Notes on Marin v The Attorney General

In 2011, a five member panel of the Caribbean Court of Justice ("CCJ") delivered judgment in the Belizean case of *Marin v The Attorney General*. This was a suit brought by the Attorney General of Belize alleging that the two defendants, while holding the post of Ministers of Government, in effect, conspired together to sell State lands to a company owned by one of the Ministers at a grossly undervalued price. This, it was claimed, resulted in loss to the State and the enrichment of the company to the tune of approximately $1 million. The defendants were sued in tort for misfeasance in public office.

As was the case in the New Zealand case of *Attorney General v Chapman*, what came up for decision by the CCJ was a preliminary point of principle, not the substance of the case. *Chapman* may have been concerned with whether the Attorney General was a proper defendant. *Marin* was concerned with the question of whether, assuming the allegations made him could all be established, the Attorney General was a proper claimant in this civil suit premised on the common law tort of misfeasance. At a case management conference the trial judge raised this question with counsel and, after hearing arguments on the matter answered the question in the negative. The Attorney General appealed. The Court of Appeal reversed the Chief Justice and it was the appeal of the two former Ministers that the CCJ heard.

By a majority of 3 – 2 the CCJ decided that it was indeed legally permissible for the Attorney General to sue in the tort of misfeasance. Each of the judges in the majority (Justices Bernard, Wit and Anderson) delivered a separate

opinion. The President of the Court (de la Bastide J.) and I delivered a joint dissent.

Although the central question for decision in the case was a narrow preliminary point relating to a somewhat obscure tort, nevertheless the matters discussed in the four opinions delivered addressed fundamental issues concerning the tort of misfeasance and the common law in general. They explore at some length the history and development of the tort of misfeasance; the purpose for which the tort was fashioned; the ingredients of the tort and whether relief on this tort is available only to members of the general public or also to the State through the Attorney General. Some of these matters had previously been examined by the House of Lords in *Three Rivers [2000] 3 All ER 1* and, while all the CCJ judges affirmed that decision, the discussion in the CCJ's judgment went beyond the issues raised in *Three Rivers* and extended to the role of the Attorney General in protecting assets of the State and to considerations of what public policy demanded where servants of the State cause economic loss to the State through their corrupt acts. Should the recourse of the State lie purely in disciplinary or criminal proceedings being brought against such errant public officials? Should the State seek recovery of lost assets or compensation through equitable proceedings such as an action for breach of duty or breach of trust in lieu of proceedings in the tort of misfeasance? Bearing in mind the history and development of the tort of misfeasance, is relief on this tort available to the State or only to members of the public who are disadvantaged by the State? Given that Attorneys General in the Caribbean are for the most part politicians, is there a risk that if the tort of misfeasance is rendered available to them they may abuse the tort solely in order to

embarrass their political opponents? Does a decision that the State can sue in misfeasance represent an extension of or departure from existing common law and, if it does, is there good and sufficient reason for such an alteration of the law?

The minority opinion actually spent some time discussing this last question and de la Bastide J and I stated in our joint judgment that:

> "As a final court, in building our own jurisprudence we are of course empowered to extend or depart from received common law. Indeed, there *must* be instances when this court should consider itself obliged to do so. Departure is justified, however, when its purpose is to improve the law; when the departure is consistent with public policy; in instances, for example, when there is a *lacuna* in the existing law that must be filled; or when the peculiarities of our social, political, cultural or economic landscape so dictate, or when evolving principles of equity and good conscience prompt the development. The radical departure offered here does not respond to any of these imperatives. It is unwarranted. There is nothing so peculiar about the Belizean or Caribbean context that justifies it and we cannot see how it improves the law in any way."

The minority was of the opinion that in light of its history and development, the tort of misfeasance was not available to the State and there were powerful policy reasons why corrupt acts of public servants should attract public and not private law sanctions. If economic loss was occasioned to the State and compensation or restitution was desirable it was easier and more

appropriate for the State to recover the same in proceedings for breach of fiduciary duty than to seek remedies in tort.

This view did not prevail. The majority were of the view that affording the Attorney General the opportunity to bring suit in misfeasance added to and did not detract from such recourse as the State already enjoyed. The majority looked at the matter from the standpoint of *standing*. For example, Justice Bernard, one of the judges in the majority, took the view that the Attorney General is to be regarded as a *corporation sole* with the right to institute civil proceedings on behalf of the state for the recovery of damages or economic loss suffered by the state. Accordingly, the Attorney General had appropriate standing to institute proceedings in tort against the former Ministers if the latter had abused power entrusted to them. Justice Bernard was conscious of the concern that the tort of misfeasance might be utilised "indiscriminately for the settling of scores in a political environment." In her view it was the duty of the courts to ensure that this abuse did not occur. Although criminal prosecution will surely send a strong message to would-be corrupt public officers, the option of criminal prosecution was not within the remit of the Attorney General who had a responsibility to preserve the patrimony of Belize by recovering compensation from those whose corrupt acts caused the State economic loss.

Justice Jacob Wit, the second of the judges in the majority, to a considerable extent also premised his judgment on the issue of the Attorney General's standing to sue. His view was that generally, there was no impediment to the State seeking the same private law relief as an individual save where the corporate nature of the State rendered this impossible such as in cases of

assault and battery, to cite two examples. Justice Wit noted that the tort of misfeasance was still developing but in essence, it was a private law tort with private law remedies and nothing prevented the State from being able to sue on it where the State suffered economic loss as a result of the corrupt acts of its officers. In a legal system based on the rule of law, anyone should have the right to mount a civil action if damage has been caused by public officers who have abused their position for ulterior and improper purposes. And the range of such possible claimants must surely include the State who may in this instance act only through the Attorney General. Justice Wit thought that even if permitting the state to sue in the tort of misfeasance was novel it was in no way to be regarded as an extension of the tort nor did it create a new principle. Instead he saw it as the logical application of the principles which had already been developed by the common law. He accepted, however, that it was not absolutely necessary for the state to have resort to the tort of misfeasance as he acknowledged that proceedings for breach of trust or fiduciary duty could accomplish the same goals as misfeasance. Moreover, he accepted that these equitable actions were actually preferable since they could accommodate the tracing of assets and the burden of proof for deliberate breaches of fiduciary duty might not be as onerous as is required in pursuing the tort of misfeasance.

Justice Winston Anderson considered that where financial loss was sustained by the State as a result of the tortious abuse of public power, the Attorney General was clearly the proper official to bring civil proceedings to recover loss sustained by the State. Both the Constitution of Belize and the Crown Proceedings Act entitled the Attorney General to sue in tort and so, in proceedings by and against the Crown, the rights of the Crown should be as

nearly as possible the same as those of a private entity in a suit between individual persons. Moreover, the state, as *parens patriae*, may sue in tort to recover economic loss for harm caused to state property. Further, Justice Anderson stated that the tort of misfeasance had undergone substantial development since its early days as a tort whose ingredients embraced malice on the part of the wrong-doer and humiliation on the part of the claimant. All that was therefore required was that an intending claimant must have a sufficient interest to found legal standing to sue and the loss allegedly suffered by the State here did indeed afford the latter a sufficient interest.

Justice Anderson also alluded to the corporate character of the Attorney General and the inability of the Attorney General to exercise control over the Director of Public Prosecutions. He indicated that the Attorney General must be entitled to take civil proceedings to seek redress for harm done to the corporate rights of the state in circumstances where the Director of Public Prosecutions does not decide to undertake criminal prosecution. The mere fact that other civil causes of action (such as breach of trust) may be available cannot rob the Attorney General of any competence he has to bring proceedings in tort.

The CCJ is a relatively new court having been established less than 10 years ago. The treaty establishing the court speaks to the court playing a key role in the development of a Caribbean jurisprudence. In an earlier case, *Boyce v Joseph*[1], the court reminded its audience of this role and stated then that in the promotion of its jurisprudence, the court would naturally consider very

[1] **[2006] CCJ 3 (AJ)**

carefully and respectfully the opinions of the final courts of other Commonwealth countries.

Marin v The Attorney General offers a window into the manner in which the judges of the CCJ intend to set about building Caribbean jurisprudence. The opinions of both the minority and the majority are underscored by copious references to numerous judgments of courts throughout the common law world. Misfeasance is a developing tort and it is possible that, just as the CCJ's judgment was influenced by these other courts the opinions expressed by the judges of the CCJ may also contribute to the discussion on the direction in which this tort should develop.