REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

(1) Consolidated Action:

(a) Claim No. CV 2017-01415

Between

TN RAMNAUTH AND COMPANY LIMITED

Claimant/First Defendant to Counterclaim

and

ESTATE MANAGEMENT AND BUSINESS

DEVELOPMENT COMPANY LIMITED

Defendant/Counterclaiming Claimant

and

TARADAUTH RAMNAUTH

Second Defendant to Counterclaim

(b) Claim No. CV 2017-01535

Between

KALL CO LIMITED

Claimant/Defendant to Counterclaim

and

ESTATE MANAGEMENT AND BUSINESS

DEVELOPMENT COMPANY LIMITED

Defendant/Counterclaiming Claimant

(c) Claim No. CV 2017-01739

Between

MOOTILAL RAMHIT AND SONS CONTRACTING LIMITED

Claimant/Defendant to Counterclaim

AND

ESTATE MANAGEMENT AND BUSINESS

DEVELOPMENT COMPANY LIMITED

Defendant/Counterclaiming Claimant

(2) Related Action:

Claim No. CV 2017-04214

Between

ESTATE MANAGEMENT AND BUSINESS

DEVELOPMENT COMPANY LIMITED

Claimant

and

(1) ROODAL MOONILAL

(2) GARY PARMASSAR

(3) MADHO BALROOP

(4) ANDREW WALKER

(5) FIDES LIMITED

(6) NAMALCO CONSTRUCTION SERVICES LIMITED

(7) LCB CONTRACTORS LIMITED

Defendants

BEFORE The Honourable Mr Justice James Christopher Aboud

DATE: 6 August 2020

APPEARANCES:

In the Consolidated Action

- Ramesh Lawrence Maharaj SC leading Jagdeo Singh, Kiel Takalsingh and Criston J. Williams, instructed by Jamie Amanda Maharaj and Karina Singh for the three claimants/defendants to the counterclaim;
- David Phillips QC leading Jason Mootoo and Tamara Toolsie instructed by Savitri Sookraj-Beharry for the defendant/counterclaiming defendant.

In the Related Action

- David Phillips QC leading Jason Mootoo and Tamara Toolsie, instructed by Savitri Sookraj-Beharry for the claimant;
- Ramesh Lawrence Maharaj SC leading Jagdeo Singh, Kiel Takalsingh, and Criston J. Williams, instructed by Jamie Amanda Maharaj and Karina Singh for the fifth defendant;
- Simon Hughes QC leading Om Lalla, instructed by Dereck Balliram for the sixth defendant;
- Lynette Maharaj S.C. instructed by Shaheera Allahar and Tynneille Tuitt for the seventh defendant.

JUDGMENT

Introduction

[1] There are six applications before me filed by three parties in the Consolidated Action and three parties in the Related Action. Each of the applicants seeks to strike out the pleadings of Estate Management and Business Development Company Limited ('EMBD').

[2] It is EMBD's case that the three claimants in the Consolidated Action (being contracting companies who won lucrative awards in the run-up to the 2015 General Election) and all the defendants in the Related Action (three of whom are similarly circumstanced contracting companies, one of whom is a former Minister of Government, and three of whom are former senior officers of EMBD) are guilty of a number of very serious acts of dishonesty. EMBD intends to prove at the trial that these parties were knowingly involved in a number of tortious acts, including unlawful means conspiracy, bribery, and dishonest assistance. EMBD also claims relief in contract law, for example declarations that the contracts are void for illegality.

[3] These six applicants, who I will collectively refer to as 'the EMBD Contractors', say that the torts have been improperly pleaded and should be struck out. They also say that public

policy is not a ground in law for a declaration that the contracts awarded to them are illegal and thus void. Alternatively, I am asked to order particulars of the pleadings.

[4] Unlawful means conspiracy is a relatively new tort in England and the Commonwealth, and it has been developing incrementally. In 2008 the tort took a quantum leap into modernity in the House of Lords judgment in *Revenue and Customs Commissioners v Total Network SL* [2008] UKHL 19. The state of the common law since then has been described as uncertain to academicians and practitioners alike. No general overriding principle for some of the tort's constituent elements has been unanimously endorsed by the House of Lords or the Supreme Court in England. This is a tort still in its developmental stages. The requirements for pleading such a tort are therefore open to argument, and I had many.

Procedural background

[5] Three contracting companies, TN Ramnauth and Company Limited ('TN Ramnauth'), Mootilal Ramhit and Sons Contracting Limited ('Ramhit') and Kall Co Limited ('Kallco') filed separate claims against EMBD for sums allegedly owed to them for road construction works in County Caroni, some three months before the 2015 General Elections. TN Ramnauth filed its claim on 24 April 2017 for $22.8 million; Ramhit filed on 11 May 2017 for $39.6 million; and Kallco filed on 1 May 2017 for $60.2 million (the figures are rounded). The claims are based on straightforward breaches of contract for non-payment of sums contractually due. These three actions comprise the Consolidated Action.

[6] On 12 October 2017 EMBD filed a Defence and Counterclaim to each of the claims. In brief, EMBD alleges that the three claimants colluded among themselves (and with the other defendants in the Related Action) and were involved in an unlawful means conspiracy that led to the award of 12 contracts and the payment of over $300 million dollars for defective and overpriced work. It is said that the cartel ensured that specific companies were awarded specific contracts at inflated amounts and received monies that were not due for defective and/or irremediable and/or useless works.

[7] By way of a general summary, the Counterclaims are grounded in (a) the tort of unlawful means conspiracy on the part of the three claimants (and the other parties named in the related action, namely, the three other EMBD contractors, Roodal Moonilal, a former government minister, and three senior EMBD officers who held office prior to the change of government in September 2015); (b) breach of fiduciary duty on the part of Dr Moonilal and the three senior officers of EMBD; (c) knowing receipt and dishonest assistance; (d) declarations that the alleged contracts are void or otherwise non-existent as a matter of agency law; (e) an account of all the monies paid to the three claimants (together amounting to over a $101 million). In the case of TN Ramnauth, EMBD added Mr Taradauth Ramnauth, the principal of TN Ramnauth, as a second defendant to the counterclaim, and made an additional claim in bribery against him and TN Ramnauth.

[8] EMBD is what is called a "special purpose company" in Trinidad and Tobago parlance. It is incorporated under the Companies Act. It is a State-owned entity with a politically appointed board. Although incorporated to carry out government policy its officers are

subject to all the duties and obligations imposed by that Act. At the material time, EMBD reported to the Ministry of Housing and Urban Development, of which Dr Moonilal was the then minister. In our vernacular, he is called "the line minister". Amongst other things, EMBD is mandated to sub-lease agricultural state lands, manage and develop lands formerly owned by Caroni (1975) Limited, and to develop residential sites on those lands. According to the Counterclaims, the award and management of massive road building contracts is not part of its mandate.

Breakdown of the claims of the claimants in the Consolidated Action

(1) TN Ramnauth:

(a) Cipero Road to M1 Ring Road (hereafter called 'contract or road C7')
(b) Solomon Hochoy Highway to Reform Project (hereafter called 'contract or road C8')
(c) Exchange III works (a residential development) (hereafter called 'Exchange III contract or works')
(d) Picton III works (a residential development) (hereafter called 'Picton III contract or works')

[9] On 7 July 2015 EMBD accepted TN Ramnauth's tender for C7 for the contract sum of $45,096,415.10 and the company claims that the sum of $12,644,920.21 remains due and owing. On the same day, EMBD also accepted TN Ramnauth's tender for C8 for the contract sum of $40,382,739.21 and the company claims that $10,193,503.75 remains due and owing. In relation to the Exchange III and Picton III works payments of $51,031,502.40 were paid to TN Ramnauth of which a balance of $5,158,126 is outstanding. In its Amended Statement of case TM Ramnauth did not claim this balance

for its works on Exchange III or Picton III. These two contracts were only raised and impugned by EMBD in the Related Action.

(2) Ramhit:

(a) Madras Road to Mon Plaisir Road (hereafter called 'contract or road C4')

(b) Endeavour Road to Soogrim Trace Project (hereafter called 'contract or road C5')

[10] On 7 July 2015, EMBD accepted Ramhit's tender for C4 in the sum of $45,422,595.35. Ramhit claims that EMBD still owes it $16,023,586.94. With respect to C5, EMBD accepted Ramhit's tender of $44,416,781.20, of which it is claimed that $23,603,482.62 is still due and owing.

(3) Kallco:

(a) Felicity Main Gravel Road to Perseverance Road (hereafter called 'contract or road C3')

(b) Todd's Road to Gravel Road (hereafter called 'contract or road C6')

(c) Colonial Road Project (hereafter called 'contract or road C9')

[11] Kallco's three tenders to EMBD were all accepted on 7 July 2015. C3 was for the contract sum of $44,824,357.87 and a balance of $24,004,501.20 is claimed. C6 was for the contract sum $44,443,805.99 and it claims a balance of $17,339,438.59. C9 was for the contract sum $45,093,138.75 and it claims a balance of $18,576,808.09.

Outline of EMBD's claims in the Related Action

[12] On 20 November 2017 EMBD filed a claim against Roodal Moonilal ('Dr Moonilal'), Gary Parmassar ('Mr Parmassar'), Madho Balroop ('Mr Balroop'), Andrew Walker ('Mr Walker'), Fides Limited ('Fides'), Namalco Construction Services Limited ('Namalco') and LCB Contractors Limited ('LCB') on much the same grounds as it had set out in its Counterclaims in the Consolidated Action. LCB, the seventh defendant, was not awarded any of the Caroni Roads Contracts. It is EMBD's case that LCB was a pre-determined loser, chosen as such in order to avoid any suspicion of cartel behaviour. It is alleged that Fides, Namalco, and LCB respectively participated in the cartel ('the Cartel Arrangements') through, at least, Mr Shane Sagar, the owner and a director of Fides, Mr Naeem Ali, the owner and a director of Namalco, and Mr Jameel Baksh, the owner and a director of LCB.

[13] As said earlier, the first defendant, Dr Moonilal was the EMBD line minister. EMBD reported to him or his ministry and he, in turn, reported to the Cabinet. The second defendant, Mr Parmassar, was at all material times EMBD's Acting Chief Executive Officer ('CEO') and, later, during the period when it is alleged that the conspiracy was in full-blown operation, he was appointed its CEO. At all material times the third defendant, Mr Balroop, was EMBD's Divisional Manager-Projects and, for the period 27 July to 7 August 2015, its Acting CEO. The fourth defendant, Mr Walker, was EMBD's resident Engineer. All four of these defendants are alleged to be part of the Cartel Arrangements. As will be examined in greater detail below, it is EMBD's pleaded case that Dr Moonilal operated like EMBD's virtual puppeteer, controlling and directing Mr Parmassar to award

the EMBD contracts, or some of them, and directing the delivery of EMBD cheques to him personally for onward delivery to the EMBD contractors (excluding LCB). Mr Parmassar is portrayed as integral to the conspiracy, beholden to Dr Moonilal who he describes as "the boss", or "the chief" and is alleged to be in breach of his fiduciary duties to EMBD. Mr Balroop is alleged to have facilitated the awards and improperly managed the contracts in breach of his fiduciary duties. Mr Walker, as Engineer, is alleged to have improperly certified works that were defective or non-existent and caused unjustified payments to be made.

[14] It is EMBD's case that the claimants in the Consolidated Action and the two contractors in the Related Action (Fides and Namalco) enriched themselves by procuring the EMBD contracts, certifications, and payments, by way of collusion between themselves and Dr Moonilal and Messrs Parmassar, Balroop, and Walker so that, through unlawful means, and in breach of the fiduciary duties owed to EMBD by its officers and those owed to the Republic by Dr Moonilal, specific companies were awarded specific contracts at greatly inflated contract prices and received excessive and unjustified payments for works that were incomplete or defective or both. LCB is said to have participated as a decoy to avoid the suspicion of cartel behaviour.

[15] Prior to my consolidation of the Consolidated Action two of those claims were docketed to other Judges and needed to be transferred to me. The Related Action was also transferred to my docket. On 22 February 2018, I made an order to consolidate the three actions. In March and April 2018 TN Ramnauth (and Taradauth Ramnauth), Kallco, and

Ramhit filed applications to strike out EMBD's Counterclaim against them and/or to obtain orders for particulars. In the Related Action similar or identical applications were filed in March and April 2018 by Namalco, Fides and LCB.

[16] On 13 July 2018, a comprehensive 6-page order was made for the determination of all six strike out applications, with directions for the filing and exchange of written submissions, legal authorities and agreed statements of facts. Thousands of pages of were generated. The hearings were spread over parts of 2018 and 2019 and involved scheduling the physical attendance to two English and two Trinidad and Tobago silks. Some hearings were adjourned due to Counsel's scheduling conflicts. Numerous "speaking notes" and replies to speaking notes were also exchanged. Unfortunately, I suffered a cervical spinal injury in June 2019 and needed emergency spinal surgery in August 2019 which, together with the 2020 COVID pandemic and my bout of influenza B, delayed the delivery of this long overdue judgment. I apologise to all the parties for this.

[17] It is highly relevant that Defences have not been filed by any party against whom EMBD has made claims. As such, the proceedings are in their infancy. The first Case Management Conference has not yet been held in either of the actions.

[18] All the other parties have also filed applications for extensions of time to file Defences and/or for a stay of the proceedings. I intend to seek Counsel's advice today on how and when those applications should be determined. They are inconsequential for present purposes.

What is EMBD's pleaded case?

[19] For the sake of convenience, EMBD's Statement of Case in the Related Action will be my focus rather than the Counterclaims in the Consolidated Action. Where necessary the Counterclaims will be discussed. EMBD's claims arise out of the tender, award, and administration of 12 contracts between EMBD and Fides, Namalco, Ramhit, Kallco and TN Ramnauth between May and September 2015. Insofar as LCB is concerned, there are no allegations involving an award or the management of any contract. These are the contracts:

(i) Ten contracts made in July and August 2015 for the upgrade and/or construction of ten existing former Caroni (1975) Limited cane estates and ancillary bypass roads known as contracts C1 to C10;

(ii) A contract between EMBD and TN Ramnauth dated 13 May 2015 for the construction of land development works at Exchange III, Mc Bean, Couva;

(iii) A contract between EMBD and TN Ramnauth dated 1 June 2015 for the construction of infrastructure works for residential development at Picton III Residential Site at Picton Road, Off-Papourie Road, Diamond Village.

[20] It is EMBD's claim that these contractors conspired or colluded with each other and with Dr Moonilal and the EMBD officers to obtain awards of these contracts pursuant to an unlawful conspiracy or by certain Cartel Arrangements between November 2014 and September 2015 with the intention to enrich themselves and injure EMBD by knowingly procuring or obtaining the contracts, certifications and payments. I must restate that an

allegation of an award of contract is not made against LCB, but it is described as a participant in the Cartel Arrangements.

[21] EMBD has alleged that these Cartel Arrangements and the participation in them by public officials resulted in the wrongful favouring of the EMBD Contractors (save LCB). EMBD has pleaded that the EMBD Contractors (being incorporated companies) had knowledge that the contracts were procured via the Cartel Arrangements and via the breaches of fiduciary duty by the former EMBD officers, in particular, Mr Parmassar.

[22] Para 8 of EMBD's Statement of Case in the Related Action sets out a summary of the Cartel Arrangements:

(a) The EMBD contractors were exclusively invited, at least to bid for the Caroni Roads Contracts, and some of them were invited to bid for the Exchange III and Picton III contracts;

(b) The EMBD Contractors were invited to bid for, and/or (save for LCB), were paid for quantities of work and materials in excess of those required for the Caroni Roads Works and/or the works actually carried out;

(c) The EMBD Contractors colluded to select which of them would be the successful bidder for the Caroni Roads Contracts at prices in excess of Pre-Tender Estimates ('PTEs') originally produced by engineers employed by EMBD, and/or the rates at which each of them was otherwise prepared to bid;

(d) Some of the EMBD Contractors, namely Fides, Ramhit, Kallco and TN Ramnauth, colluded to select which of them would be the successful bidder for the Exchange III contract, and based their bids on a PTE produced by engineers employed by EMBD, of which they had sight;

(e) The Caroni Roads Contracts were awarded to the EMBD Contractors (save for LCB) and TN Ramnauth was also awarded the Exchange III and Picton III Contracts, all of which contracts are itemised in Schedule 1 of the pleading;

(f) The respective Engineers appointed by EMBD under each of the Caroni Roads Contracts, including Mr Walker, in breach of his employment duties and/or his duties as Engineer under the respective contracts, certified payments for works without verifying whether those works had been carried out, whether they contained defects, or whether they ought to have been certified, and in certain instances, simply "rubber stamped" valuations submitted by the EMBD Contractors in support of applications for the issue of Interim Payments Certificates under the Caroni Roads Contracts;

(g) Practical Completion and/or Completion of Contract and/or Interim Payment Certificates were issued to the EMBD Contractors, save for LCB, purporting to verify that works had been undertaken and/or satisfactorily completed in circumstances

where the quantities constructed were less than those stated in bills of quantities, works had been omitted, and (in the case of the Caroni Roads Works) were defective and/or useless and/or unneeded;

(h) The works carried out under the Caroni Roads Contracts, alternatively the C1, C2, C7, C8 and C10 works are worthless and of no value to EMBD. In relation to the C1, C2, C7, C8 and C10 roads, the defects and failures to comply with the specifications identified in Schedule 2 to the Statement of Case are irremediable, render the C1, C2, C7, C8 and C10 roads not fit for the intended purpose, substantially reduce their life, and cannot be repaired without altogether destroying the roads;

(i) Inflated payments were authorized and made by EMBD for the EMBD Contracts (save for LCB), including payments for omitted and defective works;

(j) Payments, alternatively the bulk of the payments, were made under the Caroni Roads Contracts prior to the General Election on 7 September 2015 from a financing facility that had been obtained with the approval of EMBD's Board on the basis that it was obtained to pay the outstanding indebtedness of EMBD to other contracting companies. In fact, the funding facility was used to make payments to the EMBD Contractors (save for LCB) for the

Caroni Roads Works, and not to other contractors with long outstanding debts.

[23] EMBD alleges that the participation of Dr Moonilal and Mr Parmassar in the Cartel Arrangements amounts to a breach of their fiduciary duties, the former, more particularly to the Republic of Trinidad and Tobago. Dr Moonilal, Mr Balroop, and the EMBD Contractors are said to have dishonestly procured, facilitated and/or assisted in Mr Parmassar's breaches of fiduciary duty.

[24] It is further pleaded that pursuant to the Cartel Arrangements, TN Ramnauth and/or Mr Taradauth Ramnauth procured, facilitated, and/or offered benefits to Mr Parmassar, being the allocation of a house to him by the Housing Development Corporation ('HDC') and the offer to rent another property for him in Valsayn or Lange Park, which are upmarket suburbs. This benefit and offer of a benefit is said to constitute civil law bribery and the offer of a civil law bribe by Mr Taradauth Ramnauth and TN Ramnauth to Mr Parmassar.

[25] As to the status of the Caroni Roads Contracts it is EMBD's pleaded case that:

(a) Because of the breaches of his fiduciary duties, Mr Parmassar, as agent of EMBD, had no actual authority on behalf of EMBD to enter into any of the EMBD Contracts;

(b) Mr Parmassar did not have ostensible authority on behalf of EMBD to enter into any of the EMBD contracts because the EMBD contractors

knew, through their knowledge of Mr Parmassar's breach of fiduciary duty, that he had no actual authority to do so;

(c) The EMBD contracts are therefore void or otherwise non-existent as a matter of agency law, as are any certificates or other documents issued under them;

(d) Alternatively, the EMBD Contracts are unenforceable by the EMBD contractors as a matter of public policy under the doctrine of illegality, as are any certificates or other documents issued under the contracts, as it is against public policy for the Court to order any payments to contractors that have participated in arrangements such as the Cartel Arrangements which involve the wrongful payment of public funds, alternatively the wrongful payment of public funds for materially defective works;

(e) None of the EMBD contractors (save for LCB) is entitled to make any claim against EMBD under the C1 to C10 or the Exchange III or Picton III contract or works as the contracts are either void and unenforceable because Mr Parmassar purported to enter into them without actual or ostensible authority to do so, or unenforceable because of illegality.

(f) Alternatively, if the Court finds that any of the contracts are valid and enforceable contracts, EMBD rescinds them.

[26] EMBD has made claims against the seven defendants in the Related Action that are similar to those against the defendants to the Counterclaim in the Consolidated Action. It pleads that it is permitted to elect between the alternative claims following judgment:

(a) A claim against Fides and Namalco for declarations that the C10, C1 and C2 contracts are void or otherwise non-existent as a matter of agency law, as are any certificates or other documents issued under the contract, or appropriate declarations to reflect its alternative case on the status of the C10, C1 and C2 contracts.

(b) A claim in knowing receipt against Fides and Namalco for all sums EMBD has paid to Fides and Namalco purportedly under the C10, C1, and C2 contracts, together with interest. EMBD makes a claim in knowing receipt whether or not the C10, C1 or C2 contracts are void or otherwise non-existent as a matter of agency law.

(c) Claims in unlawful means conspiracy against the seven defendants, except Mr Walker.

(d) Claims against Mr Parmassar for breach of fiduciary duty and bribery.

(e) Claims against Mr Balroop for breach of fiduciary duty and breach of duties under his employment contract.

(f) Claims against Mr Walker for breach of duties under his employment contract and/or his duties as Engineer under the C1, C2, C7 and C8 contracts.

(g) Claims against Dr Moonilal, Mr Balroop, Fides, Namalco and LCB for dishonest assistance in Mr Parmassar's breaches of fiduciary duty and an account.

[27] According to the pleading, Dr Moonilal owed the Republic of Trinidad and Tobago in law and pursuant to the oaths in the First Schedule of the Constitution the following duties: a duty to act honestly and in good faith with a view to and in the best interests of the Republic; a duty to exercise the care, diligence and skill that a reasonably prudent person would exercise; a duty of loyalty and fidelity; and a duty not to prefer his own interests or the interests of others to the interests of the Republic.

[28] In his role as CEO of EMBD, it is alleged that Mr Parmassar owed these fiduciary duties to EMBD as set out in section 99 of the Companies Act: a duty to act honestly and in good faith with a view to and in the best interests of EMBD; a duty to exercise the care, diligence and skill that a reasonably prudent person would exercise; a duty of loyalty and fidelity; and a duty not to prefer his own interests or the interests of others to the interests of EMBD.

[29] According to the pleading Mr Balroop owed the same fiduciary duties as acting CEO of EMBD. In addition, he had specific duties under his contract of employment as Divisional Manager-Projects including the following: to lead direct and manage the civil and project

engineering professionals of the EMBD's Projects and Access Roads Department, to plan and oversee the execution of projects, to oversee the preparation of pre-tender documentation for the award of construction contracts, to oversee the development of detailed project plans identifying corrective actions where required, to proactively manage issues and risks on projects, to coordinate with parties involved in projects to ensure their smooth progress and on time and within budget completion, at all times, to promote the interest and welfare of EMBD, and not to disclose to any person any information relating to EMBD.

[30] Mr Balroop also had duties under a Confidentiality Agreement made between him and EMBD to protect confidential, sensitive and/or private information from unauthorized disclosures and to report any demands made for disclosure of such information.

[31] Under his contract of employment as Project Manager dated 25 June 2014 he was also responsible for the preparation of pre-tender documentation; for the award of consultancy, construction, and development contracts and agreements; to plan construction methods and procedures; to supervise construction sites and direct site managers and subcontractors to make sure standards of performance, quality, cost schedules and safety are maintained; to ensure that building regulations, standards and by-laws are enforced in building operations; to evaluate works performed by sub-contractors and make recommendations for payment; to analyse progress reports produced by contractors and recommend corrective action where necessary; to produce monthly progress reports on each project assigned; and to perform related duties as assigned;

[32] According to the pleading, Mr Walker owed the following specific duties under his contract of employment as Project Manager: to prepare pre-tender documentation for the award of consultancy, construction, and development contracts and agreements; to plan construction methods and procedures; to supervise construction sites and direct site managers and subcontractors to make sure standards of performance, quality, cost schedules and safety are maintained; to ensure that building regulations, standards and by-laws are enforced in building operations; to evaluate works performed by sub-contractors and make recommendations for payment; to analyse progress reports produced by contractors and recommend corrective action where necessary; to produce monthly progress reports on each project assigned and to perform related duties as assigned; any other suitable duties which EMBD required him to perform from time to time.

[33] As Engineer under the C1, C2, C7 and C8 Contracts, pursuant to Clauses G2, G22, G25 and G31 of the General Conditions of Contract, Mr Walker had a duty to exercise general supervision and direction of the Works; to inspect and test the Works and the materials; to prepare a detailed bill based on actual measurements and levels, for the quantities of the Works executed by contractors and to certify the amounts due to them on account of the executed works' estimated contract value; to prepare and deliver his certificates for payment to the Employer; a duty, upon completion of the Works, to make final inspection expeditiously and to notify the Contractor of acceptance; a duty to issue an itemised list of incomplete and unsatisfactory items, as soon as, in his opinion, the Works were substantially completed and passed any final test prescribed under the Contract; and a

duty, upon completion and/or correction of such items, to issue a Certificate of Completion. Mr Walker was also authorised to reject all work and materials which did not conform to the Contract; to issue change orders, the computation of quantities and the certification of payments.

EMBD's tender rules

[34] Much of the pleaded claim revolves around EMBD's Tender Rules. On 4 September 2014, the board of directors approved The Estate Management and Business Development Company Limited Tender Rules and Procedures, 2014 ('the Tender Rules'). EMBD's pleadings rely on the full terms, force, effect and purpose of the Tender Rules.

[35] In order to fulfil its mandate, EMBD pleads that it engages the services of suitably experienced and qualified contractors registered for construction of suitable projects and related infrastructure. The award of EMBD contracts is governed by the Tender Rules. The rules are designed to protect public funds and ensure fair and competitive procurement processes in the best interests of EMBD and the Republic.

[36] A Tenders Committee ('the Tenders Committee') was established under section 3 of the Tender Rules to be comprised of three members of the Board (one of whom was to be appointed Chairman), the CEO, a non-member secretary, and a lawyer "where necessary". In accordance with section 4 of the Tender Rules, the Tender Committee's role was to implement the Tender Rules, to invite offers for the supply of works or services for EMBD, to evaluate tenders, to award contracts of $2 million or less, and, to make

recommendations to the Board of EMBD in relation to the award of contracts exceeding $2 million in value.

[37] The Tender Rules set out the requirements and processes to be followed by the Tenders Committee (and contractors) when carrying out its functions and, among other things, provides that:

> (a) Where the register of prequalified contractors for a particular category contains in excess of five names of contractors, a minimum of four should be invited to tender for a specific contract which minimum shall comprise "an equitable assortment" of previous awardees and other contractors;
>
> (b) Uniformity, consistency and transparency must be manifest in all communications with tenderers on any substantive aspects of their bids subsequent to their submission;
>
> (c) To assist the Tender Committee in assessing awards, it must be provided with (genuine) in-house estimates of the cost of the goods, works and services in writing;
>
> (d) A member of the Tenders Committee or of the Evaluation Committee who has a financial interest in or relationship with a company, other corporate body, firm or partnership, whether as creditor, debtor, participator or otherwise, shall disclose the fact and shall not take part in

the evaluation, consideration or discussion of the offer, nor furnish any recommendation or vote on any question concerning the same.

The Cartel Arrangements

[38] As I will explain below, the law recognises that conspiracies are only rarely, if at all, founded on the clear evidence of a written agreement. Conspirators go to great pains to conceal their conspiracy. In pleading a lawful or an unlawful means conspiracy the courts have approved the allegation of sufficient facts that will allow the judge, if they are proven at trial, to make an inference of the conspiracy. This is an inference-dependent tort. EMBD relies individually and/or collectively on numerous facts and circumstances to infer the existence of Cartel Arrangements.

[39] In summary, it is EMBD's pleaded case in relation to the Caroni Roads Contracts that pursuant to the Cartel Arrangements and with the intention of enriching the EMBD Contractors and causing injury to EMBD:

(1) Pre-tender estimates ('PTEs') prepared by EMBD's engineers were inflated;

(2) Quantities of materials required for the works were overstated in the Bills of Quantities;

(3) The EMBD Contractors improperly and unlawfully had advance sight of revised, unjustifiably inflated PTEs;

(4) The EMBD Contractors colluded to agree which of them would win each of the Caroni Roads Contracts;

(5) The pre-selected winners used the revised, inflated PTEs to ensure that their final winning prices were very close to the estimated uplifted figures;

(6) The pre-selected losers adjusted their prices in the relevant bills of quantities to ensure those bids were unsuccessful;

(7) There was no competitive bidding for the Caroni Roads Contracts and contracts were awarded at inflated prices;

(8) Works were claimed and invoiced by the EMBD Contractors (save for LCB) and were purportedly certified on behalf of EMBD, and payments were made to them, without appropriate inspection or review of the Works, with the consequence that payments were made for defective and omitted Works, and for inflated quantities;

(9) The Caroni Roads Contracts were administered without the documentation and records ordinarily required and/or maintained for projects of that nature;

(10) A $400 million Financing Facility was obtained from First Citizens Bank to pay the EMBD Contractors (save for LCB), alternatively to meet the bulk of the payments, by a false representation made to EMBD's board of directors by Mr Balroop, acting on behalf of Mr Parmassar, that the facility would be used to pay existing debts owed by EMBD to numerous other contractors.

The pleaded history of the EMBD contracts

[40] The history of the award of the contracts is fully pleaded by EMBD:

(1) Mr Parmassar was appointed Acting CEO on 6 October 2014. Prior to that he held roles in financial management capacities.

(2) On 2 December 2015, for reasons not fully understood or explained, EMBD terminated previous contracts awarded to KJS Enterprises Limited for works at Exchange III and Picton III.

(3) On 23 January 2015 the EMBD board approved a list of pre-qualified contractors for large contracts (exceeding $35 million); medium contracts (exceeding $12 million and up to $35 million); and small contracts (exceeding $2 million and up to $12 million). All the EMBD contractors (save for LCB) were selected as pre-qualified contractors for the Exchange III and Picton III works. Other previously pre-qualified contractors were not selected.

(4) One week later, on 30 January 2015, at a meeting of the EMBD board, Mr Parmassar and Mr Balroop recommended the tendering to the pre-qualified contractors of the works at Exchange III and Picton III. The board approved the recommendation.

(5) With respect to the Caroni Roads Projects it is unclear and in what circumstances the upgrade and rehabilitation of these roads was first contemplated.

(6) On 5 March 2015 Dr Moonilal sent an SMS text message to Mr Parmassar stating, "*also prepare note for roads laiae with naim*". EMBD asserts that "*laiae*" is a misspelling of "liaise" and "*naim*" is a misspelling of Naeem, a reference to Mr Naeem Ali, the principal of Namalco. The note Dr Moonilal refers to is a Cabinet

Note, that was later presented to the Cabinet by Dr Moonilal for the approval of the Caroni Roads Project. The cabinet accepted the Note. Namalco won three tenders.

(7) I should add that all references to SMS and iPhone messages refer to transcriptions and electronic records. They are found in Schedule 8 to the Statement of Case in the Related Action. They were extracted, as far as I can tell, from Mr Parmassar's mobile phone. The iPhone messages appear to be extracted directly from Apple Inc. Some of the communications were made by email. Their admissibility at the trial is a matter of law. It does not concern me now. The text messages and emails are pleaded as matters of fact. Because of their importance as a tool of inference that will eventually have to be assessed at trial, and because the strike out applications attack the sustainability of the claims on the basis that the inferential evidence is weak and improperly pleaded, I will set out the material text messages at para [53] below. As I will explain later in this judgment, I am weighing the sufficiency of the particulars of the pleadings at an interlocutory stage and not the evidence that will be led at the trial.

(8) Five days after Dr Moonilal's SMS message, on 10 March 2015, EMBD issued a tender for the Exchange III works to TN Ramnauth, Fides, Kallco, Ramhit, and KJS Enterprises Company Limited. No reasons were recorded for the selection of only these contractors. EMBD had a list of many other pre-qualified and competent contractors for large, medium, and small contracts.

(9) Seven days later, on 17 March 2015, a pre-tender meeting and site visit took place.

(10) Two days later, on 19 March 2015 Mr Parmassar sent an email to Dr Moonilal containing a draft Note to Cabinet recommending the upgrade and development of

nine of the ten Caroni roads. C9 ("New Colonial Road, Barrackpore") was not included in Mr Parmassar's draft Cabinet Note. Dr Moonilal replied to Mr Parmassar by email: "*can you add the barrackpore rd that kalco wants to do?"* C9 (the Barrackpore Road) was eventually added to the project and eventually awarded to Kallco.

(11) On the same day, 19 March 2015, Mr Parmassar sent another email to Dr Moonilal containing a revised draft Note to Cabinet for the ten Caroni roads, now including C9. It is not known whether the state of repair of the Barrackpore road was inspected by the EMBD engineers before the C9 road works were included in the revised Note or if any draft estimates of the cost of the works was considered.

(12) Four days later, on 24 March 2015, bids were submitted to EMBD for the Exchange III works as follows: TN Ramnauth-$166,960,133.30; Ramhit-$186,471,498.24; Fides-$198,671,811.39; Kallco-$212,151,099.75; KJS-$84,617,696.90 (this tender was non-compliant as it did not price the entire Bill of Quantities).

(13) Seven days later, on 31 March 2015, Atlantic Project Consultants Limited, consultants to EMBD, issued a Tender Evaluation Report in relation to the Exchange III tenders. They recommended TN Ramnauth's tender that was said to be 9.05% higher than the Engineer's revised PTE of $153,098,143. The EMBD board approved the recommendation on 14 April 2015 and three days later, on 17 April 2015 Mr Parmassar issued an award letter to TN Ramnauth for $166,960,133.30. The contract was signed on 13 May 2015. Mr Parmassar and Mr

Balroop signed on behalf of EMBD. Dr Moonilal made a text enquiry message of Mr Parmassar of the amount of the award.

(14) On 30 April 2015, just over a month after Mr Parmassar emailed the revised Cabinet Note to Dr Moonilal, the Cabinet approved Dr Moonilal's recommendation to upgrade and develop the Caroni roads. The Cabinet accepted the recommended provisional budget of $330,400,000 VAT exclusive.

(15) Two weeks later, on 14 May 2015 Mr Balroop, as Secretary of the Tenders Committee, issued invitations to tender for the Picton III works to TN Ramnauth, Namalco, Hanover Construction Company Limited, and R. Mahabir and Sons. The invitation specified that a pre-tender meeting and site visit was to take place four days later, on 18 May 2015 and that all tender submissions were to be received no later than 11.00 am on 21 May 2015, a mere three days after.

(16) TN Ramnauth, together with Hanover Construction and R. Mahabir and Sons, submitted tenders on 21 May 2015. On the very next day Mr Khalil Baksh (an EMBD Project Manager) evaluated the tender bids and recommended that the Picton III Works be awarded to TN Ramnauth as the lowest bidder at $56,932,843 VAT inclusive. This tender was within 10% of the Engineer's revised PTE of $52,019,962.50.

(17) The EMBD board of directors met on 25 May EMBD. Mr Parmassar informed them that Dr Moonilal had recommended to the Cabinet that EMBD should be appointed to upgrade and rehabilitate the Caroni roads. This was not one of EMBD's corporate mandates. Mr Parmassar indicated that Dr Moonilal had recommended a budget of $330,375,000 and gave an explanation of the Caroni

Roads' current condition and the advantages of their development. He recommended that EMBD should approve the works subject to the Cabinet's approval. Mr Parmassar did not, as far as I can tell from the pleadings, disclose his own involvement in drafting the revised Note, or whether he liaised with Mr Naeem Ali of Namalco in its drafting, as instructed by Dr Moonilal. Namalco eventually won substantial awards of contracts.

(18) The board accepted the recommendation. Mr Parmassar also recommended, and the board approved, the award of the Picton III contract to TN Ramnauth for the revised sum of $56,758,905 VAT inclusive. It is to be noted that Mr Parmassar informed the board that KJS Enterprises, the previously awarded contractor whose services were terminated (there is some discussion of their termination in the SMS messages passing between Mr Parmassar and Dr Moonilal) had already completed 85% of the Picton III project.

(19) On 1 June 2015 the Acting Permanent Secretary in Dr Moonilal's ministry wrote Mr Parmassar to say that the Cabinet had agreed to upgrade the Caroni Roads, subject to the availability of funds.

(20) On the same day, 1 June 2015, TN Ramnauth wrote the Tenders Committee to confirm that its tender submission for the Picton III works was $49,355,570 VAT exclusive and Mr Parmassar wrote an acceptance of tender letter in which the contract sum was stated to be $56,758,905.50 VAT inclusive. By my calculation of the VAT components in both figures, Mr Parmassar thereby agreed to a figure that was $1,233,899.30 in excess of the figure originally submitted by TN Ramnauth.

(21) On 2 June 2015 the Acting Permanent Secretary emailed Mr Parmassar stating that Dr Moonilal ". . .*just spoke to me. He informed he had discussions with Ministry of Finance and they will be sourcing funds for the upgrade works* [of the Caroni Roads], *so you should proceed to commence the works*". It seems unusual to me that an instruction to proceed with the Works could be given in advance of a proper assurance that the funds were already secured.

(22) In early June a draft Note to the Tenders Committee was prepared, presumably by or at the behest of Mr Parmassar. It recommended to the Tenders Committee that tenders should be invited from the six EMBD contractors for the Caroni Roads Contracts. The draft was supposed to be signed by Mr Parmassar, but it was not. The draft Note did not disclose why only the six EMBD Contractors were selected. The Note was not sent to the Tenders Committee. The Tenders Committee was not involved in the selection of these six EMBD Contractors.

(23) On 11 June 2015 EMBD issued Invitations to Tender to the EMBD Contractors. No justification was documented by EMBD for the selection of these six contractors for each of the ten roads. There is no document that explains why the 26 other large contractors (who were pre-qualified for large contracts in excess of $35 million) were excluded, and why LCB (which was not a pre-qualified contractor) was invited to bid.

(24) Surprisingly, the Tender Invitation stipulated a pre-tender meeting and site visits commencing at 9.00 am on the following day, 12 June 2015 and a deadline for submission of tenders a short seven days later, on 18 June 2015. Those meetings and site visits took place on 12 June 2015.

(25) The EMBD Contractors submitted their tenders by 18 June 2015. The important component in each tender is the Bill of Quantities. It stated the rates and pricing of each tenderer on the ten contracts for some 208 activities or line items in each Bill. EMBD has carefully studied each Bill of Quantity and pointed out patterns, oddities, and inconsistencies in all of them. As I will explain below, EMBD is asking the trial court, based on these patterns, oddities, and inconsistencies, to make an inference of collusion sufficient to sustain part of its plea of unlawful means conspiracy in the award of specific Caroni Road Contracts to specific EMBD Contractors.

(26) A mere four days later, on 22 June 2015, Project Manager Mr Khalil Baksh prepared a Tender Evaluation Report on the 60 Bills of Quantity. This seems to me to be a Herculean accomplishment in such a short space of time. According to EMBD, the evaluation consisted of the ranking of each bid on cost alone, after the project engineers had verified their mathematical accuracy. In each case Mr Baksh recommended the tenderer with the lowest bid. No recommendation was made to negotiate bid amounts and no comment was made about the alleged patterns, oddities, and inconsistencies in the pricing data. The Tenders Committee was not involved in this exercise.

(27) The contract to TN Ramnauth for Picton III was signed by Mr Parmassar and a TN Ramnauth signatory on 25 June 2015. It specified that works were to commence eight days later, on 7 July 2015, and to be completed by 30 September 2015. Save for Dr Moonilal's Acting Permanent Secretary's email that funding "will be sourced" at the Ministry of Finance there was no guarantee of an approved

line of credit or a loan. At that time, EMBD was already indebted to many other contractors for close to $1 billion.

(28) On 7 July 2015 the EMBD board met and accepted Mr Parmassar's recommendation to award the ten contracts to the EMBD contractors (excluding LCB) in accordance with Mr Baksh's Tender Evaluation Report and the board accepted the recommendation. Also, at that meeting Mr Parmassar was appointed the CEO. SMS text messages between Dr Moonilal and Mr Parmassar demonstrate Mr Parmassar's desire to be appointed as CEO.

(29) On that same day Mr Parmassar wrote the five successful bidders to say that their bids for the ten Caroni roads (C1 to C10) were accepted. Again, at this point there was no certification from the Ministry of Finance that funds had been allocated.

(30) On 30 July 2015 First Citizens Bank Limited ('FCB') offered EMBD a financing facility of $400 million to pay historic and outstanding debts owed to other contractors. Together with interest, the cost of the loan was $437 million.

(31) The EMBD board met on 3 August 2015 and based on the recommendations of Mr Balroop, Mr Parmassar being absent, it resolved to enter into the FCB financing facility for $400 million. Mr Balroop did not disclose that the FCB facility was intended to pay the EMBD contractors for work under the Caroni Roads Contracts. Instead, he said it "would assist in significantly reducing the balance owed to [other] contractors". Mr Balroop also told the board that EMBD owed contractors $900 million for infrastructure works on 23 residential sites. This part of the pleading is asking the trial court to infer that Mr Balroop tricked the board into accepting the FCB loan.

(32) Beginning on 27 August, about a week before the General Elections, and continuing until November 2015 TN Ramnauth had a contract dispute with EMBD over additional works that it said were necessary on the Picton III works and suspended works citing, primarily, non-payment of its invoices amounting to some $70.6 million. TN Ramnauth's works on Exchange III were suspended in October 2015, again, because of unpaid invoices. By then another government had been elected.

Pleaded facts and circumstances said to demonstrate the Cartel Arrangements

(a) Patterns, oddities, and inconsistencies in the tender bids for Exchange III Contract

[41] In this section of the judgment I will set out the EMBD case in relation only to the Exchange III tender bids only. The Caroni Roads tender bids are examined at (e) below.

[42] EMBD has painstakingly analysed the bids by all the contractors (including LCB) and alleges patterns, oddities, and inconsistencies in the pricing used by the EMBD Contractors bidding for the Exchange III Contract. This contract was awarded to TM Ramnauth. Mr Taradauth Ramnauth is the person who allegedly bribed Mr Parmassar by arranging the award of an HDC house and offering to rent a house for him in an upmarket neighbourhood with one year's rent paid in advance. EMBD has correlated the bids with EMBD's PTEs and revised PTEs. These patterns and oddities are alleged to be explicable only by collusion between the bidders and by each of the bids having been prepared by a single individual and/or individuals with advance sight of the PTEs and the revised PTEs.

[43] EMBD's employees or consultants prepare PTEs to budget for likely project costs. They are said to be a critical element of EMBD's tendering process, in particular (a) for use during bid evaluation to assess Bills of Quantities or similar estimates submitted by contractors, and (b) to assist the Tenders Committee and the Board of EMBD to assess the reasonableness of bid amounts. It stands to reason that they should not be shared with bidders.

[44] The Bill of Quantities is divided into activities, with the following main headings: "1.0 General and Preliminaries", "2.0 Site Clearance and Earthworks", "3.0 Concrete and Drainage Works", "4.0 Roadworks" and "5.0 Potable Water Piping and Water Connection" and "6.0 Sanitary Piping and Sewer Connection". There are many activities listed under each heading.

[45] Schedule 3 to the Statement of Case in the Related Action contains a summary of the analysis of the rates and prices, highlighting patterns in the data which EMBD says are consistent only with collusion between the bidders and with the bidders having advance sight of the PTEs and the revised PTEs.

[46] There are numerous individually priced activities where the percentage range between the highest and lowest price tendered by the bidders is identical, to two decimal points, for a significant number of individual items within a group of activities (with the range calculated as the difference between the highest and lowest bids of the participating EMBD Contractors divided by the minimum bid). In addition, the pricing of each

contractor for these items is greater, by an identical percentage than that of the PTE. It is alleged that the pricing of all the participating EMBD Contractors demonstrates these patterns.

[47] EMBD provides this example:

(1) 25 of 38 activities in the Bill of Quantities under the heading "*3.0 Concrete and Drainage works*" had an identical 8.92% price range between the lowest and highest bids;

(2) There were the following correlations between the bids and the PTEs for all of these activities: (i) Fides's prices are 18% above the PTE, (ii) Kallco's prices are 27% above the PTE (iii) Ramhit's prices are 22% above the PTE; (iv) TN Ramnauth's prices are 17% above the PTE;

(3) 10 of the 38 activities had an identical 45.79% price range between the lowest and highest bids;

(4) There were the following correlations between the bids and the PTEs for all of these activities: (i) TN Ramnauth's prices were 7% above the PTE; (ii) Fides's prices were 30% above the PTE; (iii) Kallco's prices were 56% above the PTE; and (iv) Ramhit's prices were 22% above the PTE.

[48] In each of these cases the price of each losing bidder was also greater than that of TN Ramnauth's by an identical percentage, to two decimal points. It is alleged that the pricing of all the participating EMBD Contractors demonstrates this pattern.

[49] At para 136.6 of EMBD's Statement of Case the following example is given:

(1) The prices of Fides are all 0.85% above TN Ramnauth's respective prices.

(2) Kallco's prices are all 8.92% above TN Ramnauth's respective prices.

(3) Ramhit's prices are all 4.27% above TN Ramnauth's respective prices.

[50] EMBD asserts that these matters demonstrate that the purportedly competing bids for the Exchange III Works were created by the same person with sight of the PTE, as part of collusion between bidders and between the bidders and the Public Officials.

(b) Unusual speed in the Caroni Roads Contracts

[51] The unusual speed at which the Caroni Roads Contracts were considered, approved and paid has also been pleaded. I have set out the chronology of the main events at para [40] above. It seems to me that the events unfolded with such extraordinary rapidity that it might be regarded as emblematic of either very good governance or very bad governance. It is EMBD's case that the speed is explained only by an indecent rush to enrich the EMBD contractors in the last months before the then government faced the polls. However, unusual speed is not the determinative inferential factor in EMBD's pleading of the Cartel Arrangements. All the allegations and inferences of fact must be assessed in the round at trial. For the purposes of determining the strike out applications, they must be assessed as well. With respect to unusual speed, EMBD also relies on statements made by Mr Parmassar in an interview with Price Waterhouse Coopers ("PWC") on 1 June 2016. He told PWC that it was strange that EMBD was going to take on a roads project; that he had never heard stakeholders complain about the Caroni Roads; and that he also believed that the Caroni Roads Projects was outside of the mandate of EMBD. He told PWC that he

saw the need for only one of the roads, namely C3. What he said to PWC conflicts sharply with the pleaded extracts of text messages from his mobile phone.

(c) Private SMS and iPhone messages and emails passing between Dr Moonilal, Mr Parmassar, Mr Ramnauth and Kallco

[52] EMBD pleads the instruction given by Dr Moonilal to Mr Parmassar by email on 19 March 2015 to include what became C9 amongst the Caroni Roads Contracts because it was a road that Kallco wished to undertake and the subsequent purported award of that C9 contract in July 2015 to Kallco as evidence of wrongdoing. It also pleads the intended or actual involvement of Naeem Ali of Namalco in the preparation of a Note for Cabinet on the Caroni Roads as evidence of wrongdoing.

[53] What follows are the pertinent messages from October 2014 to September 2015 upon which EMBD relies in its pleadings. I must point out that these messages are pleaded as matters of fact and not inference. As Defences have not been filed, they are uncontradicted. CPR processes will determine their usefulness at trial.

(1) Mr Parmassar to Dr Moonilal (25 October 2014) - "*Minister good afternoon, thank you very much for the private meeting and the confidence you have placed in me thus far. It is greatly appreciated and I am honoured to be part of your team. Thank you again very much.*"

(2) Mr Parmassar to Dr Moonilal (3 November 2014) - "*Morning chief i trust you had a good weekend. I was just asked to make arrangements for interviews for the position of CEO EMBD. Dylan Mc Kenzie off the record told me that he has*

to meet with the chairman to do the short list. I am asking for your assistance in this matter as I would like to be the chosen person. You know i am willing and ready to work with you in getting the job done. Any assistance in making this happen will be greatly appreciated". Dr Moonilal replied: "*Noted*".

(3) Mr Parmassar to Dr Moonilal, five messages, (1 December 2014) - "*Afternoon, i am told your instructions are to terminate KJS from the 2 sites he is on. Can u confirm?*" (This is a reference to the Exchange III and Picton III sites. Dr Moonilal's reply is not known); "*idk i wanted to bring him to the table to discuss a way forward for both parties but was told no no discussing and this was your instruction*"; "*He has a dispute with us about a 43% rate increase amounting to about 13 mn*"; "*Of the surplus we have 148 mn remaining*"; "*How should i proceed with this KJS matter? Chair wants to do termination letter tomorrow latest*"

(4) Mr Parmassar to Dr Moonilal (3 December 2014) - "*I enjoyed the lime last night and it was an honour to hear you say i am the newest member of the crew. On Saturday I would like you to meet my wife*"

(5) Dr Moonilal to Mr Parmassar (13 December 2014) - "*Need 25 m for Ramhit on Felicity project and 10 m for kalco*"

(6) Text exchanges between Mr Parmassar and Dr Moonilal (18 December 2014) - Mr Parmassar: "*Document for Ramhit being prepared. Problems with kalco as it is variations that was not approved. Chairman told me i am not to make any payment to him. Chair also told me to tell u he is instructing me not to pay*"; Dr Moonilal: "*To kalco?*"; Mr Parmassar: "*Yes to kalco*"; Dr Moonilal: "*What*

about Ramhit?"; Mr Parmassar: "*Payment will be ready in the morning it went for 1 signature and engineer giving me certificate also. Danielle has cheque but wants to see certificate first*"; Dr Moonilal: "*Good*"; Dr Moonilal: "*Send a cheque for me to give to Ramhit tom*"; Mr Parmassar: "*Will so* [do]".

(7) Text exchanges between Dr Moonilal and Mr Parmassar (3 January 2015) - Dr Moonilal: "*Need to pay kalco some money*"; Mr Parmassar: "*OK chief i think we can a 4 mn*"; Dr Moonilal: "*That is safe?" "Give me cheque mon"; "Prepare cheque";* "*Will have to confirm but i know he submitted invoice for that amount*"; Mr Parmassar: "*Will do*"

(8) Text exchanges between Dr Moonilal and Mr Parmassar (5 January 2015) - Dr Moonilal: "*Sand pit in Milton, Couva, U know about that?*"; Mr Parmassar: *It is a new sand pit we are exploring the idea of opening*" Dr Moonilal: "*Want to lease to Ramhit and kalco*"; Mr Parmassar: "*Understood but we now making applications so it is still sometime off. But i will accelerate*"; Dr Moonilal: "*Fast forward*".

(9) Mr Parmassar to Dr Moonilal (21 January 2015) - "*Chief goodnight as u see i don't really ask for much. . .but i am asking for assistance in obtaining a single unit family home in egypt* [an HDC housing development in Egypt Village known as Oasis Green]. *Asgar has all my info but i will also u. . .Any assistance will be greatly appreciated*".

(10) Mr Parmassar to Dr Moonilal (21 January 2015) - "*My reference# 113102-EID-TVK. Application name Gary Parmassar. . .Oasis Green Egypt Village*

unit 2, 118, 119, 120, or 122 if possible. . .Thanks". Dr Moonilal: "*U want a house*?"; Mr Parmassar: "*Yes*".

(11) Mr Parmassar to Dr Moonilal (26 January 2015) - "*Gentle reminder about the house*".

(12) Text messages between Mr Parmassar and Mr Ramnauth (10 February 2015) - Mr Parmassar: "*My ref #113102-EID-TVK. Application name Gary Parmassar. . .Oasis Green Egypt Village any one of these units 2, 118, 119, 120 or 122 if possible. . .Thanks in advance*"; "*Got call. . .Have to collect package tomorrow*"; Mr Ramnauth: "*My friend great we on d inside*" [EMBD alleges that the "package" refers to the interview package issued by HDC to successful applicants].

(13) Mr Parmassar to Dr Moonilal (10 February 2015) - "*Ahould* [should] *be sending you 3 draft notes today. Sandpit, fenceline, and estate roads 100 mn*"

(14) Text exchange between Mr Taradauth Ramnauth and an HDC officer that was forwarded to Mr Parmassar's phone by Mr Ramnauth - "*Hi Gary Parmassar have been successful for his appointment on d 20 th feb 9.00am I am asking that y resched to the 25 th due to an unexpected commitment. Thans all d best for carnival leving for about 10 days will contact you when I am back. Okay. No Problem. Enjoy*."

(15) Series of text messages sent by Mr Parmassar to Mr Taradauth Ramnauth on a currently unknown subject (19 February 2015) - "*What should we expect tomorrow. . hostile or cordial?*"; "*Sent email*"; "*Spoke to the chief on the matter . . . He said he will advise on what will happen*"; "*Before any award is done it*

[if] *one is done at all he will advise . . . But he appreciated me pointing out the exposure*" [the word "chief" and "boss" are often used to describe Dr Moonilal].

(16) Text exchanges between Mr Parmassar and Mr Taradauth Ramnauth exchanged with regard to the HDC unit (25 February to 4 March) show Mr Parmassar sending reminders of his application reference number and the preferred house allocation - Mr Ramnauth: "*wud work on it c u later*" [two such replies to Mr Parmassar]; Mr Parmassar: "*All my documents have been submitted to hdc*"; Mr Ramnauth: "*Good will follow up will now send the nos. all well otherwise?*"; Mr Parmassar: "*All good. working on the important doc needed*".

(17) Dr Moonilal to Mr Parmassar (4 March 2015) - "*We have some concerns about exchange 3 let's talk later*"; Mr Parmassar in reply: "*Ok np*".

(18) Dr Moonilal to Mr Parmassar (5 March 2015) - "*Also prepare note for roads laiae with naim*" [EMBD alleges that the last three words are "liaise with Naeem" (Naeem Ali, the principal of Namalco)].

(19) Text exchange between Mr Parmassar and Mr Taradauth Ramnauth (10 March 2015) - Mr Parmassar: "*Morning . . . Showing the wife the numbers i chose . . .If possible of the five numbers 187 is the first preference*"; *"The invitation should also be ready for ex 3 today*"; Mr Ramnauth: "*The only way u can't get dat is if it already taken Hdc is checking avail. Right now will advise asap. And Appreciate all for ex*" [EMBD alleges that "ex" refers to the Exchange III project]; Mr Parmassar: *Thanka alot for everything*"; Mr Ramnauth: *K man we on d same team but me and N shud get something Lang or Vals for a man like*

u" [EMBD alleges that "N" refers to Naeem Ali, and "Lang" and "Val" refer to two upscale suburban neighbourhoods in Lange Park and Valsayn]; Mr Parmassar: "*That will be nice and appreciated but what i look at now also satisfies immediate need . . .Wife is 4 mths pregnant*"; Mr Ramnauth: "*If dat is a problem rent d best apt I paying 1 year upfront u have to talk wit me lots of ideas for helpful folks like you*"; Mr Parmassar: "*Appreciated but we prefer this for now and then move up . . . Also of appearance . . . Thanks for the offer tho*"; Mr Ramnauth: "*K*".

(20) Dr Moonilal to Mr Parmassar (12 March 2015) - "*Can we pay mainway and LCB something?*"

(21) Text exchange between Dr Moonilal and Mr Parmassar (13 March 2015) - Dr Moonilal: "*Need small payment for mainway and LCB"*; "*Tell me how much b 4"*; Mr Parmassar: "*OK will prepare*"; "*I can make payment of 5 mn each*"; Dr Moonilal: "*Yes prepare chq and send to me*".

(22) Text messages between Mr Parmassar and Dr Moonilal (17 March 2015) - Mr Parmassar: "*Minor works in picton 3 to tender and semi major works in hermitage to do tendering*"; Dr Moonilal: "*Invites* [invite] *kallco and fides for hermitage and Picton*".

(23) Text message received by Mr Parmassar from a number saved in his mobile phone's address book as "Namalco Ali"(1 April 2015): "*Find time and u and t talk to the boss on my matter*" [EMBD alleges that "t" refers to Mr Taradauth Ramnauth]; Mr Parmassar text to Mr Ramnauth on same day: "*I really appreciate u and N accepting me as one of the boys and ensuring my good faith*

with the boss" [EMBD, as before, asserts that "the boss" refers to Dr Moonilal, and "N" refers to Mr Naeem Ali, principal of Namalco]; Mr Ramnauth replied to Mr Parmassar: "*My friend you deserve no less I want before we leave to tell d boss to conf you in ur presence*"

(24) On 14 April 2015, the date of the approval of the award of the Exchange III Works, text exchange between Mr Parmassar and Mr Ramnauth - Mr Parmassar: "*Congrats. . . Approved*"; Mr Ramnauth: *Great thanks for all ur support*"; Mr Parmassar: "*My pleasure*".

(25) On 17 April 2015, the date of the award of the Exchange III contract to TN Ramnauth, text exchange between Mr Parmassar and Dr Moonilal - Mr Parmassar: "tn [TN] *on his way to collect* [letter of award]; Dr Moonilal: ". . .*Send letter to me in Parl I will give tn myself*". . . "*What is the value of the work*?"; Mr Parmassar: "*167 mn*".

(26) Text messages between Mr Parmassar and Mr Ramnauth (24 April 2015) - Mr Parmassar: *". . .thanks again for the invitation yesterday. Felt honoured. Also thanks for everything thus far*"; Mr Ramnauth: "*No probz my friend u are one of d boys*".

(27) On 26 April there was a ceremony for those moving into Oasis Green. On 25 April Mr Parmassar messaged Dr Moonilal: "*Collecting keys tomorrow. Should i be part of ceremony or attend and collect keys privately after ceremony*?"; Dr Moonilal replied: "*Don't collect keys tom*"

(28) On 18 May 2015, after the invitations to tender on Picton III (a residential development) were issued, but before bids were submitted, Text exchange

between Mr Taradauth Ramnauth and Mr Parmassar – Mr Parmassar: "*Kendall said i should let u know i want to proceed with the air condition units. . .he needed your go ahead*"; Mr Ramnauth: "*Pls convey to him he gave my approval. . .we meeting Tom wit d boss also eng estimate*"; Mr Parmassar: "*OK np guy should be finalising estimate now*"; Mr Ramnauth: "*Great. . .K thks c u at Roya*l [Hotel] *11.30 am*"; "*Gary* [Parmassar] *hi any word on d estimate*?"; Mr Parmassar: "*Getting iy* [it] *in the morning*" [this might be a reference to the PTE].

(29) Text exchange between Mr Ramnauth and Mr Parmassar (21 August 2015) - Mr Ramnauth: "*wat about Picton*"; "*U gave the instruct*"; Mr Parmassar: "*Having that discussion now*"; Mr Ramnauth: "*Great thks*".

(30) Text exchange between Mr Parmassar and Mr Ramnauth (22 August 2015) [discussing the arrangement of a meeting or a "gathering" in Chaguanas]- Mr Parmassar: "*Where ia* [is] *the gathering later and what time?*"; Mr Ramnauth: "*Not sure trying to find out*"; "*I can see u in chag briefly Tom I have to meet someone in Lange park*"; Mr Parmassar: "*Let's meet Tom around 10.30 am*"

(31) Text message sent from contact saved in Mr Parmassar's contact list as "Kall Co" to Mr Parmassar (25 August 2015)- "*call boss*" [EMBD alleges that "boss" is a reference to Dr Moonilal].

(32) Text exchange between Mr Taradauth Ramnauth and Mr Parmassar (25 August 2015) - Mr Parmassar: "*Trying to call the boss the* [to] *let him know documents there but no answer*"; Mr Ramnauth: "*we good and u got d instruct*"; Mr Parmassar: "*Yes*"; Mr Ramnauth: "*We missing u having a great time here*";

Mr Parmassar: "*Fighting for roads $";* Mr Ramnauth: "*Fight d fight we fucking lol*".

(33) Text exchange between Mr Taradauth Ramnauth and Mr Parmassar (2 September 2015, three days before the General Elections) - Mr Ramnauth: "*how are u the boss ask me to send you this. Junior 20* [EMBD alleges that "Junior" refers to Junior Sammy Contractors Limited] *Naim 20* [Naeem Ali of Namalco] *TN 26* [TN Ramnauth] *Prem 15* [EMBD alleges that "Prem" is Premchand Ramhit, principal of Ramhit] *Kallco 15 Shane 4* [EMBD alleges that "Shane" refers to Shane Sagar, principal of Fides]. *Total—100*"; "*I mean d money anyway I just following instructions let's hope we get it tomorrow*"; Mr Parmassar: "*OK*"; "*I hope so also*".

(d) Failure to follow procedures set out in EMBD's Tender Rules

[54] EMBD pleads and relies upon the failure of those purporting to act on behalf of EMBD to follow the processes required by the Tender Rules and, alternatively, to apply their underlying principles, in respect of the award of the Caroni Roads Contracts. It also relies on the allegedly inconsistent and untruthful explanations given by Mr Parmassar to PWC about the award of the Caroni Roads Contracts. What follows is EMBD's pleaded case on this point.

[55] Thirty-one contractors were pre-qualified by EMBD to carry out work for contracts exceeding $35 million with an additional 19 contractors pre-qualified for medium contracts.

[56] However, the same six contractors were asked to bid for each of the 10 Caroni Roads Contracts. According to the pleadings, no reason was recorded for limiting the pool of bidders to this select group, there was no justification for doing so, and no attempt was made to ensure "an equitable assortment of previous awardees and contractors", in breach of Clause 26(11) of the Tender Rules.

[57] EMBD asserts that the trial court should infer that the tenderers were selected by Mr Parmassar and Mr Balroop together with or on the instructions of Dr Moonilal, acting collusively with the EMBD contractors. Mr Balroop issued an email instruction on 11 June 2015 to his administrative assistant for invitations to tender to be issued to the six chosen bidders.

[58] In an interview with PWC on 1 June 2016 Mr Parmassar is alleged to have said that the EMBD Contractors were selected because funding for the Caroni Roads may not have been very readily available so EMBD looked at contractors who had the ability to undertake the projects and could mobilise and execute quickly. No evidence of such an assessment has been found and, in its pleadings, EMBD denies that this was the basis for the decision.

[59] Mr Parmassar also allegedly told PWC that the Tenders Committee had advised which contractors should be invited to tender. In fact, according to the pleading, in breach of the Tender Rules, the Tenders Committee was not involved in the selection of the six bidders

(and its members were involved in approving tenders only as members of the EMBD board). EMBD also relies on the note from Mr Parmassar to the Tenders Committee recommending the six bidders that was prepared for his signature, not signed by him, and not delivered to the Tenders Committee. It also relies on the allegation that the Tenders Committee was not asked to approve the Caroni Tender Evaluation Report prepared by Mr Khalil Baksh.

[60] Further, EMBD relies on Mr Parmassar's letter to EMBD dated 17 February 2017 where he said that the bidders were chosen by the Divisional Manager of Projects and the Project Managers. This assertion is pleaded as inconsistent with EMBD's internal documents.

[61] EMBD asserts that it is to be inferred from the facts and circumstances that the bidders were selected by Dr Moonilal and Mr Parmassar, outside of the processes mandated by the Tender Rules; alternatively, Mr Parmassar did nothing to ensure an equitable assortment had been carried out when the bidders were presented to him by Dr. Moonilal.

(e) *C1-C10: Patterns, oddities, and inconsistencies in the bids of the EMBD Contractors*

[62] EMBD relies on the inconsistent and uncommercial pricing used by the EMBD Contractors across their bids for the Caroni Roads Contracts, and/or the patterns and oddities in the purportedly competing bids submitted by the EMBD Contractors. It asserts that these oddities are explicable only by collusion between the bidders. Below are the facts that EMBD asserts as indicative of this part of the Cartel Arrangements.

[63] Firstly, EMBD pleads that rates and prices submitted by any single contractor in relation to the same or a similar scope of work would be expected to be the same or similar across that contractor's bids for all the Caroni Roads Contracts on a per unit measurement (for example, per metre, per m^2, per item etc, as applicable), as the bids were submitted on the same date for road projects with essentially similar scopes of work.

[64] In fact, according to the pleadings, the tenders submitted by each of the EMBD Contractors for the Caroni Roads Contracts contain numerous and substantial differences between items that would be expected to be consistent across that single contractor's own bids for all ten contracts.

[65] In addition, prices used by each of the EMBD Contractors on winning tenders were in certain cases significantly above the lowest prices used by them for similar items in other tenders. EMBD pleads that it will rely at trial on the full contents of the tenders for the Caroni Roads Contracts but summarises key examples of the differences in Schedule 4 of the Statement of Case.

[66] In addition, Schedule 5 compares the pricing of each of the EMBD Contractors for the C3, C6 and C9 Works, against the lowest price submitted for the equivalent activity in other Caroni Roads tenders. The data demonstrates that Fides, Namalco, LCB, Ramhit and TN Ramnauth consistently inflated their prices on a number of significant items for the C3, C6 and C9 Works, each of which were won by Kallco. Each of these contractors

submitted some prices for the C3, C6, and C9 Works which exceeded the lowest prices they had submitted for other Caroni Roads Works either by 100% or by 1000%.

[67] EMBD pleads that it is to be inferred that they submitted prices which were so high that they must have known that they would not win the contracts, or that they were determined not to win them.

[68] An example of the alleged collusion is the cost of "thermoplastic road marking paint". At the material time, according to EMBD's expert's report, the market price of line painting was between $32 per meter and $45 per meter. The EMBD Contractors were in or close to that range on their winning bids and on some of their other bids. However, for the C3, C6 and C9 Works, LCB bid $440-$800 per meter, Namalco bid $350-$500 per meter, Ramhit bid $295-$500 per meter, and TN Ramnauth bid $400-$500 per meter.

[69] EMBD pleads that the impact of the pricing differences referred to in Schedules 4 and 5 is significant. It provides an example:

(a) Each of the Caroni Roads Contracts would have been won by a different company had each bidder used the lowest per unit price it had tendered in one or more of its other bids. The outcome of that analysis is shown in Schedule 6 to the Statement of Case.

(b) In those circumstances, the total price for the ten contracts would have been $248,134,954 as opposed to the actual price of $416,340,466, an increase of 68%.

(c) Fides submitted the lowest bid for most significant items for the C3, C6 and C9 Works. Overall, it was the lowest bidder for each of these works but was pushed into second place by extremely high pricing for bituminous prime coating ($550 per meter for the C3 Works and $750 per meter for the C6 and C9 Works). Those prices are said to be significantly outside both the market rates and the rate of $30 per meter tendered by Fides in its own winning bid for the C10 Works.

[70] EMBD asserts that there are also significant pricing differences between contractors on certain standard items that would be expected to be materially similar in cost. Examples are provided in the pleadings.

[71] It is EMBD's case that an analysis of the patterns, oddities, and inconsistencies in the tenders will raise an inference of collusion sufficient to prove the Cartel Arrangements and, flowing from or in conjunction with that, the tort of unlawful means conspiracy.

(f) The Pre-Tender Estimates were inflated by EMBD's then Engineers

[72] According to the Statement of Case, the PTEs prepared by EMBD's then in-house engineers were inappropriately inflated and there are close, consistent and highly unusual correlations between the Revised PTEs and the amount of the winning bids which demonstrate that the PTEs or their contents were secretly shared by representatives of EMBD with the EMBD Contractors and used by them to prepare their bids.

[73] The Caroni Roads Contracts were initially valued in total at $200 million based on PTEs prepared by engineers employed by EMBD. EMBD pleads that the amounts stated in the original PTEs were increased significantly by Mr Balroop without any change of scope or variation of design and without discussion with the Engineer that prepared them.

[74] Individual original PTEs have, to date, been recovered for C2, C3 and C8. They are summarised in Part One of Schedule 7 as follows:

(a) The original PTE for C2 (awarded to Namalco)) was revised from $27,509,568 to $51,066,836, an increase of 86%;

(b) The original PTE for C3 (awarded to Kallco) was revised from $22,247,154 to $45,194,516, an increase of 103%;

(c) The original PTE for C8 (awarded to TN Ramnauth) was revised from $15,747,353 to $40,688,628, an increase of 158%.

None of these drastic increases involved any changes to the scope of works or design according to the EMBD pleadings.

[75] Part Two of Schedule 7 compares the revised PTEs with the amounts of the winning bids. According to this Schedule eight of the ten winning bids were between 1.4% below and 1.7% above the final PTE, with six of the bids within 1%. The other two winning bids were just 3.8% and 8.2% above the revised PTE.

[76] EMBD pleads that these differences are narrow, both in themselves and by comparison with the significant pricing differences between (1) the pricing of each EMBD Contractor

across the ten Caroni Roads Contracts, and (2) the pricing of the EMBD Contractors on the same contracts, as shown in Schedule 1.

[77] According to this Schedule, 208 items were individually priced by the EMBD Contractors in their bids for the Caroni Roads Contracts (excluding provisional sum items). As shown in Part Three of Schedule 7, of those 208 items:

(a) 73 of the total items tendered by winning bidders (being 35% of 208 items) were tendered at an identical rate or price as the revised PTEs (compared to 1.25% in losing tenders), with 68 of these items arising in relation to the C1, C3, C6, C7, C8, C9 and C10 Contracts;

(b) 27% of the items tendered by Namalco (the winning bidder) for the C1 Works matched the Revised PTE (as compared to 3% of the items tendered in the losing bids);

(c) 77% of the items tendered by Kallco (the winning bidder) for the C3 Works matched the Revised PTE (as compared to none of the items tendered in the losing bids);

(d) 71% of the items tendered by Kallco (the winning bidder) for the C6 Works matched the Revised PTE (as compared to 1% of the items tendered in the losing bids);

(e) 57% of the items tendered by TN Ramnauth (the winning bidder) for the C7 Works matched the Revised PTE (as compared to none of the items tendered in the losing bids);

(f) 48% of the items tendered by TN Ramnauth (the winning bidder) for the C8 Works matched the Revised PTE (as compared to 1% of the items tendered in the losing bids);

(g) 32% of the items tendered by Kallco (the winning bidder) for the C9 Works matched the Revised PTE (as compared to 1% of the items tendered in the losing bids);

(h) 18% of the items tendered by Fides (the winning bidder) for the C10 Works matched the Revised PTE (as compared to 2% of the items tendered in the losing bids).

(g) Taradauth Ramnauth's close relationship with Dr Moonilal and Mr Parmassar led to the award to the EMBD Contractors (save for LCB) by Dr Moonilal and Mr Parmassar

[78] EMBD contends that the close relationship is apparent from the SMS and other messages that were exchanged between Mr Parmassar and Mr Ramnauth. Many of those messages are set out at para [53] above. I should note that in a free market TN Ramnauth is to be properly regarded as a company with as equal an opportunity to win a tender as any other contractor in the marketplace. An unseemly or comradely relationship, or an "inside track" with key decision-makers may raise an inference at the trial that the market is not free and that the special relationship yielded undeserved rewards.

[79] EMBD asserts that Mr Ramnauth procured or influenced the award by Dr Moonilal and/or HDC of a house to Mr Parmassar, and the allocation of a specific unit to Mr Parmassar by HDC. The HDC is mandated to provide affordable shelter to deserving applicants who

have qualified. The Ministry of Housing and Urban Development is ultimately responsible for selecting the persons to whom housing should be allocated by HDC. There is a long waiting list for such units, and the Ministry of Housing and Urban Development selects successful applicants through a process approved by Cabinet. After an interview process, HDC's policy "Allocation & Distribution Department's processes" states that allocations of units are to be made by a management trainee, business analyst or manager.

[80] On 30 April 2015, the HDC allocated Lot #177, Oasis Green, Egypt Gardens, Chaguanas (the "HDC House") to Mr Parmassar at a price of $773,938, to be paid in full by 8 April 2016. This was three-bedroom single family unit. The allocation followed an interview with HDC on 25 February 2015.

[81] The SMS messages set out in para [53] above create a very strong impression that Mr Ramnauth was instrumental in procuring the approval of Mr Parmassar as a successful applicant by Dr Moonilal and in the allocation of the HDC house to him.

[82] Further, Mr Ramnauth's messages to Mr Parmassar on 10 March 2015, "K man we on d same team but me and N shud get something Lang or Vals for a man like u" and "If dat is a problem rent d best apt I paying 1 year rent upfront u have to talk wit me lots of ideas for helpful folks like u" create a very strong impression of an offer to procure a property for Mr Parmassar and/or to pay his rent (one year in advance) on an apartment in Lange Park or Valsayn, which are more upmarket areas of Trinidad. As indicated earlier it is

EMBD's contention that it is be inferred that the reference to "N" in this SMS message is to Naeem Ali, the principal of Namalco.

[83] EMBD asserts that the SMS message of 2 September 2015 by Mr Ramnauth to Mr Parmassar stating "*how are u the boss ask me to send u this. Junior 20 Naim 20 TN 26 Prem* [Ramhit]*15 Kallco 15 Shane 4 [*Fides] *Total. – 100.*" was:

(a) an instruction by Dr. Moonilal to Mr Parmassar to pay the EMBD Contractors (and one other contractor) $100 million;

(b) that the instruction was given and executed a few days before the General Elections on 7 September 2015;

(c) that the instruction was given by Dr Moonilal through the principal of a contractor to EMBD, with Mr Ramnauth referring to Dr Moonilal as "*the boss*";

(d) that Mr Ramnauth's company, TN Ramnauth, was also the contractor receiving the highest payments; and

(e) that the instruction by Dr Moonilal to pay the EMBD Contractors was given in circumstances where EMBD was already indebted to several other contractors for close to $1 billion, prior to EMBD entering the Caroni Roads Contracts.

(h) The FCB loan facility was not used to pay historic unpaid debts to other contractors

[84] EMBD asserts that the EMBD Contractors were preferred for payments in August and September 2015 from the $400 million Financing Facility, in circumstances where there

was existing, historic, substantial indebtedness owed to other contractors who had previously carried out infrastructural works for EMBD.

[85] According to the pleading the EMBD board was specifically told by Mr Balroop on 3 August 2015 (on behalf of Mr Parmassar) that the FCB loan had been taken to reduce these historic debts, when in fact it had been procured for the purpose of paying the EMBD Contractors for the Caroni Roads Works. The loan was approved by the Cabinet and its repayment was guaranteed by the Ministry of Finance and the Economy on this basis. According to EMBD's financial records the loan was instead primarily used to pay the EMBD Contractors for the Caroni Roads Contracts, and not the contractors whose debts were long outstanding. These payments appear to have been made on an accelerated basis in the run-up to the National Elections. In fact, according to the pleadings over $300 million of allegedly defective and/or useless and/or un-needed road works were contracted and completed in less than three months.

(i) The poor governance of the Caroni Roads Contracts

[86] EMBD asserts as a fact that omitted and defective works were certified, and payments were made that were not due to the EMBD Contractors. It asserts that Interim Payment Certificates ("IPCs") and Completion Certificates were requested and authorised by Mr Parmassar that could not properly have been requested or authorized as they covered works that had been omitted or were defective. The defects are particularized in Schedule 2 to the Statement of Case.

[87] According to EMBD, Mr Balroop instructed Mr Khalil Baksh, who was, at the time, on vacation leave, to come to the office on 19 August 2015 (16 days before the General Elections) to certify payments due to Kallco, despite the sums not being due. EMBD says that the explanation for the urgency was the need to drawdown on the FCB loan before the General Elections. EMBD pleads as a fact that Mr Baksh was told that if he did not report for duty and certify the payments he might be sent on "*long leave*". EMBD says this was a threat to dismiss him if he did not do Mr Balroop's bidding. According to EMBD's pleaded case there was no "need" to drawdown on the loan, and no justification for doing so as the payments were not properly due. At trial EMBD will ask the court to infer that other interim payment certificates were issued in a similar manner, namely on the instructions of Mr Parmassar or Mr Balroop.

[88] The SMS text messages from Dr Moonilal via Mr Ramnauth are also relied upon as establishing instructions emanating from Dr Moonilal as to which EMBD contractor should receive which payment. In one such text message Dr Moonilal appears to have instructed a payment of $100 million to five contractors in a single line of text messaging. Contingency sums stated in the Caroni Roads Contracts were allegedly paid to the EMBD Contractors, or were agreed to be paid, without justification. Mr Ramkissoon, a senior engineer employed by EMBD, was allegedly admonished by Mr Balroop and removed from management of the contracts awarded to Ramhit after questioning the contractor as to whether works were in accordance with the contracts.

[89] Having checked its records EMBD alleges that contractors failed to comply with the requirement to provide EMBD with detailed laboratory test reports of the materials to be used on each road layer for approval within seven days of receiving notification of the award of contract, as required by General Conditions of Contract. EMBD says that:

(a) Fides, Namalco, Kallco, and TN Ramnauth failed to provide laboratory reports at all.
(b) Ramhit provided a report from a laboratory it owned that had not been approved for testing by the Highways Division, Ministry of Works and Transport.
(c) Despite these contractual breaches, payments were nonetheless made to these contractors.

The claim for breaches of fiduciary duty by Dr Moonilal

[90] According to EMBD's Statement of Case Dr Moonilal participated in the Cartel Arrangements and/or inappropriately sought to favour the EMBD Contractors for the purpose of giving effect to the Cartel Arrangements and in so doing, breached his duties to the Republic set out above.

[91] As can be seen from the earlier chronology of the allegations of fact together with the inferences that are said to flow from them, Dr Moonilal has been accused of acting in breach of his fiduciary duties as follows:

(1) Initiated and/or was instrumental in the initiation of the Caroni Roads project when he knew and/or ought to have known of (a) EMBD's poor financial position, and in particular its existing level of indebtedness to other contractors for outstanding works; and (b)

that the Caroni Roads project was not a priority, was not required and/or there was no proper justification for same;

(2) Directed Mr Parmassar by SMS text message to liaise with the principal of Namalco, Mr Naeem Ali, (a bidding company) to prepare the Cabinet Note in respect of the Caroni Roads project;

(3) Directed Mr Parmassar by an email message to add C9 to the Caroni Roads Project because Kallco wished to undertake C9 (and Kallco did in fact eventually obtain the C9 contract);

(3) Recommended to the Cabinet that the Caroni Roads project be undertaken in circumstances where he knew, or it is to be inferred that he knew, of the Cartel Arrangements and/or that the contracts relative to such roads were to be inappropriately procured;

(4) Was instrumental in securing the financing for the Caroni Roads project of a loan of $400 million from FCB, guaranteed by the Ministry of the Finance and the Economy, on the false basis that it was taken to pay long outstanding debts owed to other contractors;

(5) Had an inappropriately close relationship with Mr Parmassar, EMBD's CEO which facilitated Dr Moonilal's direct and unusual involvement in the day-to-day operations of EMBD;

(6) Having been approached by Mr Parmassar for "assistance" in securing his promotion as CEO of EMBD, noted such request and Mr Parmassar was subsequently appointed CEO on 7 July 2015 (the same day that the Caroni Roads awards were made);

(7) Invited Mr Parmassar to social engagements, and on or about 2 December 2014 welcomed him as "the newest member of the crew";

(8) Issued instructions to Mr Parmassar for payments to be made to certain EMBD Contractors and caused such payments to be made;

(9) Along with Mr Ramnauth facilitated and/or assisted in the award of the HDC house to Mr Parmassar, in reliance on Mr Parmassar's preferred unit at Egypt Gardens, Chaguanas in April 2015 which EMBD alleges also amounts to a civil law bribe;

(10) Instructed Mr Parmassar to avoid the ceremony for the public collection of keys to the HDC house and to instead collect them privately;

(11) Encouraged and cultivated a relationship with Mr Parmassar whereby Mr Parmassar treated him as the *de facto* "boss" or "chief" of EMBD and Dr. Moonilal acted as such in circumstances where he ought not to have done so;

(12) From time to time, refrained from communicating with Mr Parmassar via his official email account and instead and without justification used another private email account for inquiries relative to the internal operations of EMBD;

(13) Selected certain EMBD Contractors to be invited to tender for specific projects, including but not limited to, the Caroni Roads projects;

(14) Instructed Mr Parmassar to deliver to him cheques payable to certain of the EMBD Contractors for his onward personal transmission to them (and in one case, a letter of award of contract to TN Ramnauth);

(15) Conveyed instructions to Mr Parmassar for the payment of certain contractors, including some of the EMBD Contractors, via Mr Ramnauth, on the eve of the general elections of 2015;

(16) Identified two of the EMBD Contractors, as the intended beneficiaries of leases to be issued by EMBD in respect of a sandpit in Milton, Couva, and instructed Mr Parmassar by SMS text message to expedite same in contravention of the Tender Rules of EMBD;

(17) Enjoyed an inappropriately close social or other unseemly relationship with the EMBD Contractors and furthered their interests.

The claim for breaches of fiduciary duties by Mr Parmassar and bribery

[92] Mr Parmassar is alleged to have breached his fiduciary duties to EMBD by doing the following, some of which are pleaded as facts or which are to be inferred as such at trial:

(1) Participating in the Cartel Arrangements and favouring the EMBD Contractors, and/or failing to disclose his knowledge of the Cartel Arrangements and the favouring of the EMBD Contractors by Dr Moonilal to the EMBD board when recommending the award of the EMBD Contracts, or when authorizing payments under those contracts;

(2) Recommending to the Board of EMBD that EMBD undertake the Caroni Roads project in circumstances where (a) EMBD was in a poor financial position, and in particular was heavily indebted to contractors for outstanding works; (b) the Caroni Roads project was not a priority, was not required and/or there was no proper justification for same, and (c) EMBD did not have sufficient managerial or operational resources to administer and/or oversee the project properly;

(3) Acting upon and/or implementing instructions from Dr Moonilal relative to the selection of the EMBD Contractors, the scope of the works to be undertaken under the Caroni Roads project, and approving and/or issuing or causing payments to be made to them;

(4) Abdicating his fiduciary duties as Divisional Manager-Finance and/or Chief Executive Officer to treat the interests of EMBD as paramount, by wrongfully subordinating such interests to the directions and/instructions and/or interests of Dr Moonilal;

(5) Placing himself in a position whereby he compromised the discharge of his fiduciary duties, more particularly in seeking promotion to a higher office, with the influence and assistance of Dr Moonilal, in circumstances where Dr Moonilal was issuing instructions to him concerning the day-to-day internal operations of EMBD with his willing and, it seems to me, often fawning consent;

(6) Approving the form of contract to be used for the Caroni Roads projects, which form was more favourable to the EMBD

Contractors than other forms of contract being used by EMBD on other projects;

(7) Authorising and/or causing the issue of Invitations to Tender to the EMBD Contractors in respect of the Caroni Roads contracts, without the Tender drawings and specifications being appropriately customised to each road to be undertaken, in circumstances where he knew or ought to have known this to be so;

(9) Authorising and/or causing the issue of Invitations to Tender in respect of the Caroni Roads with a deadline date for the return of duly completed tenders, a mere one week later, in circumstances where he knew or ought to have known that such timeframe was unreasonably short for the preparation of independently prepared tender bids;

(10) Failing to ensure EMBD's compliance with the requirements of the Tender Rules by:

(a) selecting and inviting the EMBD Contractors to bid for the Caroni Roads projects, contrary to the procedures contained in the Rules;

(b) dispensing with the Tenders Committee and/or the Evaluation Committee and instead appointing EMBD's engineer, Mr Khalil Baksh, as the sole evaluator of the bids submitted by the EMBD Contractors;

(c) acting upon the Caroni Tender Evaluation Report prepared by Mr Khalil Baksh as the basis of his recommendation to the EMBD board for the award of the Caroni Roads contracts, in circumstances where he knew and/or ought to have known that insufficient time and/or

resources had been allocated for the preparation of such report;

(11) Issuing the letters of award and signing the respective Caroni Roads contracts on behalf of EMBD in the circumstances set out above;

(12) Authorising payment to the EMBD Contractors in circumstances where he knew or ought to have known that no proper verification was, and/or could have been, undertaken as to whether works claimed as executed in applications for payment made by the EMBD Contractors, had in fact been executed and/or were executed in accordance with the relevant contracts or at all;

(13) Signing cheques on behalf of EMBD whereby the EMBD Contractors were paid, in circumstances where he knew or ought to have known that such payments or parts thereof were not due and/or properly verified;

(14) Issuing Completion Certificates purportedly on behalf of EMBD in respect of the Caroni Roads contracts in circumstances where he knew and/or ought to have known that there was no or no proper basis for their issuance;

(15) Based on an SMS text message, disclosing to TN Ramnauth confidential and/or sensitive information relating to the tender and/or award of the Exchange III contract; and

(16) Enjoying an inappropriately close relationship with the EMBD Contractors and furthering their interests above those of his employer.

[93] EMBD further asserts that the assistance provided by Mr Ramnauth to procure the allocation of the HDC House and/or the HDC House allocated to Mr Parmassar, comprised a civil law bribe by TN Ramnauth or Mr Taradauth Ramnauth to Mr Parmassar in return for the award of the EMBD Contracts by EMBD, and/or payments and/or favourable treatment under those contracts. The receipt of the civil law bribe was also a breach of fiduciary duties owed by Mr Parmassar to EMBD, as was his failure to disclose Mr Ramnauth's role in the award of the HDC House when recommending the allocation of the EMBD Contracts to the EMBD board and when authorising payments to TN Ramnauth and/or to the EMBD Contractors. EMBD relies on Mr Ramnauth's SMS text messages to Mr Parmassar referred to earlier.

The claim for breaches of fiduciary duties and employment duties by Mr Balroop

[94] EMBD has claimed that Mr Balroop breached his fiduciary duties and/or those owed under his contract of employment with EMBD, in participating in the Cartel Arrangements, his favouring of the EMBD Contractors, and/or his failure to disclose his knowledge of the Cartel Arrangements and the favouring of the EMBD Contractors. Further, his approving the issue of certain Interim Payment Certificates in favour of the EMBD Contractors, in circumstances where he knew or ought to have known that no proper verification was or could have been undertaken as to whether works claimed as executed in applications for payment made by the EMBD Contractors had in fact been executed and/or were executed in accordance with the relevant contracts or at all. A further claim is that he misled or tricked EMBD's board by representing that the $400 million Financing Facility from FCB would be used for

the sole purpose of paying existing debts owed by EMBD to contractors, which was a false representation.

[95] EMBD further claims that Mr Balroop was in breach of his fiduciary duties in recommending to EMBD's board that invitations be issued to pre-qualified contractors for the Exchange III and Picton III works where there had been no compliance with EMBD's Tender Rules for the selection of pre-qualified contractors; by issuing Invitations to Tender to the EMBD Contractors in respect of the Caroni Roads Contracts without the Tender drawings and specifications being appropriately customised to each road to be undertaken, in circumstances where he knew or ought to have known this to be so; and in issuing Invitations to Tender in respect of the Caroni Roads with a deadline date for the return of duly completed tenders, a mere one week later, in circumstances where he knew or ought to have known that such timeframe was unreasonably short for the preparation of independently prepared tender bids.

[96] Mr Balroop is also accused of revising the PTEs for the Caroni Roads contracts previously prepared by EMBD's engineers, drastically increasing them upwards when there was no or no proper basis for so doing, with no increase in the scope of works to be undertaken. Further, by selecting and/or recommending the form of contract to be used for the Caroni Roads projects, which form was more favourable to the EMBD Contractors than other forms of contract being used by EMBD on other projects or failing to ensure that a form of contract, more favourable to EMBD was used for the

Caroni Roads contracts and assigning project management responsibilities to two of EMBD's engineers, Mr Khalil Baksh and Mr Walker, without assessing the competence and/or ability of these persons to fulfil the role of Engineer on the Caroni Roads project.

[97] EMBD also accuses Mr Balroop of removing Mr Ramkissoon, an EMBD engineer, from C4 and C5 when Mr Ramkissoon raised concerns about the certification of works which were applied for by Ramhit but not completed, and replacing him with a Clerk of Works who did not have the requisite competencies to serve as Engineer under the Caroni Roads contracts. Further, EMBD pleads as a fact that he instructed Mr Khalil Baksh to sign various IPCs on the premise that this was required to draw down on the $400 million Financing Facility and ordered him to report for duty while on vacation leave to facilitate the preparation of IPCs, while threatening that if he did not do so, he (Mr Khalil Baksh) might be sent on "*long leave*".

[98] Another allegation is that he authorised payment to the EMBD Contractors in circumstances where he knew or ought to have known that no proper verification was, and/or could have been, undertaken as to whether works claimed as executed in applications for payment made by the EMBD Contractors, had in fact been executed and/or were executed in accordance with the relevant contracts or at all and that he approved the issue of Practical Completion Certificates in respect of works under certain of the Caroni Roads contracts, in circumstances there was no or no proper basis to do so.

The claim against Mr Walker for breaches of employment duties and/or duties as Engineer under the C1, C2, C7 and C8 Contracts

[99] EMBD's claim against Mr Walker is also for breach of his duties under his contract of employment and/or those owed as Engineer under the C1, C2, C7 and C8 Contracts. The case against him is for accepting invalid pre-construction test results from Namalco under C1 and C2; failing to inspect or test the works to determine whether they were properly executed; preparing Interim Payment Certificates for TM Ramnauth that certified payments that were not due and based on test results by an unauthorised laboratory; issuing Practical Completion Certificates under C1, C2, C7 and C8 prior to issuing an itemised list of incomplete and unsatisfactory items in respect of these roads, and/or the completion of outstanding items and the correction of unsatisfactory and defective works by Namalco and TN Ramnauth; and failing to reject all work and materials which did not conform to contract specifications and to ensure that the contract was properly administered, and the Works executed, in accordance with the Conditions of Contract and relevant drawings and specifications.

The claim that EMBD is not bound by the C1 to C10 Contracts as a matter of agency law in the Consolidated Action and the Related Action

[100] EMBD's claim here is that Mr Parmassar, as agent of EMBD, had no actual or ostensible authority to enter into the C1 to C10 Contracts on behalf of EMBD, nor to sign acceptance letters and notices to proceed, nor to authorise payments to the EMBD Contractors because of the alleged breaches of his (and Mr Balroop's) fiduciary duties I have listed

above. It also claims that the EMBD Contractors knew that Mr Parmassar had no actual authority to act as he did.

[101] EMBD claims that the C1 to C10 contracts are void or otherwise non-existent as a matter of agency law, as are any certificates or other documents issued under them. Alternatively, it pleads that the contracts are unenforceable as a matter of public policy under the doctrine of illegality, as are any certificates or other documents issued under the contracts, as it is against public policy for the Court to order any payments to contractors that have participated in cartel arrangements which involve the wrongful payment of public funds, alternatively, the wrongful payment of public funds for materially defective works.

[102] It is also EMBD's case that the EMBD Contractors are not entitled to make any claim under the EMBD Contracts, nor for work carried out under them, as the contracts are either void and unenforceable because Mr Parmassar purported to enter into them without actual or ostensible authority to do so, or unenforceable because of illegality. Alternatively, EMBD claims that it is entitled to rescind the Caroni Roads Contracts (inclusive of the Exchange III and Picton III contracts awarded to TM Ramnauth, the subject of one Counterclaims in the Consolidated Claim) and recover the payments purportedly made for those works with credit for the value of those works assessed as nil, for the reasons of defective and useless works (set out in Schedule 2 in the Related Action and in the schedules to the Counterclaims in the Consolidated Action), and to recover payments under those contracts with credit for any works properly carried out.

EMBD's specific claims against the parties in the Consolidated Action and the Related Action (insofar as they are relevant to the strike out applications)

(a) Contractual claim based on the breach of fiduciary duty by Mr Parmassar

[103] EMBD relies on Mr Parmassar's breach of fiduciary duties and seeks declarations that the C1 to C10 contracts and the Exchange III and Picton III contracts are void or otherwise non-existent as a matter of agency law or as a result of the doctrine of illegality, or alternatively that it is entitled to rescind the contracts. Further, EMBD claims that it is entitled to abate the price of the works by the entire contractually agreed sum, alternatively a sum to reflect the value of the works actually and properly carried out.

(b) Claim in the tort of knowing receipt and dishonest assistance

[104] To establish this tort EMBD relies on (i) the alleged breaches of fiduciary duty by Mr Parmassar, (ii) the facts pleaded to infer the Cartel Arrangements, (iii) the alleged bribes and offers to bribe Mr Parmassar by TM Ramnauth, (iv) the alleged breaches of fiduciary duty by Mr Balroop, (v) and the total payments of $275,477,912 that were made to the defendants to the Counterclaims in the Consolidated Action and the contractors in the Related Action (excluding LCB). These payments individually are:

(1) to TN Ramnauth, $124,334,297.70 (C7, C8, Exchange III and Picton III);

(2) to Ramhit, $45,652,890.50 (C4 and C5);

(3) to Kallco, $49,932,176.51 (C3, C6, and C9);

(4) to Fides, $5,483,260.00 (C10); and

(5) to Namalco, $50,075,288.16 (C1 and C2).

[105] EMBD asserts that these payments were knowingly and dishonestly received by the EMBD Contractors, as they had knowledge of the facts and matters at (i) to (iv) above and hold these funds on trust for EMBD as the EMBD Contractors (excluding LCB) acted unconscionably in receiving and retaining the payments. As an alternate plea, EMBD claims that these contractors are personally liable to account for the value of the works they undertook. Further, it is contended that these contractors dishonestly assisted or procured Mr Parmassar's breaches of fiduciary duty.

(c) The claim in the tort of unlawful means conspiracy

[106] EMBD relies on all the matters I earlier set out in relation to the Cartel Arrangements, some of which depend on facts and some on inferences of facts to establish its claim in this tort at trial.

[107] EMBD contends that it should be inferred from the pleaded facts and circumstances that the defendants and others identified in their pleadings were engaged in a joint combination and/or agreement with the common purpose of: (a) procuring the award of the EMBD Contracts to the EMBD Contractors at an inflated price in circumstances where such awards would not have been made had EMBD and/or the Republic known of and/or been properly appraised of those facts and circumstances; and (b) procuring certifications and payments under the EMBD Contracts, in circumstances where they were not due.

[108] EMBD pleads further that the EMBD Contractors (except for LCB) procured the award of the EMBD Contracts and payments and certifications, in circumstances where they

knew that they involved a breach of the fiduciary duties owed by Mr Parmassar and Mr Balroop to EMBD;

[109] It is EMBD's case that the EMBD Contractors intended to injure it as they intended EMBD to award the contracts in circumstances where they knew that the award, certifications, and payments involved a breach of the fiduciary duties owed by Mr Parmassar and Mr Balroop to EMBD and would involve EMBD paying inflated prices for the various works and/or paying for works that were done contrary to contractual specifications so that it would suffer financial loss.

[110] Further, EMBD pleads that Dr Moonilal, Mr Parmassar, Mr Balroop, Fides, Kallco, Ramhit, and TN Ramnauth intended to injure EMBD as they intended it to award the contracts in circumstances where they knew that the award and payments that would be made under the contracts would involve a breach of his fiduciary duties and would also involve EMBD paying inflated prices for the various works and/or paying for works that were not done in accordance with the relevant contractual specifications or at all, so that it would suffer financial loss.

[111] Yet further, according to the pleadings, Dr Moonilal, Mr Parmassar and Mr Balroop, together with at least TN Ramnauth and Mr Taradauth Ramnauth intended to injure EMBD as they intended EMBD to award the Picton III Contract in the same circumstances as set out above, causing it loss.

(d) The calculation of the claim for damages and equitable compensation for unlawful means conspiracy

[112] EMBD pleads that damages for unlawful means conspiracy and damages and/or equitable compensation for breach of fiduciary duty and dishonest assistance in relation to the contracts should be calculated by certifying the difference between the remeasured contract price stated in the contracts and a fair price for the Caroni Roads Works. To this end, EMBD says that it should be calculated as the total adjusted price stated in Schedule 6 to the Statement of Case and calculated using the lowest prices submitted by the EMBD Contractors. It also claims the cost of remedial works which EMBD says are necessary as some of the roads are useless, and interest of $37 million due on the $400 million loan from FCB. EMBD pleads that it is prepared to credit these contractors for any sums received in its claim for the tort of knowing receipt.

[113] With respect to the calculation of the damages owed by TN Ramnauth on the Exchange III and Picton III contracts EMBD pleads that it will provide particulars of the calculation of damages and/or equitable compensation for unlawful means conspiracy and dishonest assistance when the detailed reports on defective works, omitted works and over-certification of works are available. These reports were not available at the time that the Counterclaim in the Consolidated Action or the Related Action was filed

(e) The claim against Mr Parmassar for the tort of bribery

[114] EMBD relies on its SMS text records of messages passing between TN Ramnauth and/or by Mr Taradauth Ramnauth on behalf of TN Ramnauth and/or on behalf of the other EMBD Contractors and claims damages for the tort of bribery against Mr Parmassar.

[115] Other claims are made against all the other defendants, for example, against Dr Moonilal EMBD seeks an account of profits and equitable compensation. Similar claims are also made against Messrs Parmassar, Balroop, and Walker but these claims do not concern the six applications now before me for decision.

The interlocutory applications

[116] The six interlocutory applications before me attack the adequacy of the pleadings. For this reason, I have fully set out the essential particulars of EMBD's case on its pleadings. Defences not having been filed, I must therefore accept the allegations of fact as uncontradicted. If essential facts are not pleaded, I must weigh the effect of their absence. Insofar as the pleadings allege that inferences should be drawn from those pleaded facts, I must closely examine those primary facts and determine whether they are adequate to properly sustain the inferences needed to prove the commission of the various torts and contractual breaches at trial.

Overview of legal issues raised in the six applications

(1) Whether the Court should strike out EMBD's pleadings in the Consolidated Action and the Related Action or, alternatively, order EMBD to provide further particulars

of the facts on the ground that, contrary to the rules of pleading, EMBD has not pleaded all the facts necessary to sustain claims in

(a) the torts of unlawful means conspiracy, dishonest assistance, and knowing receipt;

(b) illegality, such as would invalidate the EMBD Contracts;

(c) lack of authority under the principles of agency law; and

(d) in relation to Namalco's application, and in addition to the above, that there are no normative rules established by legislation or Common Law that would render cartel behaviour as acceptable or unacceptable, such as to base an allegation of unlawful means conspiracy;

(2) Whether the Court should make an order for summary judgment in relation to Namalco's application in the Related Action.

[117] The issues raised on these applications share common features. The applications are dissimilar by their targeting of specific paragraphs of the EMBD pleadings that are said to be deficiently pleaded. Those paragraphs concern the activities in which each applicant is exclusively alleged to have been involved. Separately itemising each of the targeted paragraphs is not, in my view, essential. I can deal with them generally. The arguments can be further broken down under three main headings:

(a) EMBD's pleadings should be struck out under Part 26.2(1)(b) and (c) CPR ('Sanctions - Striking out Statement of Case') for non-compliance with Part 8.6 CPR ('Claimant's duty to set out his case'); alternatively, if the court does not strike

out the pleadings, or any parts of them, it should order EMBD to provide further particulars ("the first argument');

(b) EMBD is wrong in law to have pleaded the unenforceability of any contract as a matter of public policy under the doctrine of illegality and those parts of its pleadings should likewise be struck out under Part 26.2(1)(b) and (c) CPR ('the second argument'); and

(c) Alternatively, the applicants should not be compelled to defend the claims until it provides amended particulars in proper compliance with Part 8.6(1) CPR (the third argument').

The first argument: Pleadings should be struck out or particulars ordered

(a) The requirements of pleadings generally, and especially in reference to allegations of dishonesty or fraud

[118] Parts 1.1 and 1.2 CPR sets out the Court's overriding objective:

1.1 (1) The overriding objective of these Rules is to enable the court to deal with cases justly.

(2) Dealing justly with the case includes—

(a) ensuring, so far as is practicable, that the parties are on an equal footing;
(b) saving expense;
(c) dealing with cases in ways which are proportionate to—
(i) the amount of money involved;
(ii) the importance of the case;
(iii) the complexity of the issues; and
(iv) the financial position of each party;
(d) ensuring that it is dealt with expeditiously; and
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

1.2 The court must seek to give effect to the overriding objective when it —
(1) exercises any discretion given to it by the Rules; or

(2) interprets the meaning of any rule.

[119] Part 8.6(1) CPR is intituled 'Claimant's duty to set out his case':

(1) The claimant must include on the claim form or in his statement of case a short statement of all the facts on which he relies.

[120] Part 26.2(1) says this under the rubric 'Sanctions – Striking out statement of case'

26.2 (1) The court may strike out a statement of case or part of a statement of case if it appears to the court—

. . .

(c) that the statement of case or the part to be struck out discloses no grounds for bringing or defending a claim; or

(d) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10.

[121] In *Bernard v Seebalack* [2010] UKPC 15 the Privy Council emphasised that Rule 8.6(1) requires a short statement of all the facts on which a claimant relies. According to the applicants, this requirement has not been met. Mr Ramesh Maharaj SC, who appeared on behalf of TN Ramnauth, Mr Taradauth Ramnauth, Kallco, Ramhit (in the Consolidated Action) and Fides (in the Related Action), stressed the importance of this authority. *Seebalack* was a case of deficiently pleaded particulars of loss in a claim for personal injuries where, under Rule 8.10(1)(4) CPR, a claimant is mandated to include a plea, or attach a schedule of, special damages in the statement of case. An attempt was made to re-amend the statement of case to include several special damages claims that had been omitted, and thus enlarge the pecuniary claim. The attempt was rejected by the Court of Appeal. At the Privy Council, the claimant submitted that the amendment was no longer required as evidence of these additional claims were included in the already-filed witness statements and the defendant could also apply under Part 35 CPR for particulars if it wished.

[122] Lord Dyson, writing on behalf of the Board rejected this argument. He said:

> 15. In the view of the Board, an amendment of the statement of case was required. Part 8.6, which is headed "Claimant's duty to set out his case", provides that the claimant must include on the claim form or in his statement of case a short statement of all the facts on which he relies. This provision is similar to Part 16.4(1) of the England and Wales Civil Procedure Rules, which provides that "Particulars of claim must include—(a) a concise statement of the facts on which the claimant relies". In *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775 at p 792J, Lord Woolf MR said:
>
> > "The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules. The Practice Direction to r 16, para 9.3 (Practice Direction – Statements of Case CPR Pt 16) requires, in defamation proceedings, the facts on which a defendant relies to be given. No more than a concise statement of those facts is required."
>
> 16. But a detailed witness statement or a list of documents cannot be used as a substitute for a short statement of all the facts relied on by the claimant. The statement must be as short as the nature of the claim reasonably allows. Where general damages are claimed, the statement of case should identify all the heads of loss that are being claimed.

[123] In *Bernard v Seebalack* Lord Dyson was not, in my view, reinterpreting the rules of pleadings. He was asserting, quite rightly, that there is no substitute for pleading essential

facts, such as are strictly required in relation to special damages in personal injury cases, and that a short, not voluminous, statement of all the facts was required. In *Bernard v Seebalack* certain special damages claims were omitted in the amended statement of case. It was a pleading *lacuna* that could not be filled by evidence in a witness statement. Importantly, he qualified his statement by adding that the "statement must be as short as the nature of the claim reasonably allows". The assessment of the nature of the case is obviously important to this court.

[124] In *Monteil and anor. v The Central Bank of Trinidad and Tobago and anor*, Civil Appeal No. P19 of 2015 (unreported), a case involving serious allegations of fraud, Bereaux JA, at para [24], adopted Lord Woolf's comment in *McPhilemy* in the context of Part 8.6 CPR: ". . .what is important is that the pleadings should make clear the general nature of the case of the pleader". At para [29] he said that the pleadings should make clear "the nature of the fraud or dishonesty". In *FCB Limited v Shepboys and anor*, Civil Appeal No P231 of 2011 (unreported), Mendonça JA said at para [40] that "it has been recognised that once an allegation is sufficiently made out in the statement of case, it may be amplified by further information and/or witness statements". At para [41] he said that "an allegation, if sufficiently made may be particularised or 'amplified' in a witness statement or by further information". The question of sufficiency should not, in my view, be assessed in isolation, and without regard, to the nature of the case. In this regard see Kokaram J (as he then was) in *Metivier v AG*, CV-2009-00387. He cited the Australian case of *Kirby v Sanderson* [2002] NSWCA 44 in which Hodgson JA remarked that a defendant must not be taken by

surprise: ". . .material facts must be stated in such a way that the defendant can understand the materiality of the facts, that is, how they are material to the cause of action".

[125] In *Three Rivers District Council and Others v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1, Lord Hope, in dealing with a case of misfeasance in public office, approved Lord Woolf's dicta in *McPhilemy* and then said this at para [49]:

> "In my judgment a balance must be struck between the need for fair notice to be given on the one hand and excessive demand for detail on the other. In *British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd* (1994) 72 BLR 26, 33-34 Saville LJ said: 'The basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer it.' To my mind it seems that in recent years there has been a tendency to forget this basic purpose and to seek particularisation even when it is not really required. This is not only costly in itself, but is calculated to lead to delay and to interlocutory battles in which the parties and the court pore over endless pages of pleadings to see whether or not some particular point has or has not been raised or answered, when in truth each party knows perfectly well what case is being made by the other and is able properly to prepare to deal with it."

[126] Lord Hope's dicta in *Three Rivers* was applied in *East Caribbean Flour Mills Limited v Boyea,* (St Vincent and the Grenadines), Civil Appeal No. 12 of 2006. Barrow JA, sitting in the Eastern Caribbean Court of Appeal, said this:

> "[Lord Hope at paragraph 55] . . . draws a distinction between making an allegation of fraud, dishonesty or bad faith and the particulars of the allegation that must be given. His Lordship stated in the paragraph that followed that in the case before him 'it is clear beyond a peradventure that misfeasance in public office is being alleged.' Throughout the remainder of His Lordship's consideration of the pleading issue, which went on for a further fourteen paragraphs, the constant theme was the sufficiency of the

particulars of the allegation. The distinction between an allegation and the particulars of an allegation could not have been clearer".

[127] It must be noted that Rule 8.6(1)(d) allows a court to strike out a statement of case on the grounds of prolixity. The statement of case in the Related Action comprises 1,556 pages but no complaint is made about its prolixity. The length of the pleading is not however the determinative factor for the applicants. They are attacking it on other grounds. Nonetheless, I get the impression that the pleader slaved for many months, or even years, scrupulously examining countless documents and analysing them, and basically, at the time of its filing, put all the then-known facts and allegations into the statement of case.

[128] The court's approach to pleading allegations of fraud is not case insensitive. In a simple case of (for example) fraudulently issuing cheques from someone else's account by forging their signature, the law could not be clearer: the fraud must be fully particularised. In cases where the fraud is proven by inferences drawn from primary facts, such as in a case of unlawful means conspiracy, the issue of particulars is somewhat ticklish. In *Derksen v Pillar* [2002] All ER (D) 261, Briggs QC, sitting as a deputy judge of the High Court said this:

> "Where a claimant sought relief in relation to an alleged fraud committed by the defendants acting in concert, then provided there was evidence disclosing a real prospect that each of them would be found to have acted dishonestly and in concert with each other, in principle the claimant should be given considerable latitude to ascertain by all the processes available and up to and including trial the full amount of that conspiracy".

[129] What is lacking most noticeably in the EMBD pleadings is an express agreement between the conspirators to divide particular contracts among themselves for C1-C10, Exchange III and Picton III. How does one particularise concealed facts except by pleading primary facts which a trial judge would be able to make an inference that such an agreement existed? The ethos of the CPR is a game of poker played with all the cards face up and it is a process containing many procedural phases rather than a single trial event at which the winner is decided.

[130] Most filed cases are resolved before trial as a result of these procedural phases. Part 20 of the CPR provides the procedural route for amendments at any stage of the proceedings. In the proceedings before me, the first CMC has not been held and EMBD has the right to amend its pleadings without permission on or before the first CMC. Such amendments might include additional experts' reports or the calculation of the damages in the Exchange III and Picton III contracts. No prudent counsel would advise expenditure on those reports or calculations in the face of an undetermined strike out application. Further, the CPR provides a process of disclosure, both general and specific. The CPR process also involves the filing and exchanging of witness statements and these give advance notice of who the witnesses are and what evidence-in-chief will be led at the trial. It is not known whether any of EMBD's witnesses are former employees of EMBD or even former employees of the EMBD Contractors and it is conceivable that witnesses may also be called from local and international banking institutions or telecommunication providers. In my opinion the requirements of pleading particulars of fraud in a case such as this are restricted to only those primary facts that are sufficient to establish an inference at trial. I

am prepared to give EMBD some latitude especially since the first CMC has not been held, defences have not been filed, discovery has not taken place, and witness statements have not been exchanged. The grant of latitude is not however a licence to elude the plain language of Rule 8.6(1)(1) CPR.

(b) The need for ordering particulars of the EMBD pleadings

[131] An order to any party to provide particulars is discretionary: Part 26.1 (1)(w) CPR, (see *Real Times Systems Ltd. v Renraw Investments Ltd*. [2014] UKPC 6). The philosophy of the CPR, as previously discussed, provides parties with a full opportunity to flesh out the skeleton of their pleading during the processes leading to trial. In *Monteil* (supra), Bereaux JA refused the request for particulars prior to discovery at paras [46] and [53] on the ground of prematurity as the answers sought by the requesting party may well be provided through discovery and the provision of witness statements. The timing at which particulars may be ordered, if at all required, is a case management decision and may even be taken by the judge at any time. Moreover, applications for particulars cause unnecessary delay and expense especially in cases when each party has a basic understanding of what the other is saying.

[132] Mr Maharaj conceded that a court will not lightly strike out a claim on the grounds of insufficiency pleadings, as it was a "nuclear option", (so described by the Privy Council is *Real Time* (supra). He submitted that the question is not whether the pleading was "unwinnable or bound to fail", as Mr David Phillips QC, who appeared on behalf of EMBD, asserted. The real question, according to Mr Maharaj SC, was whether every

necessary ingredient of the cause of action was pleaded. If one was omitted the pleading cannot stand. It is a good point. But following the authorities I earlier cited I must, in addition to certifying whether the necessary ingredients are present, also consider the nature of this case and the pleading thresholds that need to be crossed. Conspiracy is not a tort with many smoking guns, far less fingerprints on them. As I will discuss below, it is an uncommon tort, the proof of which involves many anfractuous legal and evidential components. All these components converge in the trial courtroom. To assess the sufficiency of the pleadings, and, more importantly, whether the ingredients of the torts have been pleaded, I will need to closely examine the torts.

[133] In addition, I must bear in mind the specific wording of Rule 26.2(2). In order to strike out the claim the pleading must "disclose no grounds for bringing the claim". That is a command that governs a claim with no grounds. It says nothing about a claim with "some" grounds. I will therefore examine the sufficiency of the particulars pleaded to support the causes of action, bearing in mind the generally clandestine characteristics of conspiracies, and the essential ingredients of the torts. My goal is to ensure that "it is clear beyond a peradventure" that the applicants know the nature of the case brought against them.

(c) Unlawful means conspiracy: an overview of its origins and scope

[134] Unlawful means conspiracy is what is classified as an economic tort. An economic tort is primarily interested in the protection of a claimant's wealth or financial expectations. According to Hazel Carty in *An Analysis of the Economic Torts*, 2nd Ed (2010), Oxford University Press, p 2: " The common law having no general tort of unfair competition, the economic torts represent its chosen method to attack excessive (rather than simply

aggressive) competition or economic endeavour, whether through diversion of custom or attacks on commercial links." These torts developed out of the historical judicial hostility to trade unionism in the 19th century. In those years a trade union was, at common law and by statute, an "illegal conspiracy". The first cases revolved around the inducement by the defendant (a trade unionist) of a third party (a worker) to breach his/her contract of employment with the claimant (the employer). This was the classic three-party setting in which the torts of unlawful means conspiracy originated. There was therefore much uncertainty about the existence and scope on the conspiracy torts in a two-party setting.

[135] Throughout the 19th century, and up until the early 20th century, the common law evolved and widened the scope of the economic torts. Inroads were made, somewhat tentatively or incrementally, to provide redress for economic wrongs committed in the marketplace. One example is *Hedley Byrne & Company Ltd v Heller & Partners Ltd* [1964] AC 465 (negligent interference with economic interests). A major shift in relation to the scope of the conspiracy torts in a two-party setting occurred in 2008 in the judgment of the House of Lords in *Revenue and Customs Commissioners v Total Network SL* [2008] UKHL 19.

[136] Before examining the importance of *Total Network* to the tort of unlawful means conspiracy, I should say something more about the historical background. It is relevant to these applications. According to Ms Carty, the English courts (unlike the courts in New Zealand and Canada) have traditionally adopted a policy of "judicial abstentionism" in relation to the development of the tort of unlawful means conspiracy. She explains this by the natural tendency of the common law to develop slowly by analogy with earlier cases,

rather than by the independent assertion of generalised rights or liabilities. She notes the comment of W. Letwin in "*The English Common Law Concerning Monopolies,* 21 Univ Chic LR (1954) 355, that the main justification for the abstentionist policy was that "the English judges did not wish to assume the role of controlling aspects of the economy: either by curbing aggressive competition or by automatically prohibiting the exclusion of competition." That sort of interference was regarded as Parliament's role, and not the courts, despite its strong public policy element. Thus Lord Davey declared in *Jansen v Driefontein Mines* [1902] AC 484, p 500: "Public policy is always an unsafe and treacherous ground for legal decisions". EMBD in part relies on public policy considerations and the applicants have condemned that approach.

[137] The emergence of a non-abstentionist approach to the unlawful means tort (then termed unlawful interference with trade) is attributed to Lord Denning in *Torquay Hotel Co Ltd v Cousins* [1969] 2 Ch 106, p 139 where he declared: "I have always understood that if one person deliberately interferes with the trade or business of another, and does so by unlawful means . . . then he is acting unlawfully, even though he does not procure or induce a breach of contract." Following *Torquay Hotel,* a number of cases developed the hybrid tort of interference with contractual relations. That hybrid was eventually abolished in *OBJ v Allan* [2007] UKHL 31, a case on which the applicants rely. Unlawful means conspiracy was finally conceded as an existing tort by the English Court of Appeal in *Lonhro v Fayed* [1990] 2 QB 479 where it was described as a comparatively new tort "of uncertain ambit" (per Woolf LJ, at p 493). According Ralph Gibson LJ, its precise boundaries have to be established "from case to case" (at p 492).

(d) The ingredients of the tort of unlawful means conspiracy

[138] One broadly accepted definition of the tort is contained in the judgment of Nourse LJ in *Kuwait Oil Tanker Co SAK v Al Bader* [2000] 1 All ER (Comm) 271 at p 312:

> "A conspiracy to injure by unlawful means is actionable where the claimant proves he has suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him by unlawful means whether or not it is the predominant purpose of the defendant to do so."

[139] In *Total Network*, Lord Neuberger said at para [312] that the tort involves "an arrangement between two or more parties, whereby they effectively agree that at least one of them will use 'unlawful means' against the claimant" and it results in damage to the claimant.

[140] *Atkins Court Forms* Vol 38(1) (para 86) neatly summarises the ingredients of the tort:

(a) concerted action between two or more persons (a combination);

(b) use of unlawful means;

(c) knowledge of the unlawfulness;

(d) intention to injure the claimant, whether or not it is the predominant purpose of the defendant to do so;

(e) overt act in pursuance of the agreement or undertaking; and

(f) loss or damage to the claimant as a result.

Mr Maharaj SC condemned the use of *Atkins* as providing an authoritative definition but, having myself read the cases, I think the editors distilled various judicial pronouncements and were faithful to them.

(e) Unlawful means conspiracy: the role of inferences drawn from pleaded primary facts in relation to ingredients (a) concerted action or combination between two or more persons; (d) intention to injure the claimant; and (e) overt act in pursuance of the agreement or undertaking.

[141] These ingredients are most often proven by inference. The inference is to be drawn on the basis of the primary facts set out the pleadings and proved at the trial. It is not my duty at this interlocutory stage to draw any inferences. I am asked instead to examine the primary facts in EMBD's pleadings to determine whether they are adequate in themselves to later sustain an inference at the trial and to determine whether the applicants should reasonably have a proper understanding of the cases brought against them. If I find, at this interlocutory stage, before any Defences have been filed, that no proper inference can be made at the trial on the basis of the primary facts, then the ingredients will be incapable of proof and the pleadings will be struck out.

[142] In *Kuwait Oil Tanker* (supra) Nourse LJ described some of the challenges in proving the concerted action or combination ingredient at para [111]:

> "A further feature of the tort of conspiracy, which is also found in criminal conspiracies, is that, as the judge pointed out at page 124, it is not necessary to show that there is anything in the nature of an express agreement, whether formal or informal. It is sufficient if two or more persons combine with a common intention, or, in other words, that they deliberately combine, albeit tacitly, to achieve a common end. Although civil and criminal conspiracies have important differences, we agree with the judge that the following passage from the judgment of the Court of Appeal Criminal Division delivered by O'Connor LJ in *R v Siracusa* (1990) 90 Cr. App. R. 340 at 349 is of assistance in this context:

‘Secondly, the origins of all conspiracies are concealed and it is usually quite impossible to establish when or where the initial agreement was made or when or where other conspirators were recruited. The very existence of the agreement can only be inferred from overt acts. Participation in a conspiracy is infinitely variable: it can be active or passive. . .’

Thus it is not necessary for the conspirators all to join the conspiracy at the same time. . .”

[143] At para [112] he said this:

“In most cases it will be necessary to scrutinise the acts relied upon in order to see what inferences can be drawn as to the existence or otherwise of the alleged conspiracy or combination. It will be the rare case in which there will be evidence of the agreement itself.”

[144] In *Derksen v Pillar* [2002] All ER (D) 261, Briggs QC, sitting as a deputy judge of the High Court opined at para 33(2) about the use of inferences in a claim for unlawful means conspiracy:

“Because it will rarely if ever be possible to prove an express agreement between the defendants, the scope or extent of their combination will usually be a matter of inference, to be arrived at by a careful and painstaking review of the acts and omissions of each of them, considered as a whole.”

I should add that this review is amplest and most complete at a trial, and not at an interlocutory stage.

[145] In the recent case of *JSC Bank of Moscow v Kekhman and Ors.* [2015] EWHC 3073 (Comm), Flaux J, at an interlocutory stage of the proceedings, said this:

> "The correct test is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence. . .At the interlocutory stage, when the court is considering whether the plea of fraud is a proper one. . .the court is not concerned with whether the evidence at trial will or will not establish fraud but only whether facts are pleaded which would justify the plea of fraud."

[146] In *Edwin Dyson & Sons Limited v Time Group Limited* [2001] EWCA 1845 an application for summary judgment came up before the English Court of Appeal. The first instance judge had granted the summary judgment on the ground that the inferences in the counterclaim could not be drawn at trial on the pleaded case. The Court of Appeal reversed the judgment. Lady Arden LJ said that counsel for the defendant submitted "that the judge failed to approach the matter with sufficient common sense and to realise that conspirators rarely put their agreement into writing." Sedley LJ at para [33] conceded that he had doubts about the viability of the impugned counterclaim in fraud and conspiracy but, nonetheless said: "The proposed pleading of fraud is based on inference and by its nature incapable of being particularised." Aldous LJ also had doubts about the viability of the primary facts to create inferences but agreed with Arden LJ that there was a sufficient case, even on a low threshold of the inferential weight in that case, to reverse the judge's findings and send the matter back to trial. This demonstrates a willingness, at an interlocutory stage, to be flexible in pleading torts that depend on inferences to be made at trial, even where the prospects of eventual success are slim.

(f) Pleading the concerted action or combination and the intention to injure

[147] Insofar as the ingredients of concerted action or combination between two or more persons and the intention to injure the claimant are concerned there was heated debate between Mr Maharaj SC, Mrs Lynette Maharaj SC (who appeared for LCB) and Mr Simon Hughes QC (who appeared for Namalco) on the one hand and Mr Phillips QC on the other. Knowledge is critical in pleading both ingredients.

[148] In *Kuwait Oil Tanker* (supra), Nourse LJ recognised that each conspirator is not required to be intimately or fully aware of every aspect of the conspiracy. At para [133] he said this:

> "It does not follow from the above that each defendant must personally take part in every act so long as it is done pursuant to the agreement. Moore-Bick J (at first instance) put the matter in this way (at p 126):
>
> > 'Of course, as in any case of this kind, it is necessary to examine the evidence with care to see whether each defendant was involved in each fraudulent transaction, but once one reaches the conclusion that the defendants combined to steal from their employer by whatever means might present themselves, the question in relation to any particular scheme or enterprise in which only one or some of them can be shown to have directly participated is whether that enterprise fell within the overall scope of their common design. If several people agree to enable each other to steal from their employer, lending their support in different ways at different times and taking different shares of the proceeds (or even each retaining for himself what he takes), each of them is party to the agreement pursuant to which all the thefts take place. In those circumstances there is in my judgment no need for each to be fully aware of the circumstances of each theft in order for him to be liable as a

conspirator provided that the theft in question falls with in the scope of the agreement.'

We agree with those conclusions but stress the need for proof to the relevant standard at every stage."

[149] Mr Maharaj SC and Mr Hughes QC had problems with the attribution of the knowledge of unnamed individuals to incorporated companies. Apart from Dr Moonilal, the three EMBD officers, Mr Taradauth Ramnauth, (and Mr Naeem Ali and Mr Kalloo by indirect reference in the pleaded text messages) none of the officers of the EMBD contractor companies are identified in the pleadings. The question is this: can a company, against whom an allegation of conspiracy is made, be said to have knowledge of the actions of its agents?

Attributing acts, omissions, and states of mind to companies

[150] *Bowstead and Reynolds on Agency*, 21st ed. defines agency as a fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal is referred to as a third party. The authority to act constitutes a power to affect the principal's legal relations with third parties. In discussing the attributes of the agency at para (1-018) p 8, *Bowstead* says that it is common to regard "control by the principal" as a defining characteristic of agency.

[151] Some common law writers have argued that traditional agency reasoning, which requires authority or its appearance for one person to alter the legal position of another is

inadequate and that responsibility should be placed on the instigator or the beneficiary of the enterprise in relation to which a person acts. For example, in *Branwhite v Worchester Works Finance Ltd*. [1969] 1 AC 552 at 587 Lord Wilberforce said:

> " It may be that some wider conception of vicarious responsibility other than that of agency, as normally understood, may have to be recognised in order to accommodate some of the more elaborate cases which now arise when there are two persons who become mutually involved or associated in one side of a transaction."

[152] In the discussion on agency law and companies at para 1-0280, p 21, *Bowstead* recognises that a company operates only through individuals. But goes on to state that " in relation to the rules of company law (including equity), the rules of agency and vicarious liability suffice to enable a company to be held liable and entitled in respect of acts performed, and *the states of mind* held by its agents and employees in the same way as a human principal. *No special rules are needed*" (emphases added). This last sentence is an important one.

[153] In *Tesco Supermarkets Ltd. v Nattrass* [1972 AC 153] at 198-199 Lord Diplock famously said:

> "A corporation is an abstraction. It is incapable itself of doing any physical act or being in any state of mind. Yet in law it is a person capable of exercising legal rights and of being subject to legal liabilities which may involve ascribing to it not only physical acts which are in reality done by a natural person on its behalf but also the mental state in which that person did them. In civil law, apart from certain statutory duties, this presents no conceptual difficulties. Under the law of agency, the physical acts and state of mind of the agent are in law ascribed to the principal, and if the agent is a

natural person it matters not whether the principal is also a natural person or a mere legal abstraction."

It is important to recognise that not only the physical acts but the state of mind of the agent are involved.

[154] In *Bilta (UK) Ltd v Nazir (No 2) [2015] UKSC 23,* a case involving an illegality defence in the context of a fraud by two directors, Lord Sumption scrupulously examined the leading authorities on the point of the attribution of the knowledge of agents to companies at paras [65] to [70]. His insightful and impressive scholarship on attribution and illegality deserves *verbatim* quotation:

"Attribution

65. English law might have taken the position that a company, being an artificial legal construct, was mindless. If it had done that, then legal wrongs which depended on proof of some mental element such as dishonesty or intention could never be attributed to a company and the present question could not arise. In the early years of English company law, there were powerful voices which denied that a tort dependent on proof of a mental element could be committed by a company. For many years this view was principally associated with Lord Bramwell, who in a well-known *dictum* in *Abrath v North Eastern Railway Co* [1886] 11 App Cas 247, 250-251, declared that a fictitious person was "incapable of malice or of motive" even if the whole body of its directors or shareholders in general meeting approved its acts for improper reasons. This question was, however, settled as far as English civil law was concerned by the end of the nineteenth century. As Lord Lindley put it in *Citizens' Life Assurance Co Ltd v Brown* [1904] AC 423, 426, once companies were recognised by the law as legal persons, they were liable to have the mental states of agents and employees such as dishonesty or malice attributed to them for the purpose of establishing civil liability. In

the criminal law, the notion that a corporation was incapable of committing an offence requiring *mens rea* persisted rather longer. It was asserted in both the first edition (1909) and the second edition (1933) of *Halsbury's Laws of England*. But it was rejected in a series of decisions in 1944: see *Director of Public Prosecutions v Kent and Sussex Contractors Ltd* [1944] KB 146; *R v ICR Haulage Ltd* [1944] KB 551; *Moore v I Bresler Ltd* [1944] 2 All ER 515. It is now well established that a company can be indicted for conspiracy to defraud (*R v ICR Haulage Ltd* [1944] KB 551) or manslaughter before statute intervened in 2007 (*Attorney-General's Reference (No 2 of 1999*) [2000] QB 796), provided that an agent with the relevant state of mind can be sufficiently identified with it. It cannot be emphasised too strongly that neither in the civil nor in the criminal context does this involve piercing the corporate veil. It is simply a recognition of the fact that the law treats a company as thinking through agents, just as it acts through them.

66. It follows that in principle, the illegality defence applies to companies as it applies to natural persons. This is the combined effect of the company's legal personality and of the attribution to companies of the state of mind of those agents who for the relevant purpose can be said to think for it. But the principles can only apply to companies in modified form, for they are complex associations of natural persons with different interests, different legal relationships with the company and different degrees of involvement in its affairs. A natural person and his agent are autonomous in fact as well as in law. A company is autonomous in law but not in fact. Its decisions are determined by its human agents, who may use that power for unlawful purposes. This gives rise to problems which do not arise in the case of principals who are natural persons.

67. The question what persons are to be so far identified with a company that their state of mind will be attributed to it does not admit of a single answer. The leading modern case is *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500. The primary rule of attribution is

that a company must necessarily have attributed to it the state of mind of its directing organ under its constitution, ie the board of directors acting as such or for some purposes the general body of shareholders. Lord Hoffmann, delivering the advice of the Privy Council, observed that the primary rule of attribution together with the principles of agency and vicarious liability would ordinarily suffice to determine the company's rights and obligations. However, they would not suffice where the relevant rule of law required that some state of mind should be that of the company itself. He explained, at p 507:

> 'This will be the case when a rule of law, either expressly or by implication, excludes attribution on the basis of the general principles of agency or vicarious liability. For example, a rule may be stated in language primarily applicable to a natural person and require some act or state of mind on the part of that person "himself" as opposed to his servants or agents. This is generally true of rules of the criminal law, which ordinarily impose liability only for the *actus reus* and *mens rea* of the defendant himself.'

The directing organ of the company may expressly or implicitly have delegated the entire conduct of its business to the relevant agent, who is actually although not constitutionally its "directing mind and will" for all purposes. This was the situation in the case where the expression "directing mind and will" was first coined, *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705. Such a person in practice stands in the same position as the board. The special insight of Lord Hoffmann, echoing the language of Lord Reid in *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, 170, was to perceive that the attribution of the state of mind of an agent to a corporate principal may also be appropriate where the agent is the directing mind and will of the company for the purpose of performing the particular function in question, without necessarily being its directing mind

and will for other purposes. This is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was for this purpose intended to count as the act etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy.

68. A modern illustration of the attribution of knowledge to a company on the basis that its agent was its directing mind and will for all purposes is *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, where the Privy Council was concerned with the knowledge required to make a company liable as a constructive trustee on the footing of knowing assistance in a dishonest breach of trust. The defendants were a one-man company, BLT, and the one man, Mr Tan. At pp 392-393, Lord Nicholls, delivering the advice of the Board, observed that Mr Tan had known the relevant facts and was therefore liable. "By the same token, and for good measure, BLT also acted dishonestly. Mr Tan was the company and his state of mind is to be imputed to the company". On the other hand, *El Ajou v Dollar Land Holdings Ltd* [1994] 2 All ER 685 did not concern a one-man company. The issue was whether knowledge of the origin of funds received for investment by Dollar Land Holdings, a public company, could be imputed to it so as to found a liability to account as a constructive trustee on the footing of knowing receipt. Lord Hoffmann, delivering the leading judgment of the Court of Appeal and applying the principles which he would later explain in *Meridian Global*, held that the company was fixed with the knowledge of one Mr Ferdman, its part-time chairman and a non-executive director, because he had acted as its directing mind and will for the particular purpose of arranging its receipt of the tainted funds.

69. These refinements can give rise to nice questions of fact. But their application in a case like the present one is perfectly straightforward. On the pleaded facts, Mr Chopra and Mr Nazir were the directing organ of Bilta

under its constitution. They constituted the board. Mr Chopra was also the sole shareholder. As between Bilta and Jetivia it is common ground on the pleadings that they were the "directing mind and will" of Bilta for all purposes, and certainly in relation to those of its functions which are relevant in these proceedings.

70. The search for a test of a company's direct or "personal" liability has sometimes been criticised as a distraction or an artificial anthropomorphism, and it is certainly true that English law might have developed along other lines. As it is, the distinction between a liability which is direct or "personal" and one which is merely vicarious is firmly embedded in our law and has had a considerable influence on the way it has developed in relation to both kinds of liability. Vicarious liability does not involve any attribution of wrongdoing to the principal. It is merely a rule of law under which a principal may be held strictly liable for the wrongdoing of someone else. This is one reason why the law has been able to impose it as broadly as it has. It extends far more widely than responsibility under the law of agency: to all acts done within the course of the agent's employment, however humble and remote he may be from the decision-making process, and even if his acts are unknown to the principal, unauthorised by him and adverse to his interest or contrary to his express instructions (*Lloyd v Grace Smith & Co* [1912] AC 716), indeed even if they are criminal (*Lister v Hesley Hall Ltd* [2002] 1 AC 215). Personal or direct liability, on the other hand, has always been fundamental to the application of rules of law which are founded on culpability as opposed to mere liability. One example, as Lord Hoffmann pointed out in *Meridian Global*, is provided by the rules governing criminal responsibility, which do not usually recognise vicarious responsibility. . .As cases like this illustrate, if the illegality defence were to be engaged merely by proof of a purely vicarious liability, it would apply irrespective of any question of attribution, to any case in which the human wrongdoer was acting within the scope of his employment. This would extend the scope of the defence far more widely than anything warranted by the demands of justice or the principle stated by Lord Mansfield. On the

footing that the attribution of culpability is essential to the defence, the concept of a "directing mind and will" remains valuable. It describes a person who can be identified with the company either generally or for the relevant purpose, as distinct from one for whose acts the company is merely vicariously liable."

[155] Lords Toulson and Hodge in *Bilta (No. 2)* (supra) at paras [203] and [204] considered the attribution of knowledge in three distinct contexts:

"203. It is helpful in the civil sphere, to consider the attribution of knowledge to a company in three different contexts, namely (i) when a third party is pursuing a claim against the company arising from the misconduct of a director, employee or agent, (ii) when the company is pursuing a claim against a director or an employee for breach of duty or breach of contract, and (iii) when the company is pursuing a claim against a third party.

204. In the first case, where a third party makes a claim against the company, the rules of agency will normally suffice to attribute to the company not only the act of the director or employee but also his or her state of mind, where relevant. In this context, the company is like the absent human owner of a business who leaves it to his managers to run the business, while he spends his days on the grouse moors (to borrow Staughton LJ's colourful metaphor in *PCW Syndicates v PCW Reinsurers* [1996] 1 WLR 1136, 1142). Where the rules of agency do not achieve that result, but the terms of a statute or contract are construed as imposing a direct liability which requires such attribution, the court can invoke the concept of the directing mind and will as a special rule of attribution. Thus where the company incurs direct liability as a result of a wrongful act or omission of another (as in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* and *McNicholas Construction Co Ltd v Customs and Excise Comrs*) it is deemed a wrongdoer because of those acts or omissions. If it is only vicariously liable for its employee's tort, it is

responsible for the act of the other without itself being deemed a wrongdoer and without the employee's state of mind being attributed to it."

[156] What is clear to me from the judgments in *Bilta* is that the acts and states of mind of agents that are allegedly attributed to their principals must remain sensitive to the legal question that is engaged by the facts. In the case before me, the EMBD Contractors, being corporate entities cannot be said to be running on autopilot. The facts and circumstances pleaded by EMBD, especially regarding the patterns, oddities, and inconsistencies in the tender bids, the text messages between Dr Moonilal/Mr Taradauth Ramnauth and Mr Parmassar, and the haste in which the overpriced bids were prepared, the inferior works executed and the exorbitant payments made, reveal the existence within the EMBD Contractors of a governing or operating mind and will that cannot reasonably be explained at this interlocutory stage as purely accidental or the result of innocence or negligence. Clearly, agents or principals were directing the EMBD corporate entities to sign over-priced tender bids, to supervise the execution of inferior works, and to receive vast sums of money.

[157] Based on the primary facts, the prospect of fraud as opposed to innocence or negligence are not equal possibilities to explain the facts and circumstances alleged in the EMBD pleadings. In my opinion, the pleaded case leans heavily towards fraud and conspiracy, and away from innocence or negligence. It would take an assortment of mirabilia to explain the pleaded facts as not involving fraud and conspiracy. While it is true that some, but not all, of the operating minds and wills of the EMBD Contractors have been directly or indirectly identified (Dr Moonilal, Mr Taradauth Ramnath of TM Ramnath, Mr Naeem

Ali of Namalco, and Mr Kalloo of Kallco) it seems to me to be draconian in the context of a clandestine conspiracy to demand that the pleader provides the names of agents who, according to the pleaded case, would certainly not be expected to have made themselves known to anyone other than themselves. The purport of the EMBD pleadings is that a governing mind and will was involved in the actions of all the companies. The essential point is that the EMBD contractors ought to fully understand the allegations in such a way that allows them to plead their Defences. I do not see how they cannot.

[158] There was some discussion before me about the utility of two divergent precedents of pleading involving unlawful means conspiracy in relation to companies. The *Atkins'* precedent does not identify the names of the agents; the *Bullen and Leake* precedent does. Precedents of pleadings based on hypothetical cases, the facts of which are unknown, might be useful to a practitioner who will follow the template and insert his or her unique instructions in the context of real cases. However, EMBD's pleading is not a hypothetical case and the omission of the names of all the agents or directors is explainable by reason of the clandestine nature of conspiracies generally.

[159] If the EMBD contractors wish to dispute the authority of its unnamed agents or directors, they easily can do so in their defences. EMBD, by its pleading of primary facts, asks the court to make an inference that a directing mind or will was involved in the actions of each of the EMBD Contractors. That to me should make clear to the applicants beyond peradventure what case is brought against them insofar as the actions of the companies are involved.

[160] This is a case, as Lords Toulson and Hodge described in *Bilta* is one where a third party (EMBD) is pursuing a claim against a company (the EMBD Contractors) arising from the misconduct of a director, employee or agent. The cases that Mr Maharaj criticized are those involving claims by a company against a third party, and their Lordships' observation that in the first example (third party suit against a company) "the rules of agency will normally suffice to attribute to the company not only the act of the director or employee but also his or her state of mind" is a good one.

[161] I am therefore satisfied that insofar as the following ingredients of the tort are concerned, as defined in *Atkins* (supra), namely, (a) concerted action or combination between two or more persons and (d) intention to injure the claimant, that sufficient primary facts have been pleaded.

(g) Unlawful means conspiracy: pleading the use of unlawful means, knowledge of the unlawfulness, overt acts in pursuance of the combination, and damages

[162] Insofar as the other *Atkins* ingredients of the tort are concerned namely, (b) use of unlawful means (c) knowledge of the unlawfulness (e) overt acts in pursuance of the agreement or undertaking, I am satisfied by the sufficiency of the pleadings. I have already dealt with the knowledge aspect in my discussion of attribution.

Breach of fiduciary duty as an unlawful act in unlawful means conspiracy

[163] The applicants have attacked the reliance on a breach of fiduciary duty as constituting the unlawful element in unlawful means conspiracy. I am content, following the reasoning in *Total Network*, that a breach of fiduciary duty can constitute an unlawful act for the purposes of the tort if such a breach is proven to be in concert with other actions and injures a claimant. In the case of an unlawful means conspiracy, an intention to injure the claimant is sufficient and need not be the predominant purpose. *Total Network* recognised the two-party branch of the tort eliminating previous historic thinking that associated it with inducement of a breach of contract involving a third party. The House of Lords ruled that criminal conduct could constitute unlawful means whether or not it is actionable at the suit of the claimant. At para [44] Lord Hope said this:

> ". . . the rationale of the tort is conspiracy to injure. These factors indicate that a conspiracy is tortious if an intention of the conspirator was to harm the claimant by using unlawful means to persuade him to act to his own detriment, even if those means were not themselves tortious."

[164] In my opinion, any unlawful act is capable of founding unlawful means conspiracy, whether or not it is actionable in its own right. In *JSC BTA Bank v Ablyazov and another* (No. 14) [2018] 2 WLR 1125, the issue was whether an agreement to commit a contempt of court constituted an unlawful act for the purposes of an unlawful means conspiracy. The Supreme court held that it was. The headnote in the Weekly Law Report summarised the reasoning:

> ". . . although it was permissible for a person to advance his own interests by lawful means even if the result caused damage to others, there was no such right where unlawful means were used, nor where lawful means were used with the predominant purpose of injuring another; that the tort of conspiracy

was one of primary liability; that the real test for the tort was whether there was just cause or excuse for defendants combining with each other to use unlawful means; that such a test depended on the nature of the unlawfulness and its relationship to the resulting damage to the claimant; that contempts of court, being criminal offences, constituted unlawful means;"

[165] At para [11] of *JSC BTA Bank* Lord Sumption and Lord Lloyd-Jones said this:

> "Conspiracy being a tort of primary liability, the question what constitutes unlawful means cannot depend on whether their use would give rise to a different cause of action independent of conspiracy. The real test is whether there is a just cause or excuse for combining to use unlawful means. That depends on (i) the nature of the unlawfulness, and (ii) its relationship with the resultant damage to the claimant. This was the position reached by the House of Lords *in Revenue and Customs Commissioners v Total Network SL* [2008] AC 1174. The Appellate Committee held that a criminal offence could be a sufficient unlawful means for the purpose of the law of conspiracy, provided that it was objectively directed against the claimant, even if the predominant purpose was not to injure him".

[166] Breach of fiduciary duty has been held to give rise to unlawful means conspiracy in several commonwealth jurisdictions. In Canada, see *Levy-Russell Ltd. v Tecomotive Inc* [1994] OJ 650 and *McKinlay Transport Ltd v Motor Transport Industrial* [1996] OJ 461; in New Zealand, see *Chen v Karandonis* [2002] NSWCA 412; in Singapore see *Chew Kong Huat and Others v Ricwil* (Singapore) Pte Ltd. [2000] 1 SLR 385. It has also been held to ground an unlawful means conspiracy in several High Court cases in England, among them *Grupo Torras SA v Al-Sabah* [1999] CLC 1469, a decision of Mance J; *British*

Midland Tool Ltd v Midland International Tooling Ltd [2003] EWHC 466 (Ch); and *Aerostar Maintenance v Wilson* [2010] EWHC 2032 (Ch).

[167] Mr. Hughes QC made a spirited plea to me not to follow any of the Commonwealth decisions or even the English High Court cases. He said they were wrongly decided. He cautioned that the tort had been developing incrementally if not hesitatingly, and there was insufficient consensus among the Law Lords in *Total Network* to provide any universal principle that breach of a fiduciary duty could be a ground for unlawful means conspiracy. As Mr. Phillips QC correctly observed, none of the Commonwealth decisions or the English High Court decisions were appealed. If those cases were wrongly decided I imagine they would have been appealed.

[168] It seems to me that it is too late to turn back the clock. The years of inflexible "judicial abstentionism" are past. The courts today are more prepared than before to regulate the excessive conduct of players in a free market economy, especially when it is as result of a combination and involves wrongdoing that causes injury. A breach of fiduciary duty can, in my view, provide the unlawful element in unlawful means conspiracy. *Total Network* has opened a Pandora's Box but what emerges from it are not dangerous demons but principles of fair competition and the protection of a claimant's economic rights in a free market.

Unlawful means conspiracy: pleading (i) overt acts in pursuance of the agreement or undertaking and (ii) loss or damage to the claimant

[169] Insofar as overt acts are concerned, I am satisfied that the activities pleaded by EMBD cannot easily be explained by innocence, negligence, coincidence or serendipity. Mrs Lynette Maharaj SC attempted to convince me that the patterns, oddities, and coincidences in the tender bids were explainable. She relied on an expert's report that was attached to the affidavit in support of Namalco's strike out application. This expert's report contradicted the EMBD report and sought to provide an innocent rationale for the unusual patterns and oddities in the tender bids. I am not satisfied that it does do that, but, in any event, a clash of expert opinion is best resolved at a trial and not at an interlocutory stage. In my view, the pleadings (and analysis) relative to these curious and seemingly co-ordinated tender bids, taken together with the pleading of the haste in which the contracts were awarded and paid (especially in the run-up to the General Elections) constitute overt acts sufficient to raise an inference of unlawful means conspiracy at trial. The receipt alone of exorbitant funds for defective works based on inflated tender bids (such as EMBD has pleaded) is sufficient to constitute an overt act, far less when they are considered in relation to the other pleadings of primary facts.

Unlawful means conspiracy: pleading damages suffered by the claimant

[170] Insofar as the damages suffered by EMBD are concerned, I am satisfied that they are sufficiently particularised. With respect to the EMBD Contractors (excluding LCB), the formula for the assessment of damages is provided and it is only a matter of an arithmetical calculation to arrive at exact figures. Of course, I recognise that in relation to the Exchange

III and Picton III contracts, no formula has been provided. This is a deficiency, but it was not one that was unnoticed by the EMBD pleader. At paras 132 and 133 of the statement of case in the Related Action, it is stated in relation to the Exchange III and Picton III works that " a detailed report on defective works, omitted works, and over-certification of works. . . is being obtained by the claimant and particulars will be provided in due course". Further at para 169 of the Related Action, it is pleaded that EMBD " will provide particulars of the calculation of damages and/or equitable compensation for unlawful means conspiracy and dishonest assistance in relation to the Exchange III and Picton III [works] when the detailed reports on defective works, omitted works and over-certification of works are available". It seems obvious that at the time of filing, detailed reports, such as were available for the C1-C10 works, had not yet been delivered to the EMBD pleader. This is not to say that such reports were not in train or that EMBD intends to go to trial without these reports. Of course, in the absence of these experts' reports, it is impossible to have quantified the loss at the time of filing. In the face of the strike-out applications which soon followed the filing of the Related Action, it would not, in my view, be commercially prudent for any party to undertake further expense in an action that was in danger of being struck out. As I said earlier, the first CMC has not been held as Defences have not been filed and it is open to EMBD to amend its pleadings without permission on or before the first CMC. The absence of quantifiable damages in the Exchange III and Picton III works does not mean that damages were not suffered and, exercising my discretion to achieve the overriding objective of the CPR and in particular Rule 1.1(2)(c), I am prepared to disregard the omission and to await the first CMC, at

which time I expect the pleading of damages in relation to these two works will be amended after receipt of the awaited experts' reports

(h) Pleading the tort of dishonest assistance and knowing receipt

[171] According to *Bullen and Leake and Jacobs, Precedents of Pleading*, Vol. 2, 16th ed. para [54-03], a party is required to plead the following elements in the tort of dishonest assistance:

(a) that there has been a disposal of its assets in breach of trust or fiduciary duty,

(b) in which the defendant has assisted or which it has procured,

(c) the defendant has acted dishonestly,

(d) resulting in loss to the claimant

[172] Insofar as Mr Parmassar and Mr Balroop are concerned, I think that a proper case has been pleaded against them that contains every ingredient of the tort of dishonest assistance. The real question is whether the EMBD Contractors assisted, procured or induced Mr Parmassar's breach of fiduciary duty in offering a bribe and, among other things, colluding with him to secure the awards of the Caroni Roads Contracts and/or entering into these contracts and/or receiving inflated payments for inferior and defective work. A first point to note is that according to EMBD's pleadings, the EMBD Contractors (except for LCB) received payments that vastly exceeded the cost of the works that they were contracted to do. In a legally unregulated marketplace such enrichment might be regarded as a propitious windfall, but it is EMBD's case that it is no windfall at all.

[173] According to the pleading, the bids were rigged to ensure the award of certain contracts to certain contractors at prices that any reasonable or honest businessperson would immediately recognise as improper or absurd. The text messages are pleaded with a view to involving Dr Moonilal, Mr Parmassar, Mr Ramnauth and (indirectly) Mr Naeem Ali and Mr Kalloo in directly assisting or procuring a disposal of EMBD's assets in breach of trust or fiduciary duty. A full statement of the pleaded facts in support of this were set out earlier in this judgment. The establishment of the Cartel Arrangement is, in part,

dependent on inferences to be drawn at the trial which do not involve me today. The standard of behaviour expected of an honest commercial contractor placed in the position of the EMBD Contractors is an objective one to be determined at trial. It is not necessary for the EMBD Contractors to know all the details of the transaction in order to have acted dishonestly. The headnote in *Barlow Clowes International Ltd (in liquidation) and others v Eurotrust International Ltd and others* [2005] UKPC 37, a decision of the Privy Council, says it all:

> In considering whether a defendant's state of mind was dishonest an inquiry into the defendant's view about standards of honesty was not required. A defendant's knowledge of a transaction had to be such as to render his participation contrary to normally acceptable standards of honest conduct. There was no requirement that he should have had reflections about what those normally acceptable standards were. Consciousness of the dishonesty required consciousness of those elements of the transaction which made participation transgress ordinary standards of honest behaviour; it did not also require the defendant to have thought about what those standards were. In the instant case the judge had been fully entitled to make the findings of fact which she had and fully justified in her conclusions.

I have also considered *Abou-Rahmah v Abacha* [2005] EWHC 2662, [2006] 1 All ER (Comm) 247 at paras [42] to [44].

[174] In my view and having regard to what I said earlier on the pleading of particulars in unlawful means conspiracy, the tort of dishonest assistance has been sufficiently pleaded such as to permit the applicants to know the case that is brought against them.

Pleading the tort of knowing assistance

[175] The elements of the tort of knowing assistance were described by Hoffman LJ in *El Ajou v Dollar Land Holdings PLC* [1994] 2 All ER 685: (i) That there has been a disposal of the claimant's assets in breach of trust or fiduciary duty; (ii) The defendant has

beneficially received assets which are traceable as representing the claimant's own assets; (iii) The defendant has knowledge that the assets it received are traceable to a breach of fiduciary duty or breach of trust.

[176] There is no doubt in my mind that the first two elements have been properly pleaded. Insofar as the knowledge element is concerned, I am persuaded by the reasoning of Nourse, Ward and Sedley LJJ in *BCCI v Akindele* [2001] Ch 437 at 455:

> "In *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, which is now the leading authority on knowing assistance, Lord Nicholls of Birkenhead, in delivering the judgment of the Privy Council, said, at p 392G, that "knowingly" was better avoided as a defining ingredient of the liability, and that in that context the *Baden* categorisation was best forgotten. Although my own view is that the categorisation is often helpful in identifying different states of knowledge which may or may not result in a finding of dishonesty for the purposes of knowing assistance, I have grave doubts about its utility in cases of knowing receipt. Quite apart from its origins in a context of knowing assistance and the reservations of Knox and Millett JJ, any categorisation is of little value unless the purpose it is to serve is adequately defined, whether it be fivefold, as in the *Baden* case [1993] 1 WLR509, or twofold, as in the classical division between actual and constructive knowledge, a division which has itself become blurred in recent authorities.
>
> What then, in the context of knowing receipt, is the purpose to be served by a categorisation of knowledge? It can only be to enable the court to determine whether, in the words of Buckley LJ in *Belmont Finance Corpn Ltd v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393, 405, the recipient can "conscientiously retain. . .[the]. . .funds against the company" or, in the words of Sir Robert Megarry V-C in *In re Montagu's Settlement Trusts* [1987] Ch 264, 273, "[the recipient's] conscience is sufficiently affected for

> it to be right to bind him by the obligations of a constructive trustee". But, if that is the purpose, there is no need for categorisation. All that is necessary is that the recipient's state of knowledge should be such as to make it unconscionable for him to retain the benefit of the receipt.
>
> For these reasons I have come to the view that, just as there is now a single test of dishonesty for knowing assistance, so ought there to be a single test of knowledge for knowing receipt. The recipient's state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt. A test in that form, though it cannot, any more than any other, avoid difficulties of application, ought to avoid those of definition and allocation to which the previous categorisations have led. Moreover, it should better enable the courts to give common sense decisions in the commercial context in which claims in knowing receipt are now frequently made, paying equal regard to the wisdom of Lindley LJ on the one hand and of Richardson J on the other."

[177] The test of knowledge in the tort of knowing receipt has now evolved in broader terms than before. The question is whether, on the facts pleaded, it is unconscionable for the EMBD Contractors (excluding LCB) to retain the benefit of these allegedly ill-gotten gains. To my mind the EMBD pleading speaks for itself as to what good conscience demanded of these contractors. The issue of their knowledge in the tort of knowing assistance is proven by the same consideration. It is a consideration that will be taken into account at trial.

Pleading bribery

[178] The pleading of bribery against Mr Taradauth Ramnauth and/or TN Ramnauth and Mr Parmassar is, in my view, sufficiently pleaded to allow the former to know what case is made out against them. The pleaded text messages are enough to ground the claim. Mr Maharaj SC complained about the absence of any particulars of the internal arrangements of HDC and how, exactly, the house was awarded to Mr Parmassar. That surely is a matter for trial and not necessary to be included in a pleading. In any event, until the text messages are denied, they stand uncontradicted and they are very disturbing indeed. I bear in mind that Dr Moonilal was the line minister for HDC and he was also involved in the text messages on the allocation of an HDC house to Mr Parmassar. A responsible minister of government should have instructed Mr Parmassar to apply for an HDC house in the usual way, reprimand him for making a request, and entirely removed himself from the text discussions. The same can be said about Mr Taradauth Ramnauth. What business is it of his to be assisting the person who oversees the award of multimillion-dollar contracts in which he has a financial interest—to not only acquire any HDC house—but a specific unit of Mr Parmassar's choice? The pleaded fact that Dr Moonilal instructed Mr Parmassar by text message not to attend the public ceremony to collect the keys is also very telling.

<u>The second argument</u>

EMBD is wrong in law to have pleaded the unenforceability of any contract as a matter of public policy under the doctrine of illegality and those parts of its pleadings should likewise be struck out under Part 26.2(1)(b) and (c) CPR

[179] It is the applicants' case that EMBD's reliance on the illegality of the contracts (upon which they are said to be void and unenforceable) is wrong in law. The applicants say that EMBD's plea of illegality should be struck out, firstly because there is no existing category of public policy that would render the contracts unenforceable and, secondly, because there is no principled basis for expanding the existing categories. EMBD's plea of illegality is not based simply on the receipt of monies that ought not to have been paid. The ambit of the illegality plea is much wider and involves a variety of equitable and tortious wrongs: unlawful means conspiracy, bribery, knowing receipt and dishonest assistance. Public policy considerations are not divorced from the doctrine of illegality. In fact, they are common law spouses. The editors of *Halsbury's Laws of England/Contract* (Volume 22 (2012) set out the following propositions at paras 427 and 457:

(a) where a contract involves illegality at common law, its enforceability depends upon the intention of the parties;
(b) the general rule is that a contract involving the commission of a legal wrong or a contract with an unlawful purpose may not be enforced by either party in law or in equity;
(c) an agreement to do that which is a tort is illegal and will not be enforced by the courts; and
(d) a contract made with the purpose of committing a fraud on a third person or on the public cannot be enforced.

[180] In *Patel v Mizra* [2017] AC 467 the claimant brought a claim against the defendant for repayment of money advanced to him pursuant to an agreement that he would use it to bet on the movement of shares on the basis of insider information. The agreement contravened the Criminal Justice Act, 1993. The agreement could not be carried out because the expected insider information was not forthcoming. The judge dismissed the claimant's

claim as being barred by illegality. The Court of Appeal allowed the claimant's appeal on the basis that a party who had withdrawn from an illegal agreement because it could no longer be performed was not prevented by public policy from relying on it. The Supreme Court rejected the defendant's appeal. Lord Toulson JSC made the following observations:

> [99] Looking behind the maxims, there are two broad discernible policy reasons for the common law doctrine of illegality as a defence to a civil claim. One is that a person should not be allowed to profit from his own wrongdoing. The other, linked consideration, is that the law should be coherent and not self-defeating, condoning illegality by giving with the left hand what it takes with the right hand.
>
> [100] Lord Goff observed in the *Spycatcher* case, *Attorney General v Guardian Newspapers Ltd* (No 2) [1990] 1 AC 109, 286, that the "statement that a man shall not be allowed to profit from his own wrong is in very general terms, and does not of itself provide any sure guidance to the solution of a problem in any particular case". In *Hall v Herbert* [1993] 2 SCR 159 McLachlin J favoured giving a narrow meaning to profit but, more fundamentally, she expressed the view at pp 175-176, that , as a rationale, the statement that a plaintiff will not be allowed to profit from his or her own wrongdoing does not fully explain why particular claims have been rejected, and that it may have the undesirable effect of tempting judges to focus on whether the plaintiff is "getting something" out of the wrongdoing, rather than on the question whether allowing recovery for something which was illegal would produce inconsistency and disharmony in the law, and so cause damage to the integrity of the legal system.

[101] That is a valuable insight, with which I agree. I agree also with Professor Burrows' observation that this expression leaves open what is meant by inconsistency (or disharmony) in a particular case, but I do not see this as a weakness. It is not a matter which can be determined mechanistically. So how is the court to determine the matter if not by some mechanistic process? In answer to that question I would say that one cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would harmful to the integrity of the legal system, without (a) considering the underlying purpose of the prohibition which has been transgressed, (b) considering conversely any other relevant public policies which may be rendered ineffective by denial of the claim, and (c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality. We are, after all, in the area of public policy. That trio of necessary considerations can be found in the case law."

Lord Neuberger at para [174] agreed with Lord Toulson JSC at para [101] above and said at para [174] that Lord Toulson's approach

> "provides as reliable and helpful guidance as it is possible to give in this difficult field. When faced with a claim based on a contract which involves illegal activity (whether or not the illegal activity has been wholly, partly, or not at all undertaken), the court should, when deciding how to take into account the impact of the illegality on the claim, bear in mind the need for integrity and consistency in the justice system, and in particular (a) the policy behind the illegality, (b) any other public policy issues, and (c) the need for proportionality".

[181] If the pleaded facts are proven at the trial on the question of unlawful means conspiracy, dishonest assistance, dishonest receipt, and bribery, it would be a dereliction of duty of

the trial court not to hold that the contracts are unenforceable on the ground of illegality. Just as the common law has developed incrementally, so too have the activities of those who seek to subvert it. These subversionary inroads begin first on unnoticed footpaths and, unless the courts intervene in the otherwise free market, the unnoticed footpaths will soon become highways. Public policy must take account of these incremental deviations from the integrity of the legal system in Trinidad and Tobago and its effects on the public consciousness of right and wrong. In my view, there is nothing improper in law with EMBD's plea of illegality and its claim that the contracts are unenforceable.

The third argument

The applicants should not be compelled to defend the claims until it provides amended particulars in proper compliance with Part 8.6(1) CPR

[182] I have already held that the pleading of all the torts are sufficient to go to trial. Enough particulars have been provided to allow the applicants to know beyond peradventure what case is brought against them. There is no proper reason why the Defences to Counterclaim in the Consolidated Action and the Defences in the Related Action should not be filed.

The viability of the pleaded tort claims against the six applicants that are fit to go to trial

[183] In assessing the weight of the pleadings in the Consolidated Action and the Related Action I have come to the conclusion that I must take a panoramic view of the entirety of the case in both proceedings. There are linkages between all the torts *inter se* and linkages between them and the primary factual assertions. These nexuses do not appear to me to be disconnected. I pay attention to the following allegations:

(a) The text messages exchanged between Dr Moonilal and Mr Parmassar, in particular those that concern the involvement of Mr Naeem Ali (of Namalco) in drafting a Note to Cabinet for the Caroni Roads; Dr Moonilal's instruction to include the Barrackpore Road (C9) to Kallco (who eventually won the tender); the interaction relative to the award of an HDC house to Mr Parmassar; the arrangement of meetings or "gatherings" at the Royal Hotel between Mr Ramnauth and Mr Parmassar with unnamed persons; the identification of Mr Parmassar as having become "one of the crew" or "one of the boys"; the instruction by Dr Moonilal to Mr Parmassar of which contractors should receive which sums (involving a payment of $100 million) three days before the General Election and the further instruction in relation to some of the earlier cheques that they should be delivered to Dr Moonilal personally for his onward delivery to the contractors; Dr Moonilal's instruction to Mr Parmassar that EMBD should award sandpit contracts in Milton, Couva to Ramhit and Kallco; Dr Moonilal's instruction to Mr Parmassar to invite Kallco and Fides for EMBD's Hermitage and Picton projects; Dr Moonilal's intimate involvement in the day-to-day affairs of EMBD.

(b) The text messages exchanged between Mr Taradauth Ramnauth (including messages forwarded to Mr Ramnauth from someone at HDC), and instructions given to Mr Parmassar from someone

identified as " the boss" and "the chief"; the assistance in obtaining an HDC house and the offer by Mr Ramnauth to Mr Parmassar to pay one year's rent in advance for another house in Valsayn or Lange Park.

(c) The unnatural speed in the preparation of the PTEs and the drastically upwardly revised PTEs that involved no change in the scope of works or design in the original PTEs; the speed at which the Tender bids were prepared and awarded without any reference to the Tenders Committee.

(d) The threat made by Mr Balroop to Mr Khalil Baksh (who was at the time on vacation) 16 days before the General Elections that unless he attended EMBD to certify payments to Kallco he would be sent "on long leave".

(e) The allegedly defective and useless works that were performed at excessive prices without proper engineering certification before payments were made.

[184] When one looks at the pleadings as a whole, it is fair to say that the pleadings are impervious to the strike-out applications brought by TN Ramnauth and Mr Taradauth Ramnauth, Kallco, Ramhit (in the Consolidated Action) and Fides and Namalco (in the Related Action). These five contractors and Mr Taradauth Ramnauth should fully understand the nature of the case that is brought against them. Further particularisation is not required.

[185] In my opinion, LCB's application in the Related Action is a good one. If I may use an analogy, the inferences that EMBD is asking the trial court to make may be likened to a ladder with many rungs that lead in one direction. Some of the EMBD Contractors may know of some of the rungs and some may know of all. Five of them are said to have climbed it. At the top of the ladder is a large sum of money of which all the EMBD Contractors partook, save for LCB. According to the pleading, there is no evidence that LCB gained any benefit whatsoever, either directly from EMBD or indirectly from the winning bidders. The EMBD case against LCB is that its bids were rigged in order to appear as a decoy and avoid the suspicion of a cartel. It cannot be said in the absence of proof of LCB's enrichment that EMBD was deprived of any assets, an important ingredient of the torts. There is no pleaded case to suggest that LCB received any compensation for its losing bids. None of the emails or the text messages sufficiently implicate LCB. Insofar as the poor governance of the Caroni Roads works is concerned, LCB got no contracts and therefore cannot be said to have enriched itself by executing defective works at excessive prices. The same can be said of the tort of dishonest assistance. Mr Parmassar did not, on the pleaded facts, favour LCB in the award of any contract. Further, as a non-awardee, the knowledge element of this tort is completely absent. The imputation of any benefit to LCB arising out of the bribing of Mr Parmassar is imaginative at best because there is no proof of any benefit to LCB other than its submission of bids.

The Namalco application

[186] It is obvious from my findings that Namalco's application for summary judgment cannot be granted. I have already dealt with the public policy element that Mr Hughes QC raised on behalf of Namalco. Namalco's application is, unlike all the other applications, supported by an affidavit of fact (by one Mr Lenny Sookram, Projects Manager) that disputes the claims made against it. This affidavit illustrates that Namalco understands the case brought against it and is somewhat counterproductive, in my view, to its argument that the pleading is insufficient.

[187] A further point of Mr Hughes QC was that the tort of unlawful means conspiracy does not exist in Trinidad and Tobago and that there is no statutory underpinning, such as legislation to control unfair competition, to provide the unlawful or criminal element of the tort in our jurisdiction. I respectfully do not agree with those submissions. Breach of fiduciary duty is well known as a civil wrong in Trinidad and Tobago. Such a fiduciary breach can constitute an unlawful act for the purposes of unlawful means conspiracy according to several un-appealed High Court decisions in England and in superior courts throughout the Commonwealth. Its involvement in grounding the unlawful element in the tort was not specifically excluded in *Total Network.* The tort is obviously developing on a case by case basis to meet the ingenious and idiosyncratic behaviour of human actors.

[188] In Trinidad and Tobago, it was held to be a tort by Seepersad J in *Williams v Trinidad Gymnastics Federation and ors*, CV-2016-02608, a judgment of 26 November 2018 (unreported). In that judgment, at para [137] Seepersad J applied the definition of the tort

in *Ablyazov* (supra) (which he referred to as *JSC BTA Bank* v *Khrapunov* [2018] UKSC 19), and other authorities, and held that the unlawful element in unlawful means conspiracy can include a breach of fiduciary duty. I agree with Seepersad J. There is no proper reason in law to deprive a claimant of the salutary protections and redress of the tort in our jurisdiction. If our Parliament wishes to legislatively intervene in the marketplace to criminalise unfair competition it is free to do so. The common law has however been developing at a quicker pace—slowly departing from its previous abstentionist policy—and I can find no sensible rationale to ignore its recent developments.

Disposition of the six applications

[189] For the reasons I have stated above, the five applications (save for the application of LCB) are dismissed with costs certified fit for Queen's Counsel, two junior Counsel, and an instructing Attorney. In default of agreement, the costs shall be assessed before a Master on a date to be fixed by the Court Office. There shall be an order in terms of the application filed by LCB with costs certified fit for Senior Counsel, Junior Counsel and Instructing Attorney to be paid by EMBD to LCB to be assessed, in default of agreement, before a Master on a date to be fixed by the Court Office. Formal orders will be issued tomorrow.

[190] There remain the following outstanding applications in the Consolidated Action and the Related Action:

(a) TN Ramnauth, Kallco, and Ramhit (in the Consolidated Action), and Fides, Namalco, Dr Moonilal, Mr Parmassar, Mr Balroop, and Mr

Walker (in the Related Action), have filed separate applications seeking extensions of time to file Defences;

(b) Mr Parmassar and Mr Balroop have filed applications in the Related Action to stay the proceedings.

[191] Directions were previously given for the determination of all these applications, in some cases with orders for the filing and exchange of written submissions. My judgment today inevitably leads me to think of practicable ways that these applications will be disposed of or resolved. My preliminary thought is that the applications for a stay by Mr Parmassar and Mr Walker should be dismissed and that the applications for extensions of time to file Defences to Counterclaims in the Consolidated Action and extensions of time to file Defences in the Related Action should be granted. I therefore seek the advice of Counsel on a sensible way forward in determining these outstanding applications. To save time, I am today prepared to make any orders by consent in those applications. If this is not possible then, subject to the diaries of Queen's Counsel and Senior Counsel, I will hear these applications on 21 August 2020 to receive your further assistance.

[192] I sincerely thank all Counsel for their invaluable assistance to the court.

James Christopher Aboud
Judge