[2017] JMCA Civ 27

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 56/2012

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA

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

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

Charles Piper QC and Miss Marsha Locke instructed by Charles E Piper and Associates for the 1st respondent

Garth McBean QC and Mrs Jennifer Scott-Taggart and Jonathan Morgan instructed by DunnCox for 2nd, 3rd and 5th respondents

Michael Hylton QC and Miss Melissa McLeod instructed by Hylton Powell Associates for the 4th Respondent

18, 19 March, 8, 9, 10 June 2015 and 31 July 2017

PANTON P

[1] I have read the reasons for judgment that have been written by my learned brother Brooks JA, and wish to state that I agree with them in large measure and with the manner in which he suggests the appeal should be determined. We differ in respect of the counter-notice of appeal and I shall briefly state my reasons therefor.

[2] The ground stated in the counter-notice of appeal reads thus:

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

[3] From this it will be seen that the appellant Clarke is accepting the ruling in his favour by the learned trial judge, but is complaining that the judge discussed the question of disclosure without there being an issue raised. In my opinion, this is, with the greatest respect, frivolity at its highest. A judge cannot be straight-jacketed in a matter of this nature. He is entitled to make such comments as he sees fit in the circumstances. The fact that he may make a comment which irks a successful party does not give an entitlement to judgment on appeal.

[4] No authority is needed for me to say that a Cabinet Minister in Jamaica ought not to use his public office for private gain. Where such a situation arises, it is not just the Prime Minister or the Cabinet that is to be informed. Parliament is to be informed,

as that is the proper forum for the public to become aware. In the instant case, if disclosure had in fact been made, it would be a matter of public record so the appellant Clarke would have been expected to bring this to the attention of the Court at the hearing of the appeal, to show that the learned judge was indeed wrong in his reasoning and conclusion.

[5] In the circumstances, I am of the opinion that the counter-notice of appeal ought to be dismissed on the ground that it is a very frivolous appeal, and costs ought to be awarded to Western Cement.

[6] I wish to add that the trial judge did an excellent analysis of the huge mountain of facts, and applied the law correctly. My learned brother Brooks JA has dealt adequately with the issues and there is no reason for me to comment further.

DUKHARAN JA

[7] I have read the draft judgment of Brooks JA. I agree with his reasoning and conclusion and have nothing further to add.

BROOKS JA

[8] The appellant, Western Cement Company Ltd (WCC) is dissatisfied with a judgment by Sykes J, handed down on 16 March 2012. In his decision, the learned trial judge gave judgment for the respondents herein on the claim, and judgment to the 1st respondent, National Investment Bank of Jamaica (NIBJ), on its counter-claim against

WCC and three of WCC's directors, who are not parties to this appeal. The counter-claim arose from the failure by WCC to repay financing, which NIBJ had provided to WCC. Repayment had been guaranteed by WCC's directors, or, at least some of them.

[9] The formal order of Sykes J's judgment states, in part:

> "1. Judgment for the First, Second, Third, Fourth and Fifth [Respondents] on the claim;
>
> 2. Judgment for [NIBJ] against [WCC and the directors] in the sums of US$7,918,489.12 and J$9,533,955.14 on the counterclaim with interest on the sum of US$582,398.69 at the rate of 13% per annum on the sum of US$3,258,722.37 at the rate of 14% per annum and on the sum of US$4,077,368.06 at the rate of 12% per annum from June 1, 2010 to the date of Judgment;
>
> 3. Stay of execution granted for six (6) weeks."

[10] WCC asserted, in its appeal, that the learned trial judge misapplied the relevant law, particularly in relation to the tort of misfeasance in public office and to the duties that NIBJ, as an investment banker, owed to WCC. WCC also contended that Sykes J misunderstood some of the factual issues.

[11] The 5th respondent, Ms Kirby Clarke, has filed a counter-notice of appeal. She asserted that the learned trial judge was in error in one of his findings in respect of the matter. She contended that the issue on which the finding was made, was not one for resolution by the learned trial judge.

WCC's case

[12] The backdrop to WCC's case is the industry concerned with the manufacture and sale of calcium oxide, which is commonly known as lime or quicklime. Quicklime is processed from limestone, which is to be found in abundance in Jamaica. The process involves burning the limestone in a kiln. Quicklime is said to be a very versatile product. It is, among its many purposes, an essential element in the processing of bauxite.

[13] The bauxite industry uses large quantities of quicklime. The main bauxite mining and processing companies in Jamaica, at the relevant time, were Jamalco, Alcan and Alpart. Those companies produced some of their quicklime needs, but also purchased the commodity from outside sources. Jamalco was the largest consumer of quicklime in Jamaica.

[14] WCC was engaged in the mining of limestone and the manufacture of quicklime. The company conducted its operation in Maggoty in the parish of Saint Elizabeth. The company was formed in 1992, but by June 2003 had been placed into receivership by NIBJ, as a result of its failure to repay the debt owed to NIBJ.

[15] After being placed in receivership WCC, and two of its directors, filed a claim in the Supreme Court against these respondents. Two other defendants were named in the claim but WCC did not pursue the claim against those persons. WCC's directors abandoned their claims against all the defendants.

[16] WCC alleged that the respondents conspired to ruin its business by preventing it, by various means, from contracting with Jamalco, and promoting and preferring WCC's competitor, Rugby Jamaica Lime and Minerals Limited (RJLML), for supplying quicklime to Jamalco. WCC alleged that misfeasance in public office by certain of the respondents, was utilised as part of the conspiracy.

[17] In the claim, WCC sought damages for economic loss suffered by it, due to, as it alleged, the conspiracy and misfeasance. The charge of misfeasance in public office was levelled at Mr Horace Clarke as well as the respondents NIBJ and Dr Vincent Lawrence. The conspiracy charge was levelled at all the respondents, namely, those mentioned above, as well as Clarendon Lime Company Limited (CLCL) and Limestone Corporation of Jamaica Limited (Licojam).

[18] NIBJ was a limited liability company in which the majority shareholding was owned by the Government of Jamaica. NIBJ was responsible, among other things, for fostering economic growth in Jamaica. It was mandated to do so by providing financial assistance to applicants. Where it provided financing it sometimes took, by way of security, shares in the applicant's enterprise. Its operations have since been taken over by Development Bank of Jamaica.

[19] One of WCC's allegations against NIBJ was, in essence, that NIBJ entertained WCC's 1996 application for financing, despite the fact that NIBJ was already involved in financing another enterprise, CLCL, which also aspired to produce quicklime. WCC contended that NIBJ, as part of the application process, required and received

confidential information from WCC, including production plans, market strategy and product pricing. Further, WCC alleged, NIBJ concealed its involvement in CLCL, from WCC. NIBJ went further, WCC contended, by appointing a representative to the respective boards of directors of both WCC and CLCL. The result, according to WCC, was that NIBJ breached a fiduciary duty owed to WCC.

[20] WCC asserted that NIBJ compounded those actions by deliberately delaying the grant of a second application for financing that WCC had made to NIBJ. The timing was critical, WCC alleged, in that it prevented WCC from placing itself in a position to enter into a long-term supply contract with Jamalco. That delay was also designed, WCC contended, to allow CLCL time to negotiate with Jamalco and have it commit to a long-term purchase arrangement, thereby shutting WCC out and dooming it to failure.

[21] According to WCC, NIBJ also showed an improper preference to CLCL by way of the manner of financing that it provided to CLCL. Whereas, NIBJ took ordinary shares as its stake in CLCL, whereby it was risking its stake if CLCL failed, it took cumulative preference shares in WCC, thereby requiring that it would be repaid its financing.

[22] The preferential treatment given to CLCL, WCC alleged, was due to CLCL's powerful connections. For example, one of CLCL's directors was Dr Vincent Lawrence, who was also a member of NIBJ's board. Dr Lawrence was, at the material time, also a director of a number of entities engaged in the bauxite industry. These entities benefitted from public funding, either in part or entirely. He was a director of Clarendon Alumina Production Limited (CAP). He also sat, as a representative for CAP, on the

executive committee of Jamalco, which was WCC's preferred customer. He had also previously been a consultant to Licojam.

[23] WCC asserted that Dr Lawrence used his various connections and considerable influence to further the private interests of Mr Clarke, another of CLCL's influential connections. Mr Clarke was, for the period January 1995 to late 1997, the Minister of Agriculture and Mining, under which the bauxite industry, fell. He also held 99.96% of the shares in Licojam, which was a company engaged in limestone mining. WCC contended that Mr Clarke improperly used his public office to secure personal benefit, through Licojam, from public monies. It was WCC's contention that officers of NIBJ as well as Dr Lawrence concealed Mr Clarke's interest in Licojam from the rest of NIBJ's board.

[24] Mr Clarke died during the course of the litigation in the court below. His estate is here represented by the 5th respondent, Ms Kirby Clarke, mentioned above as having filed a counter-notice of appeal.

[25] Licojam, was one of the promoters of CLCL. WCC asserted that, unlike the other shareholders of CLCL, Licojam, was not obliged to pay cash for its stake (20%) in CLCL. The reason proffered for the preferential treatment, WCC stated, was that the shares were issued to Licojam in return for its promotion work done in respect of CLCL. It is through that method, WCC's case asserted, that Mr Clarke received public funding for his private venture "for free" (a term used by the learned trial judge in his excellent outline of WCC's case).

[26] CLCL shareholders were also said to be a powerful group; a mixture of influential public and private sector entities. They comprised all the respondents including, NIBJ, National Development Bank (NDB), Jamaica Venture Fund Limited (JVF), Construction Developers Associates Limited (CDA) and CAP. The monies from the public purse invested in CLCL by the public sector companies (NIBJ, NDB, and CAP) and partially through JVF, are said by WCC to have benefitted Licojam and, through Licojam, Mr Clarke. The subscription agreement between the shareholders of CLCL was signed on 30 September 1995.

[27] It is in that context that WCC alleged that the respondents conspired to injure it in its business, and that NIBJ, Dr Lawrence and Mr Clarke committed misfeasance in their respective public roles. CLCL, Licojam and Mr Clarke, it was said, benefitted from the various actions by all the respondents who conspired to block WCC from securing a long-term contract with Jamalco for the off-take of WCC's quicklime and to secure such a contract for RJLML. RJLML had been formed by CLCL and an overseas company named Rugby International (Rugby). Rugby was the majority shareholder in RJLML, and CLCL held 20% of the shares.

The case for the respondents

[28] The respondents accepted that:

a. Mr Clarke was the Minister of Agriculture and Mining from January 1995 to late 1997;

b. Dr Lawrence was a member of a number of boards of public sector companies, including NIBJ, CAP and Jamalco;

c. Both Licojam and NIBJ, among others, were shareholders in CLCL;

d. CLCL was a principal of RJLML;

e. NIBJ granted a number of loans to WCC and that upon the failure of WCC to service the loans, placed it in receivership.

[29] The respondents all denied, however, that they, or any of them, conspired to harm WCC in its business. NIBJ, Dr Lawrence and Mr Clarke all denied any wrongdoing in respect of their respective public functions. The respondents contended that WCC's demise was as a result of its bad planning, bad execution and bad luck.

A chronology of major events

[30] An analysis of the appeal requires an appreciation of the chronology of the relevant events concerning the alleged commission of the tort of misfeasance in public office. That chronology is as follows:

a. 1982: Licojam incorporated.

b. May 1992: WCC incorporated, and commences working on constructing a quicklime plant.

c. July 1994: Alcoa, the operations principal of Jamalco, leases limestone quarries to Licojam.

d. April 1995: Mr Clarke, the principal shareholder of Licojam, appointed Minister of Mining and Agriculture. His portfolio includes the mining of limestone and bauxite and the production of alumina.

e. September 1995: At the instance of Licojam, CLCL shareholder's agreement signed.

f. October 1995: WCC borrows short-term money from a consortium of banks.

g. November 1995: CLCL incorporated, and public monies invested in it through NIBJ, JVF and CAP. It secures Licojam's contract for the provision of limestone to Jamalco. CLCL has an additional aim of establishing a quicklime plant.

h. January – February 1996: CLCL's application for a Special Mining Lease published in a nationally circulated newspaper by the Ministry of Agriculture and Mining.

i. July 1996: Alumina producer, Alcan, seeks long-term contract for WCC to supply quicklime, but WCC declines.

j. July 1996: CLCL board indicates possible joint venture with Rugby Group in purchasing a quicklime plant.

k. August 1996: At a board meeting, CLCL acknowledges WCC's existence and WCC's plans to sell quicklime to the market at US$120.00 per metric tonne (pmt). The board acknowledges the various potential suppliers of quicklime and expresses the opinion that "any company which came into the [quicklime] marketplace first would get the window of opportunity" (volume 7, tab K, page 30 of the record of appeal).

l. September 1996: WCC is in financial difficulty. It cannot pay its debts or service the loan from the consortium of banks. It approaches NIBJ for financing to pay some of the debts in order to finish construction of the quicklime plant.

m. November 1996: NIBJ approves equity financing for WCC.

n. January - February 1997: NIBJ disburses the funds to WCC's creditors.

o. January - February 1997: CLCL is in financial difficulty. It cannot pay its debts. Its supply of limestone to Jamalco, and consequently the income therefrom, had ceased. It has no firm prospects for financing the proposed

purchase of a quicklime plant. Its need for additional financing is highlighted.

p. May 1997: WCC produces quicklime for the first time. The plant ceases operating after the first day.

q. September - October 1997: WCC commences production of quicklime, supplying at various times, Alcan, Jamalco and Alpart.

r. November 1997: WCC's financial debt has ballooned and it applies to NIBJ for additional financing to cure calibration miscalculations and to broaden the acceptability of its product so that it can be used by Alcan and other customers. On 26 November 1997, NIBJ appoints Mrs Dianne Wynter as its representative on the board of directors of WCC.

s. December 1997: Jamalco issues a letter committing to purchase quicklime exclusively from Rugby/CLCL for a period of 15 years.

t. February 1998: Mr Clarke, no longer a government minister, attends his first meeting of CLCL's board.

There is no precise date established by the evidence, but Mr Clarke, in his capacity as Minister of Agriculture and Mining, toured WCC's premises between 1996 and 1997. In his witness statement, he said he did not go into WCC's offices but viewed the plant

area only. He stated that the plant was not yet in operation. This would suggest that the visit was before August 1997. Other relevant events were:

u. April 1998: NIBJ relaxes the terms of its financing to WCC.
v. June 1998: Mr Clarke, as the new chairman of CLCL, writes a letter disagreeing with a proposal made by Mr Elworth Williams, a former Chairman of CLCL's board. In concluding the letter Mr Clarke stated "Our mission is to proceed with all due haste. We have already yielded too much ground to the competition".
w. July 1998: WCC re-submits its application to NIBJ for financing, and asks for an increase in the financing that it had requested.
x. September 1998: NIBJ approves WCC's application and offers it a "further investment of… (US$448,000), as well as conversion of the existing facility (US$350,000) to US Dollar denominated 12% Preference Shares…" (Page 342 volume 4 of the record of appeal).
y. June 2000 – RJLML commissions its quicklime plant.
z. December 2000 – WCC applies for third tranche of financing.

aa. January 2001 – WCC applies for further (a fourth tranche) financing of US$350,000.00.

bb. February 2001 – NIBJ approves WCC's third application for financing.

cc. June 2002 – WCC's kiln severely damaged by weather system.

dd. June 2003 – WCC placed in receivership.

The findings by Sykes J

[31] Sykes J rejected WCC's complaint that any of the respondents were guilty of misfeasance in public office. The learned trial judge did, however, find that Mr Clarke had behaved unlawfully, in that he misused his public office, as a minister of government, for personal gain. Sykes J found that Mr Clarke's unlawful conduct was to use his private business venture, Licojam, "to solicit and receive public funds for his private economic gain without disclosure, at the very least, to the Prime Minister or Cabinet" (paragraph [71] of the judgment). The learned judge found that Mr Clarke knew that his conduct was unlawful (paragraph [73]).

[32] Despite that finding, the learned trial judge found that WCC had, nonetheless, failed to prove that Mr Clarke knew, or was reckless to the fact, that his actions would have caused damage to WCC or, at least, to a class of persons to which WCC belonged (paragraph [75]). The learned trial judge also found that WCC had failed to prove that Mr Clarke's unlawful act had caused its loss (paragraph [79]).

[33] Similarly, despite the various hats that Dr Lawrence wore in the several entities involved in this case, the learned trial judge found that WCC had not proved that Dr Lawrence knew of, or supported, Mr Clarke's concealment of his personal interests from the Prime Minister or the Cabinet (paragraph [81]). Sykes J also found that there was no evidence that Dr Lawrence possessed any intention to injure WCC (paragraph [82]).

[34] In respect of the issue of intent, the learned trial judge made two crucial findings of fact. He found, firstly, that Dr Lawrence honestly believed that the quicklime market was large enough to accommodate all the production of WCC, CLCL and the respective outputs of the various bauxite companies (paragraph [82]). Secondly, the learned trial judge accepted Dr Lawrence's testimony that he did not exercise any influence over Jamalco's commercial decisions; particularly that of the entry into a procurement contract in respect of quicklime (paragraph [86]).

[35] In respect of NIBJ, the learned trial judge found that the allegation of a deliberate omission from the board submissions, of the information as to the shareholding and directorship of Licojam, would be akin to an allegation of fraud. In light of that fact, he found that in the absence of the identification of any specific person who prepared the submissions and recommendations to NIBJ's board, WCC's allegations against NIBJ's employees would be equivocal (paragraph [93]). From that finding he reasoned that the he could not "conclude that bad faith as understood in this tort [of misfeasance] has been proved" (paragraph [93]).

[36] As far as the NIBJ board was concerned, Sykes J found that it could not be said that Dr Lawrence had infected the board with any intention to carry out an unlawful act or to injure WCC in its business. The learned trial judge stated that if it had not been shown that Dr Lawrence had any intention to harm WCC, he could not possibly have infected the board with such an intention (paragraph [94]).

[37] Sykes J, in assessing WCC's complaint that NIBJ had breached a fiduciary duty owed to WCC, found that even before WCC had made its first loan application, NIBJ already knew that WCC's proposed product was overpriced. He ruled that NIBJ could not owe a fiduciary duty to WCC, merely by way of their banking relationship (paragraph [140]). NIBJ, therefore, had no duty to inform WCC, at the time of that first application, of the defects in its pricing strategy (paragraph [127]). He found, however, that when NIBJ later appointed a representative to WCC's board, it assumed a fiduciary duty to WCC and an obligation to give WCC its best advice (paragraph [188]). NIBJ's failure, at that time, to inform WCC of those defects, he found, amounted to a breach of fiduciary duty (paragraph [188]).

[38] That breach, the learned trial judge found, did not, however, cause WCC any loss. He found that WCC was, by then, already committed to a path leading, save for an injection of substantial additional capital, to financial collapse, and could not have been saved by any revelation that NIBJ could have made (paragraph [193]). WCC's losses, he found, were "caused by the cumulative effect of (a) the incorrect calibration of the

plant; (b) the high debt servicing costs; (c) the cancellation of the quicklime contract by Jamalco and (d) the various mishaps at the factory" (paragraph [193]).

[39] On WCC's charge of a conspiracy to injure it in its business, the learned trial judge found that WCC had failed on two bases. Firstly, he found that in the absence of any proof of misfeasance in public office, it could not be said that there was a conspiracy to do a lawful act, that is, construct a quicklime plant, by unlawful means, namely the misfeasance alleged. Secondly, he found, by logical extension, that WCC had failed to show that there had been any unlawful act committed and therefore it had failed to show that the tort of conspiracy to injure had been committed. It was necessary, he found, that where an unlawful purpose is alleged, it must be proved that there was also a conspiracy as well as damage. WCC, he held, had failed to prove that there was any conspiracy or, indeed any "causal connection between the [respondents'] conduct and WCC's loss" (paragraph [215]).

The appeal

[40] WCC filed numerous grounds of appeal. They are listed below:

> "1. The learned trial judge erred in law and on the facts in that he failed to appreciate that the 5th Respondent's act of misfeasance necessarily involved the displacement of market share of competitors or some part thereof and therefore the requirement that the 1st Respondent knew that his actions would possibly injure the claimant or was reckless as to whether his action would injure the claimant or a class of persons to which the Appellant belonged, was made out.

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

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

4. The learned trial judge failed to appreciate that the effect of the 5th Respondent's misfeasance in public office was to cause the loss of the JAMALCO market and to depress the price projected by the Appellant as well as to deprive the Appellant of the possibility of a long term off take contract.

5. The learned trial judge failed to appreciate that it was a reasonable foreseeable result of the 5th Respondent's misfeasance in public office that JAMALCO's exclusive long term off take contract would be unavailable and to deprive any other competitor and in particular the Appellant of it.

6. The learned trial judge failed to pay any or any sufficient regard to the evidence of the 5th Respondent in which by letter dated June 17, l998 he stated that the 2nd Respondent had yielded too much ground to the competition. The learned trial judge failed to appreciate that this clear reference to the Appellant indicated that the 5th Respondent and those conspiring with him were well aware of the effect the act of misfeasance would have and on whom.

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

8. The learned trial judge failed to appreciate that having found the 5th Respondent guilty of misfeasance in public office it necessarily followed that the 2nd and 3rd Respondents were conspirators in that they actively joined in the lime producing venture

which to their knowledge secured a private profit to the 5th Respondent and was thus unlawful.

9. The learned trial judge erred in law and in his analysis of the evidence when concluding that there was no evidence to support the fact that the 4th Respondent was also liable for misfeasance in public office and for conspiracy.

10. The learned trial judge paid no or no sufficient regard to the 4th Respondent's admitted knowledge of the Minister's involvement and personal gain and also his failure to disclose the Minister's personal involvement.

11. The learned trial judge also failed to appreciate that the only inference to be drawn from the 4th Respondent's presence on the several boards and his interventions in certain meetings was that he aided and abetted and/or was guilty of misfeasance in public office and was a co-conspirator in that regard.

12. The learned trial judge erred in his failure to appreciate that if, as he found, a fiduciary duty existed when the 1st Respondent appointed Directors to the Board of the Appellant then it necessarily meant that a fiduciary relationship existed from the moment the 1st Respondent obtained the right to appoint directors to the Board of the Appellant.

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

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

15. The learned trial judge erred in his application of the law in that he failed to appreciate that the

circumstances of the instant case displaced the general rule that a banker customer relationship did not result in a fiduciary relationship.

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

    (a) The 1st Respondent was a publicly funded investment bank, one of whose purposes was the fostering of the development of industry in Jamaica.
    (b) The 1st Respondent participated in the preparation of the Appellant's project document and its projections prior to the grant of the first and second loans.
    (c) The project document and projections were therefore the joint effort of the Appellant and the 1st Respondent.
    (d) The 1st Respondent was an investor in the Appellant's venture because the loan was by way of purchase of redeemable shares in the Appellant.
    (e) The Appellant had therefore relied upon the 1st Respondent and was also entitled to expect loyalty and uberima fides by virtue of the fact that the 1st Respondent was partnering in the venture when it purchased the Appellant's shares.

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

    (a) The Appellant relied on the 1st Respondent for the preparation of its project documentation and projections.
    (b) The Appellant was entitled to assume that the 1st Respondent would not put any fact in that project document which it had reasonable cause to suspect were not accurate.
    (c) The important facts as to the price available and the available market at that price were

aspects of the project document which the 1st Respondent's technocrats put forward as accurate at a time when the 1st Respondent's directors knew that they were not likely to be achieved.

(d) The 1st Defendant's loan was by way of an investment in the Appellant in return for shares which also gave the 1st Respondent a right to appoint two (2) directors.

(e) This right to appoint directors demonstrates the basis of the expectation in the Appellant that a relationship of trust and confidence existed.

(f) The 1st Respondent failed to disclose to the Appellant that it had already invested in a project in the same industry which was targeting the same market and which intended to offer a better price and the principals of which were highly placed and well connected in the industry.

18. The learned trial judge erred in law when he concluded that there was no evidence to support the fact that the 1st Respondent's breach of fiduciary duty caused the Appellant's loss.

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

20. The learned trial judge failed to appreciate that the disbursement of the second loan occurred after a director had been appointed by the 1st Respondent to the Board of the Appellant.

21. The learned trial judge erred in law and fact in that he failed to appreciate that the grant of the second loan in circumstances where a long term contract at a viable price from JAMALCO was impossible meant that the 1st Respondent was increasing the Appellant's

debt burden whilst knowing that its prospect of ever repaying that debt was very remote. To the 1st Respondent's knowledge JAMALCO was already committed or about to be committed to a long term contract with the Minister's venture, and at a price which was lower than that at which the Appellant could offer with any reasonable prospect of remaining viable.

22. The learned trial judge failed to appreciate therefore that even on his own erroneous finding that a breach of fiduciary duty occurred only when Directors were appointed, the failure to disclose the existence of a relationship with the competitor by the 1st Respondent deprived the Appellant of the opportunity to either,

    (a) cut its losses and sell; or,
    (b) seek a joint venture Partner; or
    (c) not take the 1st Respondent's loan and therefore not increase its liabilities.

23. The learned trial judge erred in law and his analysis of the evidence in that he failed to appreciate that the other factors such as (a) incorrect information about the size material Windalco needed, (b) industrial disputes, (c) dust control, (d) absence of an engineer, all made the reliance on the 1st Respondent's integrity and honesty all the more important.

24. These factors made the need for the acquisition of the JAMALCO market at the price projected all the more important if the Appellant was to remain viable and this to the knowledge of the 1st Respondent.

25. The learned trial judge erred in law and fact and failed to appreciate that when the 1st Respondent granted the second loan without disclosing its involvement in a venture which had or was about to secure the JAMALCO market and which was promising a price below that offered by the Appellant, it ensured that the Appellant would fail and plunged it further into debt. The 1st Respondent deprived the Appellant

at the very least of the possibility of cutting losses and exiting the industry with a reduced liability.

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

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

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

The counter-notice of appeal

[41] In her counter-notice, Ms Kirby complained that the learned judge made a finding against Mr Clarke on an issue which was not before the court. The counter-notice states:

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

The method of analysis

[42] The issue of misfeasance in public office is central to both the appeal and counter-notice of appeal. For that reason, the law regarding that tort will first be

outlined. An understanding of the relevant law will be essential to understanding the learned trial judge's decision and to assessing the appeal and the counter-notice.

[43] The analysis of the appeal will, thereafter, be done by grouping the various grounds of appeal according to the issues that they raise. Counsel for the appellant did group some of the grounds for convenience, and that grouping proved helpful to understanding the issues. As the validity of the learned trial judge's findings on the issue raised by the counter-notice of appeal, is central to some of the grounds raised in the appeal, the counter-notice will be dealt with before the various grounds of appeal.

Misfeasance in public office

[44] Recognition of the tort of misfeasance in public office is of some vintage, but there is no recorded case of any claim, based on it, having been previously litigated in this jurisdiction. The most comprehensive learning on the tort has been set out in the seminal decision of Clarke J (as he then was) in **Three Rivers District Council and others v Bank of England (No 3)** [1996] 3 All ER 558, and, even more importantly in the judgment of the House of Lords ([2001] UKHL 16; [2000] 3 All ER 1), in the terminal appeal from Clarke J's decision in that case. Their Lordships praised the lucid way in which Clarke J explained the tort.

[45] From that learning, it may be gleaned that the tort is based on the improper use of the power vested in a public office. The tort springs from the principle that, at least under Westminster-style democracies, such as that practised in this country, such power is conferred solely for use to the benefit of the public. Public officials should not

use the power of their offices for ulterior or improper purposes. They are, therefore, precluded from using such offices for personal gain, unless with the full knowledge and permission of the authority allowed to grant that permission.

[46] Public officials are similarly precluded from using the power of their offices to intentionally cause injury to any member of the public. With regard to the intention required, the tort is subdivided into two distinct alternative elements, namely "targeted malice" and "untargeted malice". In the former manifestation, a public official uses a power granted to the office to intentionally injure a specific person or class of persons. The second manifestation of the tort occurs where the official commits an unauthorised act, which causes injury to a specific person or class of persons.

[47] In both manifestations of the tort, the action of the official must be shown to have been accompanied by a mental element. The official must be shown not to have acted in good faith in respect of the validity of the act, that is, the official knew that the act was unlawful, or wilfully disregarded the risk that it was unlawful. The term "unlawful" applies to both manifestations. Not only does it refer to unauthorised acts but it reflects on carrying out an authorised act in an unauthorised way. It is important to note that mere negligence is not sufficient to constitute the tort. The official must also be shown to have had an intention to injure, or at least, a recklessness as to whether or not the action would injure an individual or class of persons. In other words, the official must be shown to have:

a. had the intention to cause injury;

b. known, or must have known, that the action would probably have caused the damage complained about; or,

c. been consciously indifferent as to the risk.

[48] In the case of targeted malice, the official must be shown to have deliberately set out to injure the individual or the class of persons. In the case of untargeted malice, the official must be shown to have been aware that he or she did not have the power to act as was purportedly done and, at least, that the injury complained of would be the probable result of that action. The term "malice" does not refer to spite or ill-will but to the intention to do that which was done.

[49] The tort is not restricted to committal by natural persons but extends to public bodies as well. Both **Three Rivers** and **Jones v Swansea City Council** [1990] 3 All ER 737 are examples of complaints against a public body. In **Three Rivers**, the complaint was that the Bank of England (BOE) had caused losses to depositors in the ill-fated Bank of Credit and Commerce International (BCCI). It was alleged that the BOE's officials had acted in bad faith by granting a banking licence to BCCI, or by failing to withdraw the licence when it was clear that BCCI's senior management had been engaged in a fraud, on a massive scale, perpetrated against the depositors. The House of Lords ruled that the tort had been sufficiently set out in the particulars of claim to allow the case to proceed to trial.

[50] In **Jones**, it was alleged that the county council, on solely political bases, improperly voted to rescind permission, which had been granted to the claimant, to

utilise, as a club, premises that the council had previously leased to her. The House of Lords found that the "plaintiff would have had a good cause of action against the council for misfeasance in a public office if she had alleged and proved that a majority of the councillors present, having voted for the resolution, had done so with the object of damaging her" (headnote). It was possible, therefore, to have had a good cause of action for misfeasance in public office against a public body such as the county council.

[51] Where the complaint is laid against a public body, it must be shown that the mental element was exercised by an identifiable human agent. In **Chagos Islanders v Attorney General and Another** [2004] EWCA Civ 997, the English Court of Appeal ruled that the claimants could not succeed on appeal on the aspect of misfeasance in public office because they would be unable to point to any officer who knew of the illegality of the actions of the public body (paragraph 28 of the judgment).

[52] A claim for misfeasance in public office requires the claimant to also show that he was the target of, or prejudiced by, the improper or unlawful act of the official, whether specifically or as one of a class of persons. The tort is of a class of torts which are deemed "actions on the case", that is, the claimant must not only show that he was affected by the official's action, but that he suffered loss as a result of that action. The claimant must prove that loss. Lord Hobhouse, in **Three Rivers**, succinctly explained this aspect of the tort, at page 45 of the report of the case:

> "The tort is historically an action on the case. It 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."

[53] The tort has been examined at the highest level in the United Kingdom (**Three Rivers**), in the Commonwealth, by way of the Privy Council (**Dunlop v Woolahra Municipal Council** [1982] AC 158, and in the Caribbean Court of Justice (**Marin and Coye v The Attorney General of Belize** [2011] CCJ 9 (AJ)). In **Dunlop**, the Privy Council asserted that misfeasance by a public officer in the discharge of his public duties was a "well-established" tort, but that it required the claimant to prove malice on the part of that officer. In **Marin**, the majority of the court held that the state could properly claim as being the victim of the official's misfeasance in public office.

[54] In his judgment, Sykes J, characteristically, comprehensively set out the juridical basis of the tort and explained the requirements placed on a party claiming damages on that basis. Neither WCC nor NIBJ complained about the learned trial judge's exposition of the relevant law. They, instead, complained about his application of the law to the facts of the case.

Counter-notice of appeal – the validity of the finding that Mr Clarke acted unlawfully

[55] The learned trial judge found that Mr Clarke, while he was the minister of government responsible for mining, had full knowledge of the activities of Licojam, the company in which he held 99.97% of the shares. Those activities involved, during the time that he was the minister, an approach to NIBJ for its participation in the formation

of CLCL and its provision of equity funding for CLCL. The learned trial judge found, at paragraph [71] of the judgment, that, by those activities, Mr Clarke unlawfully used Licojam "to solicit and receive public funds for his private economic gain without disclosure, at the very least, to the Prime Minister or Cabinet". Sykes J also held that Mr Clarke "could not have honestly believed that it was lawful to seek to use public funds in this way" (paragraph [71]).

[56] Although the cabinet submission requesting the approval of public funding for the various NIBJ projects (including the investment in CLCL) was not placed in evidence, Sykes J inferred that the submission comprised "an itemised list of investments" (paragraph [51]). That itemised list, the learned trial judge reasoned, would have stipulated that $10,500,000.00 was for investment in CLCL. Mr Clarke was a part of the Cabinet at that time. He knew, at the time, the learned trial judge found, that "Licojam had approached a number of government entities for money". Despite that, Sykes J noted, Mr Clarke had not provided any evidence that he had declared his interest in that investment. The learned trial judge said, in part, at paragraph [57] of his judgment:

> "There was no evidence that Mr Clarke told the Prime Minister or Cabinet that he was a significant investor in CLCL."

[57] The learned trial judge opined that not only should there have been disclosure of Mr Clarke's personal interest in the CLCL venture, but Mr Clarke should have secured permission for the provision of public funds in such a venture. Sykes J went on to say

that "[a]t the very least, such permission if granted should be made public" (paragraph [71]).

[58] The complaint by Ms Kirby Clarke is that the aspect of disclosure of the solicitation or receipt of public funding was not raised by WCC in its statement of case against Mr Clarke, in respect of the issue of misfeasance in public office. Mr McBean QC submitted, on her behalf, that since the issue was not raised against Mr Clarke, it was not an issue upon which the learned trial judge could properly have made any finding, much more, the findings that he in fact made.

[59] WCC asserted that the issue was indeed raised in its particulars of claim and was addressed in opening speeches by learned counsel who appeared for it at the trial. Lord Gifford QC, for WCC, stressed the fact that the term "secretly" was used in the particulars of claim. Learned Queen's Counsel further submitted that none of the respondents complained that the matter of non-disclosure, as an aspect of misfeasance, had not been raised in the pleadings as an issue in respect of Mr Clarke. He argued that the respondents would not have been taken by surprise by the learned judge's ruling on the point.

[60] In assessing these issues, it is to be noted that there is guidance to be gleaned from Blackstone's Civil Practice 2016. At paragraph 24.20 of that work, the learned editors state the purpose of a statement of claim thus:

> "A good claim or defence should enable the parties and the court to narrow down and identify the central issues in dispute. This has always been the case. For example, **a**

> **defendant is entitled to know not merely the cause of action against him, but also the manner in which it is alleged that he was in breach of his duty**, thereby causing the claimant to seek redress against him. To achieve that objective requires no more than a properly detailed set of particulars (as opposed to evidence), thereby allowing him to set out his case in response." (Emphasis supplied)

[61] The learned editors point out at paragraph 24.24, that if the issue has not been included in a statement of case then a trial judge should not normally make a finding in respect of it. The trial judge may do so, however, if the parties had so dealt with the issue during the trial that there would be no injustice in making such a finding. They state:

> "A judge should not normally make a finding of fact on an issue which depends on evidence and which has not been raised in statements of case, so that all parties did not have a proper opportunity to address it, even if it was raised in correspondence after statements of case have been served (*Sivanandan v Executive Committee of Hackney Action for Racial Equality* [2002] EWCA Civ 111, LTL 25/1/2002). **However, if a factual issue has been adequately dealt with at trial and is clearly regarded by all parties as a live issue which is crucial to the case, the judge is entitled to make a finding of fact, even if the issue was not raised in the statements of case, which could have been amended during the trial** (*Slater v Buckinghamshire County Council* [2004] EWCA Civ 1478, LTL 10/11/2004)….
>
> An appeal against a decision on an unpleaded basis may therefore be dismissed if there is no real injustice in that the evidence would be the same on the new basis of the claim (*Whitecap Leisure Ltd v John H. Rundle Ltd* [2008] EWCA Civ 429, [2008] 2 Lloyd's Rep 216)." (Emphasis supplied)

[62] An examination of WCC's claim form shows that WCC did allege improper gain by Mr Clarke while he held public office. Paragraph 2 of the further amended claim form states that WCC claimed, among other things:

> "Exemplary damages against the [NIBJ, Dr Lawrence and Mr Clarke] or any or all of them for conspiracy, deceit, breach of fiduciary duty and/or misfeasance in public office for the purpose of damaging the Claimants **and/or making a profit for any or all of the Defendants and/or to secure the interests of the Defendants or any or all of them**." (Emphasis supplied)

[63] The elements of the conspiracy and misfeasance in public office, with a view to damaging WCC, was extensively set out and expanded upon in WCC's further amended particulars of claim. A pleading that Mr Clarke had improperly profited from his office was, however, only tangentially mentioned. This was done at paragraph 71 of the document. It said:

> "[NIBJ] acted in concert with [Dr Lawrence] and [Mr Clarke] as public officials in order **to promote the financial gain of [Mr Clarke] in promoting and securing profit for him through his interests in [CLCL] and [Licojam]**. In the premises the Claimants claim exemplary damages against [NIBJ], [Dr Lawrence] and [Mr Clarke] or any or all of them." (Emphasis supplied)

WCC did not provide any particulars for those assertions.

[64] The issue of non-disclosure was not mentioned. At paragraph 50 of the further amended particulars of claim, WCC averred, in part:

> "Lawrence, free of charge advised Clarke and Licojam on a project. Thereafter Clarendon Lime was established **secretly** in August 1995. It was established with the purpose of obtaining the contract to supply quicklime to the

> bauxite/alumina companies for which government had a 50% interest…." (Emphasis supplied)

[65] The response to the assertions of improper profiting, in the joint defence filed on behalf of CLCL, Licojam and Mr Clarke, was a simple denial. It would be unfair to those respondents to characterise that response as a "bare denial", considering the connotations of that term. Given the absence of any details in the amended particulars of claim, it would be unreasonable to have expected any greater detail from these respondents. It would, likewise, be unfair to them to say that the use of the word "secretly", in the context in which it was used, raised the issue of non-disclosure to the Cabinet and Parliament of the investment of public funds into a venture in which a cabinet minister had a personal interest.

[66] It cannot be said, from the pleadings, that the issue of non-disclosure by Mr Clarke to the Prime Minister or to the Cabinet, had been raised by WCC or joined between the parties. Nonetheless, the learned trial judge found, that this was an important aspect of the case. He said, in part, at paragraph [57]:

> "Thus the real issue is whether his omission to inform the Prime Minister and Cabinet of his private economic interest in CLCL with the consequence that he was part of the Cabinet that voted public funds to be used for his private interest is sufficient to come within the tort of misfeasance in public office."

[67] As the point had not been adequately raised on the statements of case, it must be determined whether it was raised in evidence, and if it was raised in the evidence, the extent to which it was addressed, and how it was regarded by the parties. Evidence

was by way of witness statements as well as oral responses during examination and cross-examination during the trial.

[68] Mr David Wong Ken, in giving evidence for WCC, stated at paragraph 88 of his first witness statement that "CLCL was created for [the] special purpose of benefitting Horace Clarke". He relied, for that assertion, on the contents of an agreement between CLCL's shareholders. The document, he contended, included provisions that gave Licojam a preferred status among CLCL's shareholders. According to Mr Wong Ken:

> "88.8 [CLCL] which used cheap public funding was created and functioned as Clarke's personal property. The equity input of Clarke proved worthless."

It must be borne in mind that Mr Clarke was appointed the Minister of Agriculture and Mining in April 1995 and CLCL was incorporated in August 1995, that is, during his tenure as minister.

[69] Mr Wong Ken accused Dr Lawrence and another NIBJ director, Mr Nathan Richards, as "overarching" for Mr Clarke on NIBJ's board of directors. Mr Wong Ken supported that statement, in part, by reference to a March 1998 assertion by a director of Licojam, that Mr Clarke, Dr Lawrence and others, had made "several interventions" on behalf of CLCL. It must be noted, however, that Mr Clarke had, by the time of that director's assertion, already demitted ministerial office, having done so in late 1997.

[70] Nowhere, in any of his witness statements, did Mr Wong Ken raise the issue of a failure by Mr Clarke to disclose to the Prime Minister or to the Cabinet, an interest in the

venture into which public funds were about to be invested, by way of a shareholding in CLCL.

[71] Mr Clarke filed two witness statements before his demise. In the second, which was filed on 21 December 2009 (page 313 of volume 2 of the record of appeal), he addressed the allegations of Licojam having benefitted from the formation of CLCL without having made any valuable input to it. He contested the validity of those allegations. He said that CLCL benefitted from the extensive research work that Licojam had previously conducted into quicklime and its by-products. He further stated that Licojam, not only had an established relationship with Jamalco, from 1994, but also held a lease of a stone quarry owned by Jamalco. It was envisioned that Licojam would supply limestone, from that quarry, to Jamalco for use in Jamalco's quicklime kiln. Mr Clarke stated that as part of its input to CLCL, Licojam transferred its assets, including the quarry lease, to CLCL.

[72] Mr Clarke further stated that Licojam was not the only beneficiary of the CLCL enterprise. He said that all of CLCL's shareholders benefited from CLCL, including its sale of its equity in RJLML, which had eventually secured a long term off-take contract with Jamalco, for quicklime.

[73] He contended that WCC's demise was due to its failure to properly assess the market and to incorrect economic decisions. He denied ever having acted with the intention to harm WCC. He contended that, at all times, he acted within his powers as a minister of government and in good faith.

[74] As Sykes J pointed out in his judgment, Mr Clarke did not address, in his witness statement, the issue of a declaration of interest in respect of the cabinet submission concerning monies from which CLCL was to benefit. Mr Clarke had, however, died by the time the trial had started. There was therefore, no opportunity for him to either expand on his witness statement or to be cross-examined on the issue.

[75] The next question, then, is whether the issue was raised during the trial so as to require adjudication by the learned trial judge. It was raised in the opening of WCC's case before Sykes J. Lord Gifford, who addressed the learned trial judge in that opening, said, in part:

> "[NIBJ, Dr Lawrence, Mr Clarke] and others were scheming to ensure that they took over that market. And the means which they used on the part of [NIBJ] was the breach of the duty on the part of [Mr Clarke] was sponsoring or causing these companies to sponsor [CLCL's] establishment without regarding disclosure to anyone when he had personal interest…" (Volume A, tab A, page 34 of the record of appeal)

Lord Gifford submitted to the learned trial judge that Mr Clarke owed a duty of disclosure to the public, and in particular to WCC. He based that submission on the fact that Mr Clarke, as minister of mining, was the owner of a company that had received the benefit of public monies and secured a contract with Jamalco. Those factors, he submitted, prevented WCC from retaining Jamalco as a customer. Learned Queen's Counsel went on to submit that all that was achieved "without disclosure of any kind that I know" (Volume A, Tab A page 37 of the record of appeal).

[76] There was no documentary evidence presented to Sykes J of any disclosure to NIBJ, to the ministry of finance, which provided the funds invested in CLCL, or to the Cabinet, of Mr Clarke's interest in Licojam. Indeed, it is important to note that the cabinet submission, resulting in the approval of the funds for investment in CLCL, was not placed in evidence. That absence led to the learned trial judge drawing the inference that the item concerning the funds to be invested by NIBJ, specifically mentioned the CLCL project.

[77] Mr Wong Ken spoke to the issue of misfeasance in his oral testimony. It occurred in answers given in cross-examination by counsel appearing at the trial for CLCL, Licojam and Mr Clarke. The cross-examination on the point was very brief. It is recorded at Volume C, Tab A, pages 16-17 of the record of appeal, as follows:

> "Q. One of the allegations against Horace Clarke is misfeasance in public office.
>
> A. Yes I think he used his public office for private gain
>
> Q. What evidence [sic]?
>
> A. Documents from Registrar of Companies. While in public office controlling my market or one we competing for [sic], having people under his jurisdiction on various boards, yes.
>
> Q. None of these difficulties were part of your conspiracy?
>
> A. I disagree.
>
> Q. Mr. Clarke not guilty of misfeasance in public office?
>
> A. I disagree."

It can hardly be said that that exchange dealt with the issue of non-disclosure of a personal interest in CLCL. Nor can it be said that there was any evidence adduced as to what Mr Clarke had done to secure a personal benefit from his public office.

[78] Mr Milverton Reynolds, the managing director of the Development Bank of Jamaica (which had taken over NIBJ's operations), in answers given in cross-examination, did address the issue of non-disclosure. It was, however, from the point of view of an obligation by NIBJ to make a disclosure. Mr Reynolds was speaking from a position of hindsight, as he was never an employee or board-member of NIBJ. He also spoke to what he expected as being good practice in circumstances such as those surrounding NIBJ's investing in the CLCL project.

[79] Mr Reynolds stated that good practice required NIBJ to inquire who were the shareholders and directors of companies, which had approached it for equity financing. He said that good practice would also require NIBJ to disclose to its portfolio minister that a serving cabinet minister had an interest in such a company. Mr Reynolds further stated that there was no record that NIBJ had disclosed to its portfolio minister that Mr Clarke had an interest in the CLCL project, in which NIBJ intended to invest public funds. On being further questioned on the point of disclosure, Mr Reynolds agreed with the suggestion that "where a Cabinet Minister's company is entering into a joint venture with the injection of public funds and being given a stake in exchange for services, that is a matter which should be reported to parliament" (Volume B tab a page 5 of the record of appeal).

[80] Dr Lawrence was also questioned, in cross-examination, about the matter of disclosure. He, however, testified that he had no specific knowledge of Mr Clarke's interest in Licojam, although he did agree that he knew Mr Clarke did have an interest in that company. Dr Lawrence was asked about disclosure to the Parliament. He stated that he was not aware of any report to the Parliament about the investment of public funds in the CLCL project.

[81] Mr McBean, who also appeared for Licojam, CLCL and Mr Clarke, in the court below, addressed the issue of misfeasance in public office in his opening statement to Sykes J. Learned Queen's Counsel submitted that there was no evidence, in WCC's case, of any misfeasance. He did not, however, specifically address the issue of any requirement for disclosure.

[82] Based on that analysis, it is difficult to agree with Lord Gifford that the non-disclosure had been so raised and addressed as to justify the learned trial judge's assertion that "the real issue is whether his omission to inform…is sufficient to come within the tort of misfeasance in public office". It would be correct to say that the issue of Mr Clarke's personally benefitting from public funds while he was a cabinet member was raised. WCC sought to infer from that situation that Mr Clarke, who was the minister in charge of the sector, in which his personal interest lay, had improperly benefitted from his office. It cannot be said, however, that WCC had raised the issue of disclosure or that Mr Clarke did not have authorisation from the Prime Minister or the Cabinet for obtaining that benefit.

[83] Further, the learned trial judge seemed to have placed the onus of proving authorisation on Mr Clarke. Sykes J made the following statement at paragraph [57] of his judgment:

> "Mr Clarke's witness statement did not produce any evidence on which this court could find that he did not know that his private economic interest (CLCL) was provided money from public funds. **There is no evidence that Mr Clarke told the Prime Minister or Cabinet that he was a significant investor in CLCL**. Indeed, he declared that Licojam approached a number of government entities for money. There is no evidence that he spoke to or did any 'leg work' in relation to the loan from NIBJ. **Thus the real issue is whether his omission to inform the Prime Minister and Cabinet of his private economic interest in CLCL** with the consequence that he was part of the Cabinet that voted public funds to be used for his private interest is sufficient to come within the tort of misfeasance in public office." (Emphasis supplied)

From that extract, it will be noted that the learned trial judge moved from the absence of evidence from Mr Clarke concerning disclosure to the Cabinet, to a conclusion that there had been no such disclosure. Sykes J did not intimate that he was of the view that an evidential burden rested on Mr Clarke in the circumstances. Given the burden placed on a claimant to prove the mental element of this tort, it is doubtful that there was any such evidential burden placed on Mr Clarke.

[84] In light of the tenuous nature of the pleadings and the evidence in relation to the issue of disclosure, the counter-notice of appeal should succeed. The issue was not so definitively raised that Sykes J was entitled to find, at paragraph [71] of his judgment, that "…it was unlawful for Mr Clarke to use his company, Licojam, to solicit and receive

public funds for his private economic gain without disclosure, at the very least, to the Prime Minister or Cabinet….", or that "Mr Clarke could not have honestly believed that it was lawful to seek to use public funds in this way….". The learned trial judge would have been justified in making such findings if Mr Clarke had been available and was cross-examined on those issues. The issues of disclosure and authorisation were, however, not raised before he died and it would, therefore, not be fair to his case to say that he did not address it in his witness statement.

[85] Without a finding of unlawful conduct, WCC would have failed to prove an essential ingredient of the allegation of misfeasance in public office by Mr Clarke. Based on that analysis, the counter-notice of appeal should succeed. Despite that finding, the grounds of appeal will still be analysed.

Appeal grounds 1, 4, 5 and 6 – The issue of misfeasance by Mr Clarke

[86] The learned trial judge found that Mr Clarke's action, of having Licojam solicit and accept public funding for its venture, while he was a minister of government, was unlawful. He, however, found that the action had no effect on WCC's business. A critical aspect of WCC's complaint against the learned trial judge's approach addresses the issue of causation. At paragraph 48 of its skeleton submissions, WCC set out the core of that complaint. It said:

> "The learned trial judge failed to appreciate that without the Minister's misfeasance in public office, CLCL would not have been formed, the coveted Jamalco contract would not have been awarded to it and the multi-national company Rugby would not have entered the lime market in Jamaica. The learned trial judge failed to appreciate that [WCC] would be

> better able to tolerate and survive its start up issues if its monopoly position had not been upset by the Respondents when through the misfeasance in public office of the Minister they established CLCL."

[87] Ignoring for the moment, the finding in respect of the counter-notice of appeal, the only action by Mr Clarke that could be said to have been "proved" as being improper was being involved, albeit indirectly, in the creation of CLCL with public funds. Mr Clarke's visit to WCC's plant was only the basis for speculation by Mr Wong Ken that Mr Clarke had, there, improperly obtained, and subsequently used to CLCL's advantage, information gained on that visit. The concept was, as the learned trial judge described WCC's case, "a theory". There was no evidence to support it. The statement by Mr Clarke about "yielding ground to the competition" was made after Mr Clarke had already demitted office. It did not necessarily mean that while he was the minister in charge of the industry, he carried out any act which would constitute misfeasance.

[88] The difficulty with WCC's complaint, quoted above, is threefold. Firstly, the events which it identified as flowing from the creation of CLCL (the impugned act of Mr Clarke), were not reasonably foreseeable. Even at the time of the creation of CLCL it could not be said that Mr Clarke would have known of the existence of any entity that would have been negatively affected by CLCL. It is true that CLCL was founded in order to supply quicklime to the alumina trade, and that it had a natural synergy with Jamalco, but Jamalco was only one of three alumina producing companies with a demand for quicklime. Any competing supplier would have had a market in one or other or both of the other alumina companies. There were one or more other intervening

factors, including the size of the product, which prevented WCC from securing a contract with Alcan or Alpart. Those factors were not of CLCL's making.

[89] The second difficulty with WCC's criticism is that it ignores all those other factors which intervened to create the situation which eventually caused WCC's demise. A principal factor was that its product was not widely acceptable to the consumers of quicklime. The problem was due to imprecise information that WCC had received prior to constructing its plant. That information suggested that all the alumina companies used the same specification for quicklime in their process. WCC configured its plant based on that information. The result was that only Jamalco could easily use WCC's product. One of the reasons that WCC applied for a second tranche of financing from NIBJ was to attempt to cure that malady. Even then, the machinery acquired and installed as the cure, proved to be ineffective, as it was not properly designed and needed even more equipment in order to be used. Similar problems attended the fact that consumers of quicklime, other than the alumina companies, wanted the product in bags. WCC did not originally have a bagging plant and the attempts to put one in place were also ineffective.

[90] The third difficulty with WCC's criticism of the learned trial judge's approach is that WCC presumed that it was entitled to an unending, or at least lengthy, monopoly in supplying the quicklime market. That presumption was neither sound nor reasonable. It ignored the fact that WCC could not, based on its production levels, supply the demands of the market for quicklime and therefore the opportunity for one or more

competitors was always on the cards. The alumina companies had been importing quicklime even before WCC commenced operation. Competition from imported quicklime was also an inherent feature of that market. Indeed, WCC acknowledged, from as early as December 1996, that there was competition in the market by way of imports. In a letter to NIBJ of 6 December 1996, WCC stated that both Jamalco and Alcan were then "importing lime into Jamaica" (volume 4, page 40 of the record of appeal). WCC was of the view that it would have been able to comfortably compete with those imports. It proved, however, that a later entrant to the market, Chemical Lime Corporation, was prepared to supply the alumina companies with imported quicklime at a cost significantly less than that at which WCC could profitably produce the commodity. WCC could not prevent, or deny the possibility of, the entry to the market of an entity which could provide quicklime at a lower cost or on more attractive terms than it could.

[91] For those reasons, the learned trial judge's reasoning on this point cannot be faulted, and these grounds cannot succeed.

Appeal grounds 2 and 3 – The size of the quicklime market

[92] The issue of the size of the quicklime market was a major issue joined between the parties at the trial. WCC's position was that the market was small and, in any event, its only realistic market for its product was Jamalco. WCC contended that CLCL had improperly shut it out of the Jamalco market. The methods used, it said, were the

securing of an exclusive contract with Jamalco to off-take RJLML's quicklime and using product-pricing with which WCC could not compete.

[93] The stance by the respondents was that the market for quicklime was larger than both companies together could supply and was constantly increasing. The respondents provided evidence supporting their stance. The issue was a question of fact for the learned trial judge and he accepted, as reliable, the evidence provided by the respondents, particularly the evidence of Dr Lawrence and Mr Norman Davis, a former employee of Alcan and managing director of RJLML.

[94] The learned trial judge explained his reasons for accepting the testimony of those two witnesses. He was justified in doing so. There was an enormous amount of evidence that spoke to a commitment by all the relevant government agencies, including NIBJ, JVF and CAP to an expansion of the local production of limestone and quicklime. Mr Wong Ken's testimony suggesting a small market for quicklime was not always consistent and even he, on at least one occasion in cross-examination, accepted that the market could accommodate more than one supplier.

[95] There is also evidence, from a letter written by WCC, dated 18 October 2000, that even with competition from RJLML, there was still a shortfall in meeting the demand for quicklime. WCC said, in part:

> "…A critical analysis of the existing market reveals that Alcan experiences a daily shortfall of 70m/t/d/ and Jamalco experiences a shortfall of 50m/t/d. Further to these daily shortfalls are the [in]evitable kiln failures which place huge

> demands on the islands [sic] stretched lime producing facilities." (volume 4 page 454 of the record of appeal)

[96] The learned trial judge noted that in a submission to the NIBJ board, there was a suggestion by its technical team that the market could not accommodate both WCC and the, then proposed, CLCL/Rugby entry into the market. At paragraphs [184] – [185] of his judgment, he rejected that opinion and explained his reason for so doing. This court should not disturb the finding of the learned trial judge on this issue of fact. The stance that has been taken by this court has consistently been that it will not interfere with findings of fact by judges at first instance, if they are not unreasonable and are supported by evidence. That stance was endorsed by the Privy Council in **Industrial Chemical Co (Ja) Ltd v Ellis** (1986) 23 JLR 35 at pages 39F-40G. Their Lordships more recently re-emphasised that position in **Beacon Insurance Co Ltd v Maharaj Bookstore Ltd** [2004] UKPC 21.

[97] The result of the learned trial judge's finding of fact on that important issue was pivotal for his findings on the major questions of misfeasance and causation. He found that none of the public officials in this case were guilty of misfeasance in public office and that it was not the creation of CLCL that caused WCC's demise. He said at paragraph [74] of his judgment:

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

> once there is a market sufficient in size to accommodate two or more producers it becomes increasingly difficult to succeed in the tort because it would be hard to show that the public official, while promoting his private interest, knew that the claimant would be harmed or was reckless as to whether he would be harmed. In this type of situation it is not a zero sum game where one producer must eliminate the other to survive and so must necessarily bring about the demise of the claimant. It seemed to this court that Mr Clarke did not even address his mind to eliminating WCC but rather devoted his energies to promoting his company. All the reliable evidence from knowledgeable persons pointed to an ever expanding market. In this regard, Mr Norman Davis, a witness for the second, third and fifth defendants, spoke of the demand for quicklime for Windalco [Alcan]. His evidence is most telling. Not only did he say that the demand for quicklime was increasing but gave a sound scientific basis: Jamaica's bauxite now had increasing levels of phosphorous which needed to be extracted by quicklime….Thus increase in demand for quicklime was spurred by two things: the increased phosphorous content of the bauxite ore and the increased production of bauxite. All this took place in the context of the three bauxite plants having old quicklime plants which needed to be replaced."

[98] Although WCC relied heavily, at the trial, on a dependence on off-take of its product by Jamalco, its approach prior to, and at the time of its commencing operation, was that there was a wider market available to it. It based its applications to NIBJ, for financing, on its intention and ability to supply all the alumina companies, the local sugar industry and even an overseas market, in the Caribbean and beyond. That approach continued even after its discovery that supplying Jamalco was then a limited option. The learned trial judge was entitled to find that the loss of the Jamalco market was not what caused WCC to fail. There was ample evidence of major miscalculations, misapplications and misadventure, hampering WCC over the years of its operation, to

enable the learned trial judge to have found that its demise was not due to the actions of the respondents.

Ground 7 – The evidence of Messrs Wong Ken and Williams

[99] This ground straddled the areas of both the size of the market and the issue of misfeasance in public office by Mr Clarke, Dr Lawrence and NIBJ.

[100] WCC's complaint for this ground is that the learned trial judge did not give sufficient attention to the evidence of Mr Wong Ken or to the documents written by Mr Elworth Williams. It, however, cannot be denied that Mr Wong Ken's evidence was fully outlined in what the learned trial judge described as WCC's "theory". WCC's case, as it was understood and set out by the learned trial judge, was contrasted with the evidence of Mr Davis and Dr Lawrence and the learned trial judge explained why it was that he accepted their evidence, both as to the size of the market and as to Dr Lawrence's influence, or lack thereof, in the conclusion of a contract between RJLML and Jamalco. As was mentioned above, this was a finding of fact which should not be disturbed.

[101] The bulk of Mr Williams' correspondence, which was admitted into evidence, was written in the context of a quarrel between certain other members of the board of CLCL and himself. The quarrel emanated from a dispute as to whether his company, Tricon Investments Corp Ltd (Tricon), ought to have been paid for services, which he said that it had rendered to CLCL. His chairmanship of CLCL's board was a casualty of that dispute. He was replaced as chairman. Mr Williams was a principal of Tricon as well as

of CDA, one of the shareholders of CLCL. There was also a stand-off between the other members of the CLCL board and himself about having Tricon registered as the owner of the shares, for which CDA was the registered owner.

[102] In his letters to various persons, Mr Williams levelled accusations of wrongdoing which, he said, negatively affected CLCL's progress. These accusations were made mainly against Dr Lawrence. Mr Williams did, however, speculate that possibly Mr Clarke had improperly sought to benefit CLCL while he was the Minister of Mining. He made no specific accusation against Mr Clarke, nor did he refer to any specific factual situation in his speculations.

[103] Mr Williams, in his letter of 23 March 1998, addressed to Dr Lawrence, referred to WCC. He said at page 3 of his letter (page 170 of volume 2 of the record of appeal):

> "The operations of [CLCL] are rife with conflicts of interest which, if remain unresolved, will jeopardize implementation of the project. You are a member of the *NIBJ* and have undoubtedly been party to decisions relating to [WCC], our competitor, **simultaneously, you attend Board meetings of [CLCL] and seek to determine policies which could adversely impact on [WCC]**. We also understand that [WCC] is currently negotiating a short-term supply contract with *Jamalco* and you will undoubtedly participate in that Board's decision on the matter. How can you simultaneously serve impartially all these conflicting interests?" (Italics as in original, Emphasis supplied)

In that extract, Mr Williams seems to suggest that Dr Lawrence may have been improperly using his position and influence to "adversely impact" WCC.

[104] In his focus on raining opprobrium on Dr Lawrence, Mr Williams seems oblivious to the fact that he contradicted himself when he later suggested that Dr Lawrence did not have any real influence on the Jamalco board. In an attempt to demonstrate that Dr Lawrence had not been of any beneficial assistance to CLCL, Mr Williams said at paragraph (d) of page 4 of the said letter (page 171 of volume 2 of the record of appeal):

> "You have been claiming that you have made a substantial contribution to the [CLCL] project. I happen to know that your claims are false. But if indeed you have the influence you claim, why was it necessary for the project to be shelved because the JVF was unable to obtain a lime supply contract with *Jamalco*? How was *Jamalco* able to enter into an agreement with Chemical Lime such that if the latter had performed, the [CLCL] project would be dead? Why is it that you are presently the greatest obstacle to [CLCL's] performance of an existing US$1 million limestone supply contract with Jamalco, on whose Board of Directors you sit?" (Italics as in original)

Mr Williams concluded that paragraph of his letter with the following:

> "While we are not suggesting that you should improperly use your influence with *Jamalco* on [CLCL]'s behalf, where is the manifestation of your assistance? Don't you perceive any conflict of interest here?" (Italics as in original)

[105] His claim of not seeking any improper grant of favours appeared in the paragraph following his suggestion to Dr Lawrence that he should seek to use his influence to benefit CLCL. Mr Williams said, in part at paragraph (c) (page 171 of volume 2 of the record of appeal):

> "You have already done much damage to the project and, in order to mitigate the damages, my advice to you is to use your influence to have the facilitating institutions

> immediately subscribe the additional equity for which they are already committed. Perhaps this might just give [CLCL] the necessary leverage to recover its initiative in this project."

[106] Mr Williams did not provide a witness statement. By the time of the trial, he was very ill. There was a proposal to have him testify at his home, but his medical condition prevented any progress in that regard. In the end, the only material from Mr Williams, which was before the learned trial judge, was Mr Williams' letters and memoranda to members of CLCL's board. The learned trial judge had admitted them into evidence. None of those were made under oath or subject to any testing for accuracy or reliability. They not only included speculation by Mr Williams, but they included Mr Williams' interpretation of certain situations. In light of those deficiencies and the tenor of some of Mr Williams' communications, it is not surprising that the learned trial judge ignored those bits of evidence.

[107] This was not a case like **Flannery v Halifax Estate Agencies Ltd** [2000] 1 WLR 377, where the learned trial judge had contending expert evidence that required him to explain a preference for one body of evidence over its competitor. Mr Williams' documentation did not constitute expert evidence. There is no doubt in this case why the learned trial judge found that WCC lost its claim. He carefully explained his reasons for his finding on each issue that was identified as relevant. His decision was transparent.

[108] It is noteworthy, however, that except for the single reference to WCC mentioned above, Mr Williams showed no interest in WCC. He did not demonstrate any concern with undermining or thwarting WCC's progress. He made no allegation that any other director of the company had done so. His main concerns were his company, Tricon, and the health and welfare of CLCL, by which he undoubtedly hoped that Tricon's investment in CLCL would prove profitable.

[109] Based on that assessment, this ground of appeal cannot succeed.

Grounds 9, 10 and 11 – The issue of improper conduct by Dr Lawrence

[110] The learned trial judge, at paragraph [80] of his judgment, succinctly summarised WCC's case against Dr Lawrence. He identified the various accusations that WCC had made against Dr Lawrence and stated that the conduct, of which Dr Lawrence was accused, was said to amount to misfeasance in public office and "conspiracy to advance the interests of Mr Clarke at the expense of WCC" (paragraph [80] of the judgment).

[111] Sykes J, in paragraphs [81] through [86] of the judgment, assessed each of the accusations and found that neither misfeasance nor conspiracy had been proved. In respect to the charge of misfeasance, the learned trial judge found that the mental element of the tort had not been proved. He found that:

> "…Dr Lawrence never addressed his mind to the permission [to Mr Clarke by the Cabinet] issue Dr Lawrence was not a member of the Cabinet.…This tort requires a mental element which is either knowledge that neither he nor Mr Clarke had the power to do what they did or was reckless as to whether

> he or Mr Clarke had the power. If he never thought about it, how can it be said that he had either states of mind?" (paragraph [81])

[112] The learned trial judge, in considering WCC's several accusations, made two very important findings of fact. He held that Dr Lawrence:

> 1. "…always honestly believed that there was enough room in the market for two producers…[and] that even with the combined production of CLCL, WCC and the bauxite/alumina companies, there would still be a shortfall" (paragraph [82]).
>
> 2. "…did not exercise any influence over Jamalco's commercial decisions. Therefore he did not exercise any influence over Jamalco's decision to purchase or not to purchase quicklime from WCC" (paragraph [86]).

[113] It was later in his judgment that the learned trial judge concluded his analysis in respect of the conspiracy charge. He held that failure in respect of the misfeasance charge necessarily meant failure on the conspiracy charge, as there was no proof of an unlawful act. He said at paragraph [215]:

> "The evidence relied on to ground the conspiracy is the same as that used in the tort of misfeasance in public office and breach of fiduciary duty. From what has been said above this court has concluded that neither Dr Lawrence nor NIBJ was part of any conspiracy to injure WCC. In addition, there is no causal connection between the defendants' conduct and WCC's loss."

[114] WCC's complaints in respect of the learned trial judge's approach to this area of the case is that he failed to give sufficient weight to the fact that Dr Lawrence wielded great influence in the bauxite/alumina industry, by virtue of his many memberships of

various boards in that industry. It argues that the learned trial judge's findings that there was no proof that Dr Lawrence influenced the Jamalco/RJLML contract ignored realities in Jamaica. Lord Gifford, on WCC's behalf, argued that there was evidence that Dr Lawrence was to have sought to influence the issue of the limestone contract between Jamalco and CLCL and therefore it is not inconceivable that he could have influenced the Jamalco/RJLML contract in respect of quicklime. WCC further argued that the learned trial judge, in concluding that Dr Lawrence did not intend to harm WCC, was addressing the wrong question, in that WCC was not alleging targeted malice but rather the knowledge or recklessness that assisting CLCL would result in harm to WCC or to a class to which WCC belonged.

[115] Mr Hylton QC, appearing for Dr Lawrence, contended that WCC's case against Dr Lawrence was based on broad generalisations that relationships of the kind, in which Dr Lawrence was engaged, resulted in favouritism being practised in Jamaica in matters of business. Learned Queen's Counsel argued that the effect of WCC's position, on the situation in Jamaica, was that it asked that wrongdoing be presumed even without evidence. He submitted that a close examination of the evidence demonstrated that not only did Dr Lawrence not have as great an involvement in the business of CLCL or in respect of WCC, as WCC asserts, but that the evidence shows that Dr Lawrence insisted on a level playing field for all players in the quicklime market. Mr Hylton submitted that there was no evidence of any abuse, by Dr Lawrence, of his office, or indeed, of any conspiratorial conduct by him, in relation to damaging WCC.

[116] WCC's arguments lean heavily on inferences which, it says, may be drawn from the various elements of Dr Lawrence's participation in the bauxite/alumina industry. The learned trial judge was entitled, however, having seen and heard the witnesses, particularly Dr Lawrence himself, to find that the size of the market was such a factor that Dr Lawrence's:

a. presence on the board of NIBJ when it participated with Licojam and others in the creation of CLCL;
b. contributions to the board of CLCL; and
c. contributions to the board of NIBJ in its dealings with WCC,

did not prove WCC's theory of misfeasance and corruption. The learned trial judge was entitled to find that Dr Lawrence was seeking to enhance the quicklime industry and assist both manufacturers of the product. There was evidence that Dr Lawrence informed CLCL's board that the policy regarding incentives was that each manufacturer would be given the same level of support, "no more, no less" (volume 7 Tab J page 81 of the record of appeal).

[117] There was similarly, no evidence of a conspiracy between Dr Lawrence and any person or entity to inflict harm on WCC.

[118] These grounds should also fail.

Grounds 12 - 17 – The issue of NIBJ and a fiduciary duty to WCC

[119] The learned trial judge's findings concerning the accusations of fiduciary breach against NIBJ have been set out above. WCC's criticisms of those findings are multifaceted. Firstly, it asserts that the learned trial judge failed to appreciate that the general principles concerning commercial banks and their customers did not apply to investment banks, particularly those that are charged with using public funds to facilitate and encourage production and industry in the island. Next, it contends that the learned trial judge failed to give any, or any sufficient, weight to the fact that the submissions to NIBJ's board were the result of a joint effort of WCC and NIBJ's staff. That situation, WCC contends, was such that it was entitled to believe that the assertions in those submissions, especially regarding its market and price strategy were, not only accurate, but were supported by both the staff and board of NIBJ.

[120] WCC's third area of complaint is that the learned trial judge ought to have found that NIBJ owed a fiduciary duty to WCC as soon as NIBJ became entitled to appoint directors to WCC's board as a condition of the grant of the first loan. Finally, WCC contends that the learned trial judge was in error when he found that NIBJ's breach of fiduciary duty, as he found did occur, did not cause WCC any loss.

[121] These broad areas shall be considered separately.

a. <u>NIBJ's status as an investment bank</u>

[122] Lord Gifford submitted that the learned trial judge was wrong in applying the learning concerning the relationship between commercial banks and their customers to

the situation existing between NIBJ and WCC. He argued that the principle in **National Commercial Bank (Jamaica) Limited v Hew** (2003) 63 WIR 183 (hereafter referred to as **NCB v Hew**), that bankers did not automatically owe a duty to advise their customers, did not apply in the present circumstances. He submitted that investment banks operated differently from commercial banks and therefore different principles applied.

[123] Learned Queen's Counsel also submitted that the learned trial judge failed to recognise "and pay due regard to the importance of NIBJ's position as an investor with knowledge that the success of the venture depends on the existence of a state of affairs, which NIBJ's very participation in the rival venture [CLCL] will prevent from occurring" (paragraph 59 page 25 of his skeleton arguments). He cited, amongst others, **Commonwealth Bank of Australia v Smith** [1991] FCA 375; (1991) 102 ALR 453, in support of his submissions.

[124] Mr Piper QC, appearing for NIBJ, submitted that NIBJ had a statutory responsibility to develop industries. He argued that mining was one of the industries that were critical to the Jamaican economy. Learned Queen's Counsel submitted that in carrying out its statutory mandate, NIBJ would be statutorily required to support more than one entity in an industry, such as mining, even if it resulted in a conflict of interest.

[125] Less startlingly, Mr Piper submitted that NIBJ, as an investment banker, had no duty to tell an entity that it was pursuing an incorrect course. He relied on **NCB v Hew**

for support in respect of these submissions. He adopted the learned trial judge's approach, and submitted that it was when NIBJ had appointed its representative to WCC's board of directors that NIBJ then owed a duty to advise WCC.

[126] The essence of the decision in **NCB v Hew**, concerning this point, is that unless there was some other relationship, such as financial adviser, established between a banker and a customer, the banker had no duty to inform a customer seeking financing, that the proposed project was commercially disadvantageous to the customer. Their Lordships, at page 188d, adopted the opinion expressed by Warne and Elliot in their work, Banking Litigation (1999), at page 28:

> "A banker cannot be liable for failing to advise a customer if he owes the customer no duty to do so. Generally speaking, banks do not owe their customers a duty to advise them on the wisdom of commercial projects for the purpose of which the bank is asked to lend them money. If the bank is to be placed under such a duty, there must be a request from the customer, accepted by the bank, under which the advice is to be given."

[127] There is nothing in the authorities cited by Lord Gifford which supports his contention that investment bankers, simply by virtue of their enterprise, owe a duty to advise potential borrowers of the likelihood of success of the proposed project for which financing is sought. In **Commonwealth Bank of Australia v Smith**, the bank was a commercial bank, but the transaction, the subject of the dispute between the parties, was an investment transaction. The court found that the bank's manager had become, over a number of years, the investment adviser of the customer. It was by virtue of that position that the bank owed a fiduciary duty to the customer. It breached that duty

when it placed itself in a position of conflict with the customer's interests, and the manager engaged in conduct that was misleading to the customer.

[128] In one of the academic papers cited by Lord Gifford, Investment Banks as Fiduciaries: Implications for Conflicts of Interest, Melbourne University Law Review August 2005, page 478, the learned writer, Andrew Tuch, makes it clear that although a core function of investment banks is the provision of financial advisory services, "in the absence of a fiduciary relationship and outside any express contractual undertaking, investment banks will, generally speaking, not be obliged to avoid conflicts of interest in providing these financial advisory services" (page 479). It is true, that in many circumstances the investigation and implementation of the transaction will result in the investment bank providing advice to the customer and the customer, to the knowledge of the investment bank, placing trust and confidence in that advice. In such circumstances a fiduciary duty is placed on the investment bank. Each case is, however, dependent on its own facts.

[129] Mr Piper's submission that NIBJ's statutory obligations supersede any fiduciary duties it may owe to its customers is also untenable. NIBJ is registered under the auspices of the Companies Act. Its memorandum of association is exhibited at volume 3 page 289 of the record of appeal. At paragraph EE of that document, it is noted that its objects "shall be carried out on commercial lines and in the best interests of the shareholders and Jamaica as a whole". It had no special statutory exemption from

operating in conformity with any law. It was therefore obliged to conform to the requirements of equity.

[130] NIBJ's mandate would, however, as would any other investment bank, allow it to invest in competing enterprises in an industry, provided that it could avoid being placed in a position where it owed a fiduciary duty to any of those entities. Full disclosure of the competing interests would, undoubtedly, be an essential element of such ventures.

[131] On that analysis, there was no obligation on NIBJ to give advice and no position of trust which was undertaken, simply by virtue of NIBJ being an investment bank. It is inconceivable, therefore, that the mere entitlement to make an appointment to the board of directors, without having acted on that entitlement, would create a duty in NIBJ to WCC, or to alter NIBJ's status.

b. <u>The submissions to NIBJ's board</u>

[132] WCC's applications for funding were, on each occasion, assessed by a technical team comprised of NIBJ's employees. In conducting its analysis, the technical team received information from WCC in relation to the company and the financing that it required. The team made a visit to WCC's factory plant as part of its assessment of WCC's first application for financing. The team then prepared an analysis of the respective applications. Each analysis was in the form of a report or submission to NIBJ's board. In its submission to NIBJ's board in respect of WCC's first application, the team concluded that the "project is viable and fits well within NIBJ's Investment [sic]

guidelines" (volume 4, page 30 of the record of appeal). It recommended that NIBJ invest in WCC.

[133] WCC's submission is that this conclusion and recommendation became advice to WCC that its pricing and overall project was viable. The contention cannot be accepted. Firstly, there is no indication that the submission was shared with WCC, but even if that submission was shared with WCC, there was no relationship at the time of that first submission, which placed NIBJ in the role of an investment adviser. There is no reason to rule that the second submission required any different consideration. The second reason for rejecting WCC's contention is that those analyses were for NIBJ's purposes and aimed at addressing NIBJ's interests. A recommendation of an application for financing cannot automatically become advice to the applicant that its pricing and project are viable. Nor should a recommendation for the grant of financing create an expectation in WCC "that a relationship of trust and confidence existed" (ground of appeal 17(e)) between NIBJ and itself.

[134] The issue of the WCC's proposed price, at the time of its first application for financing, must next be considered. WCC argued in this appeal (ground 17(f)), that not only did NIBJ fail to disclose that it had invested in an entity which intended to compete in the same market, but it failed to disclose that the proposed price to be charged by the competitor was significantly less than that being charged by WCC.

[135] The fact situation is that, just before WCC's first application to NIBJ for financing, its potential rival, CLCL, was in a very unhappy state. CLCL's limestone production was

beginning to encounter quality difficulties, and its expenses required further financing from its shareholders, which need was not being swiftly met. It still hoped to produce quicklime but did not have the financing to acquire the equipment. It was in this context that it was considering its options. At a meeting of the board of directors, held on 28 August 1996, the discussions spoke, in part, to the then status of the market:

> "The Chairman, Dr. Lyon reported on the discussions and negotiations he had been having with the Rugby Cement Group who had been in the island during which time they visited all the alumina plants as well as Western Cement. Based on their findings their Chief Executive Officer travelled to the island. Rugby is to submit a proposal to their Board of Directors in early September.
>
> Rugby is seeking for an indicative price from the alumina companies. They have received assurance from Alcan that their Ewarton refinery will be willing to purchase their lime requirements from Clarendon Lime Company Ltd. Alpart is capable of producing their own needs, therefore, would not be outsourcing. Rugby estimates that Jamalco's cost price for lime is about US$86.00/per ton and have therefore offered them US$85.00 per ton. Jamalco is, however, using the possible entry of Chemical Lime into the market place to negotiate prices downward. Rugby has to make a determination if the investment in Jamaica is feasible before making a commitment.
>
> Western Cement is planning to sell lime at US$120.00 per ton. Their plant, however, might not be efficient. The general consensus is that Chemical Lime is entering the market by cutting prices after which they can raise their prices."

It must be borne in mind that this market intelligence was being analysed before WCC had commenced production of quicklime and before it had made an application to NIBJ. WCC's claimed ignorance of this intelligence at that time speaks to its failure to prepare for the market that it was proposing to enter. The extract suggests that Rugby had had

contact with WCC during its reconnaissance of the Jamaican market. How could Rugby have disclosed information to CLCL, yet WCC was not able to secure that information?

[136] The excerpt from the minutes also shows that WCC's complaint of wrong-doing by NIBJ, at that time, is misguided. There was no intention by CLCL to offer quicklime to the market, at any price, at the time of WCC's first application to NIBJ. It would therefore be incorrect to say that NIBJ knew, at the time of that application, that CLCL "intended to offer [quicklime at] a better price [than WCC could]" (ground 17(f)).

c NIBJ's representation on WCC's board

[137] The effect of the appointment of NIBJ's representative on the board of WCC must now be considered. NIBJ appointed Ms Diane Wynter to WCC's board as of 27 November 1997. She was already a member of the board of directors of CLCL as NIBJ's representative. The learned trial judge opined that the appointment to WCC's board created a duty on NIBJ to give WCC its best advice. The appointment, he found, also placed NIBJ "in an irreconcilable conflict between the duty of loyalty owed to CLCL and the same duty to WCC" (paragraph 180). He found that NIBJ failed in its duty to WCC. He said at paragraph [188]:

> "This court is prepared to accept that when Mrs Dianne Wynter was appointed to WCC's board as NIBJ's representative, **NIBJ was under a fiduciary duty to give its best advice to WCC because it had become a director**. As noted earlier, a director has a duty of loyalty to his company and that means, among other things, giving it the best advice that he has to offer. The court accepts that **when NIBJ appointed Mrs Wynter to WCC's board NIBJ came within the accepted categories of a fiduciary**. A director has an obligation, unless modified by contract or other means, to advance the best interest of the company.

> NIBJ therefore had a duty to give WCC its best advice. There is nothing to indicate that NIBJ, without revealing the proposed pricing structure of CLCL, indicated to WCC that it may wish to revise its strategy since it appeared to be unworkable. **NIBJ through Mrs Wynter, qua director, should have made it clear to WCC that its pricing strategy was questionable. The failure to do this, in the opinion of this court, amounts to a breach of fiduciary duty**." (Emphasis supplied)

[138] The learned trial judge supported his position with references to **Bristol and West Building Society v Mothew (t/a Stapley & Co)** [1996] 4 All ER 698, 711-712. That case did not involve a company director but spoke to the need for loyalty in a fiduciary. Lord Porter made it clear in **Regal (Hastings) Ltd v Gulliver** [1967] 2 AC 134, that directors "occupy a fiduciary position toward the company whose board they form" (page 159). That fiduciary position requires a duty of loyalty to the company and acting in the company's interest.

[139] The learned trial judge's reasoning that NIBJ, through its representative on WCC's board, failed to act in WCC's interest, cannot be faulted. Not only did NIBJ breach its fiduciary position when it placed itself in a position of conflict; being on the respective boards of directors for the competing entities, WCC and CLCL, but it failed to disclose to WCC that it was represented on the board of WCC's competitor. In that position of conflict, NIBJ was required to serve two masters with equal dedication, which has been long pointed out to be an impossible task. The issue of whether that failure resulted in loss to WCC will be analysed below.

[140] Based on that analysis, however, grounds 12-17 should fail.

Ground 18 – The issue of causation

[141] The issue of causation arises in the case of NIBJ's breach of its fiduciary position. The learned trial judge, however, dealt with the issue of causation on a wider basis. He did so partly because he found that Mr Clarke had been guilty of misusing his office for his personal gain.

[142] In dealing with the issue of causation, Sykes J stated the incontrovertible principle that there "must be a causal connection between the action of the tortfeasor and the damage suffered by the [claimant]" (paragraph [78] of the judgment). He stated that, even in claims in equity, "there must still be a causal connection between the alleged breach of duty and loss allegedly suffered by the claimant" (paragraph [191] of the judgment). The learned trial judge examined the "facts relating to the causation issue...in the section dealing with breach of fiduciary duty" (paragraph [79] of the judgment).

[143] As a prelude to his analysis, the learned trial judge set out his finding that WCC had, by the time NIBJ had appointed a director to its board, already committed itself to a flawed business plan. The learned trial judge used a cricketing analogy for his description of WCC's position. He said at paragraph [189]:

> "By the time of Mrs Wynter's appointment in 1997, WCC had already committed itself to playing down the wrong line."

He went on to say:

> "WCC in fact commenced production on a false premise. Had WCC properly informed itself of the accurate information

> needed during the planning and construction phase of the plant it would undoubtedly have found that the different bauxite companies had different quicklime size requirements. WCC was heading towards the iceberg and nothing could be done to save it save massive injections of capital which NIBJ, even as a director/lender was not under any legal obligation to provide."

[144] He commenced his analysis of the issue of causation at paragraph [191] of his judgment. After explaining the juridical basis of his approach, the learned trial judge repeated his earlier assertion that WCC was already committed to a flawed business platform. He said, in part, at paragraph [193]:

> "NIBJ had no duty to advise WCC on its course of action before it became a director of WCC. When it became a director, WCC's problems were very severe and total disclosure of what NIBJ knew about pricing and cost of production after Mrs Wynter's appointment would not have changed WCC's position. WCC was committed to a flawed production strategy which it did not know until after it started actual production. By the last quarter of 1997, WCC needed money to recalibrate the plant. It had not rid itself of the high cost debt it acquired to start the construction of the plant. When WCC got the first loan from NIBJ it was supposed to have begun production in January 1997. Production did not start until May 1997 and even then production stopped from May 2 to August 1997. In effect, from January 1997 to August 1977 [sic], WCC had only one day of actual production. The high cost debt was still there. Even when production resumed in August 1997, WCC had not known at that point that its plant was wrongly calibrated for all three bauxite companies. WCC did not have a bagging plant to sell quicklime in bags to purchasers who might require quicklime be given to them in bags...."

[145] The learned trial judge concluded that WCC's losses were "caused by the cumulative effect of (a) the incorrect calibration of the plant; (b) the high debt servicing costs; (c) the cancellation of the quicklime contract by Jamalco and (d) the various

mishaps at the factory. The losses were not caused by any breach of fiduciary duty" (paragraph [193]).

[146] WCC, in this appeal, took those conclusions to task. It argued that the learned trial judge's assertions "were seriously flawed and not warranted on the facts" (paragraph 92 of the appellant's speaking notes). As to finding (a), WCC asserted that the flawed calibration of the plant "only became a material issue after WCC had been unable to obtain a long term contract with Jamalco" (paragraph 93 of Lord Gifford's speaking notes). On this issue, there was ample evidence to support the learned trial judge's finding. In its 1996 application to NIBJ, WCC clearly indicated that it had all the alumina companies in its sights as potential customers. It particularly singled out two as having already indicated an interest in its product. At paragraph 6.0 of the submission to the board of NIBJ (volume 4 page 26 of the record of appeal), the following appears as representing WCC's hopes:

> "[WCC] has identified two (2) major customers, JAMALCO and Alcan, who have indicated that they would be willing to purchase a minimum of 60,000 MT and 12,000 MT per annum respectively. The bauxite/alumina companies currently meet their lime requirements by local suppliers and importing the shortfall. The companies have expressed their dissatisfaction with the quality of the lime from local sources. At the same time, Alpart has expressed a willingness to purchase 240,000 ton [sic] per year of aggregate for feed stock for its own lime production. This level of production would more than meet [WCC's] own projections for outside sale of aggregate."

[147] The evidence is that it was only when it had started production of quicklime that WCC realised that its product was not readily acceptable to Alcan. The reason being

advanced in this appeal for the need for recalibration of WCC's plant was not that which was advanced at the relevant time. In its letter of 24 November 1997, applying for additional financing, WCC blamed its position on the faulty information it had received concerning the quicklime needs of the alumina companies. In this regard, the letter stated, in part:

> "[WCC] finds itself in a rather disturbing situation arising from our reliance on information provided to us in 1992 by the alumina industry's Lime task force headed by Alcan. At that time we were provided with the specifications for the product required by the alumina industry and we dutifully constructed our plant around same. As it has turned out, the size specification of the product is not common to all the alumina plants, specifically Alcan is unable to use the product at its Kirkvine works and worst [sic] none of the companies had the ability to receive the product without some modification to their receiving facilities." (Volume 4, page 225 of the record of appeal)

[148] The letter went on to explain that Jamalco had adjusted its receiving facility but that WCC wished to broaden its market opportunities. It pointed to the specific needs of Alcan and the sugar industry:

> "Alcan has told us that their Kirkvine works require lump lime rather than our milled lime, and we must now acquire, engineer, and install equipment that meets their specifications. Further, the sugar industry who [sic] has always expressed great interest in our product for the most part receives it in a bagged form and to that end we now wish to install a bagging plant."

[149] It is true that, up to about the end of October 1997, Jamalco was taking almost all of WCC's production of quicklime. At or about the beginning of November 1997 Jamalco suspended their order for quicklime. "The reason given is that they are

currently mining a deposit that is very pure and as a result, their lime requirements have been reduced. The time frame for this suspension has not been specified and it could be two weeks as well as be two months" (NIBJ's update report on WCC's status (volume 4 page 219 of the record of appeal)). The update report noted that WCC was obliged to cease production in light of Jamalco's position.

[150] For completeness it should be stated that it was in December 1997, that Jamalco issued a letter committing to purchase quicklime exclusively from Rugby/CLCL for a period of 15 years. Rugby/CLCL was, however, not in a position to manufacture quicklime at that time and Jamalco resumed purchasing the product from WCC.

[151] The calibration difficulties continued to dog WCC. Although it secured the equipment that was intended to meet Alcan's and the sugar industry's requirements, the equipment (financed largely by NIBJ funding) was not properly designed for the purpose and, for the most part, remained unused.

[152] The conclusion to be drawn from that evidence, as the learned trial judge found, was that it was WCC's lack of flexibility, based on its flawed market intelligence and incorrect installation of equipment, which was a major contributor to its inability to earn. This was in the context of its having to grapple with the crippling interest rates from its short-term debt.

[153] On the issue of the "high debt servicing costs", WCC complained that the learned trial judge should have found that it was because WCC had unlawful competition from

Rugby/CLCL that its debt costs were a significant factor. The fact is, however, that WCC was sagging under its debt costs from as early as 1996. It was its inability to pay its debts that led it to apply to NIBJ, for financing, in the first place. It is to be noted that a condition of the grant of the first tranche of financing by NIBJ was that it was to be used exclusively for payment to third parties, mainly suppliers who had, prior to the application, remained unpaid. By August 1997, just prior to commencing the regular production of quicklime, WCC's debt had ballooned. It continued to be affected by various issues that reduced or suspended its operations, but the interest on the debt was a constant that continued to accumulate. The correspondence from both Mr Cartade, and Mr Wong Ken, at their respective stints as managing director, shows them attempting to placate the consortium of bankers to whom WCC was indebted.

[154] In so far as competition was concerned, it has already been pointed out that WCC was misguided to think that it was entitled to a monopoly in the supply of quicklime. It bears repeating also that RJLML did not commence production of quicklime until June 2000. WCC is therefore incorrect in saying that the absence of the Jamalco contract denied it any "breathing space" to allow it to get over its teething pains and establish itself as a competitive entity.

[155] The learned trial judge was entitled to find that WCC's debt burden was a major factor in its being unable to produce a competitively priced product.

[156] With regard to the cancellation of the quicklime contract by Jamalco, Lord Gifford correctly pointed out that the contracts between Jamalco and WCC were short-term

arrangements. The learned trial judge did point out, however, that WCC had, prior to commencing production, declined a long term contract with Jamalco. Although Lord Gifford submitted that this was, in fact, an offer for a short term contract, it is more likely that the offer was for a long term contract in the light of the fact that WCC was not yet in a position to produce quicklime. WCC was probably correct in declining a long term contract in July 1996, but the significance of Jamalco's offer at that time was that it was prepared to offer a long term contract to any local supplier that could provide it with quicklime, even if the supplier was not yet ready to manufacture the product. RJLML was prepared to take the risk that WCC declined. It was better suited, because of its association with Rugby, to take that risk. Rugby had the capability to import the product pending the commissioning of RJLML's plant in Jamaica.

[157] The learned judge is correct in saying that the loss of Jamalco as a major customer was an important blow to WCC. Jamalco was taking almost all of WCC's entire production up to October 1997, and at that time was the only alumina company that had made modifications for receiving WCC's deliveries. It is also true to say that Jamalco's custom was lost because of the efforts of CLCL/Rugby. Those were not, however, due to any improper efforts by Mr Clarke, Dr Lawrence or NIBJ. The learned trial judge accepted that it was Jamalco's management that negotiated the quicklime contract with CLCL/Rugby and not Jamalco's executive committee, of which Dr Lawrence was a part.

[158] The various mishaps at WCC's factory and with its employees was the next factor that WCC criticised as being inappropriately ascribed as a reason for its failure. Lord Gifford argued that those mishaps did "not justify a conclusion that the unlawful acts of the respondents had no causal connection to the disastrous loss suffered by [WCC]" (paragraph 97 of the speaking notes).

[159] Lord Gifford's submissions ignored the context in which these incidents and accidents occurred. Whether it be the failure of the plant after the first day of production, 1 May 1997, injury to workers because of inappropriate gear, closing of the plant for breaches of the Factories Act, incapacity of the production manager due to a motor vehicle crash, or the flooding of the plant due to heavy rainfall, all these interruptions to production, sometimes for extended periods, meant that there was no income from sales. All this was while the debt resulting from the short-term loans continued to increase. The cost of servicing the debt became a significant factor for the pricing of its product. Without the "massive injection of capital", of which the learned trial judge spoke, it would not have been possible for WCC to sell its quicklime at a price at which it could compete, and yet remain viable.

[160] The learned trial judge's assessment of the reasons for WCC's failure was sound. Ground 18 should fail.

Grounds 19 - 25 – WCC's response to information of competition from CLCL

[161] WCC argued, in respect of these grounds, that the learned trial judge ignored Mr Wong Ken's evidence that, had he known of the kind of competition facing WCC, "he

would have cut his losses and sold out or he would have sought a joint venture partner". Lord Gifford argued that where a breach of fiduciary duty occurs, the party in breach cannot be heard to say that the innocent party would not have changed course if he had known of the breach. In support of his submissions, Learned Queen's Counsel relied on **United Pan-Europe Communications NV v Deutsche Bank AG** [2000] 2 BCLC 461 and **London Loan & Savings Co of Canada v Brickenden** [1934] 3 DLR 465.

[162] Lord Gifford cited the following extract from paragraph 16 of **London Loan & Savings Co of Canada v Brickenden** in support of his submissions:

> "When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure wound not have altered the decision to proceed with the transaction, because the constituent's action would be solely determined by some other factor, such as the valuation by another party of the property proposed to be mortgaged. Once the Court has determined that the non-disclosed facts were material, **speculation as to what course the constituent, on disclosure, would have taken is not relevant**." (Emphasis supplied)

[163] The evidence from Mr Wong Ken in this regard may be found at volume A, tab A, pages 218-219, or alternatively, at volume A, tab B pages 23-24 of the record of appeal. Mr Wong Ken, in his evidence in chief, stated that he did not know, prior to WCC applying to NIBJ for financing, that NIBJ had invested in CLCL. The exchange concerning his alternative to taking that financing continued thus:

> "A. Well, for start we certainly would not have taken money from NIBJ, whatever else we did would have required serious thinking.
>
> Q. Serious thinking?
>
> A. Yes, the market was very small and we didn't think that the market could tolerate two parts [sic] I certainly would not have gone into competition against such a well funded company with persons of such powerful stature in Jamaica, that would be suicide. These guys sat on my market.
>
> Q. So, this page [of NIBJ's annual report 1995-1996] makes reference to investment of NIBJ in Clarendon Lime. If you had discovered the identities of all the participants in Clarendon Lime, how would that affect your position?
>
> A. In 1996, well as I said, we certainly would not have taken any money from NIBJ, we would have had to consider the options open to the company at the time. Thinking about it now it might have – the projection of selling out cheaply to try to find a joint venture partner, it is difficult to say now. One thing is clear we would not have gone to NIBJ for money."

[164] The contemporary documentary evidence and evidence of events occurring subsequently do not support Mr Wong Ken's evidence at the trial. It is beyond question that WCC was in serious debt at the time of the first application to NIBJ. The suppliers of the conveyors, FMC, and the supplier of the kiln, Fercalex, were owed money and requiring payment. In fact, it seems that FMC were threatening court action at the time of WCC's first application to NIBJ. Mr Wong Ken agreed in cross-examination that WCC's need for cash was "urgent" (volume A, tab A, page 148 of the record of appeal) and the need for disbursement of the financing was "critical" (volume A, tab A, pages 163-4).

[165] Subsequent events also undermine Mr Wong Ken's testimony. His evidence was that he learned of NIBJ's involvement in CLCL in July 1998. He was by then the managing director of WCC. Despite that knowledge, WCC continued its relationship with NIBJ. It applied for and accepted further funding from NIBJ on two subsequent occasions. Mr Wong Ken, at a later date, also expressed confidence in the professionalism of the NIBJ's officers. He stated this in a letter dated 28 April 2000:

> "We have noted [the comments of NIBJ's director of portfolio management Mrs Portia Nicholson-Clarke in a letter dated 13 April 2000] regarding confidentiality. We have the highest regard for Mrs. Wynter and Ms. Gayle and believe that they discharge their duties in a highly ethical and professional manner." (Volume 4 page 426 of the record of appeal)

It is true, however, that he had expressed concern to Mrs Wynter about the situation. It was his expression of that concern that led to Mrs Nicholson-Clarke to write to him concerning the issue of confidentiality. The minutes of the February 1999 board meeting of WCC reveals that Mr Wong Ken had been assured that Dr Lawrence would not deliberate on WCC's matters (volume 4 page 390 of the record of appeal).

[166] In a letter dated 13 May 2002, Mr Wong Ken re-affirmed his satisfaction with the integrity of NIBJ's officers (see volume 5, tab A, page 250 of the record of appeal).

[167] Whether WCC would have taken the first loan, had it known of NIBJ's involvement with CLCL, may well be speculation, and as a result, NIBJ could not properly suggest that WCC would have gone ahead nonetheless. The issue, however, is

whether WCC suffered any loss as a result of the breach of the fiduciary duty. That question has already been answered in the negative.

[168] Lord Gifford, in respect of these grounds, submitted that NIBJ led WCC into a debt trap, leading to its being put into receivership. The evidence, however, is that in respect of the first loan, WCC was already indebted to its suppliers and financiers, and the NIBJ financing was used to settle those debts. There was therefore no, or very little, increase in WCC's overall indebtedness as a result of this tranche of the financing. The second tranche of funding was not granted with a view to supplying Jamalco, but rather Alcan, whose Kirkvine plant could not accommodate the size of the quicklime that WCC was producing. There was also an element of the funding which was required to pay for a weigh scale and a dump truck, which would have improved WCC's general efficiency. There was an increase of indebtedness as a result of this tranche of financing but with a view to broadening the acceptability of the product. It was WCC's inability to make use of the equipment that it had acquired, that resulted in its failure to generate increased income from that increase in its debt stock.

[169] In light of the finding in respect of causation these grounds should also fail.

Grounds 26 - 28 – claim for damages

[170] In these grounds, WCC concludes its position in respect of its previous grounds of appeal and argues that the learned trial judge ought to have awarded damages for misfeasance in public office, conspiracy to injure and breach of fiduciary duty. Lord

Gifford submitted that, if WCC were successful in this appeal, the case would have had to be remitted to the Supreme Court for damages to be assessed.

[171] Based on the conclusions reached in this judgment there would be no reason to overturn the learned trial judge's judgement and consequently, no reason to order any assessment of damages to be conducted.

Conspiracy to injure WCC in its business

[172] There are two points to be made concerning WCC's allegations of a conspiracy to injure it in its business. The first point is, as the learned trial judge pointed out, there was no proof of a conspiracy. There was no evidence of any agreement between any of the respondents to injure WCC.

[173] The second point is that the suggestion was that the conspiracy was hatched in 1995. This was before there was any indication of WCC as a force in the production of quicklime. At the time of CLCL's incorporation, WCC did not even have a kiln in place and NIBJ had had no relationship with WCC. The learned judge pointed out why the allegation of a conspiracy was unsound. He said at paragraph [212] of his judgment as follows:

> "[Counsel for WCC] submitted that the conspiracy consisted of agreeing to build a lime plant to supply quicklime to the bauxite companies. This was said to be an agreement to do a lawful act (construct the quicklime plant) by unlawful means (misfeasance in public office and breach of fiduciary duty). The submission is that unlawful means were used. This conspiracy was said to have been formed in 1995. **Since this court has concluded that NIBJ and Dr Lawrence did not commit the tort of misfeasance in**

> **public office then a conspiracy of the form alleged by WCC did not occur**…." (Emphasis supplied]

And again at paragraph [215]:

> "…The evidence relied on to ground the conspiracy is the same as that used in the tort of misfeasance in public office and breach of fiduciary duty. From what has been said above this court has concluded that neither Dr Lawrence nor NIBJ was part of any conspiracy to injure WCC. In addition, there is no causal connection between the defendants' conduct and WCC's loss."

In the light of the evidence, the learned trial judge cannot be faulted for his findings.

Conclusion

[174] The conclusion to this long, and long delayed (which delay is sincerely regretted) judgment is that the appeal should be dismissed. The learned trial judge was correct in finding that there was no proof of misfeasance in public office on the part of any of the respondents. As the alleged acts of misfeasance were also the acts said to be in proof of a conspiracy to injure WCC in its business, the claim of a conspiracy was also properly dismissed.

[175] The learned trial judge made two additional findings that were adverse to one or other of the respondents. Firstly, he found that Mr Clarke had misused his public office in allowing his company, Licojam, to seek and acquire public funding for the creation of CLCL, without having first disclosed his interest to the Prime Minister and the Cabinet and having obtained approval for that investment in that context. Ms Clarke is correct in her assertion that that issue was not one that had been properly joined between the parties so as to allow the learned trial judge to make that finding. On that basis her

counter-notice of appeal should succeed. Having said so, however, the learned trial judge's disquiet about the circumstances was quite understandable. There should be no costs awarded on the counter-notice of appeal in the circumstances.

[176] The second finding was adverse to NIBJ. The learned trial judge ruled that NIBJ had breached its fiduciary duty when it had representatives on the boards of competing companies, without disclosing, at least to WCC, that it was so connected. He was, with respect, correct in his finding in that regard. He was also correct in finding that as a director of WCC, NIBJ owed a duty to that company to inform it of the defects in its pricing strategy.

[177] Based on those conclusions, the orders should be:

1. Appeal dismissed.
2. Counter-notice of appeal allowed.
3. Costs of the appeal to the respondents to be agreed or taxed.
4. No order as to costs on the counter-notice of appeal.

PANTON P

ORDER

1. Appeal dismissed.
2. By majority (Panton P dissenting) Counter-notice of appeal allowed.
3. Costs of the appeal to the respondents to be agreed or taxed.

4. By majority (Panton P dissenting) no order as to costs on the counter-notice of appeal.