

**IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE OF GUYANA**  
**CIVIL JURISDICTION**

**2021-HC-DEM-CIV-SOC-25**

**BETWEEN:**

**THE ATTORNEY GENERAL OF GUYANA**

Claimant

-and-

1. **BK MARINE INC.**, a company duly incorporated under the Companies Act, Law of Guyana with its registered office situated at 119 Peter Rose and Laluni Streets, Queenstown, Georgetown
2. **WINSTON JORDAN in his capacity as former Minister of Finance**
3. **COLVIN HEATH-LONDON in his capacity as former Chief Executive Officer (ag) of NICIL**
4. **NATIONAL INDUSTRIAL AND COMMERCIAL INVESTMENTS LIMITED (NICIL)**, a Company incorporated under the provisions of the Companies Act No.29 of 1991 and whose registered office is situated at 199 Camp Street, Georgetown
5. **REGISTRAR OF DEEDS**

Defendants

Jointly and/or Severally

**Before:**

**The Honourable Justice B. Reynolds**

**Mssrs E Luckhoo, SC, R Stoby, SC, S Fraser, SC – Applicant/First-named Defendant**  
**Mr Roysdale Forde, SC – Applicant/Second-named Defendant**  
**Mr Anil Nandlall, SC, Mr Nigel Hawke – Respondent/Claimant**

**Ruling in consolidated Notice of Applications by the first and second-named Defendants**

**Background**

[1] The Attorney General of Guyana filed these proceedings claiming the following reliefs:

- (i) A Declaration that the Agreement of Sale dated the 23<sup>rd</sup> of October, 2017 between the First Named Defendant and the Fourth Named Defendant for the property situate at Mudlots 1 and 2, Lot F of Mudlot 3 and Lots A, B and D, North Cummingsburg, Georgetown, held under Transport No. 634 of 2020 dated the 21<sup>st</sup> day of July, 2020 is illegal, unlawful, null, void, repugnant and contrary to Public Policy;
- (ii) A declaration that Transport No.634 of 2020 dated the 21<sup>st</sup> day of July, 2020 was obtained unlawfully, illegally and by fraud;
- (iii) An Order directing the Registrar of Deeds to set aside Transport No. 634 of 2020 dated the 21<sup>st</sup> day of July, 2020 on the ground that it was obtained unlawfully, illegally and by fraud;
- (iv) Alternatively, an Order setting aside Transport No. 634 of 2020 dated the 21<sup>st</sup> day of July, 2020 as being obtained by an illegal instrumentality, that is, the breach of the fiduciary duty of the Second Named Defendant relating to his constitutional duty to the people and State of Guyana;
- (v) A Declaration that the Vesting Order No. 50 of 2020 made by the former Minister of Finance, Mr. Winston Jordan, the Second Named Defendant, and advertised in the Official Gazette on the 28<sup>th</sup> March, 2020, is illegal, unlawful, null, void, repugnant and contrary to Public Policy having been made by the Second Named

Defendant in breach of his fiduciary duty to the people of Guyana and the State of Guyana;

- (vi) A Declaration that the Vesting Order No. 50 of 2020 made by the Second Named Defendant under the Public Corporations Act and advertised in the Official Gazette on the 28<sup>th</sup> March, 2020, is null and void and incapable of effecting Transfer of Title of the said properties therein described to the First Named Defendant;
- (vii) An Order setting aside Vesting Order No. 50 of 2020 made by the Second Named Defendant on the basis that it is illegal, unlawful, null, void, repugnant and contrary to Public Policy having been made by the Former Minister of Finance in breach of his fiduciary duty to the people of Guyana and the State of Guyana;
- (viii) A Declaration that the First Named Defendant, BK MARINE INC has been unjustly enriched in the sum of approximately five billion Guyana Dollars which is the true representation of the value of the property situate at Mudlots 1 and 2, Lot F of Mudlot 3 and Lots A, B, and D, North Cummingsburg, Georgetown;
- (ix) An Order for Restitution to the State of the property situate at Mudlots 1 and 2, Lot F of Mudlot 3 and Lots A, B, and D, North Cummingsburg, Georgetown held under Transport No.634 of 2020 dated the 21<sup>st</sup> July, 2020;
- (x) An Order for disgorgement of any sums paid by the First Named Defendant to the State;
- (xi) An Order that the First Named Defendant do deliver up possession of the property situate at Mudlots 1 and 2, Lot F of Mudlot 3 and Lots A, B, and D, North Cummingsburg, Georgetown to the State;
- (xii) Damages in excess of one hundred million dollars (\$100,000,000) against the Second, Third and Fourth Named Defendants for loss and damage suffered as a result of the negligence and/or breach of the duty of care owed to the State of Guyana;

- (xiii) Damages in excess of one hundred million dollars (\$100,000,000) for loss and damage suffered as a result of conspiracy and/or breach of the duty of care owed to the State of Guyana by Second, Third and Fourth Named Defendants;
- (xiv) Damages in excess of one hundred million dollars (\$100,000,000) for loss and damage suffered as a result of breach of fiduciary duty owed to the State by Second Named Defendant;
- (xv) Damages in excess of one hundred million dollars (\$100,000,000) for misfeasance in public office committed by the Second Named Defendant;
- (xvi) Damages in excess of one hundred million dollars (\$100,000,000) for loss and damage suffered as a result of fraud committed by the Defendants;
- (xvii) Interest in accordance with Section 12 of the Law Reform Miscellaneous Act, Chapter 6:02, Laws of Guyana;
- (xviii) Such further or other Orders as the Court deems just and reasonable;
- (xix) Prescribed Costs.

[2] In response to the Statement of Claim, Counsel for **the First Named Defendant, BK MARINE INC**, filed an Application to strike out Statement of Case as disclosing no reasonable ground or cause of action for bringing the claim, or that it is an abuse of the process of the court, or that it is scandalous, frivolous, or vexatious.

[3] The Grounds for the Application can be summarized as follows:

- (i) NICIL is a Limited Liability Company incorporated under the provisions of the Companies Act, Chapter 89:01 which was incorporated by the Government of Guyana who has a controlling interest in the Company by virtue of owning all of its shares as its only shareholder.
- (ii) NICIL thus, has a separate and distinct legal personality, separate and apart from that of its shareholders.

- (iii) The property described as Mudlots 1 and 2, Lot F of Mudlot 3 and Lots A, B and D, all of North Cummingsburg, Georgetown ceased to be State owned property when same were vested to NICIL by virtue of Vesting Orders No. 43 of 2003 and No. 42 of 2005 respectively.
  - (iv) NICIL is the proper party to bring any claim against the First Named Defendant.
  - (v) The Claimant, The Attorney General, by this action herein seeks to wrongly assume the right to assert and complain of matters that are within the legal province of NICIL and its Board of Directors and not that of the Claimant contrary to the law and practice of limited liability private companies such as NICIL, and constitute scandalous and vexatious conduct and is otherwise an abuse of process.
- [4] **The Second Named Defendant, Mr. Winston Jordan**, through Counsel filed a Defence to these proceedings on the 8<sup>th</sup> day of March, 2021. However, a Notice of Application to strike out was subsequently filed on behalf of the Second Named Defendant on the 15<sup>th</sup> day of May, 2021.
- [5] In that Defence dated 8<sup>th</sup> March, 2021, it was contended that the Fourth Named Defendant by Vesting Orders No. 43 of 2003 and 42 of 2005 made under the provisions of the Public Corporation Act 1988, was the owner of the subject properties.
- [6] It was further contended that the Second Named Defendant being the Minister with responsibility for Public Corporations was authorised under **Section 8 of the Public Corporation Act** to vest the property in NICIL.
- [7] It was also further contended that the action instituted herein by the Claimant is an abuse of process, frivolous and vexatious, scandalous and ought to be dismissed with costs.
- [8] Thereafter, a **Notice of Application** was filed on behalf of the Second Named Defendant praying for:
- (i) An Order that the Action or Claim No. 2021-HC-DEM-CIV-SOC-25 herein instituted against the Second Named Defendant be dismissed as disclosing no cause of action and misconceived;

- (ii) An Order that Action or Claim No. 2021-HC-DEM-CIV-SOC-25 instituted against the Second Named Defendant be dismissed as an abuse of process, and or frivolous and vexatious and or scandalous;
- (iii) An Order that the institution of the Action or Claim No. 2021-HC-DEM-CIV-SOC-25 against the Second Named Defendant is an abuse of process, as it is politically motivated and actuated by bad faith, vindictiveness, spite and constitutes an abuse of process;
- (iv) An Order staying Action or Claim No. 2021-HC-DEM-CIV-SOC-25 until the hearing and determination of the Notice of Application herein;
- (v) Such further or other Order as this Honourable Court may deem just;
- (vi) Costs.

Because the applications to strike are in substance essentially the same, in order to save judicial time these applications have been consolidated and will be dealt with together.

### **Issues**

[9] Having regard to the contentions of the parties, the issues that fell for the Court's consideration were as follows:

- (i) Whether the Statement of Claim discloses a viable cause of action;
- (ii) Whether the Attorney General is the proper person to bring this claim; and
- (iii) Whether the Claim should be struck out.

### **Law to be applied**

[10] It is the Claimant's submission that there exist causes of action for misfeasance in public office, breach of fiduciary duty, negligence, fraud and conspiracy.

[11] The court treats with misfeasance in public office first as it has shown itself to be the common thread in these proceedings.

### **Misfeasance in Public Office**

[12] The Attorney General has submitted that the Second Named Defendant, the Former Minister of Finance, not only issued a Title for the Property after receipt of only ten per cent (10%) of the purchase price by the vendor, the Fourth Named Defendant, but the Title says on its face that **it is free from all liabilities**. In short, the Attorney General contends that by the action of the Minister, the Government of Guyana as the principal shareholder has lost a property that is valued five billion dollars for \$202,602,759 (two hundred and two million, six hundred and two thousand, seven hundred and fifty-nine dollars). This, he alleges, was due to the negligence of the Second Named Defendant, in breach of his duty to the public.

[13] In his “Particulars of Misfeasance” the AG stated as follows:

- (a) Issuing Vesting Order No. 50 of 2020 dated 28<sup>th</sup> March, 2020 knowing that the Second Named Defendant nor the Government had legal power or authority to do so;
- (b) Issuing a purported Vesting Order for property for which a mere fraction of the purchase price was paid, that is to say, only ten percent;
- (c) Issuing a purported Vesting Order for property for which a mere fraction of the purchase price was paid but whereas, the said Vesting Order purports to vest title of that property to the First Named Defendant “absolutely, free and clear of all claims and liabilities”;
- (d) Issuing a purported Vesting Order for property for which the full purchase price was never paid;
- (e) Issuing a purported Vesting Order for property at a gross undervalue directly resulting in severe financial loss to the State;
- (f) That the Vesting of the property to the First Named Defendant caused the State to lose public property at no benefit to the State;

- (g) The decision made by the Second Named Defendant to execute the Vesting Order No. 50 with the knowledge that it is likely to cause damage to the State upon having only received ten percent (10%) of the purchase price which was \$20,260,276 at the time of the execution of the Vesting Order No. 50 of 2020;
- (h) That the execution of the Vesting Order No. 50 of 2020 was deliberate and dishonest since it resulted in direct economic loss felt in the Consolidated Fund; and
- (i) That the said Vesting Order No.50 of 2020 benefited BK Marine Inc and deprived the State of property without any benefit whatsoever to the State and People of Guyana.

[14] In **Three Rivers District Council and others v Governor and Company of the Bank of England** [2000] 2 WLR 1220, Lord Steyn in delivering the opinion of the House of Lords traced the history of the tort, and concluded that its rationale was that in a legal system based on the rule of law, executive or administrative power may be exercised only for the public good and not for ulterior and improper purposes. The purpose of the tort was to compensate those who suffered loss as a result of improper abuse of power.

[15] Closer home, in **Florencio Marin v The Attorney General of Belize**, CV 5 of 2010, [2011] CCJ 9 (AJ), Madam Justice Bernard JCCJ, opined at paragraph 66 that a new dimension of the tort can be developed “making it possible for the State to be granted the option of ensuring that public officials are held accountable **when they abuse the power conferred on them for their own benefit instead of for the public good.**”

[16] The elements of the tort as adumbrated in **Three Rivers** *supra* and cited in **Florencio Marin v The Attorney General of Belize**, are as follows:

- (i) The Defendant must be a public officer;
- (ii) There must be the exercise of power as a public officer;
- (iii) The Public Officer must either have acted out of malice i.e., specifically intending to injure a person or persons (“targeted malice”); or acted knowing that he had no



power to do the act complained of and that the act would probably cause injury to the plaintiff (“untargeted malice”);

- (iv) Any Plaintiff with a sufficient interest to found a legal standing to sue was competent to bring the action;
- (v) The plaintiff must prove that his loss was caused by the abuse of power; and
- (vi) The damage must not be too remote.

[17] Additionally, to ground an action in misfeasance, the Claimant has to establish the essential ingredient of bad faith. In **R v Talbot BC** [1988] 2 All ER 207, Lord Nolan commented on the meaning of bad faith in these terms:

“as Megaw LJ said in **Cannock Chase DC v Kelly** [1978] 1 All ER 152 at page 156...bad faith means dishonesty; **it always involves a grave charge...**”

[18] Further, albeit in dissent, the judgment of Saunders J and de La Bastide J in the **Marin case** is instructive on the standard of pleading required for the tort of misfeasance. The Learned Justices of the CCJ stated:

*“...A Claimant in tortious misfeasance must meet a very high standard in pleading. Particularising and establishing both the dishonest motive of the defendant and the causation issues involved in proving misfeasance are no less formidable challenges than those that must be overcome in securing a conviction for corruption or for misconduct in public office...So onerous are the challenges faced by Claimants in misfeasance that most cases are actually struck out, withdrawn or dismissed before they even get to trial. The rate of success for misfeasance suits is notoriously low...”*

[19] In **Dunlop v Woollahara Municipal Council** [1981] 2 WLR 693, the Judicial Committee of the Privy Council, on page 703(b) to (c) held that malice or bad faith or knowledge of invalidity are essential ingredients of misfeasance. Thus, the Claimant must prove that the Second Named Defendant’s abuse of power caused the loss or damage complained of by

the Claimant. In order to determine whether there was an abuse of power, the court must first determine whether the subject property was indeed sold at an undervalue.

- [20] The case of **Marin** sets out what must be pleaded to ground a successful action in misfeasance in public office as it relates to the sale of land. At paragraph 50, it was pleaded that:

**“...Thereby occasioning a loss of some \$924,056.60 to the Government of Belize and that the two appellants had acted with knowledge or were reckless that the transfer would cause that loss...”** [Emphasis mine]

- [21] Based on the aforementioned excerpt, the Claimant in that case pleaded, among other things:

- (a) the quantum of the loss, and;
- (b) the requisite state of mind of the Appellants (that is to say, of the former Ministers).

- [22] In the instant case, the Claimant did not comply with these requirements. The Claimant only pleaded that:

**“the First Named Defendant, BK MARINE INC has been unjustly enriched in the sum of approximately five billion Guyana Dollars** which is the true representation of the value of the property situate at Mudlots 1 and 2, Lot F of Mudlot 3 and Lots A, B, and D, North Cummingsburg, Georgetown”

- [23] Having regard to the above elements of the tort and the principles formulated in various case law, this Court is not of the considered view that the Claimant made out a case of misfeasance in public office. The Court found favour with Counsel for the Second Named Defendant’s contention that the instant case can be distinguished from **Florencio Marin v The Attorney General of Belize**. It is the court’s respectful finding that the Marin case is clearly distinguishable from the case at bar, as the subject properties for reasons to be later adduced are clearly not state property within the meaning of the authorities; any property in the state lying properly in its ‘shares’ in the fourth-named defendant company.

- [24] The Claimant in this instant action has also failed to plead or prove that the Second Named Defendant has accrued any personal benefit from the alleged sale of the land and that he

had acted in bad faith or had a dishonest motive. No sufficient circumstances have been pleaded or brought to the attention of the court on the evidence which can ground a finding to the extent required of misfeasance in public office. The threshold of sufficiency has not been achieved by the Claimant to ground a finding of misfeasance in public office on the authorities. It is not sufficient for the claimant to allude to or to invite the court to infer that the parties have acted in bad faith or with any dishonest motive, even more so in the absence of any true comparator as to the value of the subject property; the court being itself unable to substitute or ascribe any valuation of its own motion.

### **Fiduciary Duty**

[25] The Claimant has asked the Court alternatively, to grant an Order setting aside Transport No. 634 of 2020 dated the 21<sup>st</sup> day of July, 2020, as being obtained by an illegal instrumentality, that is, **the breach of the fiduciary duty** of the Second Named Defendant relating to his constitutional duty to the people and State of Guyana. He also prays for an Order setting aside Vesting Order No. 50 of 2020 made by the Second Named Defendant on the basis that it is illegal, unlawful, null, void, repugnant and contrary to Public Policy having been made by the Former Minister of Finance **in breach of his fiduciary duty** to the people of Guyana and the State of Guyana.

[26] Dicta of Dickson J (as he then was), in **Guerin v The Queen [1984] 2 S.C.R 335 at page 384**, provides a good starting point for addressing the issue of breach of fiduciary duty. He states:

“...where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary...”

[27] The Court is therefore of the view that by virtue of the Second Named Defendant’s position as Minister and Member of Parliament, and therefore public officer, and in particular by virtue of his Oath of Office, he occupied a fiduciary position and can thus be characterized as a fiduciary.

[28] In **Bristol and West Building Society v Mothew**, Millett LJ stated that:

“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.”

[29] The next question that fell therefore to be determined was whether the Second Named Defendant breached his fiduciary duty as alleged or at all?

[30] According to the learned writers of **Underhill at page 3, paragraph 4<sup>1</sup>**:

“any act or neglect of such a person (a fiduciary) in respect of a fiduciary power, which is not authorised or excused by the terms of the trust instrument or by law, may be called a breach of a fiduciary duty.”

The writers also opined at paragraph 35 that “not every breach of duty by a fiduciary is a breach of fiduciary duty...”

[31] It is settled law that he who asserts must prove. In the case at bar, the Claimant has not sufficiently particularised the breach of fiduciary duty of the Second Named Defendant about which he complains. It is undisputed that the decision to privatise the land was that of the National Assembly. The Claimant has, however, not provided cogent evidence that there was a duty imposed on the Second Named Defendant to determine the market value of the land; or to make any effort so to do.

[32] For these reasons, the Court is not of the considered view that the Second Named Defendant breached his fiduciary duty.

### **Negligence**

[33] As established in the case of **Blyth v Birmingham Waterworks Co.**<sup>2</sup> per Alderson B:

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<sup>1</sup> Underhill and Hayton, Law of Trust and Trustees, 14<sup>th</sup> edition, David Hayton, Butterworths 1987

<sup>2</sup> (1856) 11 Ex Ch 781, 156 ER 1047

*“Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.”*

[34] In order to prove negligence four elements must be established, namely, (1) a duty of care to the Claimant, (2) breach of that duty of care, (3) damage to the Claimant attributable to the breach of the duty by the defendant and (4) the kind of damage suffered by the Claimant must not be so unforeseeable as to be too remote.

[35] In relation to the aforementioned definition and elements of the tort of negligence, the question arises whether the Second Named Defendant owed a duty of care to the State when he signed the vesting orders. The answer to this question would of necessity turn on the further question whether the properties were in fact State owned, an issue to be more fully discussed later on in the ruling.

[36] The Claimant in his Statement of Claim particularised negligence thus:

- (i) Selling the Property described in Transport No. 530 of 1947 at the sum of \$202,602,759-
  - (a) when they knew or ought to have known that it was a gross undervalue of the current market price;
  - (b) when they knew that the option to purchase in the Agreement of Lease was already inoperable;
  - (c) failing to receive the full purchase price agreed from the First Named Defendant;
  - (d) selling and vesting the property at a gross undervalue and way below market value in relation to comparable and competitive facilities of a similar nature, form and usage which was sold consistent with the market value;
  - (e) failed and/or neglected to collect Rental due, owing and payable for the property; and

- (f) converted rental due, owing and payable for the property towards the agreed purchase price.

[37] As stated before, negligence would turn on whether the properties are state owned. This question will be more fully discussed under the second issue of the *locus standi* of the Attorney General.

### **Conspiracy**

[38] “Unlawful Means” is the type of conspiracy alleged by the Claimant. This tort involves an arrangement between two or more parties, whereby they...agree that at least one of them will use ‘unlawful means’ against the Claimant, and, although damage to the claimant need not be the predominant intention of any of the parties, the Claimant must have suffered loss or damage as a result.<sup>3</sup>

[39] In his “Particulars of Conspiracy”, the Claimant stated:

- (a) On or about the 23<sup>rd</sup> October, 2017, the First, Second and Fourth Named Defendants unlawfully conspired and combined together to injure the State by unlawful means, namely by *inter alia* selling and vesting the property at a gross undervalue and way below the market value.
- (b) In pursuance of and in furtherance of the said conspiracy, the Third and Fourth Named Defendant overtly and in breach of its fiduciary duty accepted the offer to purchase the property for the sum of \$191,983,307, acted recklessly and without obtaining a Certificate of Value for the property in order to ascertain the current market value and sold the property at a gross undervalue.
- (c) The First Named Defendant, pursuant to the said Agreement made on the 23<sup>rd</sup> October, 2017, filed at the Deeds Registry, Georgetown, An Affidavit of Purchaser sworn to by Brian Tiwarie; Resolution of Board of Directors of BK MARINE INC dated June and 20<sup>th</sup> July 2020 respectively; Certificate of good standing; Letter

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<sup>3</sup> Said to be “common ground” between the parties in *Revenue and Customs Commissioners v Total Network SL* [2008] UKHL 19.

from Mr. Colvin Heath-London; and Certificate of Value by Mr. Mc Garrell, Valuation Officer.

- [40] The Claimant is contending that the Second Named Defendant did not have legal power and authority to vest said property and was acting unlawfully, illegally, capriciously, unreasonably and with mala fides. The second-named defendant contends for his part that his actions were in conformity with the scope of his duty as the Minister of Finance pursuant to the provisions of the section 8 of the Public Corporations Act, observing further that the fourth-named defendant's act of vesting, which was permissible under the act, had had the blessings of Cabinet.
- [41] According to the learned authors of **Winfield and Jolowicz on Tort**,<sup>4</sup> the tort **requires an intention to injure**: it is not enough that the defendants combine to do an unlawful act which has the effect of causing damage to the claimant. Thus, the Claimant must prove that there was an intention to injure the State when the property was sold at an alleged gross undervalue. This Court is not of the view, having regard to the submissions of the Claimant, that there was necessarily an intention to injure the State when the Second Named Defendant vested the property which was later sold to the First Named Defendant. Neither is there evidence on the record which establish any facts from which and such inference could reasonably be drawn.
- [42] This Court, is therefore not of the view that the Claimant can avail himself of this cause of action, and so rules.

### **Fraud**

- [43] It is trite law that he who asserts must prove. According to Blackstone<sup>5</sup>, "as to the incidence of the legal burden at Common Law, the general guiding principle is to be derived from the precedents is that 'he who asserts must prove, not he who denies' - per Lord Maugham in **Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd** [1942] AC 154 at page 174.

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<sup>4</sup> Paragraph 19-045

<sup>5</sup> Blackstone's Civil Practice 2011, Oxford Press Ed. Rt. Hon. Lord Justice Maurice Kay 2010

- [44] This Court is not of the view that the Claimant has sufficiently pleaded or particularised fraud in his Statement of Claim. As such, the Court is not persuaded that the Claimant can seek to utilise the ground of fraud, and so rules.

### **Issue #2: Locus Standi of the Attorney General**

- [45] It is well settled law that for any party to bring a claim he or she must have *locus standi* or standing to institute such a claim. Under **section 10 of the State Liability and Proceedings Act, Chapter 6:05** the Attorney General is empowered to bring a claim where it is for the enforcement of any claim by the State. It states:

*“10. except as otherwise provided in any written law before the commencement of this Act, not being any provision of a written law repealed by this Act, proceedings for the enforcement of any claim by or against the State shall be brought by or against the Attorney General...”* [Emphasis mine]

- [46] It is the First and Second Named Defendants’ contention, however, that the Fourth Named Defendant, the National Industrial and Commercial Investments Limited (“NICIL”), by Vesting Orders No. 43 of 2003 and 42 of 2005 made under the provisions of the Public Corporation Act 1988, was the owner of the subject properties at the material time; and not the State.
- [47] Thus, they allege that this action is brought by the Attorney General in relation to property owned by NICIL, which is a private limited liability company incorporated under the **Companies Act, Chapter 89:01.**, albeit that the State is the single shareholder in the company. The question then is, is the property of a company owned by its shareholder?

### **Is the Property of a Company the Property of the Shareholder?**

- [48] It is now well established that a Company has its own legal personality, i.e., it can sue and be sued. The learned author of the text **Commonwealth Caribbean Company Law** cites the locus classicus **Saloman v Saloman and Co [1897] AC (HL)** in which it was stated that:



“the company is at law a different person altogether from the subscribers...and though it may be that after incorporation the business is precisely the same as it was before, and the same hands received the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers, as members liable, in any shape or form, except to the extent and in the manner provided by the Act.”

[49] Further, in **Foss v Harbottle (1843) 67 ER 189**, the “proper plaintiff rule” was developed. In this case it was held that shareholders cannot bring an action for loss suffered by the company. It was observed that a company has a separate entity distinct from its members and has the right to sue under its own name.

[50] Based on these well-established principles, and the awareness of the parties to these proceedings that NICIL had become the owner of the subject properties by virtue of Vesting Orders No. 43 of 2003 and 42 of 2005, the court has formed the view, respectfully so, that NICIL was the owner of the subject properties at the material time, and accordingly the proper party to institute a claim against the First Named Defendant for any loss suffered by them.

[51] The claimant’s misapprehensions on this issue are made clear from its observations both in the opening gambit of its submissions insofar as the material facts are concerned and in paragraph B12 of the pleadings themselves. The court is not persuaded that the conclusion in paragraph 9 of the submission that the subject properties were at the material time part of the national patrimony of Guyana is consistent with the claimant’s acceptance in paragraph 8, that the properties were by virtue of vesting order 42 of 2005 vested in the fourth-named defendant NICIL. The vulnerability of non-state actors in their contractual relationships with State controlled entities is laid bare on this issue, more strikingly so in the face of the differing postures of succeeding Governments as manifested in their relationships (through the differing iterations of the Boards of the fourth-named defendant) (NICIL) with the second-named defendant in this instant matter.

[52] Counsel for the second-name defendant’s observations in paragraph 42 of its submissions also finds favour with the court insofar as the spirit, intendment and suitability of the State Assets Recovery Act is concerned; as well as the appropriateness of that said Act for the recovery of state assets in the appropriate circumstances.

## **DERIVATIVE CLAIM**

- [53] Styled as it is, the court could also not be satisfied that the claim constituted a derivative claimed pursuant to section 222 of the Companies Act, Cap 89:01., as nothing on the record suggests that any attempt had been made to give notice to the directors of the fourth-named defendant Company (NICIL) or to secure their involvement in this regard.

## **Privity of Contract**

- [54] The court briefly address the issue of privity of contract since having found as it did, that NICIL was the proper party to institute these proceedings. According to the Doctrine of Privity, a contract creates enforceable rights and obligations only between the parties to it; thus, only the original parties can sue and be sued on it: **Dunlop Pneumatic Tyre Co. Ltd v Selfridge and Co. Ltd [1915] AC 847** per Lord Haldane.
- [55] In the letter dated the 23<sup>rd</sup> day of October, 2017, NICIL made an offer to BK International Company Inc for the sale of the subject properties. Mr. Brian Tiwarie, on behalf of BK International Company Inc, accepted the offer when he signed and returned the said letter. As such, the parties to this “Agreement” were NICIL and BK International Company Inc. The proper party to sue for a purported breach of contract would have been NICIL and not the Attorney General on behalf of the State.

## **Issue #3: Whether the Claim Should be Struck Out**

- [56] The Civil Procedure Rules of Guyana, 2016 (‘CPR’) governs striking out applications. **Part 14.01 of the CPR** specifically deals with the issue of striking out of a Statement of Case. It states:

### ***“14.01 Striking Out Statement of Case***

- (1) In addition to any other power to do so under these Rules, the Court may, on its own initiative or upon application, strike out the whole or part of a Statement of Case if it appears to the Court that,*
- (a) the Statement of Case or the part to be struck out,*

*(i) does not disclose any reasonable ground for bringing or defending the claim;*  
*(ii) is an abuse of the process of the Court;*  
*(iii) is scandalous, frivolous or vexatious; or*  
*(iv) is likely to obstruct the just disposal of the proceedings; or*  
*(b) there has been a repeated or intentional failure of a party to comply with a Rule, Practice Direction or order.”*

[57] In addition, *any* party to a proceeding may make an application to strike out the whole or part of a Statement of Case pursuant to **Rule 14.02(1) of the CPR**. Although a party may make an application to strike out a Statement of case, it is at the Court’s discretion to grant such an application. However, this discretion must be exercised in light of the Overriding Objective of the CPR. Thus, as pointed out by the learned author **Gilbert Kodilinye in the Commonwealth Caribbean Civil Procedure (4<sup>th</sup> edn) p.203:**

“Accordingly, under the CPR regime, in deciding whether or not to strike out a case on the ground that it is an abuse of process, the Court has complete discretion which must be exercised in the light of the Overriding Objective.”

[58] In **Purdy v Cwmbran**, May J<sup>6</sup> pointed out that -

“Under the CPR, the Court takes into account all relevant circumstances and in deciding what order to make, makes a broad judgment after considering available possibilities. There are no hard or fast theoretical circumstances in which the Court will strike out a claim or decline to do so. The decision depends on the justice in all the circumstances of an individual case.” [Emphasis added]

[59] Be that as it may, a Statement of Case can be struck out as an abuse of process for a number of reasons. The learned author **Gilbert Kodilinye in the Commonwealth Caribbean Civil Procedure (4<sup>th</sup> edn) at P.202** provided a non-exhaustive list of abuse of process scenarios. These included:

“...

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<sup>6</sup> CA Transcript, 17 December 1999.

(d) issuing a Claim that is *res judicata*;<sup>7</sup>

(e) issuing a Claim that is vexatious, scurrilous or obviously ill-founded;<sup>8</sup>

[60] It is the contention of the First-named Defendant that as a shareholder of NICIL, the Claimant is not entitled to lay or assert claim to property which is not held in title or ownership by the Claimant and over which the Claimant has no property, right or title to advance in contradistinction to or in substitution to the claims of the title holder. He further contends that the statement of case is misconceived, an abuse of process and improper since only the company NICIL can claim restitution of title or ownership in and to the said property and/or delivery up of possession of the said property and not the State.<sup>9</sup>

[61] The Second Named Defendant, though not in similar terms, shared similar sentiments as the First Named Defendant. He averred that the Claim is an abuse of process, as it is politically motivated and actuated by bad faith, vindictiveness, and spite. In his grounds he stated that the Fourth Named Defendant, NICIL, was the owner of the subject properties by virtue of Vesting Orders No. 43 of 2003 and 42 of 2005. He further asserts that the only duty laid upon the Second Named Defendant as the Minister with responsibility for Public Corporation, is to sign the necessary Vesting Order after Cabinet's Approval has been granted. Therefore, he submits that the Action is an abuse of process, frivolous and vexatious, scandalous and ought to be dismissed with costs.

[62] Having earlier determined that while ordinarily the Attorney General could have instituted a claim for misfeasance in public office, he did not in this instant matter satisfy the elements of the tort; and having further determined that the Attorney General was not the proper party to institute this action, and beyond that, that the causes of action relied upon by him were on the evidence misconceived. And whilst further this court accepts that 'striking out' is a measure that should be used sparingly, and while not finding the claim by the Attorney General to have been politically motivated or actuated by bad faith, vindictiveness, and

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<sup>7</sup> Wright v Bennet (No.2) [1948] 1 ALL ER 227

<sup>8</sup> Koch v Chew (1997/98) 1 OFLR 537

<sup>9</sup> Paragraph 6 of the Grounds of the Notice of Application filed by the First Named Defendant.

spite, the court is persuaded for the aforementioned reasons that the claim constitutes an abuse of the Court's process and cannot be allowed to stand.

[63] Of note, the circumstances and material aspects of this case, highlight the need for state actors across the political spectrum to develop a deeper appreciation for the indivisibility of sovereign state having regard to the vulnerability of other actors to the vagaries of the political arena.

### **STATUTE BARRED**

[64] In any event, even assuming sufficient basis had been established for a claim to have been properly instituted, it would have on the timelines disclosed in the record, become statute barred by the time it had been filed.

[65] And so, for the afore-stated reasons, this Court orders that the Claim instituted by the Attorney General on the 8<sup>th</sup> day of February 2021 be struck out with costs to the first-named and second-named defendants in the sum of two (2) million (\$2,000,000.00) dollars each.

B G REYNOLDS, MSM

Judge

13<sup>th</sup> day of September, 2022