope of which is not yet settled'.<sup>10</sup> The essential elements of the tort were summarized in Clarke J's judgement at first instance<sup>11</sup> and endorsed by both the Court of Appeal and the House of Lords. It provides a thorough understanding of the requirements of the tort and is later simplified into a logical sequence in Lord Steyn's lead judgment in *Three Rivers DC*.

- i. 'Misfeasance in public office is concerned with the deliberate and dishonest wrongful abuse of the powers given to a public office.
- ii. Malice, in the sense of an intention to injure the plaintiff or a person in a class to which the plaintiff is a member, and knowledge by the officer...that he has no power to do the act complained of...the act will probably injure the plaintiff or a person in a class to which the plaintiff is a member....are alternative not cumulative ingredients of the tort.
- iii. The officer knows that he has no power to do the act complained of. To satisfy this requirement it is sufficient that he 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
- iv. For the purposes of this 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

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<sup>9</sup> [2009] Claim No. 41 of 2009 Belize Supreme Court at para 3

<sup>10</sup> S. A. de Smith, Lord Woolf and J. Jowell, *Judicial Review of Administrative Action* 5d ed., (Sweet & Maxwell, 1995) 784.

<sup>11</sup> *Three Rivers* [1996]

sufficient if he has actual knowledge that his act will probably damage the plaintiff or such a person, or in circumstances 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.

- v. 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.
- vi. Where a plaintiff establishes (i) that the D intended to injure the plaintiff or a person in a class of which the plaintiff is a member (limb one) or that the D 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 a sufficient right or interest to maintain an action for MIPO 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".<sup>12</sup>

21. In the House of Lords, Lord Steyn provided a comprehensive and methodical analysis of these requirements which are worth mentioning as his statements are regarded as 'a masterly analysis of the tort'<sup>13</sup> '...the requirements of the tort (are as follows) in a logical sequence of numbered paragraphs:

- i. *The defendant must be a public officer*

*It is the office in a relatively wide sense on which everything depends. Thus a local authority exercising a private law function as a landlord is potentially capable of being sued (See Jones v Swansea CC)*

- ii. *The second requirement is the exercise of power as a public officer*

*...the conduct of the officials (ought to be) in the exercise of public functions...it is not to be disputed that the principles of vicarious liability apply as much to MIPO as to other torts involving malice, knowledge or*

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<sup>12</sup> *Florencio Marin and Jose Coye v AG Belize* [2011] at para 29 per Justice Winston Anderson quoting the judgment of Clarke J at first instance in *Three Rivers DC* [1996]

<sup>13</sup> The Honourable Justice Abdulai Conteh



intention (See *Racz v Home Office* [1994])

iii. *The third requirement concerns the state of mind of the defendant.*

...first there is the case of targeted malice, the second involves 'knowledge on the part of the defendant that his conduct is unlawful (untargeted malice)'<sup>14</sup>

22. Two further points were included in the judgment of Anderson J<sup>15</sup> to reflect that any plaintiff with a sufficient interest to found a legal standing to sue was competent to bring the action; that the plaintiff must prove that his loss was caused by the abuse of power and the damage must not be too remote.
23. The state of the mind of the defendant is critical in establishing the tort and deserves further explanation to highlight the judicial approaches taken in determining what state of mind is required. As mentioned above, Lord Steyn observed that there were 'two distinct forms of liability which could potentially arise. In practice, 'the second form of liability indicates that while foreseeability is not sufficient, subjective recklessness in the sense of turning a blind eye to the consequences of the act is enough to establish the requisite mental element if the tort; an omission may also suffice.'<sup>16</sup> Lord Hobhouse held that the features of the tort had to found in the origin and in the consequence. He eagerly noted that the official must have dishonestly exceeded his powers and must have caused loss to the plaintiff which has the requisite connection with his dishonest state of mind.
24. This assertion was confirmed in the joint dissenting judgment of de la Bastide J and Saunders J in the *Florencio Marin*<sup>17</sup> case where they agreed that 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 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. Lord Millett considered the core concept of the tort to be abuse of power from which stemmed

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<sup>14</sup> Vivienne Harpwood, *Modern Tort Law* (7<sup>th</sup> edn, Routledge 2009) 8-9

<sup>15</sup> *Florencio Marin and Jose Coye v AG Belize* [2011] at para 130


<sup>16</sup> *Markesinis and Deakin's Tort Law* (6<sup>th</sup> edn Clarendon Press 2008)

<sup>17</sup> [2011] CCG 9 (AJ)

other concepts such as dishonesty, bad faith, and improper purpose. But he did not share the view of Lord Steyn and Lord Hutton and instead viewed the two limbs of the tort as 'different ways in which the necessary element of intention is established. This is established in the first case by evidence and by inference in the latter.

### Conclusion

- Having considered the several authorities, this Court is of the view that the Claimant has failed to establish an entitlement to any of the relief sought as the evidence that he has put forward falls short of establishing misfeasance by the Director of Public Prosecutions. Accordingly the claim is dismissed. As indicated at the dismissal of the matter, I made no order as to costs.



**Stanley John**  
High Court Judge (AG)