

IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
2017: No 66

BETWEEN -

THE ATTORNEY-GENERAL OF BERMUDA

Plaintiff

-and-

(1) ZANE DE SILVA
(2) WENDALL BROWN
(3) DELANO BULFORD
(4) ISLAND CONSTRUCTION SERVICES LIMITED
(5) S.A.L. LIMITED

Defendants

SPECIALY INDORSED WRIT OF SUMMONS

ELIZABETH THE SECOND, by the Grace of
God, of the United Kingdom of Great Britain
and Northern Ireland and of Our other realms
and territories Queen, Head of the
Commonwealth, Defender of the Faith.



TO: (1) ZANE DE SILVA
Zane De Silva
8 Whaling Lane
Southampton, SB03
Bermuda

(2) WENDALL BROWN
Wendall Brown
8 Malva Lane
Sandys, MA02
Bermuda

(3) DELANO BULFORD
Delano Bulford
20 Whale Bay Road
Southampton, SB03
Bermuda

(4) ISLAND CONSTRUCTION SERVICES LIMITED
Island Construction Services Limited
9 Middle Rd
Devonshire, DV06
Bermuda

(5) S.A.L. LIMITED
S.A.L. Ltd
4 Hermitage Road
Devonshire, FL01
Bermuda

We command you that within 14 days after the service of this writ on you, inclusive of the day of service, you do cause an appearance to be entered for you in an action at the suit of **THE ATTORNEY-GENERAL OF BERMUDA**, and take notice that in default of your so doing the Plaintiff may proceed therein, and judgment may be given in your absence.

Witness the Honourable Ian Kawaley, Chief Justice of Our said Court the 27 day of February 2017.

Note - This writ may not be served more than twelve calendar months after the above date unless renewed by order of the Court.

DIRECTIONS FOR ENTERING APPEARANCE

The Defendants may enter an appearance in person or by an attorney either (1) by handing in the appropriate forms, duly completed, at the Registry of the Supreme Court in Hamilton, Bermuda, or (2) by sending them to the Registry by post.

Note - If the Defendants enter an appearance, then, unless a summons for judgment is served on them in the meantime, they must also serve a defence on the attorney for the plaintiff within fourteen days after the last day of the time limit for entering an appearance, otherwise judgment may be entered against them without notice.

STATEMENT OF CLAIM

Introduction

1. The Plaintiff is the Attorney-General of Bermuda and brings this claim

on behalf of the Government of Bermuda ("the Government").

2. The Government owns the Port Royal Golf Course ("Port Royal"), the Ocean View Golf Course and the St George's Golf Course. By the *Golf Courses (Consolidation) Act 1998* the Government established the Board of Trustees of the Golf Courses ("the Board of Trustees"). The Board of Trustees consists of members who are appointed by the Government ("the Trustees"). The Trustees owe fiduciary duties to the Government.
3. The Board of Trustees' functions (amongst others) are to have the general control, management and administration of Port Royal. The Board of Trustees must obtain the Government's prior approval for capital development expenditure. The Board of Trustees must comply with any instructions or directions issued by the Minister of Finance, as set out in section 10(2) of the *Golf Courses (Consolidation) Act 1998*, in respect of any Government funds used for capital development or operation and maintenance expenditure. This requires the Board of Trustees to comply with the Financial Instructions issued by the Accountant General in the Ministry of Finance.
4. At all material times the First, Second and Third Defendants were Trustees.
5. The First Defendant was Deputy Chairman of the Board of Trustees from June 2006 until December 2009. At all material times the First Defendant was a director and owner of the Fourth Defendant and was one of its controlling minds and wills.
6. The Second Defendant was Chairman of the Board of Trustees from June 2006 until on or about December 2010. At all material times the Second Defendant was a director and owner of the Fifth Defendant and was one of its controlling minds and wills.
7. The Third Defendant was a Trustee from June 2006 until on or about

December 2012. At all material times the Third Defendant was an agent of Miracle Steel Structures Limited ("Miracle Steel").

Nature of the Claims

8. This action arises out of the refurbishment of Port Royal that took place between 2007 and 2009, during which period the First, Second and Third Defendants were Trustees. The Defendants each participated in and were responsible for the decisions made by the Board of Trustees.

9. The Plaintiff make claims of breaches of fiduciary and other duties against the Defendants –
 - (1) The First Defendant (a) caused or permitted the Board of Trustees to award contracts to the Fourth Defendant so that the First Defendant made a profit by reason of his position as a Trustee; (b) made use of confidential information that had come into his possession in his capacity as a Trustee in order to assist the Fourth Defendant to devise terms that would enhance its prospects of securing those contracts with the Board of Trustees that it in fact secured; (c) caused or permitted the Third Defendant to receive a secret commission.
 - (2) The Second Defendant (a) caused or permitted the Board of Trustees to award a contract to the Fifth Defendant so that the Second Defendant made a profit by reason of his position as a Trustee; (b) caused or permitted the Third Defendant to receive a secret commission.
 - (3) The Third Defendant received a secret commission from the Board of Trustees in respect of a contract awarded by the Board of Trustees to Miracle Steel.
 - (4) The Fourth Defendant dishonestly assisted the First Defendant to secure the award of contracts to it.
 - (5) The Fifth Defendant dishonestly assisted the Second Defendant to secure the award of a contract to it.

The Defendants' Duties

10. The First, Second and Third Defendants owed the Plaintiff the following fiduciary duties –
 - (1) a duty to act honestly and in good faith with a view to and in the best interests of the Plaintiff;
 - (2) a duty of loyalty and fidelity;
 - (3) a duty not to prefer their own interests or the interests of others to the interests of the Plaintiff.

Factual Narrative

11. In June 2006 the then Trustees were removed and the Defendants and others were appointed in their places. Following the appointment of the Defendants the Board of Trustees decided to proceed with the refurbishment of Port Royal. The cost of the refurbishment, as the Defendants and each of them knew, was to be borne by the Plaintiff.
12. Planning of the refurbishment works began before the Board had appointed a project manager to oversee the refurbishment. The planning was undertaken by the Trustees. There was no system for the awarding of contracts for the refurbishment works. The Trustees did not adopt any procedure for avoiding conflicts of interest or of withdrawing from discussions in which their personal interests might conflict with those of the Plaintiff. Indeed, some Trustees actively sought to promote the interests of Trustees over other contractors. For example,
 - (1) On 30 June 2007, the First Defendant emailed Bob Wilson (Trustee and Chair of the Board's Finance Sub-Committee):

"Bob,
Was wendall [the Second Defendant] and bulford [the Third Defendant] on the list of bidders for the r o plant?"
 - (2) Mr Wilson replied to the First Defendant, copying in Bill Pitt (the General Manager of Port Royal), on 2 July 2007:

"I don't know Zane and Daniel is now handling the process but Bill

please ensure Consolidated Water are on list and ask Mr. Bulford if he wants to nominate anyone (please email him directly)."

13. The Board of Trustees was bound to follow the prevailing Financial Instructions issued by the Accountant General in the Ministry of Finance. In particular, the Plaintiff relies upon the following paragraphs, which are applicable.

- (1) Conflicts of interest are prohibited:

4.3 Conflict of Interest

Employees must perform their duties conscientiously, honestly and in accordance with the best interests of the Government.

Employees must not use their position or the knowledge gained through it, for private or personal advantage, or in such a manner that a conflict or an appearance of conflict arises between the Government's interest and their personal interest. A conflict of interest is created when an obligation, interest or distraction exists which would interfere with the independent exercise of judgement in the Government's best interest.

If an employee feels that a course which they have pursued, are pursuing or are contemplating pursuing, may involve them in a conflict of interest, they should immediately make all facts known to their superior.

- (2) There is specific guidance for the purchase of goods and services, including obligations to tender and contract:

9.1 Objectives

A consistent approach to purchasing across the whole of Government is essential to achieve the following objectives:

- value for money,*
- fairness, i.e. quotations and/or tenders will be treated equally,*
- conduct of business openly and without restrictive practice,*
- a variety of suppliers are given the opportunity to quote,*
- compliance with Financial Instructions.*

9.2 Procedures

9.2.3 Goods and Services in Excess of \$5,000

Goods and services with an estimated value in excess of \$5,000 shall be obtained on the basis of at least 3 quotations.

The range of suppliers requested to provide quotations must be as wide as practicable.

Accounting Officers are responsible for ensuring that these procedures are followed and may be called upon to justify the tendering process.

The employee initiating the request shall clearly state all the relevant information necessary to secure an accurate price.

Quotations must be submitted in writing and retained in accordance with FI Section 23.

A closing date/time for submission of quotations must be stated and strictly observed.

The lowest price must be accepted or reasons for not accepting the lowest price must be documented.

Unsuccessful suppliers should not be allowed to re-submit a lower quotation price - the first quotation must be accepted.

Successful and unsuccessful suppliers should be notified in writing.

Where possible, quotations for an annual supply should be sought to obtain quantity discounts.

When requesting quotations from foreign suppliers, ensure that total landed cost is used to compare to local quotations. Landed cost should include purchase price, exchange, freight, duty and all handling costs.

9.3 Contracts / Agreements for Goods or Services

9.3.1 Documentation

Quotations or tenders accepted for the supply of goods or services in excess of \$50,000 must be documented in a written agreement or contract.

Once a satisfactory contract is formatted, except for minor amendments, the contract could be used for many other types of supply.

- (3) There are specific obligations relating to capital expenditure.

13.1 Definitions

Capital expenditure is defined as the acquisition, construction or development of any tangible capital asset valued in excess of \$5,000.

For the purposes of this Section, tangible capital assets are defined as assets having physical substance that are:

held for use in the production or supply of goods and services;

have useful lives extending beyond an accounting period and are intended to be used continuously; and

not intended for sale in the ordinary course of operations.

Capital expenditure is distinguished from current account expenditure for repair and maintenance. The cost incurred to enhance the service potential of a capital asset is a betterment and therefore would be charged to capital expenditure. The cost incurred in the maintenance of the service potential of a capital asset is a repair, not a betterment, and therefore would be charged to current account expenditure.

Capital expenditure is both a significant economic resource managed by the Government and a key component in the delivery of many Government programmes.

There are two types of capital expenditure:

capital acquisitions are vehicles, plant and equipment,

capital development relating to land and buildings or other structures.

13.2 Tenders

Before the commencement of any capital project, the Permanent Secretary of W&E must obtain tenders on behalf of the appropriate Accounting Officer.

The tendering process must be in accordance with FI Section 9 or W&E written procedures (per W&E internal publications: P.F.A. 2000 - Purchase of Goods & Materials and P.F.A. 2002 - Procurement of Contract Services.), depending on the department responsible for the project.

All capital development should be the subject of a written contract with the successful tenderer.

14. In July 2007 the Board appointed Daniel Lemoine as the project manager responsible for the day to day management of the

refurbishment of Port Royal.

15. Mr Lemoine generally identified potential contractors for each stage of the refurbishment. A variety of methods were used to identify contractors, including private and public tenders and pre-existing relationships. Mr Lemoine prepared memoranda on the merits of each potential contractor and made recommendations to the Board of Trustees on the most suitable candidate. Decisions to award contracts were usually taken by the Trustees during Board of Trustees meetings, or by email, after consideration of Mr Lemoine's memoranda and recommendations.
16. Mr Lemoine updated the Trustees on the progress of the refurbishment at meetings of the Board of Trustees. Trustees accompanied him on a physical inspection of the works in progress and any other relevant part of the Port Royal. Decisions relevant to the refurbishment of the Port Royal were taken by Trustees at Board of Trustees meetings and, occasionally, by email outside such meetings.

The Fourth Defendant: contract (sand and gravel)

17. The Board of Trustees began discussions amongst themselves about the supply of sand for the bunkers in late December 2006, before Mr Lemoine was appointed. These discussions related to the supply of sand which was required regularly by Port Royal to maintain the sand in bunkers, and did not relate to the much larger quantity of sand that would be required for the refurbishment works. On 18 December 2006 the First Defendant was included in an email exchange between the Second Defendant, Bob Wilson and Bill Pitt concerning consolidating the importation of sand and gravel, and the quality of sand required to meet USGA standards. The First Defendant did not declare his interest in the Fourth Defendant to the Plaintiff but proceeded to play a full and active part in the ensuing discussions. In his role as a Trustee, the First Defendant was privy to confidential information regarding the rates of competitors to the Fourth Defendant, which he shared with the Fourth

Defendant. The Fourth Defendant used that knowledge to adjust its prices to appear more competitive.

18. Thereafter, the First Defendant was involved in discussions with some Trustees concerning the amount of sand that was required for the regular requirements of the course, the supply of sand, and the price to be paid by the Board. By 22 February 2007 the Board of Trustees had instructed the First Defendant (on behalf of the Fourth Defendant) to supply sand. The First Defendant wrote to Bill Pitt and Marie Johnson (the General Manager of Ocean View Golf Course) enquiring about the amount of sand that it would require in the coming years. On 12 March 2007 the First Defendant wrote to Bill Pitt, commenting dismissively on an enquiry that had been made by a competing supplier of sand and seeking a competitive advantage by requesting details of the supplier's price. On 24 April 2007, following an informal meeting regarding the refurbishment, Bob Wilson, a Trustee, instructed the First Defendant (on behalf of the Fourth Defendant) to supply a container of sand to be used for top dressing for Port Royal and the other two courses and the First Defendant was subsequently invited to import approximately 95 tons of sand for this purpose. During the summer of 2007 the First Defendant (on behalf of the Fourth Defendant) was asked to and did quote for the supply of sand, undercutting the price that had been quoted by an alternative supplier.
19. These events took place before the appointment of Mr Lemoine. The First Defendant did not declare his interest in the Fourth Defendant to the Plaintiff or obtain the Plaintiff's permission to contract with the Board. The Fourth Defendant had therefore by this stage secured for itself (with the assistance of the First Defendant) the contract to supply sand required for the ongoing needs of the golf courses.
20. By August 2007 the Board of Trustees had agreed in principle terms for the supply of sand by the Fourth Defendant to meet its regular needs. At around that time the Board began to consider the needs of Port Royal

in connection with the refurbishment. Such needs involved the acquisition of a substantial volume of sand for the construction of greens and for new bunkers. The Board of Trustees initially considered using the same sand for both construction and for the bunkers, but had concerns whether the colour of construction sand (which would not be visible) would be suitable for use in the bunkers (which would be visible).

21. There was a direct link between the award of the contract to supply sand for the ongoing needs of Port Royal and the later award of a contract to provide sand and gravel for the refurbishment of Port Royal. The Fourth Defendant obtained the contract for the supply of sand and gravel for the refurbishment without any further tender or consideration of its suitability as a supplier for this much larger contract. The First Defendant actively participated in discussions with the Board of Trustees and the staff at Port Royal over the supply of sand and gravel. His involvement ensured that the Fourth Defendant obtained the contract for the supply of sand and gravel for the refurbishment, providing it with an unfair and unwarranted advantage over other suppliers.
22. On 13 August 2007 Mr Lemoine asked the First Defendant (on behalf of the Fourth Defendant) to quote for the supply of 13,000 tons of sand (both for construction and bunkers) and 3,000 tons of gravel for the refurbishment of Port Royal. On 11 September 2007 Mr Lemoine recommended to the Board of Trustees that the Fourth Defendant should be awarded a contract for the supply of 9,000 tons of sand (both for construction and bunkers) and 3,000 tons of gravel. No competitive tendering or similar process had taken place before that recommendation was made.
23. Mr Lemoine's recommendation was discussed by the Board of Trustees on 26 September 2007. The First Defendant did not declare his interest to the Plaintiff, and did not withdraw from that meeting but took an

active part in the discussion. At the conclusion of the discussion the Board of Trustees agreed for the First Defendant (on behalf of the Fourth Defendant) to order the gravel and construction sand. The Board decided not to place an order for sand for bunkers at that stage but to agree the preferred colour of the bunker sand before finalising an order. The circumstances by which the contract had been awarded to the Fourth Defendant, in particular the fact that there had been no competitive tendering or similar process, and that the First Defendant had played an active role in the process of deciding to award the contract to the Fourth Defendant, were not disclosed to the Plaintiff.

24. On 28 November 2007 the First Defendant (on behalf of the Fourth Defendant) wrote to the Board of Trustees with a formal quotation for the supply of 12,300 tons of sand (for construction and bunkers) and 2,600 tons of gravel. The Board of Trustees proceeded with the order of 9,000 tons of sand (for construction) and 3,000 tons of gravel from the Fourth Defendant. The Fourth Defendant commenced delivery of sand, and submitted its first invoice on 1 January 2008.
25. Thereafter, the Board of Trustees received and considered samples of lighter coloured sand for use in the bunkers. These samples were submitted by an alternative supplier. In April 2008 the Second Defendant decided to use the construction sand supplied by the Fourth Defendant for the bunkers. On 7 May 2008 Mr Lemoine wrote to the Fourth Defendant confirming the order of sand and gravel, but varying slightly the quantities required.
26. The Fourth Defendant delivered sand and gravel to the Board of Trustees, pursuant to the terms agreed. The Board of Trustees paid the Fourth Defendant approximately \$ 1.7m for the supply of sand and gravel. The First Defendant did not declare his conflict of interest to the Plaintiff or obtain the Plaintiff's permission for the Fourth Defendant to contract with the Board. The First Defendant played a full and active part in the Board's discussions about the award of the contracts.

The Fourth Defendant: contract (construction equipment and excavation services)

27. In August 2007 Mr Lemoine began to investigate the hire of construction equipment. On 28 November 2007 Mr Lemoine informed the Board of Trustees that he had *“met with and agreed upon a lease and pricing for equipment with Mr. Alan DeSilva of Island Construction and are in the process of finalizing a contract draft for Board approval”*. The First Defendant did not declare his interest to the Plaintiff or obtain the Plaintiff's permission to contract with the Board but remained actively involved in determining the rates that were to be charged by the Fourth Defendant.
28. By a letter dated 7 December 2007 Mr Lemoine forwarded to the Board of Trustees the proposal from the Fourth Defendant and recommended that it be accepted. Mr Lemoine's memorandum indicated that no competitive quotations had been received. The Board of Trustees accepted Mr Lemoine's recommendation and agreed to rent construction equipment from the Fourth Defendant.
29. The Fourth Defendant rented construction equipment to the Board of Trustees, and additionally carried out excavation services for it. The Board paid the Fourth Defendant approximately \$1.2m for the hire of the construction equipment and approximately \$600,000 for the excavation services. The First Defendant did not declare his interest to the Plaintiff or obtain the Plaintiff's permission to contract with the Board of Trustees, and played a full and active part in the Board of Trustees' discussions about the award of the contracts.

The Fifth Defendant: sub-contract (supply of concrete for cart paths)

30. In April 2008 Mr Lemoine began to investigate the construction of concrete paths for carts. On 22 April 2008 the Board of Trustees agreed to resurface all of the cart paths in concrete.
31. By a memorandum to the Board dated 7 May 2008 Mr Lemoine

recommended that the contract for the construction of the cart paths should be awarded to Richold Construction Co Ltd ("Richold") but that the concrete should be supplied by the Fifth Defendant. On receipt of this memorandum the Second Defendant did not disclose his interest in the Fifth Defendant to the Plaintiff or obtain the Plaintiff's permission to contract with the Board of Trustees and did not withdraw from the discussion that ensued.

32. On 9 May 2008 the Board of Trustees sent Richold a purchase order for the construction the concrete cart paths. Richold constructed the cart paths using concrete supplied by the Fifth Defendant. The Plaintiff does not know how much the Fifth Defendant was paid by Richold for the concrete.

Miracle Steel: contract (maintenance shed)

33. In February 2008 Mr Lemoine was considering a contract for the supply of a maintenance shed. One of the suppliers under consideration was Miracle Steel. In a memorandum to the Board of Trustees dated 14 February 2008 Mr Lemoine reported that if the contract was awarded to Miracle Steel a commission would have to be paid to the Third Defendant. Following discussions amongst the Defendants, on 29 February 2008 the Board of Trustees decided to award the contract for the supply of the maintenance shed to Miracle Steel for the price of \$187,847.
34. By an email dated 24 April 2008 the Board of Trustees was sent an invoice from DLRK Associates (a business of which the Third Defendant was the proprietor) for "*the agreed agency fee payment \$10,000*".
35. On 21 May 2008 Mr Wilson and the First Defendant agreed that the Third Defendant should be paid by Miracle Steel directly: "*Zane I do remember a conversation where we agreed the amount would be paid to the company and it would be for the company to pay their agent. I know we said no*

direct payment to Mr. B from us."

36. The Board of Trustees discussed the request for payment of \$10,000 to the Third Defendant at the meeting of the board on 27 May 2008. The minutes of the meeting of the Board of Trustees record the following -

Maintenance Sheds

The Chairman asked Mr. Bulford to temporarily excuse himself from the meeting.

The Chairman informed the Trustees that an issue has arisen with regards to Mr. Bulford's commission payment for the purchase of the maintenance shed. He stated that the Board is aware Mr. Bulford represents the vendor in selling the sheds and as such is entitled to receive commission for any shed sold. He noted that the problem that has arisen is that the vendor has provided an invoice for the shed which does not include Mr. Bulford's commission payment. Mr. Bulford has submitted a separate invoice to the Board for the commission therefore when the accounts are audited the concern is that there will be a cheque written to a trustee for commission. He suggested that Mr. Bulford go back to the vendor and request they reissue the invoice for an amount which includes his commission so the Board can issue one payment to the vendor with Mr. Bulford to receive his commission payment directly from the vendor. Mr. DeSilva confirmed that it is normal for the vendor to issue one invoice which includes the commission and they are then responsible to distribute their representative's commission. The Board discussed in detail and agreed to advise Mr. Bulford to liaise with Mr. Pitt and request a revised invoice from the vendor.

37. The Plaintiff will say that these minutes (which were signed by the Second Defendant on 24 June 2008 without amendment) demonstrate the Second Defendant's intention (agreed by the other Trustees) deliberately to conceal from the Plaintiff's auditors the said payment to the Third Defendant by means of the artificial device of inflating the payment from Miracle Steel to conceal the Third Defendant's commission.
38. On 3 June 2008 Mr Lemoine received an invoice from Miracle Steel that named the Third Defendant.
39. At the Board meeting held on 24 June 2008 the Board of Trustees considered the invoice received from Miracle Steel. The minutes (signed by the Second Defendant on 12 August 2008 without amendment) record the following:

Mr. Bulford

As requested by the Board, Mr. Pitt had contacted Miracle Steel requesting a letter and invoice for \$10,000 for the commission payment which was omitted. The Board can then pay the monies owed to Miracle Steel who could in turn reimburse Mr. Bulford. The Chairman noted that although the invoice cannot stipulate Mr Bulford's name, it needs to specify miscellaneous services or similar. The Board discussed in more detail and agreed for Mr. Pitt to request another revised invoice stipulating commission or consultancy services.

40. The Plaintiff will say that those minutes evidence the Second Defendant's yet further intention (agreed by the other Trustees) deliberately to conceal from the Plaintiff the true position by the use on a revised invoice of misleading words of the sort suggested.
41. On 25 June 2008 Miracle Steel sent the Board an invoice for \$10,000, being a "*fee payable to D.L.R.K. Associates*". Miracle Steel's covering letter dated 25 June 2008 made clear that fee was payable to, and would be paid to, the Third Defendant.
42. On 28 June 2008, in response to a request by Curtis Stovell (Financial Controller, Ministry of Tourism and Transport), Mr Lemoine emailed Mr Pitt copies of the memorandums he had prepared for the Board. He did not include the memorandum recommending Miracle Steel as the supplier of the steel shed, noting "*Miracle Steel is not included, let's discuss*".
43. By way of follow up, on 1 July 2008, an administrative assistant at Port Royal emailed a list of suppliers to Mr Stovell. Miracle Steel was not included. Later that day, Mr Stovell emailed Mr Pitt and enquired how Miracle Steel had been selected as a supplier. The Plaintiff has not seen a response to that enquiry.
44. At the meeting held on 12 August 2008 the Board of Trustees approved the payment of the Miracle Steel invoice, expressly recording that it

represented a commission payment to the Third Defendant. The sum of \$10,000 was paid by the Board to Miracle Steel on 13 September 2008.

45. The repeated conduct of the Board as a whole, individual Trustees, employees and contractors outlined above amounted to a concerted effort to conceal the true nature of the commission from its principal, the Government, and in particular, the fact that, having authorised payment of a commission to the Third Defendant, and in the knowledge that such a payment to a Trustees was wrong, the Trustees had deliberately and expressly set out on a course to conceal that payment from the Government. The Trustees, in particular the First, Second and Third Defendants knew that such payment was improper yet nevertheless proceeded with such payment and attempted to ensure it was concealed from the Plaintiff.

Breaches of Duty

46. The First Defendant was in breach of fiduciary duty in that he -
- (1) Failed to disclose his interest in the Fourth Defendant to the Plaintiff.
 - (2) Failed to withdraw from any discussion being held by the Board of Trustees about the possibility of making contracts with the Fourth Defendant.
 - (3) Failed to obtain the Plaintiff's permission to contract with the Board.
 - (4) Made use of confidential information that came into his possession in his capacity as a member of the Board of Trustees in order to assist the Fourth Defendant to devise terms that would enhance its prospects of securing those contracts with the Board of Trustees that it in fact secured.
 - (5) Made a profit by reason of his membership of the Board of Trustees.
 - (6) Caused or permitted the Third Defendant to receive the commission set out in paragraphs 33 to 45, above.

47. The Second Defendant was in breach of fiduciary duty in that he –
- (1) Failed to disclose his interest in the Fifth Defendant to the Plaintiff.
 - (2) Failed to withdraw from any discussion being held by the Board of Trustees about the possibility of Fifth Defendant being awarded a contract for the supply of concrete for cart paths.
 - (3) Failed to obtain the Plaintiff's permission to contract with the Board.
 - (4) Made a profit by reason of his position as a Trustee.
 - (5) Caused or permitted the Third Defendant to receive the commission set out in paragraphs 33 to 45, above.
48. The First to Third Defendants were in breach of fiduciary duty in that the Third Defendant received, and the First and Second Defendants allowed him to receive, the secret commission set out in paragraphs 33 to 45, above.
49. The knowledge of the First Defendant is to be imputed to the Fourth Defendant. Accordingly, the Fourth Defendant knew of the existence of the fiduciary relationship between the Board of Trustees and the Plaintiff, and of the fact that the First Defendant was acting in breach of trust. The Fourth Defendant assisted the First Defendant in the breach of trust by entering into the contracts for the supply of sand and gravel, and the contracts for the hire of equipment and the provision of excavation services. That assistance was dishonest because it would not have been given by an honest person equipped with the knowledge of which the Fourth Defendant was in possession. The Fourth Defendant is therefore liable to the Plaintiff in dishonest assistance.
50. The knowledge of the Second Defendant is to be imputed to the Fifth Defendant. Accordingly, the Fifth Defendant knew of the existence of the fiduciary relationship between the Board of Trustees and the Government, and of the fact that the Second Defendant was acting in breach of trust. The Fifth Defendant assisted the Second Defendant in

the breach of trust by entering into the contract for the supply of concrete. That assistance was dishonest because it would not have been given by an honest person equipped with the knowledge of which the Fifth Defendant was in possession. The Fifth Defendant is therefore liable to the Plaintiff in dishonest assistance.

Limitation

51. These proceedings were commenced more than six years after the cause of action accrued. The action is not statute barred by reason of the provisions of section 33 *Limitation Act 1984*. The Plaintiff will rely on the matters set out below.
52. In respect of the First and Fourth Defendants:
- (1) The First Defendant failed to disclose his interest in the Fourth Defendant to the Board of Trustees or to the Government.
 - (2) The First Defendant failed to withdraw from any Board of Trustees discussions regarding the award of contracts to the Fourth Defendant.
 - (3) The First Defendant conspired to conceal the Third Defendant's commission payment from the Government.
 - (4) In response to an article about Port Royal in the *Mid Ocean News* dated 11 July 2008, the First Defendant falsely stated in a draft press statement that the Fourth Defendant had submitted the most competitive price for the supply of sand and gravel and that he had had "*no day to day involvement in the project*". The First Defendant had been intimately involved in the discussions by the Trustees regarding the award of the contract for the supply of sand and gravel, knew that no other party had submitted a price for the supply of sand and gravel before the work was awarded to the Fourth Defendant, and therefore knew those statements to be false.
 - (5) In evidence before the Public Accounts Committee ("PAC") on or around 27 April 2016, the First Defendant falsely stated that:
 - (a) He was not involved in determining the equipment rates;

- (b) He was not involved in the award of any contracts to the Fourth Defendant;
 - (c) He did not participate in any meetings with Mr Lemoine and his brother Allan De Silva regarding the equipment hire contract;
 - (d) He recused himself from the Board's discussions regarding the equipment hire contract;
 - (e) He had declared his conflict as a principal of the Fourth Defendant and a Trustee of the Board of Trustees;
 - (f) The Board had received rates for excavation costs from D&J Excavating, which were higher than the Fourth Defendant's rates.
- (6) The First Defendant knew all of those statements to be false, but deliberately proceeded falsely to perpetuate the idea that he had not participated in, indeed had absented himself from, the award of contracts to the Fourth Defendant which had been awarded after proper and full competitive tendering processes. That the First Defendant was willing to lie to a committee of Parliament about what had occurred, when taken with his earlier conduct, demonstrates that the First Defendant engaged in a deliberate and repeated course of conduct to deceive the Government and the wider public about the true position for a substantial number of years.
- (7) The actions of the First Defendant are attributable to the Fourth Defendant.

53. In respect of the Second Defendant and Fifth Defendant:

- (1) The Second Defendant failed to disclose his interest in the Fifth Defendant to the Board or to the Government.
- (2) The Second Defendant failed to withdraw from any Board discussions regarding the award of a sub-contract to the Fifth Defendant.
- (3) The Second Defendant conspired to conceal the Third Defendant's commission payment from the Government.

- (4) The Second Defendant conspired to conceal the First Defendant's breach of fiduciary duty in his statement to the *Mid Ocean News*, reported in an article on 11 July 2008: "*Island Construction was given the contract because of their experience, having recently done the excavating at Tucker Point and Mid Ocean and providing a competitive price. At no point was Mr. Zane de Silva involved with the bidding process either as a Trustee or as a representative of Island Construction*". The Second Defendant knew that such a statement was false and misleading.
- (5) The Second Defendant assisted with the preparation of a draft press statement in response to the *Mid Ocean News* article dated 11 July 2008 that again concealed the true position, including asserting that the Fourth Defendant had provided "*a competitive price*". The Second Defendant knew that statement to be false since he knew that no other party had submitted a price for the supply of sand and gravel before the work was awarded to the Fourth Defendant.
- (6) In evidence before the PAC on or about 30 April 2015, the Second Defendant falsely stated that the Board had not dealt with the First Defendant and had only deal with his brother, Allan de Silva.
- (7) The actions of the Second Defendant are attributable to the Fifth Defendant.

54. In respect of the Third Defendant:

- (1) The Third Defendant conspired to conceal the Third Defendant's commission payment from the Government.

55. Accordingly, the Defendants and each of them deliberately concealed the Plaintiff's right of action. The Plaintiff could not have discovered the concealment until the publication of the Special Report of the Auditor General on the Port Royal Golf Course Improvements Capital Development Project in October 2014.

AND THE PLAINTIFF CLAIMS: -

1. Against the First Defendant -
 - (1) An account of the profits made as a consequence of the making of the contracts for the supply of sand and gravel, and the contracts for the hire of equipment and the provision of excavation services;
or
 - (2) Equitable compensation for the breach of fiduciary duty; and
 - (3) Compound interest; and
 - (4) Costs.

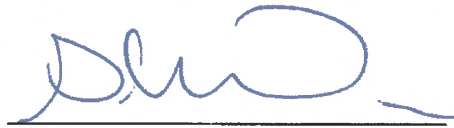
2. Against the Second Defendant -
 - (1) An account of the profits made as a consequence of the making of the contract for the supply of concrete for the cart paths; or
 - (2) Equitable compensation for the breach of fiduciary duty; and
 - (3) Compound interest.
 - (4) Costs.

3. Against the Third Defendant -
 - (1) Repayment of the secret commission of \$10,000; or
 - (2) Equitable compensation for the breach of fiduciary duty; and
 - (3) Compound interest; and
 - (4) Costs.

4. Against the Fourth Defendant -
 - (1) An account of the profits made as a consequence of the making of the contracts for the supply of sand and gravel, and the contracts for the hire of equipment and the provision of excavation services;
or
 - (2) Equitable compensation for dishonestly assisting the breach of fiduciary duty by the First Defendant; and
 - (3) Compound interest; and
 - (4) Costs.

5. Against the Fifth Defendant -
 - (1) An account of the profits made as a consequence of the making of the contract for the supply of concrete for the cart paths; or
 - (2) Equitable compensation for dishonestly assisting the breach of fiduciary duty by the Second Defendant; and
 - (3) Compound interest; and
 - (4) Costs.

6. Against any or all of the Defendants, such further or other relief as the Court thinks fit.



**The Attorney General's Chambers
Attorneys for the Plaintiff**

This Specially Indorsed Writ was issued by The Attorney General's Chambers of Global House, 43 Church Street, Hamilton, HM 12, Bermuda, Attorneys for the Plaintiff.

Dated this 27 day of February 2017.

This writ was served by me at _____ on

the Defendant on _____, the _____ day of _____ 2017.

