[2012] JMSC Civ 32

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2006/HCV-1847

BETWEEN	**DAVID WONG KEN**	**FIRST CLAIMANT**
A N D	**JACK KOONCE**	**SECOND CLAIMANT**
A N D	**DAVID WONG KEN (Representative of the Estate of Shirley Shakespeare)**	**THIRD CLAIMANT**
A N D	**WESTERN CEMENT COMPANY LIMITED**	**FOURTH CLAIMANT**
A N D	**NATIONAL INVESTMENT BANK JAMAICA LIMITED**	**FIRST DEFENDANT**
A N D	**CLARENDON LIME COMPANY LIMITED**	**SECOND DEFENDANT**
A N D	**LIMESTONE CORPORATION OF JAMAICA LIMITED**	**THIRD DEFENDANT**
A N D	**DR. VINCENT LAWRENCE**	**FOURTH DEFENDANT**
A N D	**KIRBY CLARKE (Representative of the Estate of Horace Clarke)**	**FIFTH DEFENDANT**
A N D	**CEZLEY SAMPSON**	**SIXTH DEFENDANT**
A N D	**VINROY GORDON**	**SEVENTH DEFENDANT**

Lord Anthony Gifford QC, David Batts, Miguel Williams instructed by Livingston Alexander and Levy for all the claimants

Charles Piper and Marsha Locke for the first defendant

Garth McBean and Teri-Ann Lawson instructed by DunnCox for the second, third and fifth defendant

Michael Hylton QC, Tamara Dickens and Sacha Vaccianna instructed by Vaccianna and Whittingham for the fourth defendant

February 21, 23, 24, 25, 28 March 1, 2, 3, 4 July 25, 26, 27, 28, 29 November 29, 30 2011, January 5 and March 16, 2012

FIDUCIARY DUTY – BREACH OF FIDUCIARY DUTY - MISFEASANCE IN PUBLIC OFFICE – CONSPIRACY TO INJURE - CAUSATION

SYKES J

[1] This claim began with the claimants making very damaging and serious allegations against all five defendants. At the end of the evidence, the first three claimants have given up the pursuit of the defendants. Western Cement Company ('WCC') is the only claimant left and it claims that:

(1) National Investment Bank of Jamaica ('NIBJ') committed

(i) the tort of misfeasance in public office;

(ii) conspiracy to injure WCC in its business;

(iii) breach of fiduciary duty;

(2) Clarendon Lime Company Limited ('CLCL') committed the tort of conspiracy to injure WCC in its business;

(3) Limestone Corporation of Jamaica Limited ('Licojam') committed the tort of conspiracy to injure WCC in its business;

(4) Dr Vincent Lawrence committed

(i) the tort of misfeasance in public office;

(ii) conspiracy to injure WCC in its business.

(5) Mr Horace Clarke (now represented in the claim by Miss Kirby Clarke) committed

(i) the tort of misfeasance in public office;

(ii) conspiracy to injure WCC in its business.

[2]Mr Cezley Sampson and Mr Vinroy Gordon were not served and therefore are not a part of this claim.

Structure of judgment

[3]This judgment is divided into three parts. The first part introduces WCC, Mr David Wong Ken and the first five defendants. The other claimants will only be mentioned where necessary in order to make the narrative more intelligible. The second part will give an overview of the claimant's case theory on each claim. The third part will examine the law, the evidence and state the conclusion in respect of each claim.

Part one

The litigants

[4]Mr. David Wong Ken is an attorney at law. He was a shareholder, director, investor, Chief Executive Officer and at one time Chairman of WCC. Mr. Wong Ken's primary responsibility in this project was to do the legal work associated with (a) the company; (b) acquiring lands; (c) procuring quarrying licences; (d) environmental permits and such like.

[5]WCC is a limited liability company incorporated in 1992 under the Companies Act of Jamaica. Messieurs Koonce and Shakespeare were shareholders and investors in the company. WCC was the commercial vehicle by which the investors in the company were hoping to realise their goal of producing profitably quicklime and cement.

[6]An important person in this case but who is not a litigant is Mr. Robert Cartade. He was a shareholder, director, managing director and investor in WCC. His expertise was his well-acknowledged expertise in managing large scale multimillion dollar business ventures.

[7]The defendants are now introduced. NIBJ, the first defendant, is a company incorporated under the Companies Act of Jamaica and is wholly owned by the Government of Jamaica. Its articles of association indicate, among other things, that it is charged with the responsibility of fostering economic development in Jamaica. NIBJ carried out its functions by making loans to applicants who met the criteria of the bank. It did this oftentimes by taking shares in the company borrowing the money and after a period of time the shares were bought back by the company. In this case, NIBJ's support for WCC's venture took the form of an equity holding in the company which, according to the terms of the investment by NIBJ in WCC, entitled NIBJ to appoint a director to WCC's board of directors. NIBJ's operations, assets and liabilities have now been acquired by another wholly-owned government company, the National Development Bank ('NDB').

[8]CLCL, the second defendant, is a limited liability company established under the Companies Act of Jamaica. It is a joint venture between a number of juridical persons. It was formed in August 1995 with the objective of producing quicklime. The original shareholders and investors were Licojam, NIBJ, Jamaica Venture Fund Limited ('JVF'), Construction Developers Associates Limited ('CDA'), Clarendon Alumina Production Limited ('CAP') and NDB. More will be said about these investors.

[9]Licojam, the third defendant, was incorporated in 1982 under the Companies Act of Jamaica. This company was 99.96% owned by Mr. Horace Clarke. It had a 20% stake in CLCL.

[10]Dr Vincent Lawrence, the fourth defendant, an engineer by training, during the relevant period (1995 – 2001), sat on a number of boards including NIBJ, CLCL and CAP. He sat on the executive committee of Jamalco, a joint venture company in which the Government of Jamaica had shareholdings with Alcoa, a Canadian mining company. CAP held the 50% stake of the Government of Jamaica in Jamalco. Jamalco operated in the bauxite/alumina industry.

[11]Mr Horace Clarke, formerly the fifth defendant, was a former Minister of Government with responsibility for agriculture, mining and minerals. Mr Clarke held ministerial office from January 16, 1995 to late 1997. The bauxite/alumina industry fell under his portfolio. CAP was also part of his portfolio assignment. Mr Clarke owned 99.96% of the shares in Licojam which in turn had a 20% interest in CLCL. Unfortunately, Mr Clarke has now died and his estate is represented by Miss Kirby Clarke, his sister. In these reasons for judgment the court will refer to Mr Clarke and not his sister because it is less likely to lead to confusion.

[12]Other persons and companies will be referred to but they will be introduced at the appropriate point in the analysis.

Part two

The claimants' case theory

[13]The allegations against each of the defendants claim will be better understood if the claimant's theory is explained. Messieurs David Wong Ken, Jack Koonce, Shirley Shakespeare and Robert Cartade came together to establish WCC which had as its objective the production of quicklime and ultimately, the manufacturing of cement. Quicklime is used in many industries including the bauxite/alumina and sugar industries.

[14]There were three bauxite companies operating in Jamaica at the material time. These were: (a) Jamalco which operated at Halse Hall, Clarendon; (b) Alpart which operated at Naine in St. Elizabeth and (c) Alcan which operated at Ewarton, St. Catherine, and Kirkvine in Manchester. Of these three companies, Jamalco was the single largest user of quicklime.

[15]All three companies had their own quicklime producing capability but generally they never produced enough to meet their own demand. The quicklime producing factories at these plants were old and tended to breakdown frequently. The companies tended to be chronically short of quicklime and therefore imported the balance of their needs.

[16]WCC's goal, as stated earlier, was to produce quicklime and cement. To this end, it bought land in Maggotty, St. Elizabeth. This land was the site of Revere Alumina Company which had long ceased operating at that location. After purchase, WCC invested heavily in equipment and other material to begin the production of quicklime. WCC obtained loans from a consortium of local banks to finance the project. In 1996, WCC decided that it needed to secure additional funding to complete the plant for production. It sought and obtained a loan from NIBJ. This was the first time WCC was borrowing from NIBJ. WCC made the application in September 1996 and by February 1997 the loan was approved and disbursement in the form of payments to third parties began.

[17]At the time WCC began its investment in this sector, the only other quicklime producer in Jamaica, other than the bauxite/alumina companies was another company known as Chippenham Park. WCC took the view that Chippenham Park was not a serious rival.

[18]When NIBJ made the loan to WCC, it did so by becoming an equity partner (preference shares) in WCC, that is to say, it became a shareholder. Under the terms of the first loan, NIBJ was entitled to appoint a director to the board of NIBJ. This option was not exercised until November 27, 1997, when WCC made a second loan application to NIBJ.

[19]WCC is saying that the first application to NIBJ made two things possible. First, NIBJ was able to acquire critical confidential information about WCC because NIBJ as lender required WCC to submit information which contained its production and marketing strategy (see para. 27 of supplemental witness statement of David Wong Ken dated July 9, 2010). Second, NIBJ had direct and immediate access to the inner workings of WCC as they unfolded by virtue of NIBJ's appointed representative to WCC's board. NIBJ, through its director, would hear, first hand, the discussion of production and marketing strategies; participate in and actually be able to influence the decisions of WCC (see para. 34 - 37 of supplemental witness statement of David Wong Ken dated July 9, 2010). This circumstance, the theory goes, meant that NIBJ was in a fiduciary relationship with WCC and therefore ought to conduct itself in a manner that did not breach its fiduciary duties to WCC. The fiduciary duty is said to be owed by NIBJ to WCC consisted of (a) not to have conflicting loyalties and (b) failing to bring to WCC's attention that the project was doomed to fail because it was based on an incorrect pricing strategy. NIBJ was said to be obliged to disclose (since it had that information) that WCC's project was not viable. This aspect of the fiduciary duty is said to have arisen from the moment NIBJ began the process of treating with WCC's first loan application. Added to this is the fact that by the time of WCC's first loan application NIBJ had already invested in CLCL and held a directorship on CLCL's board. This meant that NIBJ now had conflicting loyalties to CLCL and WCC. These non-disclosures amounted to breaches of fiduciary duty.

[20]The proposition has a knock-on effect. Since NIBJ was a public institution, the breach of fiduciary duty also amounted to the tort of misfeasance in public office because it occurred a in context where it was funding Mr Clarke's private investment in CLCL with public funds and did not ensure or find out or insist that Mr Clarke disclose his private interests to the Prime Minister and/or Cabinet of Jamaica, the Parliament or the people. The breach of fiduciary duty and the commission of the tort of misfeasance in public office were evidence of NIBJ's participation in a larger conspiracy to injure WCC in its business.

[21]There were other developments which WCC says are relevant to its case theory. This relates to the non-disclosure of NIBJ's investment in CLCL. Even before WCC sought funding from NIBJ, NIBJ had also loaned money to CLCL, a rival of WCC. NIBJ made the loan to CLCL in an identical manner as that in relation to WCC – it took an equity position in CLCL. This it did in 1995, one year before WCC approached it for a loan. However, there was a qualitative difference between the two equity positions in the respective companies. It appears that NIBJ was an ordinary shareholder in CLCL whereas in WCC it was a preference shareholder with the right to a dividend rate of 26.5%. This meant that at no time was CLCL obliged to repay the money invested in it by NIBJ but WCC was under this obligation, albeit that the obligation was wrapped up in the preference shares. The commercial form of NIBJ's equity position was a disguise for giving Mr Clarke public funds which he would not be obliged to pay back in the event the project failed. In practical terms, the argument goes, Mr Clarke was getting public funds for free.

[22]WCC made a second loan application to NIBJ in November 1997. It was approved in September 1998. WCC claims that this application was deliberately delayed by NIBJ in order to (a) facilitate CLCL taking active steps to secure its position in the quicklime market and (b) place a financial stranglehold on WCC in order to ensure its demise. The specific person accused of engineering this delay was Dr Lawrence. Thus when the second loan was eventually approved WCC was in such dire financial straits that not even the entrepreneurial genius, in combination or singly, of Mr. Gordon Stewart, Mr.

George Soros, Mr. Carlos Slim, Mr. William Gates and the legendary Mr. Warren Buffet could save it from collapse.

[23]WCC alleges that Mr Clarke, while Minister of Agriculture and Mining (1995 – 1997), used his position to secure access to public funds from NIBJ, NDB, CAP and JVF to further his private interest in Licojam and CLCL at the expense of WCC. All these were said to be public sector entities except JVF which was a joint public/private sector company. It is further alleged that Dr. Vincent Lawrence used his position on the board of NIBJ to influence the delay in approving the second loan to WCC. It is also the theory that Dr. Lawrence used his influence over Jamalco's board to persuade Jamalco to reject WCC as a potential long-term supplier of quicklime in favour of CLCL. These actions, WCC says, amount to misfeasance in public office on the part of NIBJ, Mr. Horace Clarke and Dr Vincent Lawrence. NIBJ committed the tort because it used public funds to further the private interest of Mr Clarke while delaying the second loan to WCC. Mr Clarke was concerned to develop his private economic interest at the expense of WCC while Dr Lawrence used his presence on the board of NIBJ and influence over Jamalco to ensure favourable outcomes for Mr Clarke.

[24]As can be seen from this breathtaking picture outlined by the claimant, this is a conspiracy worthy of the pen of Robert Ludlum and John Le Carre, the great authors of spellbinding tales. Needless to say, to make good such allegations compelling evidence is required. These allegations are very serious and involve serious imputations on the integrity of all the defendants. It is now time to examine the law and the evidence in relation to each claim and defendant.

Part three – the law and evidence

Misfeasance in public office

[25]This is a tort that has had a long history dating back at least two hundred years. Its development has not been a smooth one but its ingredients can now be stated with reasonable certainty. One of the leading reported case in the Commonwealth common

law countries on this tort is the House of Lords' decision in ***Three Rivers District Council v Governor and Company of the Bank of England (No. 3)*** [2003] 2 A.C. 1. The House paid tribute to the absolutely outstanding review and distillation of legal principles by Clarke J at first instance ([1993] 3 All ER 558). It is truly a remarkable effort which cannot be too highly praised.

[26]The tort, as the name implies, can only be committed by public officials. The term public officer or public official includes natural and non-natural persons. There is no dispute here that Mr Clarke and Dr Lawrence were public officials at the material time. There is no issue here that NIBJ is a public body for the purpose of the tort. It is equally clear from the case law (and there has been no point taken on this) that the tort can be committed by public bodies such as city councils and public companies.

[27]There are two forms of the tort. There is targeted malice, the first form, and untargeted malice, the second form. Targeted malice occurs where a public officer uses his power with the specific intent of injuring a specific claimant or a class of persons to which the claimant belongs. In this form of the tort, there is oftentimes outwardly lawful actions that are not ultra vires, but which are in fact unlawful because the public official has the specific intent of harming the claimant or a class of persons to which the claimant belongs. It is this intent which transforms the ostensibly lawful conduct into an unlawful one for the purpose of this tort where one is dealing with the targeted malice version of the tort.

[28]The second form of the tort is committed where (a) the public official does not have the power to do what he did (ultra vires); (b) he knows that he has no power to do the act in question or is reckless as to whether he has the power and (c) he knows that his action will probably injure the claimant or is reckless as to whether his action will injure the claimant or a class of persons to which the claimant belongs. It is untargeted in the sense that the defendant did not target a specific claimant or a specific class of persons to which the claimant belongs but is aware that his action will probably cause loss to the claimant or an identifiable class to which the claimant belongs (***Three Rivers*** p 230 (Lord Hobhouse)). Both forms are alternate ways of committing the tort (***Three Rivers*** p 191 (Lord Steyn)).

[29]WCC is relying on the second form of the tort. In either form of the tort, the underlying core idea is deliberate misuse of power. 'This in turn involves other concepts, such as dishonesty, bad faith, and improper purpose. These expressions are often used interchangeably; in some contexts one will be more appropriate, in other contexts another. They are all subjective states of mind' (***Three Rivers*** p 235 (Lord Millett)). Additionally, 'excess of power is not the same as abuse of power' (***Three Rivers*** p 235 (Lord Millett)). Not even 'a deliberate excess of power' will necessarily amount to an abuse of power (***Three Rivers*** p 235 (Lord Millett)).

[30]Lord Hobhouse in ***Three Rivers*** stated at page 229:

> *Thus the holder of a public office who acts honestly will not be liable to a third party indirectly affected by something which the official has done even if it turns out to have been unlawful. Illegality without more does not give a cause of action: Lonrho Ltd v Shell Petroleum Co Ltd (No 2) [1982] AC 173, 189; Dunlop v Woollahra Municipal Council [1982] AC 158, 172; the Mengel case, 69 ALJR 527, 546. There is no principle in English law that an official is the guarantor of the legality of everything he does; but he is liable if he injures another by an act which is itself tortious if not justified and he is unable to justify it, however honestly he may have acted.*
>
> *…*
>
> *It applies to the holder of public office who does not honestly believe that what he is doing is lawful, hence the statements that bad faith or abuse of power is at the heart of this tort.*

[31]What about mixed intentions? Is it a defence to show that some other legitimate purpose was being advanced by harming the defendant? Lord Millett in ***Three Rivers*** speaks to this point indirectly. His Lordship said at pages 235/6:

> *The question is: why did the official act as he did if he knew or suspected that he had no power to do so and that his conduct would*

injure the plaintiff? As Oliver LJ said in Bourgoin SA v Ministry of Agriculture, Fisheries and Food [1986] QB 716, 777:

> *"If an act is done deliberately and with knowledge of its consequences, I do not think that the actor can sensibly say that he did not 'intend' the consequences or that the act was not 'aimed' at the person who, it is known, will suffer loss."*
>
> *As that case demonstrates, the inference cannot be rebutted by showing that the official acted not for his own personal purposes but for the benefit of other members of the public. An official must not knowingly exceed his powers in order to promote some public benefit at the expense of the plaintiff.*

[32]The tort cannot be committed negligently (***Three Rivers*** p 235 (Lord Millett)). If it could then it would be covering the ground already patrolled by the tort of negligence. It is well established that public officials or departments can be held liable in the tort of negligence and so there is no need to extend the tort in this direction. Likewise, there is no need to extend the tort to areas governed by breach of statutory duty (see joint judgment in Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ in ***Northern Territory of Australia v Mengel*** 185 C.L.R. 307).

[33]The tort of misfeasance in public office cannot be committed inadvertently or carelessly. There has to be an absence of an honest attempt to use the power for a proper purpose. An honest misapprehension of the scope of the power by the public official is not sufficient to establish liability. Mere knowledge that his actions will injure or quite likely will injure the claimant without the additional mental element is not sufficient to ground the tort. The reason is that if the public official's actions are lawful and he acts with the certain knowledge that his actions will cause loss to the claimant, then the loss visited on the claimant is in fact authorised by law once he does not have the intent to injure. Similarly, if the public official honestly believed that he had the power to do what he did but it turned out that he did not in fact have that power this lack of lawful authority does not make him liable. This is why the claimant must prove, in this form of the tort,

not only an absence of lawful authority in fact (objectively determined) but also knowledge that he did not have the power or was reckless as to whether he had the power coupled with knowledge or recklessness that his action would injure the claimant or a class of persons to which the claimant belonged.

[34]WCC relies on dicta from ***Jones v Swansea City Council*** [1989] 3 All ER 162, (pp 173 – 175 (Slade LJ); p 186 (Nourse LJ)) to make the point that a Cabinet minister, like all other public officials, cannot use his office for private gain without permission. The submission based on dicta in ***Jones*** is a derived argument since the case did not, in terms, decide the point. The effort of counsel has not unearthed any case in which facts similar to the case at bar have been examined by any court. Counsel were only able to find a paragraph in Dr. Lloyd Barnett's, ***Constitutional Law of Jamaica*** (1977), and Ministerial Guidelines developed in the United Kingdom for their parliamentarians (2010).

[35]In light of the absence of authority, this court proposes to adopt the approach of Anderson J of the Caribbean Court of Justice who stated in ***Marin v The Attorney General of Belize*** (2011) 73 WIR 51 [118]:

> *Where any court … is faced with a novel point of law on which there is no controlling authority, the matter must be approached from the point of view of the guiding principles of logic, doctrine and legal policy.*

[36] The court has to look at the legal policy behind the articulated rule to see whether the proposition advanced by WCC is sustainable. The case of ***Jones*** is an important one to examine because it contains general statements regarding the underlying theory of the tort. In examining the case, the court recognises that the Court of Appeal was reversed on the facts by the House of Lords but not on the law.

[37]The facts in ***Jones'*** case were that the Swansea City Council initially voted to permit the claimant to change the use of land she had leased from the council. At the time of this vote, an opponent to the permission stated that if his party won the coming local government elections the decision would be reversed. The party of the opponent to the change won the election and he became leader of the council. The council voted

to reverse the permission. The claimant countered with a claim in the tort of misfeasance in public office. She alleged that the City Council intended to injure her and her husband. The Council, on appeal, took the position, through its counsel, that the tort was not committed because no statutory power was breached because it was simply a decision not to grant a lease to the claimant. The City Council was acting in its capacity as a landlord using private law powers derived from contract and was not acting under any express statutory power per se. The attorney for the City Council buttressed the point by submitting (citing authority) that the fact that the tortfeasor was a public body was not sufficient to make it liable. The claimant, said counsel, had to show that the City Council was in fact directly exercising a statutory power.

[38]Slade LJ noted that in a very general sense the City Council was established by statute and in that broad sense it was exercising statutory powers. His Lordship however met the point more directly. He noted that while the immediate context of the power exercised was a contract and while it is true that none of the previous cases involved a contractual and therefore private law context, there was no reason in principle to limit the tort in the way suggested by the City Council. Once it could be proved that the City Council exercised its law making power with either an intent to injure the claimant or with knowledge that the decision was ultra vires then the tort was sustainable assuming of course that the claimant could prove damage. The reason for this, according to the learned Lord Justice, was stated at page 175:

> *The essence of the tort, as I understand it, is that someone holding public office has misconducted himself by purporting to exercise powers which were conferred on him not for his personal advantage but for the benefit of the public or a section of the public either with intent to injure another or in the knowledge that he was acting ultra vires. All powers possessed by a local authority, whether conferred by statute or by contract, are possessed 'solely in order that it may use them for the public good': see Wade Administrative Law (6th edn, 1988) p 400. In the present context, in my judgment, it is not the juridical nature of the relevant power but the nature of the council's office which is the*

important consideration. It is the abuse of a public office which gives rise to the tort.

[39]Nourse LJ also dealt with the point at page 186:

The assumptions of honour and disinterest on which the tort of misfeasance in a public office is founded are deeply rooted in the polity of a free society. That, we may suppose, is what Lord Diplock had in mind when he described the tort as well established. It ought to be unthinkable that the holder of an office of government in this country would exercise a power thus vested in him with the object of injuring a member of that public by whose trust alone the office is enjoyed. It is unthinkable that our law should not require the highest standards of a public servant in the execution of his office.

There is therefore no foundation for the suggested distinction between a power reserved in a lease granted by a local authority of one of its properties, which is said to be a private power, and any other power having what is called a more direct statutory or public origin. True, a private landlord who is not by covenant constrained to act reasonably is free to withhold his consent to a change of user of the demised premises, even if his sole object in doing so is to injure the tenant. That is an illustration of the general rule that a power arising under a contract or other bilateral instrument can be exercised for a good reason or a bad reason or for no reason at all; it having been pointed out that, if it were otherwise, there would be a great unsettlement of property titles and commercial transactions and relationships: see Chapman v Honig [1963] 2 All ER 513 at 522, [1963] 2 QB 502 at 520 per Pearson LJ. That suggests that the rule is one of expedience. No doubt it can equally be supported by the reasons of practicality which are said to justify the corresponding rule that motive is irrelevant in most torts: see Allen v Flood [1898] AC 1 at 118-119, 153, [1895-9] All ER Rep 52 at 78, 93. But neither expedience nor practicality is a good ground for

> *confining the tort of misfeasance in a public office in the manner which has been suggested. It is not the nature or origin of the power which matters. Whatever its nature or origin, the power may be exercised only for the public good. It is the office on which everything depends. For these reasons, as well as for those stated by Slade LJ, I agree with him that the first issue must be decided in favour of the plaintiff.*

[40]Stuart-Smith LJ, who was the third member of the court, agreed with the position taken by the other two Lords Justices. It is therefore beyond doubt that holders of public office are held to a high standard of conduct. The power they exercise must be for the public benefit and not for private gain or some other motivation inconsistent with public benefit.

[41] ***Jones*** was based on targeted malice. The claimant alleged that the City Council exercised its power with an intent to injure her and her husband. This fits in with the first form of the tort in which a lawful act (refusal to grant a lease) becomes unlawful if the City Council was motivated by an intention to injure the claimant in the purported exercise of its undoubted power to grant or deny a lease. ***Jones*** also established that the nature or origin of the power is unimportant. What matters is the nature of the office.

[42]The reasoning that one of the critical factors in this tort is the nature or origin of the power applies equally to untargeted malice. In light of the reasoning in ***Jones***, an abuse of public office can occur even in the absence of a specific statute or rule or guideline proscribing the impugned conduct, because public officers are given power solely for the public good and not to advance their private economic interest. It necessarily follows from this premise that any use of the power for private gain must necessarily be ultra vires the power unless there is evidence that the public officer had lawful authority to use the power to benefit himself. This is the deep rooted aspect of the tort to which Lord Diplock referred. This deep rooted dimension is part of the Westminster model of government which is practiced in Jamaica.

[43]The idea that a public official, including a Cabinet minister, is not to use his office to advance his private economic interests is not to be found expressly stated in any

legislation but that need not be so. This is, as stated Nourse LJ, ‘deeply rooted in the polity of a free society’ and the court would add, democratic society founded on the rule of law which is underpinned by the idea that the public officer is to serve the public. The execution of the public duty cannot include advancing one’s private business interest without disclosure and receiving permission.

[44]All reason points towards extending the law as contemplated by WCC. This extension is compatible with what Lord Steyn called the ‘meaningful requirement of bad faith in the exercise of public powers which is the raison d'être of the tort’ (***Three Rivers*** p 193). To exercise the power for private gain without authorization must necessarily be a bad faith exercise of the power. This point was picked up on by Anderson J in ***Marin*** where his Lordship stated at paragraph 131:

> *It will be seen that **Three Rivers** represented a significant departure from the origin and early development of the tort in several particulars that are relevant to the case before this court. … The tort was no longer one of obloquy in the sense of being meant to redress the infliction of intentional humiliation as a result of the abuse of power …. It was expressly stated that the essence or raison d'être of the tort was simply bad faith in the exercise of power by a public official which occasioned loss to the plaintiff and that this could be equally evidenced through targeted malice as through an unlawful act done with improper motive, i.e. where the public officer acts knowing that he has no power to do the act complained of and that the act would probably injure the plaintiff. Untargeted malice suffices.*

[45]No public officer can honestly believe that the power he has is to be used to advance his private economic interest without proper authorisation. The consent would have to come from someone or entity which, in the scheme of things, is the proper body to do so. Without getting into all the technicalities of who this might be, what can be said is that in the case of the Cabinet minister the permission ought to come from at least the Prime Minister if not the whole Cabinet. At the risk of redundancy, to use one’s power to advance one’s private economic interest, even in the absence of statute or some explicit

subsidiary legislation prohibiting such use of the power, must necessarily be ultra vires because public office and the power attached to it are to be used solely to advance the public good and not one's private economic interest unless there is permission. Therefore, if it can be shown that Mr Horace Clarke used his public office for private economic gain without approval then that must necessarily be ultra vires and must necessarily be an abuse of public office sufficient for the tort of misfeasance in public office. Since WCC is relying on the second form of the tort, to succeed WCC must establish (a) the mental element for this form of the tort and (b) damage from the unlawful act.

Analysis of evidence: misfeasance in public office

[46]WCC relies exclusively on circumstantial evidence to establish all aspects of the tort and that evidence is not the most compelling. This is how WCC has put the case. Section 69 (2) of the Constitution of Jamaica makes it plain that the Cabinet is the principal instrument of policy and is charged with the general direction and control of the Government of Jamaica. Importantly, section 69 (2) sets out the principle of accountability: the Cabinet is collectively responsible to Parliament. The members of Cabinet are appointed, depending on the circumstances, from either the House of Representative or the Senate (section 70 (1) of the Constitution of Jamaica). This leads to the conclusion that a Cabinet minister must necessarily be a public official for the purposes of the tort. Mr Clarke was appointed to the Cabinet and as such he had responsibility for his assigned areas of responsibility within the overall context of being part of a team that had overall direction and control of the Government. The very text and spirit of the constitutional provisions precludes any notion of using powers granted to the Minister for his private economic gain unless permission is granted.

[47]The next phase of the reasoning goes like this. Mr Clarke was assigned responsibility for agriculture and mining which included the bauxite/alumina industry. In this capacity, Mr Clarke cannot use his power or influence to promote his private interest particularly if it involved the use of public funds unless he made full, frank and

complete disclosure to the Prime Minister, or Cabinet, or Parliament or the public at large and gets permission. This must be so in a constitutional democracy founded on the rule of law. So much for the major premise.

[48]These are the facts relied on by WCC to develop the minor premise for its syllogism. These are facts on which WCC relies. They are

(1) Mr Clarke was a minister with responsibility for the bauxite/alumina industry during the period January 1995 to late 1997;

(2) during the period Mr Clarke was minister he owned 99.96% of the shares in Licojam;

(3) he was a director of Licojam;

(4) Licojam applied for a loan from NIBJ to fund the quicklime project;

(5) it was always the intention of Licojam to establish a company to undertake the project;

(6) the company to undertake the project was incorporated on August 17, 1995;

(7) there was a Subscription Share Agreement which identified the investors and suggested the percentage and number of shares that each should hold;

(8) it was contemplated that Licojam would hold a maximum of 20% of the shares in the company so incorporated;

(9) Licojam was not expected to pay any cash for its initial share allocation;

(10) the value placed on Licojam's shareholding was determined by valuing Licojam's non-monetary contribution to the project;

(11) CAP, a government owned company, fell directly under Mr Clarke's portfolio invested JMD$10.5m in CLCL, the company incorporated for effecting the quicklime project;

(12) NIBJ a second government owed company was a direct investor in CLCL;

(13) NDB, a third government owned entity was also a direct investor in CLCL;

(14) JVF, a company in which the government had a stake also invested directly in CLCL.

[49]That money invested in CLCL by NIBJ came from public funds is not in doubt. By letter dated March 7, 1996, Mr Lloyd Pinnock wrote to Miss Shirley Tyndall, Financial Secretary, Ministry of Finance, captioned 'Clarendon Lime Company' (exhibit one page 883). In that letter Mr Pinnock is reminding the Financial Secretary of a meeting between him, the Financial Secretary and Mr Nathan Richards. He stated that one of the items discussed at the meeting was a disbursement from the Capital Development Fund to NIBJ of JMD$10.5m for Clarendon Lime Company which was approved by the Managing Committee of the Fund. He added that the sum to be disbursed to the bank was JMD$164.4m which comprised various amounts which include JMD$10.5m for Clarendon Lime. He stated that Cabinet had now approved the payment by the Fund to NIBJ and he hoped that the approval would now be given so that NIBJ could receive the outstanding amount.

[50]There is a second letter dated March 21, 1996 from Mr Lloyd Pinnock, Vice President Finance and Investment of NIBJ to Miss Shirley Tyndall and copied to Mr Nathan Richards, then Chairman of NIBJ. In that letter, Mr Pinnock noted that Cabinet approved JMD$164.4m advanced from the Capital Development Fund to NIBJ for specific investment and that sum included JMD$10.5m for CLCL (exhibit 1 page 885). The letter stated that on February 26, 1996, Cabinet 'approved the capitalization by NIBJ as equity the amount of $164.4m advanced by CDF to NIBJ for specific investments which included the $10.5 for Clarendon Lime Company.' This is followed by

a letter dated April 10, 1996 from Miss Tyndall to the Governor of the Bank of Jamaica. This letter described the Minister of Finance as having responsibility for the Capital Development Fund and goes on to indicate that the sum of JMD$10.5m is authorised to be paid to NIBJ for investment in CLCL (exhibit 1 page 887). There is the direction from the Minister of Finance dated April 3, 1996 which states that the sum of JMD$10.5m was to be transferred from the Capital Development Fund to NIBJ 'for the Clarendon Lime Project as approved by the Advisory Committee of the Capital Development Fund on 11 September 1995' (exhibit 1 page 889). A letter from Miss Shirley Tyndall to the Governor of the Bank of Jamaica dated April 10, 1996 stated that 'in accordance with the direction of the Minister of Finance … the payment of Ten Million Five Hundred Thousand Dollars ($10,500,000.00) to National Investment Bank of Jamaica for investment in the Clarendon Lime Project as specified in Direction 1/96 (copy attached) is hereby authorised' (exhibit 1 page 887). Direction 1/96 has the signature of the Minister of Finance.

[51]In Mr Pinnock's letter of March 21, 1996 he makes the very specific assertion that Cabinet had approved a sum of $164.4m for specific investments including what would now be an incorporated company known as CLCL. By the time of this letter CLCL was already incorporated (August 1995) and had applied to NIBJ for a loan. The documentation capturing what Cabinet approved has not been placed before the court. However, the totality of the correspondence does suggest, on a balance of probabilities, that Cabinet knew of the specific investments. This suggests, on a balance of probabilities, that in order for there to be specific investments the amounts, type and nature of investments would have to be known to arrive at the specific figure of JMD$164.4m. Mr Clarke was a member of the Cabinet at this time. From the evidence on this issue the court is prepared to infer that an itemised list of investments was prepared and this list was placed before the Cabinet of which Mr Clarke was a part. The balance of probabilities favours this conclusion and this court so concludes. One of the specific investments was CLCL in which his company, Licojam, had a 20% stake.

[52]Mr Clarke was at all material times a director of Licojam and in that capacity would be entitled to receive minutes of Licojam's board meetings and prima facie would be

aware of what Licojam was doing to advance the project. The balance of probabilities favours the conclusion that Mr Clarke knew of Licojam's activities while he was a minister.

[53]There are additional points to note. Licojam was awarded shares on the basis of work done by it in order to get the proposed investment off the ground. WCC sought to rely on some aspects of Mr Milverton Reynolds' evidence. He gave evidence for NIBJ. At the time of testifying, he was the managing director of the Development Bank of Jamaica Limited ('DBJ'). Mr Milverton Reynolds is a well-respected, experienced manager of large-scale business enterprises who has held high managerial positions in both public and private sector institutions. His formal training and managerial résumé are indeed impressive. He is not a man given to hyperbolic language or to speaking more than is required. He is careful in speech, tactful, and respects the professional decisions made by others. If the court is permitted to use hyperbole, Mr Reynolds could be described as the managerial King Midas. His views are to be accorded great weight.

[54]According to Mr Reynolds this type of arrangement where a shareholder receives an allotment of shares based the value of his contribution to the development of the company is not unusual but good practice suggests that an independent valuation of the contribution made by Licojam would have been desirable. The evidence is that there was a valuation done by one of the other investors (exhibit 1 page 497). Mr Reynolds said he is unable to speak to the competence of the valuer but what he can say is that since the valuation came from an investor in the project he would have liked another valuation to be done. Dr Lawrence agreed that in the context of the case it would have been helpful to have another valuation.

[55]Mr Clarke's two witness statements were admitted into evidence. His witness statements made the following points:

(1) he had ministerial responsibility for mining and agriculture for the period 1995 – 1997;

(2) CLCL was incorporated (no year stated) and he became a director in 1998 (after leaving office);

(3) Licojam, NIBJ, CAP and JVF were shareholders in CLCL;

(4) CLCL formed a joint venture with the Rugby Group; and

(5) Licojam approached NIBJ, CAP, DBJ and the Commonwealth Development Fund for funding to start CLCL.

[56]He denied the following:

(1) he conspired with anyone to harm WCC;

(2) he not owed any fiduciary relationship to WCC;

(3) he acted in bad faith while a minister; and

(4) he is guilty of conspiracy, deceit, and breach of fiduciary duty or misfeasance.

[57]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.

[58]It appears to the court that Mr Clarke is asserting, at best, that he honestly believed that it was alright to use public funds for his private benefit without adequate disclosure to his Cabinet colleagues including the Prime Minister. This court finds it difficult to accept that Mr Clarke in the years 1995 – 1997 could have honestly believed that it was lawful for a sitting Cabinet minister to be part of the same Cabinet that was voting funds which were to be used to invest in his business venture which would undoubtedly advance his private interest without disclosing his direct pecuniary interest in the

outcome to the Prime Minister or Cabinet and receiving permission. This conduct must necessarily be unlawful because it cannot be posited that in the system of government in Jamaica, a public servant can solicit or use public funds for his private economic interest without full disclosure of that fact to his boss or to the public entity administering such funds. If it is otherwise, the implications are staggering.

[59]It was the evidence of Mr Reynolds, when shown the Share Subscription Agreement which set out the shareholdings of the investors in CLCL, that it indicated that NIBJ's investment in CLCL was a direct taking up of shares without any indication that the investment was to be paid back. The Shareholders' Subscription Agreement showed that of the JMD$59,500,000.00 of capital to be contributed by the investors in CLCL initially JVFL was to contribute JMD$12,240,000.00; CDA, JMD$4,760,000.00; NIBJ, JMD$10,200,000.00; CAP, JMD$10,200,000.00 and NBD, JMD$10,200,000.00. Licojam's share allotment was valued at JMD$11,900.000.00. JVFL was a company that managed funds contributed by both private sector and government. NIBJ, CAP and NDB were wholly-owned government companies. Therefore of the total amount of actual cash to be injected into CLCL JMD$30,600,000.00 were to come from government owned and operated institutions and a further JMD$12,240,000.00 were to come from a fund in which the government had an interest. CDA was the only pure private entity investing in this enterprise.

[60]Mr Reynolds was careful to point out that he did not know the full details of Share Subscription transaction and he had not seen any other documentation relating to the transaction and the view he expressed was based solely on the agreement. However, the point that was being made by WCC was that NIBJ did not invest in CLCL by way of preference shares at a specified dividend rate as it had done in respect of WCC. This point is dealt with in more detail below in the section dealing with breach of fiduciary duty but at this point in the judgment the submission is that whereas in respect of NIBJ's investment in WCC, it was in the form of preference shares at 26.5% interest, the investment in CLCL was common stock with no interest rate and no clause indicating that NIBJ was to be repaid.

[61]Mr Reynolds pointed out that a dividend rate of 26.5%, depending on the circumstances surrounding the issue of the preference shares, may amount, in practical terms, to a loan at 26.5%. The court understood Mr Reynolds to be saying, as well, that, usually, the dividend on preference shares is paid out of profits. This was also the view of Dr Lawrence. Even with this position, Mr Batts pressed the point that while this seems favourable to WCC it was still a debt burden on the profits of WCC which stands in sharp contrast with the type of investment given to Mr Clarke's interest, namely a direct purchase of shares by NIBJ without any indication that the money was to be repaid in any form, whether as a loan or via dividends on preference shares.

[62]Mr Batts developed this point further by submitting that when this arrangement is viewed in the context of NIBJ using public funds which were replenished by further public funds coming from the Capital Development Fund which in turn was voted to NIBJ by the Cabinet of Jamaica of which Mr Clarke was apart and he was at the material time of the vote, not only a 99.96% shareholder of Licojam but also a director of Licojam which in turn had a 20% interest in CLCL, this amounts to an abuse of public office. The abuse being that Mr Clarke is using public funds to further his private business interests. Mr Batts stressed that the structure of the investment in CLCL could not take place without Mr Clarke's knowledge and blessing. So while he may not have actually sat on the various boards of the various entities that invested in CLCL such an investment of this magnitude involving Licojam could only have taken place with his full knowledge and acquiescence. Thus the acts of Licojam are the acts of Mr Clarke which are to be coupled with his certain knowledge that he was in fact getting the use of public funds to advance his private economic interest without disclosure to the Prime Minister, Cabinet, Parliament or the public. Licojam was Mr Clarke in corporate form.

[63]Mr Batts submitted that such favourable terms from NIBJ using public funds could not have taken place without Mr Clarke's influence and this is the inference it is asking the court to draw from the objective facts. Mr Batts also submitted that NIBJ was not the only public sector entity but one of three including CAP which fell directly under Mr Clarke's portfolio.

[64]WCC also relied on the following evidence from Mr Reynolds. While Mr Reynolds was not at NIBJ at the time the investments were made in CLCL or WCC and so cannot speak to what the actual practices of NIBJ were, he did say that good practice suggests that if public funds are being loaned to a company it would be helpful to know who the majority shareholders are. This was not done because the documentation from NIBJ on CLCL's application did not show who all the shareholders were. This omission was being relied on to say that this could only have come about because of the influence of Mr Clarke on NIBJ being exerted through Dr Lawrence. In other words, NIBJ deliberately refrained from documenting the shareholders because it was known that one of them was a sitting Cabinet minister.

[65]Mr Reynolds stated that he would not have dealt with an application for funding from a public institution by a sitting Cabinet minister in the same way as another applicant. He even added that an application by a politically connected person is a red flag event. He added that in such circumstances perhaps full disclosure would be necessary and it might even be the case that Cabinet approval would be required. Mr Reynolds also referred to guidelines which he believed came from the Ministry of Finance governing this question of public funding to a Cabinet minister or public official. Unfortunately, he was unable to recall precisely whether they existed at the time of these transactions. He did not have them at the time he testified and to be fair to him, based on his witness statement it was not something that he could anticipate.

[66]Mr Reynolds also testified that good practice suggested that a public lending institution advancing loans or making a direct investment using public funds ought to take steps to find out who the borrower really is. If it turns out that a company is promoting another company as the vehicle for carrying out a particular investment, then prudence suggested that details of who is involved in both companies are known to the lender or investor.

[67]This evidence of Mr Reynolds is relevant in this context. The board submission to NIBJ's board did not disclose that Mr Clarke was by far and away the majority shareholder and director of Licojam which had a stake in CLCL. Mr Batts sought to say that this non-disclosure in the board submission was a deliberate departure from best

practice designed to conceal Mr Clarke's interest. This omission coupled with the alleged favourable terms received from NIBJ was at the behest of Dr Lawrence.

[68]From the totality of the evidence including the witness statement of Mr Clarke, who died before trial, it is difficult to resist the inference sought by Mr Batts that the Minister misused his office to such an extent that it amounts to an act capable of supplying the first stage of the act or omission relied on to establish the tort. From what has been described it is difficult to accept that Licojam could have done what it did in getting CLCL off the ground with substantial public funds without the knowledge, approval and encouragement of a director and major shareholder, Mr Clarke. CAP, the court was told by Dr Lawrence, was the government-owned company incorporated to hold the state's 50% stake in both Jamalco and Windalco. It fell directly under Mr Clarke's ministerial assignment. It is difficult to accept that CAP could have made the decision to invest JMD$10.5m in CLCL without Mr Clarke's knowledge. Surely the knowledge would come from two sources. One would be from Licojam and the other from CAP in the form of updates of its activities. There is no evidence that Mr Clarke gave up the directorship or give up his shares in Licojam while he was a sitting Cabinet minister. It was said by Mr McBean, counsel for Mr Clarke, that CAP had its own board of directors that makes these kinds of decisions. All this may well be true but in the context of this case, that is not the issue. The issue is whether in all the circumstances of this case, with Licojam being described as the promoter of the project, whether (a) the funding from public institutions; (b) the structure of that funding which saw them all being ordinary shareholders as distinct from lender or investors by means of preference shares (or a similar structure that would entail repayment); (c) non-monetary contribution to CLCL by Licojam; (d) Mr Clarke being a director of Licojam and (e) holder of 99.96% of the shares could have taken place without the direct knowledge and encouragement of Mr Clarke. Can the inference be drawn that he knew that public funds were being used to advance his private economic interest? Can the inference be drawn that he did all this without informing the Prime Minister or Cabinet?

[69]It must be noted that when Mr Clarke demitted office and went to CLCL directly and eventually became Chairman, there is nothing in the minutes in the subsequent

meetings at which he attended to indicate that he was surprised about any of the developments in relation to Licojam and CLCL or had to be brought up to date on all the developments. On the contrary, the minutes are more consistent with Mr Clarke having full knowledge than emerging from a cloud of ignorance.

[70]It is always legitimate to look at conduct before, during and after an incident in order to get as accurate a picture as possible regarding the state of mind of any person whose intention is being determined. It seems to this court that Mr Clarke had the requisite degree of knowledge which when coupled with his conduct is sufficient to be the kind of conduct necessary to establish the tort of misfeasance in public office. The court finds it difficult to accept that Licojam could have been so involved in the CLCL project without Mr Clarke's knowledge and support. Licojam's actions were the result of a deliberate strategy and it is inconceivable that a 99% shareholder and director would have allowed his company to engage in the acts that it did without it being for his private economic gain.

[71]What is it that makes Mr Clarke's conduct unlawful in the absence of a specific legislation which makes it so? It is this: inherent in our system of government is the idea that a public official cannot use public resources for his private economic gain without permission. The very nature of public office excludes the idea that a public official can use public resources in this way unless he received permission to so act. To hold otherwise would be to undermine the foundations of governance in a free and democratic society based on the rule of law. The reason for is that a public official is given power to act solely and only for the public good. He is never given public office to further private gain. For these reasons this court finds that it was unlawful for Mr Clarke to use his company, Licojam, to solicit and receive public funds for his private economic gain without disclosure, at the very least, to the Prime Minister or Cabinet. The court finds that Mr Clarke could not have honestly believed that it was lawful to seek to use public funds in this way. This court concludes that there was no power for Mr Clarke to act in the way he did in this matter and further, that he knew that he had no power to do what he did without permission from either the Prime Minister or Cabinet. At the very least, such permission if granted should be made public.

[72]From the nature of the evidence it is not hard to see why WCC abandoned any idea of basing its case on the first form of the tort. From the evidence it does not appear that Mr Clarke was targeting WCC specifically. His focus was on himself and to that extent the specific intent necessary for the first form of the tort would be difficult to establish in this case.

[73]Based on the case law, not only must the conduct be unlawful but a double mental element must be proved in the second form of the tort. The double mental element is (a) knowledge that the conduct was unlawful and (b) knowledge that his conduct would cause damage to the claimant or a class of persons to which the claimant belongs. The claimant may succeed if he fails to prove actual knowledge at (b) but can prove that the public official was reckless as to whether his conduct would injure the claimant or a class of person to which the claimant belonged. The court has found that (a) has been proved.

[74]It seems to this court that it cannot be said on a balance of probability that the second aspect of the double mental element of the second form of the tort has been satisfied because the evidence on the size of the market which I have accepted is that the quicklime market was always undersupplied and was expected to expand. In other words, once there is a market sufficient in size to accommodate two or more producers it becomes increasingly difficult to succeed in the tort because it would be hard to show that the public official, while promoting his private interest, knew that the claimant would be harmed or was reckless as to whether he would be harmed. In this type of situation it is not a zero sum game where one producer must eliminate the other to survive and so must necessarily bring about the demise of the claimant. It seemed to this court that Mr Clarke did not even address his mind to eliminating WCC but rather devoted his energies to promoting his company. All the reliable evidence from knowledgeable persons pointed to an ever expanding market. In this regard, Mr Norman Davis, a witness for the second, third and fifth defendants, spoke of the demand for quicklime for Windalco. His evidence is most telling. Not only did he say that the demand for quicklime was increasing but gave a sound scientific basis: Jamaica’s bauxite now had increasing levels of phosphorous which needed to be extracted by quicklime. He said

quicklime is used to extract phosphorous from the bauxite. Up to the 1990s Jamaican bauxite had 0.2% phosphorous but since that time the percentage had climbed to over 1%. This meant that the demand for quicklime would necessarily have had to increase. His evidence was that between 1999 and mid 2002 Windalco had a shortfall in production of quicklime and therefore imported as well as relied on local supplies. In addition, there is evidence to show that the bauxite/alumina companies were expanding production. Thus increase in demand for quicklime was spurred by two things: the increased phosphorous content of the bauxite ore and the increased production of bauxite. All this took place in the context of the three bauxite plants having old quicklime plants which needed to be replaced.

[75]It follows from what the court has said that WCC's action against Mr Clarke founders on the inability to satisfy the second aspect of the double intent requirement of the second form of the tort. Inspite of this conclusion the court will go on to examine the disclosure point made by Mr McBean and the issue of causation.

[76]It has been said that since NIBJ published annual reports and in one of those reports, it was stated that NIBJ made investments in CLCL then that statement amounts to disclosure. This court finds that such a statement would not be sufficient in all the circumstances. All that the reader would have been told was that NIBJ had invested in CLCL. It did not reveal any information that would have connected Mr Clarke to CLCL.

[77]It has also been said that the curious reader of the report could then go the Registrar of Companies and search and he or she would find that Licojam had a stake in CLCL and so on. This court does not say that the intrepid member of the public could not uncover all these facts but that is not what is intended by the principle of disclosure. What is intended is a full, clear and unambiguous statement making it clear that a public official who is a sitting Cabinet minister has a personal investment in a company that is being funded by three public sector institutions and that the Minister has not put up any cash but is relying on the value of work done by his company (Licojam) and there has been no independent valuation of the value of this work. What is expected at the very least is that when Cabinet approved using money from the Capital Development Fund to invest in Mr Clarke's private business, the Prime Minister and/or the Cabinet had full

and complete knowledge that it was Mr Clarke's private interests that were being furthered.

[78]The tort requires that damage be caused to WCC before it can succeed against Mr Clarke. The law on causation is quite clear. There must be a causal connection between the action of the tortfeasor and the damage suffered by the defendant. It is not sufficient to say, 'He breached his duty. I suffered damage. Therefore I am to be compensated.' There has to be proof that the damage flowed from the defendant's breach.

[79]In ***Target Holdings Ltd. v Redferns*** [1996] A.C. 421, 432 Lord Browne-Wilkinson speaking in the context of a claim in equity spoke also to the common law rule of causation. His Lordship observed that in fault-based systems of liability the claimant must prove that the defendant's wrongful act caused the damage. The facts relating to the causation issue are more developed in the section dealing with breach of fiduciary duty but it can be stated that on this issue WCC has failed.

[80]The case against Dr Lawrence was put this way. Dr Lawrence is accused of being Mr Clarke's 'point man' on the NIBJ board who used his influence to procure funding on favourable terms for Mr Clarke while using his influence, malevolently, against WCC, first in terms of the preference shares in the first loan and second, the delay in processing the second loan. This delay meant that CLCL was gaining ground on WCC and the fruit of the plot was CLCL's securing an exclusive supply contract with Jamalco in 1998 at a time when CLCL's plant was still two years away from completion. It was said that Dr Lawrence used his influence as member of Jamalco's executive committee to cause Jamalco to terminate its contract with WCC in late 1997 and procured CLCL's contract with Jamalco. This cancellation it was said further crippled WCC financially and was designed to erase WCC as a competitor from the market place. It was also said that Dr Lawrence was strategically placed to thwart WCC and promote CLCL because Dr Lawrence was, at the material times, (a) board member of NIBJ; (b) member of Jamalco's executive committee; (c) board member of CAP; and (d) member of Windalco's executive committee. Windalco was another entity in which the Government of Jamaica had an interest. Windalco managed the production of bauxite/alumina at Kirkvine and Ewarton. These positions, Mr Batts argued, placed Dr Lawrence in a

position to acquire information about the bauxite/alumina industry and use the information so acquired to assist Mr Clarke at the expense of WCC. CAP, it will be recalled, was an investor in CLCL. This conduct by Dr Lawrence, it was said, amounted to misfeasance in public office by Dr Lawrence. It was also said that the coincidence of conduct by (a) NIBJ in the way that it treated with CLCL, (b) Dr Lawrence; (c) Mr Clarke personally and through his company Licojam and (d) CLCL, was the result of a conspiracy to advance the interests of Mr Clarke at the expense of WCC.

[81]Dr Lawrence's role in the claim does not rise to the level where this court finds it possible to conclude that he committed the tort of misfeasance in public office. It was said that he furthered the private interest of Mr Clarke knowing that it was unlawful for Mr Clarke to further his interest without disclosure and also unlawful for Dr Lawrence to assist Mr Clarke in doing this. The evidence is simply not cogent enough to draw the inference sought by WCC. It is true that Dr Lawrence was a director of CAP and NIBJ. He admitted during cross examination that he appreciated at some point that Mr Clarke had shares in Licojam but he said that his primary focus was on supporting any investment that could lead to an increase in quicklime production. The impression the court formed was that Dr Lawrence never addressed his mind to the permission issue. Dr Lawrence was not a member of Cabinet. What the evidence shows is that he was a public official with skills that the government of the day felt could be of great value. This tort requires a mental element which is either knowledge that neither he nor Mr Clarke had the power to what they did or was reckless as to whether he or Mr Clarke had the power. If he never thought about it, how can it be said that he had either states of mind?

[82]The claim against Dr Lawrence also fails on another ground: there is no evidence that Dr Lawrence wanted to harm WCC. On the contrary, the evidence from Dr. Lawrence is that he always honestly believed that there was enough room in the market for two producers because Jamaica's total quicklime requirements could not be met even if WCC was producing at full capacity. He said that even with the combined production of CLCL, WCC and the bauxite/alumina companies, there would still be a shortfall.

[83]It was said that Dr Lawrence used his influence on Jamalco's executive committee to cause the company to end the contract with WCC in late 1997. Apart from the evidence of Dr Lawrence and Mr Pat McIntosh, both witnesses for the defence, there is no other evidence that explained how the executive committees worked at Jamalco and Windalco. Mr McIntosh was general manager at Windalco from 1999 to 2003. He said that the executive committee was not privy to the details of proposals coming from the management of the company. This evidence was designed to show that Dr Lawrence's account of how the executive committee at Jamalco worked was true since it appears that the same management model was used at both Jamalco and Windalco.

[84]This is what Dr Lawrence said about the executive committee and he was supported by Mr McIntosh who was not cross examined to suggest that his evidence on this point ought to be rejected. Dr Lawrence said that the executive committee of Jamalco was not a board of directors. According to him, the arrangement between Alcoa and the Government of Jamaica was that Alcoa would manage the production and running of the plant while the Jamaican Government provided capital. Any alumina produced was divided equally and each partner was free to dispose of its share of the product as it wished. The role of the executive committee was simply to see if the amount of alumina produced matched the projected costs of production.

[85]He said that all procurement decisions were made by Alcoa. The Government of Jamaica had nothing to do with that. The executive committee had nothing to do with that. Neither the Government nor the committee could decide from whom Jamalco could purchase goods and services. This meant that the executive committee did not decide whether or not Jamalco should purchase quicklime from WCC or some other person or what price should be paid by Jamalco for any input used for alumina production.

[86]Mr Batts submitted that this part of the evidence should be rejected as self serving. There was no evidence from WCC to compare and contrast with Dr Lawrence's evidence. For WCC to succeed in getting this court to reject Dr Lawrence's evidence it would have to show that his testimony was irrational or unreasonable or internally inconsistent or inconsistent with other evidence. This has not been done. The court accepts Dr Lawrence's evidence and finds that he 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. The claim against Dr Lawrence in the tort of misfeasance in public office fails.

[87]In respect of NIBJ, the evidence is worse than against Dr Lawrence. Here the allegation is made against a company. The case against NIBJ is based on omissions in two board submissions to NIBJ's board regarding Licojam's application for funding. The proposition is that the omissions were done deliberately to conceal Mr Clarke's involvement with Licojam so that he could gain access to public funds without any difficulty and definitely without having to disclose his interest in CLCL. The case is also based on the proposition that the delay in the second loan was the result of Dr Lawrence's influence over the board's decision on this specific application.

[88]There were two board submissions to NIBJ's board regarding Licojam's proposed project. The project was called the Clarendon lime project in the board submission. The first board submission to NIBJ regarding the Clarendon lime project describes Licojam as the promoter of the project. Significantly, the document referred to Mr Cezley Sampson and Mr Conrad Douglas as Chairman and Managing Director of Licojam respectively but failed to mention the shareholders. Specifically, there is no mention that Mr Clarke held 99.96% of the shares (exhibit 1 p 381). Neither was it mentioned that Mr Clarke was a director of Licojam. This lack of detail stood in sharp contrast to the board submissions regarding WCC. All the shareholders of WCC were named in the board submission (exhibit 9 p 1). This board submission regarding Licojam's application was done in June 1995. Mr Reynolds indicated that it would have been prudent to note who the shareholders in Licojam were.

[89]There was a second board submission regarding the Clarendon lime project. This was in July 1995. In that board submission, the board of directors of Licojam were listed but not the shareholders (exhibit 1 p 395). Mr Clarke was not listed either as a director or shareholder notwithstanding the fact that he was one of the first directors of the company and majority shareholder. It is important to note that the board submission observed that Licojam initiated the project from 1993. It was apparently agreed 'that a new company, Clarendon Limestone Company, (or otherwise suitably named) be

formed to undertake the project. Licojam would be an investor in the new company' (exhibit 1 p 395).

[90]The July 1995 board submission noted that Licojam had a contract to supply Jamalco with 60,000.00 mt of limestone/year with the supply to commence in July 1995 (exhibit 1 p 399). In other words, Mr Clarke's company, Licojam, had a contract to supply Jamalco, a company in which the Government of Jamaica had a 50% shareholding.

[91]This second board submission ends by recommending to the board that the investment be made subject to conditions, one of them being that NIBJ should have a seat on the board of the company.

[92]At the time of both submissions, CLCL was not incorporated. This was done on August 17, 1995 (exhibit 1 p 519).

[93] There is no evidence indicating who actually prepared the board submissions on the Clarendon lime project which involved Licojam. It would dangerous to leap to the conclusion that the absence of detailed information on Mr Clarke's interest in Licojam was as a direct result of a scheme of which the board was a part. Thus prima facie there is no evidence that the board knew of Mr Clarke's involvement and the extent of his shareholdings. It is the position of this court that where a claim such as this is akin to fraud then if the evidence is equivocal that is to say consistent with both dishonesty and negligence or plain carelessness or no wrongful act then a court cannot conclude that bad faith as understood in this tort has been proven.

[94]The question will always be whose mind and conduct are to be attributed to NIBJ so as to make it liable in this tort. As the case law makes clear, when one is talking about a company doing or refraining from doing some act with some specified intention or recklessness, there is no simple formula to be applied (***Meridian Global Funds Management Asia Ltd v Securities Commission*** [1995] 3 All ER 918). Depending on the context a lower level employee's conduct and intention may be attributed to the company (***Tesco Stores Ltd v Brent London Borough Council*** [1993] 2 All ER 718). In another context, it would have to be the conduct of a person or persons at

management level or even board room level. Mr Batts sought to say that Dr Lawrence's knowledge or malice should be attributed to NIBJ since he was a director of NIBJ. If the case is to be decided on this basis in favour of WCC, then it is the respectful view of the court, that WCC would need to show, at the very least, that the board, as a whole, were infected with Dr Lawrence's intention or adopted his malice as theirs or had formed the double intention necessary for the second form of the tort. As far as the base being based on being infected with Dr Lawrence's intention or adopting his malevolence, that was not possible having regard to the finding of this court regarding Dr Lawrence's mental state. In other words, the board could not have an intention by way of attribution via Dr Lawrence if he himself did not have it. This mean that success for WCC meant showing that either the whole or a majority of the board had the mental state required for the second form of the tort. WCC has not shown any of the possibilities outlined above. The claim against NIBJ fails.

Breach of fiduciary duty

[95]In this case it is being alleged that NIBJ breached its fiduciary duty to WCC. This raises a number of important questions of the type articulated by Frankfurter J of the United States Supreme Court in ***Securities and Exchange Commission v Chenery Corporation*** (1943) 318 US 80, 85 - 86:

> *But to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?*

[96]In order to know whether WCC has established its case it is important to know, who the law regards as a fiduciary. What criteria are used to determine who is a fiduciary? When does a fiduciary relationship arise? What duty is classified as a fiduciary duty? What is the content of such a duty? If there is a breach of duty by the fiduciary, is the duty alleged to have been breached a fiduciary duty or is it a non-fiduciary duty?

[97]There is no single comprehensive definition of the expression ‘fiduciary’ and neither is there a single universal test for identifying fiduciary relationships that can be applied to all circumstances and neither are the duties identical in content and extent across all fiduciary relationships.

[98]There are some relationships which once established are said to be fiduciary ones. Some of these are ‘trustee and beneficiary, agent and principal, solicitor and client, employee and employer, director and company, and partners’ (***Breen v Williams*** 186 C.L.R. 81, 92, Dawson and Toohey JJ). However, a banker/client relationship is not one of them.

[99]The case before this court involves a banker and a client. The law in Jamaica in relation to fiduciary relationships between bankers and their clients is clear. In ***Financial Institutions Services Ltd v Negril Holdings Ltd and Another*** (2004) 65 W.I.R. 227 the Privy Council, on appeal from Jamaica, held that ‘the authorities show that the relationship between a banker and his customer, although not normally a fiduciary relationship, may exceptionally become one although equitable relief is available only if the relationship is shown to have been abused’ (page 233). It should be noted that Ellis J, at trial, found specifically that the bank had entered into a special relationship with the customer. That special relationship amounted to a fiduciary relationship. The most important part of the evidence on which the learned trial judge rested his finding of fact was this: the customer was told by the bank that it would carry out the function of being a financial adviser to the customer in place of the adviser that the customer had previously ([13, [14]). This finding was not disturbed on appeal by either the Court of Appeal or the Privy Council.

[100]For a bank to be in a fiduciary relationship there has to be something more than the normal banker/customer relationship. For example, in ***Commonwealth Bank of Australia v Smith*** 42 FCR 390 the bank not only introduced the parties to the transaction but became the adviser to the respondents. The respondent relied on the advice to his detriment. The bank was held to be a fiduciary. The banker crossed the line and became a trusted adviser to his customer.

[101]In another Australian case of ***Golby v Commonwealth Bank of Australia*** 72 FCR 134, 136 Hill J held that in the absence of some special feature such as giving advice there is no basis for saying that the relationship is a fiduciary one.

[102]The cases of ***Negril Holdings***, ***Smith*** and ***Golby*** all show that before a bank can be held to be subject to fiduciary obligations in relation to a customer, there must be something more than just a banker/client relationship. Mr. Andrew Tuch in his article *Investment Banks as Fiduciaries: Implications for Conflicts of Interest***,** Melb. U. L. Rev 478, 489 helpfully lists some of the things which, if present, may point in the direction of a fiduciary relationship between banker and customer. These are:

> *Financial advisory services involve all or some of the following activities: advising on the merits and wisdom of entering into the proposed transaction; providing valuation analyses for the proposed transaction; evaluating and recommending financial and strategic alternatives; advising as to the timing, structure and pricing of the transaction; analysing and advising on potential financing for the transaction; assisting in implementing the transaction; assisting in preparing an offering document or other materials, as required; and assisting in negotiating and consummating the proposed transaction.*

[103]It is important to note that Mr Tuch spoke in the context of financial advisory services being provided by the bank to the customer. What the courts are looking for is evidence to show that the financial institution became like a ‘coach’, ‘trusted confidante’ such that the customer relied on and acted on the advice. If the institution was a mere sounding board which helped the customer to think through the decision but the client was in full control and placed little or no reliance on the response of the institution then no fiduciary obligation on the part of the institution can arise in those circumstances.

[104]There is one further point that must be made since it figured prominently in the submissions made on behalf of WCC on this issue. The point is that a bank has absolutely no obligation to advise any customer on the wisdom or otherwise any particular transaction or investment. As far as Jamaica is concerned this point is not up

for discussion because of the Privy Council's decision in ***National Commercial Bank (Jamaica) Limited v Hew*** (2003) 63 WIR 183. In that case Mr Hew sought to have transactions set aside on the basis of undue influence and negligence. Mr Hew succeeded at trial and fended off a challenge by the bank in the Court of Appeal. The bank prevailed in the Privy Council. Lord Millett said at paragraphs 13 – 14:

> ***[13]*** *The legal context in which this question falls to be decided is well established. In Banbury v Bank of Montreal [1918] AC 626 at 654, Lord Finlay LC said:*
>
> > *'While it is not part of the ordinary business of a banker to give advice to customers as to investments generally, it appears to me to be clear that there may be occasions when advice may be given by a banker as such and in the course of his business ... If he undertakes to advise, he must exercise reasonable care and skill in giving the advice. He is under no obligation to advise, but if he takes upon himself to do so, he will incur liability if he does so negligently.'*
>
> *In relation to a failure to advise a customer, Warne & Elliot: Banking Litigation (1999) p 28 states:*
>
> *'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.'*
>
> ***[14]*** *It is, therefore, not sufficient to render the bank liable to Mr Hew in negligence that Mr Cobham [the banker] knew or ought to have known that the development of Barrett Town with the borrowed funds was not a viable proposition. It must be shown either that Mr Cobham advised*

that the project was viable, or that he assumed an obligation to advise as to its viability and failed to advise that it was not.

[105]From all these cases and the academic writings, it is fair to say that courts do not lightly conclude that a bank owes duties beyond what was contractually agreed. Courts do not readily hold that banks are advisers unless there is something to show that the bank undertook or did something which can be said to have transformed the relationship from ordinary lender to one of adviser, trusted friend and confidante. Having set out what WCC has to prove, it is now time to examine the evidence adduced on this issue.

Analysis of evidence: breach of fiduciary duty

[106]WCC submitted that NIBJ had 'a fiduciary duty to disclose to Western prior to disbursement and at the time of the application for the first and/or second loans that the premises on which it placed its hopes to repay the loans and to be profitable viz: a long-term contract with Jamalco and a price of US$120.00 per ton (sic) were unrealistic' (para 81 of written submissions). The failure to do this amounted to a breach of fiduciary duty. WCC also submitted that 'NIBJ also breached its fiduciary duty to Western by placing itself in a position where its duty to the CLCL project and to Western conflicted with its interest in the CLCL project and Western' (para 82 of closing submissions). WCC submitted further that 'the failure of NIBJ to disclose material facts, the placement of NIBJ of itself in a position where its duties and interest were in conflict and the encouragement to Western by participating as an equity partner in a joint venture whose key assumptions to NIBJ's knowledge were unlikely to materialize, all amount to an egregious breach of fiduciary duty' (para 86 of written submissions).

[107]It is important to observe that WCC did not plead that NIBJ undertook to advise it on the wisdom of the investment. There is no assertion that there was any contractual obligation on the part of NIBJ to give such advice.

[108]NIBJ is a state-owned investment bank. As noted earlier, Mr Milverton Reynolds testified for NIBJ. He testified that in or about 1995 NIBJ was approached by Licojam with a view to it becoming an equity partner with Licojam in a quicklime project in Clarendon. This was before WCC's first application to NIBJ in 1996. Eventually, NIBJ approved Licojam's application and became a direct investor in CLCL, the company which was formed to give effect to Licojam's vision.

[109]CLCL had its first board meeting on October 10, 1995. Licojam and NIBJ were part of the board and continued on the board, although each company was represented by different persons from time to time.

[110]An examination of the minutes of the board meetings, generally, reveals that the NIBJ representatives were not just present but active participants in the decision making of CLCL. For example, at the first board meeting of CLCL Mr Phoenix (who represented Mr Lloyd Pinnock), the NIBJ representative, asked questions about the engineering and phasing of the project (exhibit 20 p 3). At another meeting of January 24, 1996, Mrs Simpson-James, the NIBJ representative, asked about the tax liability of a Mr Paul McGaffic who was to come to Jamaica to conduct training sessions for the proposed lime kiln (exhibit 20 p 12). Mrs Simpson-James was part of a sub-committee of the board to discuss the terms and conditions of a purchase order with Jamalco before accepting it (exhibit 20 p 16). The sub-committee met and completed its work (exhibit 20 p 21).

[111]At a meeting of August 28, 1996 the minutes record that CLCL had been having discussions with an entity which shall be called the Rugby Group. This was an overseas company that had expressed an interest in investing in quicklime production in Jamaica. Representatives of Rugby had been in the island and visited all alumina plants. WCC was also visited. The minutes go on to say that Rugby estimated that Jamalco's cost for producing its own quicklime would be USD$86.00/mt and so Rugby offered Jamalco quicklime at USD$85.00/mt. WCC is recorded as 'planning to sell lime at US$120.00 per ton' (exhibit 20 p 30). Mrs Simpson-James, NIBJ's representative on CLCL's board, asked questions about what had been presented to the board on this issue.

[112]At another board meeting of September 25, 1996, there is further discussion of the price of quicklime and Rugby's intentions. Dr Lyon, CLCL's board chairman, told the parties Rugby was seeking to negotiate a price of USD$86.00/mt while Jamalco proposed USD$55.00/mt (exhibit 20 p 34). NIBJ was represented at this meeting.

[113]These discussions about possible prices preceded or were contemporaneous with WCC's first application to NIBJ. It should be noted that Rugby's proposed price to Jamalco, as will be seen, was well below WCC's lowest possible price.

[114]On February 5, 1997, there was another board meeting at which NIBJ had three representatives. These were Mrs Simpson-James, Mr Basil Sutherland and Dr Vincent Lawrence. The minutes record that Dr Lawrence told those present that 'his presence at this Board meeting (sic) was because of a mandate given to him by his Boards (sic) – NIBJ and CAP to ascertain the true position of this venture' (exhibit 20 p 45). It will be recalled that CAP was one of the investors in CLCL. Thus Dr Lawrence represented two of the public sector investors. The record shows that Dr Lawrence asked Mr Sutherland of NIBJ to undertake an analysis of the project so that the way forward could be determined. The meeting was reminded, by Dr Lawrence, that the investors were interested in a lime operation and not a quarrying operation.

[115]At the board meeting of March 26, 1997, Mr Sutherland had done the analytical work required which was to be presented at the next board meeting (exhibit 20 p 56).

[116]At the May 7, 1997, meeting of CLCL's board it was announced that Mrs Diana Wynter would be one of the alternates representing NIBJ. Dr Lawrence was present at this meeting. The discussion on lime prices revealed that CLCL was thinking of a price of USD$57.00/mt. This was in the context of an assumed importation cost of lime into Jamaica at USD$86.00 – USD$94.00/mt (exhibit 20 p 58).

[117]The July 30, 1997 minutes show further discussion about the Rugby Groups' possible entry into the Jamaican market as an investor in CLCL (exhibit 20 p 68). The next board meeting was October 29, 1997 (exhibit 20 p 73).

[118]All these minutes show that NIBJ was an active participant on CLCL's board. NIBJ also had knowledge of the proposed pricing arrangements which were being considered by CLCL and other entities including WCC. However, as can be seen, the information relating WCC's price was known before WCC approached NIBJ for a loan. The pleaded case of WCC made the assertion that NIBJ got access to WCC's possible price and production costs from documents submitted by WCC when it made its first loan application. The evidence does not support this assertion. The August 1996 board minutes show that WCC's possible price was known before the application was made. The minutes do not record the source of the information. There is no evidence indicating how CLCL came by the information.

[119]One of WCC's complaints is that NIBJ did not disclose that it had invested in CLCL and had NIBJ done this, then WCC would not have approached NIBJ for a loan. This is said to amount to a breach of fiduciary duty which led to damage suffered by WCC.

[120]In September 1996, WCC first applied to NIBJ for a loan. The loan was approved at NIBJ's board meeting held on November 28, 1996 (exhibit 2 p 77). The loan was disbursed in the form of payments to third party suppliers of goods and services provided to WCC. The loan sum was USD$320,000.00 (exhibit 2 p 79). The loan took the form of an equity position, that is to say, NIBJ took cumulative redeemable preference shares which were to be redeemed in two equal tranches in November 1997 and March 1998. The dividend rate was 26.5%. This, in practical terms, amounted to an interest payment on the loan assuming that it was the usual preference shares arrangement. This differed from a loan to the extent that dividends are payable out of profits whereas a loan is usually repayable regardless of whether there was a profit. There were other conditions to the loan. These were (a) WCC had to finalise all additional financing for the project; (b) a mutually acceptable schedule for the disbursement of NIBJ's equity funding; (c) payment must be to a third party; (d) NIBJ must have a representative on the board; (e) conversion of all director's loans to WCC to equity (exhibit 2 pp 77/78). WCC accepted the loan with the conditions on December 16, 1996 (exhibit 2 p 76).

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

[122]The board submission in relation to WCC's first loan application to NIBJ revealed that it was predicated on a conservative price of USD$120.00/mt. WCC's intended price was USD$145.00/mt. WCC's possible price at the time of the first loan application was USD$145.00/mt. This is stated in the board submissions and confirmed in letter by WCC to NIBJ (exhibit 2 pp 30, 41 and 42). It is to be noted that WCC's conservative price was already at least USD$30.00/mt above Rugby's proposed price.

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

[124]There is an additional bit of evidence that must be reviewed here because counsel for WCC submitted that at all material times, NIBJ knew that WCC was targeting the Jamalco market for quicklime and that the price of the product was absolutely vital. The evidence does not support this assertion. The board submission in respect of WCC's first loan application under the heading 'Markets' examined a whole range of markets beyond Jamalco and Alcan. There was mention of proposed export markets to St. Lucia and the domestic market of the domestic sugar industry. What this means is that when NIBJ was assessing the loan it was looking at all possible markets and not just Jamalco and given the unchallenged evidence that from that time (1996) to today (2012) the demand for lime has exceeded the domestic production capacity, it is more probable that NIBJ had the broader market in mind when it decided to lend the money. An examination of the letters written by WCC to NIBJ during this period shows that WCC was not restricting itself to just Jamalco. WCC consistently highlighted the possibility of markets other than Jamalco in order to convince NIBJ that it was a good credit risk, that is to say, there would be markets that would generate revenue to repay the loan.

[125]Mr Wong Ken in his evidence stated that WCC was not able to secure a long term contract but following the recommendation of a Mr Sands of Jamalco, WCC decided to demonstrate its capacity by building a smaller plant (para. 31 of first witness statement). However, the NIBJ board submission for the first loan reads:

> *The local bauxite companies were anxious to sign supply contracts with WCCL in July 1996, however the management of WCCL decided to postpone signing until the plant was commissioned. This strategy ensured that the reputation of WCCL was not compromised. Both Alcan and JAMALCO have received plans from WCCL to build receiving systems (at the expense of the bauxite company) for the lime, and JAMALCO has completed the system.* (Exhibit 2 page 26)

[126]If what is stated in the board submission is true then it would mean that WCC in fact had the opportunity to secure a supply contract with Jamalco, even before its plant was completed and commissioned, but declined to do so. The decision not to take advantage of this golden opportunity was WCC's alone uninfluenced by any of the

defendants. It is important to make this point here because much has been made of the fact that CLCL and Jamalco concluded a contract without the lime plant being completed to say nothing of production. What this evidence shows is Jamalco's willingness to contract with quicklime suppliers before they commenced production. Jamalco was prepared to remove from itself the burden of securing additional quicklime for its requirements and place that burden on others via a contract. Jamalco would undoubtedly try to protect itself against non-performance or under performance of any proposed supplier by way of suitable contractual provisions.

[127]The conclusion that Jamalco was not the only market in view of WCC is further buttressed by this bit of evidence. There is a letter from WCC, signed by Mr Robert Cartade, the Managing Director, that dealt extensively with the issue of price and market (exhibit 2 p 59). This letter is important because it shows that WCC had conducted its own analysis of the market and determined that a price of USD$145.00/mt was sustainable. The letter is dated December 6, 1996. This was after the first loan application was made and approved. There is no evidence that NIBJ or any of the defendants had anything to do with this price per metric tonne. The opening sentence of the letter gives the context of a telephone call on December 5, 1996 between Mr Cartade and Mrs Simpson James of NIBJ. Mr Cartade is explaining why WCC's price of USD$145.00/mt is sustainable. He said that from the information available to WCC, Alcan imports lime from the USA and lands it at Port Esquivel, Jamaica, at a cost of USD$180.00 – US$200.00/mt. This cost does not include handling and freight to Kirkvine in Manchester and Ewarton in St. Catherine. He also said that he understood that Jamalco imported lime at USD$200.00/mt. Therefore he said WCC's price of USD$145.00/mt was sustainable. This was before WCC discovered the error in the configuration of the plant which was only uncovered one year later after production began. This meant that WCC had clearly developed a plant which it intended to be able to supply all the bauxite/alumina companies with quicklime. WCC thought that it would be able to do because it honestly thought that all the companies used the same size quicklime. This was the basis of Mr Cartade's optimism that the price of USD$145.00/mt was sustainable. Production had not yet started when the letter was written; that was five months into the future. While this discussion was taking place

between WCC and NIBJ, it is true to say that NIBJ would have known from its presence on CLCL's board that WCC's price perhaps was not competitive or likely to be so but as Lord Millett so forcibly pointed out in ***Hew's*** case, the bank has no duty to advise on these matters unless bound by contract to do so or the bank undertook that responsibility.

[128]On the question of whether Jamalco was the only market in view there is this additional evidence. In the same letter in respect of the market, Mr Cartade assured Mrs Simpson James that in 1997, from WCC's perspective, there would be a total shortfall in the bauxite companies of 100,000mt and in addition the sugar industry needed 20,000mt. From the evidence WCC at full production without mishap would not be able to supply the total shortfall. To put it another way, the shortfall exceeded WCC's total capacity. There was also unlimited export potential. This reassurance came after NIBJ's board had approved the first loan. This letter from Mr Cartade, the Managing Director of WCC at the time, shows that it is not accurate to say that WCC had in mind the Jamalco market exclusively. Here Mr Cartade was sparing no effort to convince the NIBJ official that there were other markets and these were (a) the sugar industry and (b) overseas.

[129]By January 24, 1997 NIBJ had paid suppliers of WCC USD$140,641.62 (exhibit 2 p 133). This was done despite the fact that not all the measure to secure NIBJ's interest was in place (exhibit 2 p 144).

[130]There is an internal memorandum dated February 13, 1997 in which Mrs Simpson James is writing to Miss Tina Beckford about the views of the Executive Chairman of NIBJ. The Executive Chairman is reported as stating that the requirement of security in respect of WCC is overkill and 'that disbursements should not be withheld due to non-performance or non-fulfilment of non-critical pre-condition' (exhibit 2 p 157).

[131]Another internal memorandum dated February 19, 1997 from Miss Andrea Martin to Mr Lloyd Pinnock indicated that as of that date USD$169,941.62 were disbursed. WCC had requested that the additional sum of JMD$5,251,683.16 be disbursed to National Commercial Bank ('NCB') despite the fact that NIBJ was not in possession of invoices supporting the expenditures of this sum (exhibit 2 p 163). By February 21, 1997

the cheque in that amount was sent to WCC (exhibit 2 p 174). This letter also indicated that this sum represented the final disbursement to WCC. This may be an error because there is a letter of May 27, 1997 showing that there was a balance of JMD$46,561.78 (exhibit 2 p 184).

[132]This court has gone into great detail in respect of the first loan in order to show that between September 1996 when WCC made its first contact with NIBJ and February 21, 1997, there is absolutely no evidence to show that during that time NIBJ undertook or actually advised WCC in relation to any of its activities. There is nothing in NIBJ's conduct to show that it intended or planned or conspired with anyone to harm WCC. All of its dealings with WCC were above board. The final disbursement of funds in fact occurred on September 17, 1997 when a cheque for JMD$46,563.78 was made payable to the Collector of Customs (exhibit 2 pp 203, 204).

[133]What the evidence in relation to this first loan has shown to this court is that the loan was processed and disbursed even before all the conditions were met. Further, there is internal correspondence to suggest that NIBJ's Executive Chairman was questioning the need for additional security and actually urged the bank to dispense with non-essential conditions.

[134]The evidence is inconsistent with any conspiracy to injure WCC. If NIBJ was intent on furthering Mr Clarke's interest at the expense of WCC, why give it a loan? Why process the loan quickly and disburse before all the requirements for the loan were met? Where is the fiduciary duty?

[135]On this issue it is necessary to bear in mind the evidence at paragraphs 87 - 93 above. This evidence is necessary so that WCC's allegation against NIBJ for breach of fiduciary duty can be properly understood.

[136]Mr Batts submitted that even in this context a fiduciary duty arose. The basis of this duty is said to be that once NIBJ began dealing with the loan application, that act in and of itself and without any other added feature, turned NIBJ from ordinary lender into a lender with fiduciary responsibilities. This court does not accept this proposition. While it is true that the circumstances in which a fiduciary relationship can arise are not

closed, if Mr Batts is correct then just about any lender by simply entertaining a loan application would find himself fixed with fiduciary obligations. Mr Batts' submission only serves to reinforce the good sense of the law in rebuffing all attempts to turn an ordinary lender/debtor relationship into one where fiduciary duties arise just from that fact. Lord Millett's advice in ***Hew*** as firmly shut the door against such submissions in Jamaica.

[137]Mr Batts sought to rely on the income projections made by NIBJ regarding WCC's capacity to service the loan and make the investment a success. This was how the conservative price USD$120.00/mt was arrived at by NIBJ. It used this figure to do its calculations in relation to the loan to WCC. This court can only quote Lord Millett's response to submissions of counsel in ***Hew***. At paragraph 22 his Lordship said:

> *This is a useful illustration of the truism that the viability of a transaction may depend on the vantage point from which it is viewed; what is a viable loan may not be a viable borrowing. This is one reason why a borrower is not entitled to rely on the fact that the lender has chosen to lend him the money as evidence, still less as advice, that the lender thinks that the purpose for which the borrower intends to use it is sound.*

[138]A customer cannot rely on the lender's projection as proof that the lender is encouraging the purpose for which the loan is required. The lender's interest is not the same as the borrower's. The lender is interested in one thing: will I get back my money with interest and if not is there any asset the borrower has which I may sell to recover the money lent?

[139]Mr Batts goes further to say that the breach of duty was the failure of NIBJ to tell WCC that it had invested in CLCL and that WCC's pricing business strategy was unworkable. Respectfully, this court declines to accept this submission because there is no principle of law that remotely requires any lender to become a business adviser. When a lender is approached by a would-be borrower, the lender is faced with the decision of whether he will take the risk. The risk to a lender is always that the borrower may default. But that is his risk to take. If the lender chooses to be foolish and lends in

circumstances where he may well lose all his money that is his business. If it is a bank with shareholders then the management of the bank is accountable to them and to the board. If he makes an error in assessment of the risk that is his business. No lender has any obligation to inform any borrower of his folly. There is no evidence in this case that WCC requested advice from NIBJ and NIBJ agreed to provide advice. There is no evidence that NIBJ voluntarily undertook to provide unsolicited advice.

[140]This court is satisfied that the circumstances of the first loan created no expectation on the part of WCC that NIBJ would be undertaking any role of adviser or providing guidance in the management of the business. No fiduciary duty to WCC existed at the time of the first loan and thus there can be no breach.

[141]The circumstances leading up to the second loan to WCC is now examined. It will be recalled that WCC first went to NIBJ on the premise that if it got the requisite financing it would be up and running by the end of January 1997. NIBJ provided the requisite funding and WCC was not up and running.

[142]WCC began production in May 1997. By May 2, 1997 there was a fire at the plant and no production took place until the kiln was re-fired on August 8, 1997 (exhibit 2 p 196). This exhibit is a letter written by Mr Robert Cartage, then Managing Director of WCC.

[143]By letter dated November 26, 1997, NIBJ told WCC that Mrs Dianne Wynter was appointed to WCC's board (exhibit 2 p 236). This was the first time that NIBJ took advantage of its right to appoint a director to WCC's board. This meant that Mrs Wynter was involved in the boards of CLCL and WCC. She was appointed to CLCL's board in May 1997. This appointment of Mrs Wynter is relied on by WCC to say that NIBJ breached its fiduciary duty to WCC because there was now a conflict of interest which was undisclosed to WCC.

[144]Mrs Wynter continued as the NIBJ representative on WCC's board until 2000 (exhibit 2 p 459). She was replaced by Mr. Vinroy Gordon, another employee of NIBJ.

[145]WCC has insisted that context is important. Let the context of Mrs Wynter's appointment be examined. Mrs Wynter's appointment to WCC's board came after this

letter from WCC (exhibit 2 pp 228 – 230). Mr Cartade wrote to NIBJ, in a letter dated November 24, 1997, in which he states in the opening paragraph:

> *Thank you for finding the time at such short notice to meet with the undersigned and Mr Koonce on Friday last. As we discussed, this company 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.* (my emphasis)

[146]The letter goes on to deal with the difficulties with Alcan and then states that for 'the reasons stated above Western Cement Company now formally requests a loan in the amount of USD$350,000.00' to be used in the manner specified in the letter. The loan was to be used for design modification for limestone aggregate, for lump lime and to build a bagging plant. The modification for lump lime was to enable WCC to provide quicklime for Alcan. The bagging plant was to enable WCC to supply lime to the sugar industry.

[147]Paragraphs two to four of that letter read:

> *Our engineer visited each of the alumina companies and designed for each a simple receiving system. To date only Jamalco has installed the system and we understand that Alpart is in the process of doing so. Alcan's Kirkvine facility requires a different size lime and their Ewarton plant has still not installed the necessary receiving equipment.*
>
> *We have always recognised the need to broaden our market and it is to that end that we have persistently encouraged the alumina companies to install the receiving facility.*

> *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 wish to install a bagging plant.*

[148]The letter is so clear it needs no analysis. It is plain that of the bauxite/alumina companies only Jamalco could take WCC's product.

[149]The bagging plant was installed but that did not appear to solve the problem. This is known from a letter dated April 28, 2000 from Mr Wong Ken to NIBJ (exhibit 2 p 429). That letter informs that the bagging plant 'is in place however, it appears that it is unable to efficiently handle the grain size of our lime. To bring this machine into service a mill will be necessary ahead of the bagging plant. To date the company has been fortunate to have maximized its sales and therefore the need to bag lime has not arisen.' If what has been quoted is correct then it means that either the problem identified in Mr Cartade's letter of November 24, 1997 was incorrectly diagnosed or if correctly diagnosed, the bagging plant was not the appropriate solution at that point.

[150]The date of Mr Cartade's letter was November 24 which was a Monday. The reference in that letter to 'Friday last' was to November 21. It appears from the letter that Mr Cartade had made an informal request for further funding at the Friday meeting which was followed up by his letter of November 24.

[151]These letters are important because they are letters written by WCC to NIBJ explaining is problems. No one has suggested that these letters were inaccurate.

[152]If there were lingering doubts that WCC was fully in charge of the decision making process right up to the second application, Mr Wong Ken's letter serves to put such doubts to rest. The highlighted portion of the letter is potent evidence against any loss to WCC arising from any misconduct or breach of any duty including a fiduciary one by any of the defendants. This letter was prompted by the difficult circumstances in which WCC found itself.

[153]Mr Cartade's assessment of the problem was repeated in a letter to Alcan. By November 25, 1997, Mr Cartade writes to Alcan (exhibit 2 p 169). The letter reads:

> *We are concerned that notwithstanding that we manufacture a high quality reactive lime, Alcan finds it necessary to import for its needs. Arising from this concern we have made enquiries with several of your technicians and have identified the following as being the factors that militate against your purchasing from us. We have examined the steps that we are able to take and we set out below the problems as we have identified them and we also set out the steps taken to remedy the situation.*
>
> 1. ***Our price is too high. To this end we have by letters dated November 6th and November 10th proposed a reduction of price from US$140.00 to US$106.00 per metric ton (sic).*** *(my emphasis*)
>
> 2. *Size unacceptable. WCC's plant was constructed to produce lime of minus one-sixteenth, a specification provided by the Lime Task Force headed by Alcan in 1992. WCC offers two different solutions as follows:*
>
>   a. *WCC could purchase and install equipment capable of producing lump lime of 95% CaO size ½" to 1½" . Acquisition and erection time estimated to be 6 – 8 weeks. WCC would be encouraged to undertake this expenditure in exchange for your confirmation that you would take lime of that size and quality or*
>
>   b. *WCC could supply to Alcan for its Kirkvine Plant;*
>
>   *(1) A design for a Lime Receiving facility.*

(2) The following materials required to install the Receiving Facility:

- *4" long radius elbow*
- *Kamlock fittings*
- *Bin vent*

[154] From this, there is an admission that WCC proceeded on an incorrect premise regarding lime size. WCC concedes that in relation to Alcan, its quicklime price is too high. This is in November 1997. This is to be contrasted with the December 1996 letter from Mr Cartade where he was supporting a price of USD$145.00/mt and was explaining to NIBJ why that price was realistic (see paragraph 126 above).

[155]It appears that WCC went ahead and acquired the equipment despite the absence of any written confirmation from Alcan that it would take WCC's lime (exhibit 2 p 272). WCC also borrowed USD$150,000.00 from Capital and Credit Merchant Bank to acquire the bagging plant (exhibit 2 p 272). There is correspondence suggesting that the bagging plant was purchased with money loaned by NIBJ (exhibit 2 pp 427 – 428). Either way, it does not matter the source of funds for the bagging plant. The important point is that WCC took on additional debt to construct a bagging plant.

[156]Mr Batts submitted that WCC's application for the second loan was made in even more alarming circumstances than the first. The time taken for the approval of the loan assumed greater significance because Jamalco, which was the only customer of WCC in the October/ November 1997 period had indicated that it would not be taking supplies of quicklime from WCC at some point in the near future. The case against Dr Lawrence has already been stated and need not be repeated. He was Mr Clarke's 'point man' in NIBJ and did the things attributed to him. If Mr Batts is correct, Prince Nicolo Machiavelli would be immensely pleased with his protégé.

[157]This submission by Mr Batts is troubling. How can it be said that a lender breaches some duty to process a loan within a particular time frame in the absence of some contractual obligation or representation to that effect by the lender? A lender has no

duty to lend money to anyone, not even a lender owned by the Government unless some statute, regulation or some source of law imposes this duty. In the absence of some legal obligation either to lend or to inform the prospective borrower of the outcome of the application, it is difficult to see how delay per se can create a fiduciary duty between lender and borrower.

[158]Before the formal request for further funding was made there were two important board project updates that have to be examined. The first is dated September 25, 1997 (exhibit 2 pp 206-207). The second is dated November 21, 1997 (exhibit 2 pp 222-224).

[159]Taking the first project update. The report notes that the plant commenced production on May 1 but went down on May 2 because of a fire. The kiln was re-commissioned on August 8, 1997 but safety issues in respect of the workers arose. The NIBJ team visited the plant and saw first-hand the effects on the respiratory system of the workers because of the absence of filter masks. The production of quicklime requires very high temperatures; about 800° C. Apparently, workers were injured from the heat. The team even saw burns to two persons. Indeed the report stated that WCC was in breach of the Factories Regulations of 1961.

[160]Safety equipment was ordered and it arrived in Jamaica during the last week in August 1997 but was not cleared until September 15, 1997. The plant was shut down on September 9, 1997 because of severe injuries received by a worker. The report noted that this shut down resulted in the loss of product valued at USD$14,000.00.

[161]Turning now to the second project update. The NIBJ board submission stated that WCC relied on Jamalco as its sole customer and geared its production to meet its specific requirements. From all reports, NIBJ noted, WCC was meeting satisfactorily Jamalco's purchase order of 12,000 mt/yr. The report noted that Jamalco had suspended its order for lime from WCC. The reason recorded in the project update, as given by Jamalco, was that Jamalco was mining a deposit to use in its own quicklime plant. It was not clear how long the suspension would be. There is no evidence that this information was not true. There is no evidence, direct or circumstantial, that this decision was influenced any of the defendants. As noted earlier, this kind of decision would be made by Alcoa's management team and not the executive committee to which Dr Lawrence belonged.

[162]By November/December 1997 the plain fact of the matter is that WCC was in the position where the plant was calibrated in such a manner that it could supply only Jamalco with quicklime; it had no other customer and the sole customer, Jamalco, had indicated that it would soon stop taking supplies. If WCC's theory about Jamalco being the only market is accurate it is only at this point that Jamalco would have emerged as the only viable market for its product. Add to this the high debt burden it was carrying and this burden predated any contact with NIBJ, it could hardly be surprising that NIBJ was perhaps reluctant to lend more money in the absence of a positive showing that WCC had contracts which, in practical terms, would turn into a revenue stream out of which WCC could repay its debts and ultimately redeem the preference shares.

[163]Mr Batts submitted that this court could not interpret the evidence this way because the reason for the delay was given by the bank and where a reason is given by the bank then it is not open to the court to find another reason. In response to this submission this court notes, firstly, no lender has any obligation to accommodate an applicant for a loan. This is so even if the lender is a public sector lending institution. Second, any lender, unless contractually bound to do otherwise or has made a promise which was intended to be acted upon and was in fact acted upon by the borrower to his detriment, has no specific time scale within which to approve a loan. Third, any lender must be at liberty to decide when any application for a loan would be approved and disbursed. Fourth, surely a prudent lender would be concerned that an applicant for loan apparently has difficulty securing markets for his product and maintain production for acceptable periods. Fifth, there were serious issues regarding WCC's ability to maintain production given the difficulties of 1997 when it began production.

[164]The November 21 board project update stated that Jamalco suspended taking lime from WCC. The report does not state on what date the notice was given and when it would take effect. Neither is it known when the kiln was re-commissioned and fully operational after the September 9 shutdown.

[165]What it clear is that the September 9 shutdown occurred because the workers became restive because one of their numbers was seriously injured. It will be recalled that in the first project update NIBJ officials record that they attended the work site and actually saw persons with burn injuries 'because they were inadequately clad.'

[166]There is no evidence that between the disbursement of the first loan and the formal application for the second that NIBJ advised or became involved in the active decision making process of WCC's board. There is no evidence that WCC sought NIBJ's advice on how to structure its project.

[167]There is no evidence that the reason Jamalco gave for stopping the taking of quicklime from WCC in November/December 1997 was untrue. Mr Cartade accepts that WCC got the information wrong. By November 25, 1997 Mr Cartade is writing to Alcan indicating that WCC would be prepared to reduce its price from USD$140.00/mt to USD$106.00/mt. Mr Cartade repeats the problem that 'WCC's plant was constructed to produce lime of minus one-sixteenth, a specification provided by the Lime Task Force headed by Alcan in 1992' (exhibit 2 p 232). Thus when Mr Cartade stated in the letter to NIBJ that the company had '*rather disturbing situation*', it was an understatement. The disturbing situation was that WCC had no market because Alcan could not take the product and Jamalco had suspended taking the lime. It is not surprising that Jamalco was hesitant in 1997 to commit to a possible price of USD$145.00/mt because Jamalco and the other companies could produce their own lime at much less than USD$100.00/mt and so there would be no need unless compelled to pay WCC's USD$140.00/mt. Also, by this time there was talk circulating in the industry of another possible entrant into the quicklime market who might be selling at less than USD$100.00/mt. Armed with this information, why would Alcoa or Jamalco make a decision to lock itself into a long term contract at a high price? This stark economic reality struck home hence Mr Cartade's letter to Alcan reducing the price to USD$106.00/mt.

[168]When the formal request for funding was made NIBJ had before it (a) a company that had already borrowed USD$320,000.00; (b) a company which borrowed money on the premise that production would have started at the end of January 1997; (c) a company that started production on May 1 but was down by May 2 and did not begin producing until August 8; (d) a company that had to shut down again by September 9 because persons were being injured because of a lack of proper safety equipment; (e) a company which had ceased production again by late 1997 because its sole purchaser indicated that it would cease taking its product and (f) a company that had great

difficulty servicing its high cost debt it had borrowed from a consortium of banks and had already rescheduled some of this debt.

[169]Mr Batts sought to say that NIBJ is somehow at fault for delaying additional funding when the situation was more desperate than at the time of the first loan. Respectfully, this court begs to disagree. Where is the contractual or statutory duty on NIBJ to disburse funds to WCC because it finds itself in difficulty? The root cause of the problems in late 1997 was that WCC began on a fundamentally incorrect premise, namely that all bauxite alumina companies in Jamaica used the same size quicklime. Admittedly this is what WCC was told by the lime task force but as is now clear, this information was not correct. It is also the undeniable fact that the bauxite companies, despite the inefficiency of their plants could produce quicklime for under USD$90.00/mt because they did not have high cost debt. In addition without additional funding to recalibrate the plant WCC, quite literally, had no other market in the bauxite industry other than Jamalco and even then, this was subject to the fluctuating needs of Jamalco and the cost per metric tonne. The court poses the rhetorical question, could a prudent banker be blamed for being reluctant to make further loans in these circumstances?

[170]Despite the dark cloud over WCC, the November 21, 1997 project update made a recommendation that NIBJ invest a further USD$350,000.00 (exhibit 2 p 224) subject to three things: (a) analysis of the in-house (initially) and audited financials; (b) presentation of firm commitments from sugar companies and Alcan for lime; and a market for the limestone (Alpart, Jamalco and construction industry); and (c) additional financial support from the principals to make funds available to meet monthly operating shortfalls over the next 12 months at a reasonable rate (exhibit 2 p 224). If truth be told, NIBJ worked out the total cost of doing the necessary modifications including providing some support in working capital at USD$408,000.00. Clearly, NIBJ was saying to the investors that they were to come up with the additional USD$58,000.00 needed.

[171]Another board submission of January 23, 1998 shows a number of important things (exhibit 2 pp 268 – 274). The NIBJ board met in November 1997 and deferred a decision because a number of matters needed clarification. These matters were (a) the value of WCC's lime plant; (b) the production price of WCC's lime and (c) firm commitments (in the form of supply contracts) for both lime and limestone. This

submission noted (this date must be an error and 1997 was meant) that WCC's average cost of production of a tonne of lime was USD$91.00/mt. However, WCC had a debt servicing cost of US$38.00/mt. NIBJ noted (WCC has not said this was inaccurate) that the high debt burden 'is largely due to the high interest rate on the loan facilities … as well as the short-term nature of the debt. The debt obligations of WCC prevent the company from reducing the price at which it is able to sell lime.' Thus despite the high quality of WCC's lime, despite the greater efficiency of its plant in comparison to the bauxite companies' the high debt component of cost prevented WCC from reducing its price to competitive levels which would enable it to pay its debt and still leave sufficient revenue to operate the plant. The bauxite companies did not have this high cost debt structure.

[172]At the time of this January 1998 board submission, WCC had ceased production. At the risk of repetition, the plant closed because Jamalco, the only bauxite company that was taking WCC's product, stopped taking the product because Jamalco was exploiting its own lime resources. NIBJ's technical team repeated its recommendations made in November 1997. If anything, what this shows is NIBJ's technical team was optimistic when the objective facts were pointing towards failure.

[173]There was another board submission in April 1998 (exhibit 2 p 306). In this submission, it is noted that WCC had purchase orders from Jamalco and Alcan. Both companies, it was reported, declined to enter into any long term supply contract on the basis that WCC was new and emerging and had not established itself as a credible supplier in the market place. In respect of Jamalco, in light of Dr Lawrence's and Mr Pat McIntosh's evidence this decision was not made by the executive committee but Alcoa. Given the difficulties in 1997, this does not seem to be an unreasonable assessment by the two companies. Apparently, the board was not prepared to approve further capital injection in the absence of firm contracts. This court understands this to mean that the board was concerned about a reliable stream of revenue that would enable WCC to service its debts and become a viable entity. NIBJ's technical team were optimistic, the board was a bit more reserved.

[174]One positive result for WCC coming out of this April board meeting was that WCC's request for an extension of the period for redemption of the shares to six and

seven years was approved. Thus what was intended to be a relatively short term investment (first loan) became much longer. This decision by the board is inconsistent with any conspiracy to injure. Would it not have been easier to ensure the certain demise of WCC by insisting that the first loan preference shares be redeemed in accordance with the initial agreement?

[175]At the September 1998 board meeting there was another board submission regarding WCC (exhibit 2 pp 335 – 344). By this time WCC had asked for an actual increase from USD$350,000.00 to USD$448,000.00.

[176]This September board submission had some important observations. First, despite the frequency of the breakdowns of the lime plants at Alcan and Jamalco, those plants were interested in purchasing lime only if it would be less than USD$100/mt. Second, Chemlime is able to sell lime at USD$89.00/mt and add to this USD$15.00/mt for transportation to Kirkvine and Ewarton the price would be US$104.00/mt. Third, Chemline had been selling lime to the bauxite companies for USD$60.00/mt FOB. Fourth, Rugby's projected selling price at this time was USD$87/mt. Fifth, even the combined output of WCC and Rugby would leave a shortfall of 51,613 mt/year. Sixth, Rugby's plant was still two years away from production. What all this meant was that if WCC could get itself properly organized there was a market for quicklime which was greater than its productive capacity.

[177]In light of all this the technical team recommended the additional investment in WCC. The loan of USD$448,000.00 was eventually approved at the September 16, 1998 NIBJ board's meeting and WCC was so informed by letter of September 29, 1998 (exhibit 2 p 345). Up to this point, there is no evidence that NIBJ undertook the role of adviser.

[178]From what has been said, the recurrent difficulty that WCC had was its inability to reduce its price to a level that would enable it to service its debt and generate revenue to meet day to day expenses and of course produce some profit for the investors. The high debt service which hung around the neck of WCC like a millstone did not make it competitive even though the bauxite companies had lime plants that were old and inefficient and suffered frequent breakdowns. WCC's price per tonne excluding debt service was USD$91.00 (exhibit 2 p 269). In desperation, WCC reduced the price of its

quicklime to USD$106.00/mt to sell to Alcan. At this price WCC would find it difficult to service the debt and cover the cost of production. If this is so, it is difficult to see any prudent bauxite company in Jamaica locking itself into a long term supply contract with WCC at any price above USD$100.00/mt. Not surprisingly, Jamalco and Alcan only purchased via purchase orders and not long-term supply contracts.

[179]It may be said that when NIBJ appointed Mrs Wynter to WCC's board of directors, NIBJ had a duty of loyalty to WCC to inform it of its unsupportable premises because a director has a duty of loyalty to his company. There is great force in this view. Also a director falls within the automatic and presumptive category of fiduciary relationships. This court would accept that it was at this point alone that a fiduciary relationship developed between WCC and NIBJ. The date would be November 27, 1997 when Mrs Dianne Wynter was appointed to WCC's board of directors.

[180]By exercising its right to appoint a director, NIBJ placed itself in an irreconcilable conflict between the duty of loyalty owed to CLCL and the same duty to WCC. The director is required to act in the best interest of the company. If the person is a director of two rival companies then disclosure has to be made of that fact. One option that was open to NIBJ was to have in place contractual provisions regulating how it managed its relationship with both entities. It is unwise, to say the least, to be a director of potential or actual rivals without adequate liability risk management through the medium of appropriately drafted contractual provisions.

[181]Having taken the directorship in both companies NIBJ found itself in the regrettable position of either telling one company about the other or keeping silent. It chose the latter.

[182]Millett LJ in ***Bristol and West Building Society v Mothew; (t/a Stapley & Co)*** [1996] 4 All ER 698, 711 – 712:

> *A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several*

facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations.

[183]Millett LJ made a telling point in ***Mothew*** at page 712:

The nature of the obligation determines the nature of the breach. The various obligations of a fiduciary merely reflect different aspects of his core duties of loyalty and fidelity. Breach of fiduciary obligation, therefore, connotes disloyalty or infidelity. Mere incompetence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty.

[184]The claimants rely on two passages in the September 1998 board submission in support of their proposition that NIBJ breached its fiduciary duty to WCC. In that report the technical team noted that NIBJ's investment in both CLCL and WCC increased NIBJ's exposure to the lime industry 'while at the same time increasing the possibility of failure of one of the entities due to competition for the same the market [in original].' The team suggested that the letter of commitment given to CLCL should be recalled so that NIBJ would have the opportunity to determine whether an investment in this project is feasible.

[185]This was the first intimation that any person in NIBJ thought that the market was now so small that WCC and CLCL would be competing for the same market. This assessment goes against the evidence of very knowledgeable persons such as Dr Lawrence and Mr Norman Davis who also testified in the case. Mr Davis insisted that there was always a quicklime shortage in Jamaica which local production never met. As indicated earlier, Mr Davis gave objective reasons why there would be an increased demand for quicklime. There is no evidence to suggest that the team within NIBJ that were concerned about the size of the market had any greater knowledge than either Dr Lawrence or Mr Davis on this point. These were two men who were actually involved in

the industry over many years and so would have deep knowledge of the quicklime needs of the industry. This court has no hesitation in finding that there was indeed a consistent shortage of quicklime in Jamaica before WCC was founded, during its operation and even to today.

[186]This view of the technical team has to be balanced against the fact that (a) Rugby had not yet started producing lime and (b) even if Rugby had begun production with its proposed capacity and with WCC's capacity there would still be shortfall in the market in a context where demand was expected to increase because of the proposed expansion in bauxite production by the Jamalco, Alpart and Alcan.

[187]Grist for WCC's mill was provided by an internal memorandum of NIBJ. Mrs Wynter wrote to Mrs Portia Nicholson Clarke and raised a number of concerns (exhibit 2 p 423). She indicated that NIBJ had invested in CLCL and WCC. Mrs Wynter outlined other issues and ends the memorandum with a request for guidance on how NIBJ's representative should manage the problem of acting in the best interest of WCC 'whilst balancing same with the terms of employment at NIBJ.'

[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.

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

[190]It was submitted that had WCC known what NIBJ knew then it would or might have gone about the matter differently for example seeking funding from a different source. It is not entirely clear where this alternative source at NIBJ's rate of interest would be found. There is evidence that WCC sought to borrow from an overseas source but that effort was not fruitful. Even without a loan from NIBJ, WCC's debt structure was such that it could not produce quicklime at a price that would enable it to compete with even the inefficient quicklime plants of the bauxite companies. The case law reviewed on this head of liability says that the claimant must prove that the breach of duty caused any loss it claims to have suffered.

[191]Turning now to the question of causation. The claim being made is one of equity. While it is true that the common law rules of remoteness and causation do not apply in a claim for monetary compensation in equity, there must still be a causal connection between the alleged breach of duty and loss allegedly suffered by the claimant. If it were not so it would be as McLaughlin J of the Canadian Supreme Court pointed out that the misbehaving fiduciary would be exposed to unlimited liability (***Canson Enterprises Ltd v Boughton & Co*** (1991) 85 D.L.R. (4th) 129). Her Ladyship arrived at the same result as the majority but did not follow the majority down the road of the fusion fallacy. The judgment of Stevenson J in the same case while concurring in the general reasoning of the majority took issue with 'heresy' of saying that tort law and breach of fiduciary duty should have the same principles applied to the measure of damages. The orthodox position, historically, was affirmed by Lord Browne-Wilkinson in ***Target Holdings Ltd. v Redferns (A Firm)*** [1996] A.C. 421. This court does not accept the fusion fallacy view that proceeds on the basis that since it now the case that one court administers law and equity, both types of remedies are now be lumped together to produce a remedy that is 'just.' The court agrees and accepts the analysis on this issue of compensation in equity of McLaughlin and Stevenson JJ and Lord Browne-Wilkinson.

[192]The careful judgment of Mummery LJ in ***Swindle v Harrison*** [1974] 4 All ER 705 emphasises the point that the errant fiduciary is under an obligation to make good the loss which flows from his breach of duty. He is not liable for every loss suffered by the claimant but only for such losses which can be attributed to his breach of duty. This is why it is always important to identify clearly what duty the fiduciary is alleged to owe, to whom and the acts or omissions relied on as the breach of duty.

[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, 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. This court is unable to see to how any breach of fiduciary duty could have averted these disastrous events when all these decisions were made before NIBJ was approached. All that was needed were the consequences to follow the decision and unfortunately for WCC the consequences came soon enough. This court finds, on a balance of probabilities, in light of all that has been said above about, that WCC's loss was 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.

[194]By the time of the second application for a loan from NIBJ the consequences of the events listed at (a) to (d) in the immediately preceding paragraph were well and truly being felt by WCC. Even if WCC had received loans from another source that would not

have changed the fact that its only market for the product was Jamalco. This was the position before Mrs Dianne Wynter was appointed director to WCC's board. Its high cost debt was still in place. Also, it must be remembered that the second loan from NIBJ was not to pay out other creditors and so reduce the interest charges but rather to recalibrate the plant which was an absolute necessity if it was going to survive. WCC has not made out the case that the breach of fiduciary duty by NIBJ caused its loss.

[195]It would also be helpful to look at the correspondence in the years following the second loan. WCC was under severe financial pressure. There is a file memorandum from Trafalgar Development Bank dated August 16, 2000 (exhibit 2 p 449). There the bank recorded that it had a meeting with Mr Wong Ken. Mr Wong Ken took over the lead role in dealing with NIBJ and the other bankers because Mr Cartade retired as a director in April 2000 (exhibit 2 p 426). The note indicated that WCC was in arrears regarding its loans from the bank. The reason for the arrears given by Mr Wong Ken, according to the memorandum, was that WCC had to pay a fuel bill of USD$350,000.00 to Alpart. The problem with arrears was a recurring theme even before WCC approached NIBJ for the first loan.

[196]Interestingly, the memorandum noted that Mr Wong Ken indicated that despite Rugby's contract with Jamalco for 250 mt/day, Jamalco required between 320 – 350 mt/day. WCC would supply the 70 – 100 mt differential. It appears that Mr Wong Ken told the bank that WCC had orders from Alcan to supply 75 tons/day (at USD$90/mt) and Alpart at 1000 tons monthly (at USD$80/mt). If Mr Wong Ken was correct it would mean that the daily production of WCC would be taken by Jamalco, Alpart and Alcan even in the context of Jamalco having an exclusive supply contract with the Rugby Group. This would be consistent with the assertion of Dr Lawrence and Mr Davis that the total demand for quicklime in Jamaica could accommodate the full production of WCC and the Rugby Group. If one adds to this the demand from the sugar industry then WCC's thesis that the defendants caused its loss by conspiring to exclude from Jamalco is tenuous.

[197]If anything, what this confirms is that WCC's high price because of high cost debt was its Achilles heel. The price it proposed to Alcan for supplying quicklime could not cover its costs.

[198]On October 18, 2000, Mr Wong Ken wrote to Trafalgar Development Bank (exhibit 2 p 454). That letter speaks to a kiln shut down in May 2000. It notes that WCC was not able to recover income lost from the May 2000 shut down. Mr Wong Ken noted that 'immediately following the May shutdown there was the loss of the lucrative Jamalco market to Rugby Jamaica who commissioned their kiln in June 2000. The loss of that market coincided with the breakdown of the Alcan Ball Mill, which precluded sales to that Company (sic).'

[199]The same October 18 letter noted that WCC's plant manager was injured in a motor vehicle accident. These events, (a) loss of market consequent on May 2000 kiln shut down and (b) the plant manager's injury, 'resulted in further slippage of the company's ability to meet its financial obligations.' The letter stated that in the month of August 'the Rugby Jamaica kiln suffered a major breakdown forcing them to purchase lime from WCC at a price of US$80/m/t delivered.' The point being made from this letter is that in October 2000, WCC is admitting that it could not properly service its debts because of kiln failure and the injury to the plant manager. It sold quicklime at US$80/mt which was shown by other documents in the case, to be well below the minimum price necessary to make it able to cover production costs and service the debt WCC had incurred in setting up operations when it borrowed from a consortium of private banks.

[200]A month later on November 21, 2000, Mr Wong Ken is again writing to Trafalgar Development Bank (exhibit 2 p 466). WCC is clearly in financial distress. What was revealed there shows that WCC's operations were not sustainable. The letter reads:

> *We acknowledge receipt of your letter dates November 14, 2000, and note with clear understanding your concern about the continuing build-up of arrears on the captioned loan. Whilst the bottom line is that the company continues to be in arrears we believe it is necessary to make some clarifications:*

1. *We have been selling lime, however the quality and quantity have been below acceptable standards. … Between June – October 2000 we have produced and sold a monthly average of 2,500 m/t of lime at USD80.00 delivered for an average USD200,000. This amount has not been sufficient to meet operational expenses, that being so it has been necessary to prioritize how and whom we pay. … We refer to the period September 1999 at which time our financial situation was not much better than it is now, and by the end of June 2000, we had become current. We see no reason why we cannot do it again….*

2. *At the meeting of October 17th 2000, the writer indicated a "hope" to secure personal loan money to address the interest arrears. …*

[201]The letter ends with a request 'that you consider converting your loans (or part thereof) due from the company into equity….'

[202]The desperate situation of WCC by November 2000 is revealed by a file note by Mrs Portia Nicholson Clarke in which she recorded that in a discussion with Mr Wong Ken on November 21, 2000, it was revealed that the project was out of funds and needed at least USD$200,000.00 (exhibit 2 p 471). All this was confirmed by a letter from WCC, written by Mr Wong Ken, dated December 18, 2000 (exhibit 2 pp 474 – 476).

[203]The build-up of arrears was ongoing. By letters dated October 26, 1999 (exhibit 2 p 404, WCC to Trafalgar Development Bank) and February 14, 2000 (exhibit 2 p 407, Trafalgar Development Bank to WCC), the issue of arrears on the loans is being discussed. The bank is becoming increasingly concerned about its exposure to WCC. The NIBJ post-loan period shows that WCC was well on the way to collapse.

[204]An important thesis of WCC needs to be addressed. It has been argued that the goal of the defendants was to put WCC out of business by excluding it from a contract

with Jamalco thereby hastening the demise of WCC. This exclusion from a contract with Jamalco was said to have eliminated WCC from the market. This thesis is not sustainable and these are the reasons.

[205]The Rugby Group plant did not begin operation until February 2000. What this meant was that even with a contract between Jamalco and CLCL which ultimately teamed up with the Rugby Group, other than Chippenham (not an effective competitor to WCC) and the bauxite companies, WCC was, for all practical purposes, the sole producer of quicklime in Jamaica. The documentation suggests that deliveries of quicklime to Jamalco which were suspended by Jamalco in late 1997 resumed in February 1998 (exhibit 2 p 296, letter dated March 4, 1998, WCC to Trafalgar Development Bank). It was said in this letter that a new purchase order for eighteen months supplying 40 – 60 mt/day beginning April 1, 1998 had been negotiated. It was also said that effective April 1, 1998, WCC would supply quicklime to Alcan on a trial basis for three months. These figures meant that WCC would be able to dispose of its rated production capacity of 100mt/day as of April 1, 1998 for at least three months if Alcan and Jamalco took the supply as agreed.

[206]In the September 1998 submission to NIBJ's board the technical team noted that the projected increase in demand for quicklime in Jamaica was such that even with WCC's current output of 36,000 mt/year and the projected output from Rugby/CLCL of 126,000 mt/year, the demand exceeded supply by 51,613 mt/year. In passing, this assessment by the technical team seems at odd with what was noted earlier when some persons within NIBJ were concerned about market size. WCC might wish to find some comfort from to say that the market in view was Jamalco but as has been shown, even WCC itself, in order to justify the borrowing from NIBJ did not present itself as targeting a single market, that is, Jamalco. In other words, there is little evidence to support the proposition that exclusive contract between Jamalco and CLCL somehow deprived WCC of a space in the market.

[207]Windalco had the oldest plant. That plant was 57 years old whereas the expected life of a quicklime plant is 25 years. Mr Davis said that Windalco imported

10,000/15,000 mt/year since 1999. To put it another way, had WCC been able there was a market from Windalco that could have taken 1/3 to ½ of WCC's annual output.

[208]In 2001/2002, WCC won a tender to supply Windalco with quicklime. This was after CLCL teamed up with Rugby and Rugby began production in February 2000. However by June 2002, WCC suffered a refractory failure from which it never recovered and Windalco began importing quicklime after that time.

[209]The court has referred to parts of Mr Davis' evidence already. This aspect of his evidence under cross examination was illuminating. What it confirmed was that any hope that WCC had of selling lime at USD$145.00/mt was not sustainable. If quicklime came from the United States and landed at Port Esquivel the cost would be about USD$130.00/USD$135.00/mt. If imported from Columbia, the cost would be USD$110.00/USD$115.00/mt. However, because Windalco owned Port Esquivel there would be no additional cost to push the price beyond what has been stated because the cost of handling was worked into the cost of Windalco's operations. Therefore, once the quicklime got to Port Equivel, Windalco's price per tonne did not change. Thus, either way, it would be extremely unlikely that Windalco would have paid WCC's initial price of USD$145.00/mt.

[210]Even with the conservative price of USD$120.00/mt for WCC's quicklime, it could not compete with the imported lime from Columbia at USD$110.00/USD$115.00/mt. This price assumed that Windalco paid the full price, including bagging and costs as if it did not own Port Esquivel. This price included bagging. Quicklime, Mr Davis told the court, is a bulk product. The actual ex-factory price from Columbia with bagging is in the vicinity of USD$70.00/USD$75.00mt. When the Columbian quicklime arrived at Port Esquivel the price was approximately USD$88.00/mt. It has been noted already that NIBJ's assessment concluded that WCC's cost of production of quicklime was USD$91.00/mt. The debt servicing part of the cost was USD$38.00/mt. It would not have made economic sense for Windalco to have a long term contract with WCC.

[211]Mr Davis became involved in the CLCL/Rugby Group operations in March 2002. He testified that Jamalco paid USD$81.00/USD$85.00/mt for quicklime from the Rugby

Group. This was USD$6.00/USD$10.00 below WCC's cost of production of USD$91.00/mt. If this is correct then clearly Jamalco was not going to have a long term contract with WCC and would only purchase quicklime from WCC as needed. In real terms, the quicklime from Columbia and that supplied by the Rugby Group cost less than WCC's cost of production. WCC was always going to be under pressure in this kind of market and the primary reason for this was WCC's decision to finance its operations with expensive debt in a context where it does not appear that its rivals had similar constraints.

Conspiracy to injure

[212]Mr Batts 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. However, in the event that the court is wrong on this it will consider the conspiracy allegation.

[213]In the case of ***Crofter Hand Woven Harris Tweed Company Ltd v Veitch and another*** [1942] A.C. 435, the House of Lords held that in the civil tort of conspiracy to injure, the claimant must prove (a) the agreement; (b) the unlawful purpose and (c) damage. Unlike a criminal conspiracy, the tort requires more than just the agreement to effect an unlawful purpose because an agreement to injure, per se, does not cause harm. As Viscount Simons LC explained at pp 439 - 440:

> *But the tort of conspiracy is constituted only if the agreed combination is carried into effect in a greater or less degree and damage to the plaintiff is thereby produced. It must be so, for, regarded as a civil wrong, conspiracy is one of those wrongs (like fraud or negligence) which sound in damage, and a mere agreement to injure, if it was never acted*

upon at all and never led to any result affecting the party complaining, could not produce damage to him.

[214]As recently as 1991 the position was reaffirmed. In ***Lonrho plc v Fayed and others*** [1991] 3 All E.R. 303. Lord Bridge stated:

… when conspirators intentionally injure the plaintiff and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further or protect their own interests; it is sufficient to make their action tortious that the means used were unlawful.

[215]From these cases, WCC must prove that acts done were in themselves unlawful where it is alleged that the conspiracy was to do a lawful act by unlawful means. The cases have also established that where unlawful means are used, if those means cause injury to claimant then it matters not whether there was a conspiracy. The reason is that no one has a right to use unlawful means to injure any one in their business. 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.

NIBJ's counter claim

[216]NIBJ has counterclaimed for the sums due under the loans advanced to WCC. No issue has been taken by WCC with the fact of the loans and the amounts proved to be owed to NIBJ. WCC's point was that in light of NIBJ's alleged breach of fiduciary duty which was itself said to be misfeasance in public office when coupled with its own misfeasance of assisting Mr Clarke to advance his private economic interests, equity would intervene and fashion a remedy to meet the justice of the case. In its eyes, justice means that the remedy should be setting aside of loan so as to relieve WCC from the obligation of repaying the loans.

[217]From all that has been said already, this court cannot acceded to this request and judgment is granted to NIBJ on the counterclaim.

Clearing the back porch

[218]It is now time to deal with some minor but important matters. This court understands that the first three claimants are no longer pursuing the claim against the defendants and so judgment is entered for the defendants in respect of the claims brought by the first three claimants. The court also understands that WCC is no longer pursuing claims of deceit, misuse of confidential information, interference with the claimants' business and contractual arrangements and corrupt bargains made by the alleged conspirators.

Summary

[219]WCC established that Mr Clarke misused his public office of Cabinet minister to advance his private business interest with the use of public funds without any disclosure being made to the Prime Minister or Cabinet. Such actions without the knowledge of and consequently without the approval of the Prime Minister or Cabinet are capable of amounting to the tort of misfeasance in public office given that the true basis of the tort is to prevent public officials from advancing their private economic interests by harming members of the public. However, WCC did not establish that Mr Clarke's actions caused it loss. Neither did WCC establish the second element of the double intent necessary in the second form of the tort.

[220]Also the action against Dr Vincent Lawrence and NIBJ for the tort of misfeasance in public office also fails. The evidence is insufficient to draw the inference that these persons knowingly or recklessly assisted Mr Clarke in misusing his office for his private economic gain. Even if WCC were to establish that they did so, the claim would fail on the ground of causation.

[221]The claim against NIBJ for breach of fiduciary duty fails because by the time NIBJ and WCC became involved in a fiduciary relationship, WCC was already suffering from the incorrect decisions based on incorrect information. In any event, there is no evidence that the actions of NIBJ caused the loss to WCC.

[222]Judgment is given for the defendants on the claim and judgment to NIBJ on the counterclaim. Counsel are asked to agree a form of order that reflects the reasons for decision.