BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT
CIVIL JURISDICTION

CV No. 0333 of 2011

FINANCIAL SERVICES COMMISSION **PETITIONER**

AND

CLICO INTERNATIONAL LIFE INSURANCE LIMITED **RESPONDENT**

Before: The Honourable William J Chandler, High Court Judge

Dates of Hearing: 2015 July 10th, 15th
August 4th and 5th
Date of Decision: 2015 December 2nd

Appearances:

Mr. M. Adrian King with Mrs. Cyralene Benskin-Murray and Ms. Deidre Marquez, Attorney-at-Law for the Petitioner.
Mr. Ramon O. Alleyne with Ms. Sheena-Ann Ince of Messrs. Clarke, Gittens & Farmer, Attorneys-at-Law for the Judicial Manager.
Sir Richard L. Cheltenham QC with Ms. Shelleyann Seecharan Attorneys-at-Law for the ECCU and Grenada Ports Authority.
Mr. Ralph A. Thorne QC in association with Mr. Frank Odle Attorneys-at-Law for David Wall, Quinda Wall, Andre Wall, Anastasia Wall, Hazel Layne and Dave Thorne, interested parties.
Ms. Jennifer C. Edwards QC, Solicitor General of Barbados with Ms. Donna Brathwaite QC, and Ms. Joanna Murphy, Crown Counsel, for the Ministry of Finance and Economic Affairs.
Mr. Elson Gaskin with Ms. Sadie Dixon Attorneys-at-Law for the Central Bank of Barbados.

DECISION

The Application

[1] This decision concerns an application filed on 01 June 2015 by the Judicial Manager (the JM) of CLICO International Life Insurance Limited (CIL or the Company) pursuant to section 60 of the Insurance Act, Cap. 310 of the laws of Barbados for the following:

i. An order that the recommendation(s) of the JM contained in the Report filed on 15th day of December 2014 be adopted.

ii. An Order terminating the judicial management of CIL.

iii. An Order appointing Deloitte Consulting Ltd the liquidator of CIL.

iv. An Order setting out the powers of the liquidator of CIL.

v. An Order that the Costs of the application be the costs in the cause.

By virtue of the events which transpired subsequent to the application, there is now the following additional application before the Court for

vi. An order to give effect to an application by the Ministry of Finance and Economic Affairs (the Ministry) for a proposed scheme (Option One) for the future conduct of the business of CIL on the basis that the proposal is the most advantageous to the interests of the policy holders of CIL. The proposal is set out in the affidavit of Mr. Ashley

Bignall (the Bignall Affidavit), Chief Accountant (ag.) in the Ministry and in the June 2013 Reports of the JM.

Background

[2] CIL is an insurance company registered under the provisions of the **Insurance Act of Barbados**, which was placed under judicial management by an Order of this Court on 14th April 2011. Deloitte Consulting Limited (Deloitte) (acting through Mr. Patrick Toppin and Mr. Oliver Jordan) was appointed JM, to manage the affairs of the company pursuant to the terms of the order of Court and the provisions of the **Insurance Act**. Mr. Jordan resigned from Deloitte and Mr. Toppin continued to so act.

[3] Several interim reports were submitted to the Court and various applications were made, including applications for orders tracing various assets of the company, resulting in Court proceedings, which are not the subject matter of this decision. The final report was submitted to the Court on the 14th day of June 2013.

The Proposal

[4] I now set out the proposal (which has been called the 'Regional Restructuring Plan' (RRP) in full for the purposes of this decision.

a) **The establishment of NEWCO (a separate entity responsible for conducting insurance business and which is proposed to assume the traditional policy liabilities sold in Barbados by CIL) to hold CIL's portfolio of traditional insurance business sold in Barbados and the restructured individual EFPAs. At the time the actuarial value of the various liabilities were as follows:**

- Actuarial value of the portfolio of traditional business in Barbados of $176MM
- Actuarial value of the portfolio of traditional business in the ECCU of $160MM
- Present value of the restructured individual EFPAs in Barbados totalling $99MM
- Present value of the restructured individual EFPAs in the ECCU totalling $107MM

Total value of the policyholder liabilities transferred to NEWCO would be $542MM.

b) **The establishment of two Property Trusts each holding all of CIL's real estate assets located in the ECCU and in Barbados, respectively:**

- Total current value of CIL's real estate assets was approximately $325MM (CIL's non-real estate assets of approximately $115MM would be transferred to the NEWCO);
- Barbados Property Trust to hold real estate assets with current value of approximately $230MM;
- ECCU Property Trust to hold real estate assets with current value of approximately $95MM; and
- Trustees for each Property Trust will be appointed by the relevant Governments to represent the interests of the various blocks of shareholders and will in turn appoint professional managers to manage the affairs of the Property Trusts with the objective of enhancing the value of the assets over time.

c) **Corporate and Government EFPA policyholders to receive shares in the two (2) Property Trusts based on the principal balance outstanding of their EFPAs:**

- Corporate EFPA principal balance of $118MM
- Government EFPA principal balance of $39MM

d) These shares will be issued at nominal value (i.e. zero coupon bonds) initially however there is a possibility that based on the future growth of the value of the assets in the Property Trusts that the shareholders may recover some or all of the amounts lost. The ultimate aim was for these shares to be listed on the Barbados and Eastern Caribbean Securities Exchanges to provide the Corporate and Government EFPA policyholders with an option to realise value in due course.

e) The Barbados Property Trust and the ECCU Property Trust would then issue $215MM and $95MM respectively in interest bearing bonds guaranteed by the Government of Barbados and the ECCU Governments respectively. These bonds would be used to provide statutory fund eligible assets, for a buyer of the CIL policies that were to be transferred to NEWCO. Any remaining value will accrue for the benefit of the common shareholders in the Property Trusts.

f) The Barbados Government would also directly issue a bond in the amount of $150MM which will be used to provide eligible assets for the ECCU policies in NEWCO that are not covered by the ECCU Property Trust Bond ($117MM), and to cover the

estimated cost of implementing this restructuring plan (such as repayment of secured creditors, unpaid amounts to policyholders and management fees ($33MM).

The Bignall Affidavit

[5] Mr. Bignall deposed that the Key elements of the Government's implementation of Stage One of the Regional Restructuring Plan will include the following measures:

(i) Government will be the guarantor of the bonds issued by New Life Investment Company Inc (NLICO) to CIL, in the sum of approximately **BDS $65 million** for the purpose of transferring the real estate assets of CIL in Barbados. These bonds will be issued by 31st October 2015.

(ii) NLICO will hold and manage designated real estate assets of CIL in Barbados. Those assets are to be transferred to NLICO in exchange for the bonds issued. Moreover, NLICO will raise cash through the disposal of the real estate assets and other assets it acquires from CIL to assist in the liquidation of the bonds issued to CIL and guaranteed by the

Government. The Government will meet any shortfall arising as a result of the guarantee.

(iii) The Government will issue to NEWCO a Demand Note in the sum of approximately **BDS $215 million** for the amount of any Statutory Fund shortfall, being the difference between the aggregate value of the current assets, eligible other assets and the bonds issued by NLICO as well as the actuarial liability of CIL's traditional life and insurance business as it relates to policies sold in Barbados.

(iv) The Demand Note shall pay interest to NEWCO at a rate sufficient to fund the expected monthly shortfall from NEWCO's operations, including monthly distributions to individual EFPA policies, which were sold in Barbados by CIL. As noted at paragraph 12 above, the funding for NEWCO's initial operations during the first year of restructuring, will be provided by the Central Bank of Barbados. In a joint meeting held on 22nd May 2015, the Judicial Manager informed the Ministry that the cash requirement for the liabilities

of CIL, up until 31st December 2015 had been estimated at approximately BDS $45 million.

(v) Individual EFPA policyholders of CIL referred to in the sub-paragraph above shall have their principal claims converted to 10-year fixed annuities at current interest rates at the time of conversion with blended monthly payments. Should the operating cash flow of NEWCO be insufficient after payment of claims, expenses, selling, general and administrative expenses and other costs, the Government shall guarantee the monthly blended payments of interest and principal due on the restructured 10-year fixed annuities. On 22nd May 2015 the Judicial Manager informed the Ministry that as at 31st December 2013, the principal amount of this guarantee was approximately **BDS $113 million**.

(vi) The Government or its assignee shall be the owner of the common shares of NEWCO, which shall have a nominal value on the date of transfer of the identified assets and liabilities of CIL relating to Barbados.

The Submissions

[6] Much ado was made by counsel for the ECCU in the cross-examination of the JM as to whether the proposal placed before the Court was the JM's proposal or that of the Ministry of Finance and Economic Affairs. I do not think that anything turns on that issue. I am satisfied that this proposal is that of the Ministry and that, as given in evidence by Mr. Toppin, it is supported by the JM. As will be seen later in this decision, I am also satisfied that the provisions of the **Insurance Act** permit me to make a decision based on the proposals put forward by the Ministry and supported by the JM.

The Submissions of the Ministry

[7] The Solicitor General filed written submissions on 11 August 2015. She noted that the restructuring plan of the Ministry was supported by the JM and BIPA and that it was the preferable option rather than the alternative of liquidation of the company. The plan was viable. The government through the Central Bank of Barbados had pledged its commitment to contributing to financing the operational requirements of Stage One of the RRP, particularly by way of a $52m Bds. loan to support the immediate liabilities of CIL up to 31st December 2015 and the operations of New Life Investment Company

Inc. (NLICO) for its first two years of existence, should the plan be approved by the Court.

[8] The advantages of the plan were:

i. It contemplated a transitional management and oversight role of the Government's involvement in stage one of the RRP.

ii. It envisaged the establishment of a separate entity for conducting insurance business, which would assume the traditional policy liability of CIL in Barbados, managed by competent managers until the insurance business was divested (Resolution Life Assurance Company Limited (RLAC)).

iii. It would provide a viable option under which policyholders had the opportunity to yield higher returns on their principal.

iv. It allowed for any appreciation of assets to be realised for the benefit of policyholders.

v. Regional support was not essential until Stage 2 of the RRP which stage required a commitment of financial resources from the Government of Barbados and the Eastern Caribbean (EC) Territories in order to make the regional portion of the Ministry's plan feasible, and

vi. It envisaged that the distressed portfolio of CIL relative to traditional policies sold in Barbados would be rendered solvent and operational through specific restructuring measures outlined in paragraph 17 of the Bignall's affidavit.

Submissions of the ECCU and Grenada Ports Authority

[9] The ECCU, represented by Sir Richard, submitted that the proposed plan made no corresponding proposal to deal with the interests of EC policy holders and was, in effect, a Barbados only plan which ought to be rejected for the following reasons:

Discriminatory Treatment

[10] All of the policyholders, corporate or natural Barbadian or Eastern Caribbean, were members of the same class and were unsecured creditors of CIL which was registered in Barbados with branches in the Eastern Caribbean registered as external companies. Sir Richard submitted that for legal purposes there was one entity with access in several jurisdictions.

[11] The current proposal would, he posited, transfer the traditional and restructuring individual EFPA Barbadian policies to a new insurance company whilst the policies of the EC policyholders would remain with the beleaguered CIL and the liabilities related to the Corporate EFPA policies

issued in Barbados would be exchanged for preference shares in NLICO which was an entity with no apparent value and then extinguished.

[12] This was discrimination based on national origin, which the Court could not sanction. Sir Richard also submitted that it was *ultra vires* the Court's powers to sanction the Ministry's plan, which was unlawful and discriminatory.

[13] Sir Richard contended that it is the responsibility of the JM to treat all creditors of the same class equally and to find an investor or solution. Instead he (the JM) was seeking to displace his responsibility by suggesting that the inability to arrive at an agreement with the ECCU justified his support of preferential treatment of some creditors.

[14] He submitted that the JM could and ought to have consulted with the regulatory agencies of the EC before proposing the Government's plan but instead refused to negotiate further with the ECCU on the basis, inter alia, that its 2014 counter proposal would result in increased expenditure to the Government of Barbados, thereby exhibiting bias and partiality in the matter.

[15] Counsel suggested that the JM's view ought to be discounted and an independent assessment of the Government's proposal undertaken by an independent advisor for the benefit of the Court which did not have the

expertise to adjudicate the feasibility of the plan without the benefit of independent assessment.

[16] Sir Richard further submitted that the Barbados first plan had no second act. There was no provision for the EC policyholders. The ring fencing of $31m in assets for the EC policyholders would not provide payment of pensions or any other benefits to them now or in the future.

[17] This ring fencing did not provide equal treatment of the creditors and could reasonably be viewed as a fraudulent preference to the Barbadian Policyholders.

[18] CIL would continue in judicial management with the EC policyholders bearing the costs of the continued judicial management with possible liquidation in the future. The remaining value held by the EC policyholders would continue to be eroded with the full cost borne by the EC policyholders only.

[19] Counsel suggested that the proposal discriminated between policyholders in three ways:

i. Traditional policyholders in Barbados were intended to receive more favourable treatment as compared with all Barbadian EFPA policyholders. Traditional policy holders were to have

their policies transferred to the new insurance company and all their rights preserved whilst individual EFPA policy holders would only receive their principal back with some future interest over a 10 year period. Corporate EFPA policyholders would lose all rights to any asset of CIL.

ii. Individual EFPA policyholders in Barbados were being preferred over corporate EFPA policyholders in Barbados, which is preferential treatment, and in violation of sections 61 and 62 of the **Insurance Act**. The law of liquidation and reorganisation prohibited differentiated treatment on the basis of identity and the Court ought not to distinguish between national and corporate policyholders.

iii. Corporate and statutory policy holders who were issued preferential shares in NLICO upon extinction of their rights as creditors of CLICO would have their standing legally affected since, if there was a petition to wind up CIL at a later stage, they would not be creditors but would be shareholders of another company altogether.

iv. The proposal sought to change the nature of their contracts and not merely the terms of them and was not permissible without the consent of the affected policyholders.

v. The Barbadian policyholders were being treated in a manner, which was both unequal and prejudicial to the EC policyholders contrary to the **Insurance Act**, in breach of the **American Convention on Human Rights (the Convention),** which prohibited discrimination on the basis of national or social origin and was also a fraudulent preference.

[20] He relied upon Article I of the Convention, **Attorney General v McMillan and Lockwood Limited [1992] LRC (Comm) 49** and **Bankruptcy Reorganisation** by **Martin Bienenstock 1987**.

[21] The ECCU submitted that BIPA by application filed 3rd June 2015 supported outside investment as a means of rescuing the whole company whereas it now supported the Government's proposal. There was no serious investigation of the probability of rescue of the entire entity.

[22] Reference was made to the affidavit of Philip Springer, Director of Entec Financial Services Limited and Equity Centre Barbados Limited filed 9th July 2015 where he deposed that both companies were nominees of Youe

Capital which was interested in purchasing CLICO Holdings Limited, the owner of CIL. A due diligence form was given to Entec by BIPA which it had not completed up to the date of filing of the affidavit.

[23] He submitted that the JM's failure to disclose the offer to purchase the Company was an egregious breach of duty especially in light of a circumstance where the only option advanced by the JM and the Barbados Government was inherently discriminatory.

***Pari Passu* Principle**

[24] Counsel submitted that the legal doctrine of '*pari passu'* is applicable to the instant proceedings as defined in **Black's Law Dictionary, 8th Ed**. as "by equal step. Proportionally; at an equal place; without preference <creditors of a bankrupt estate will receive distributions pari passu>". He submitted that it is a fundamental doctrine of bankruptcy and insolvency law. In this instance there could be no derogation from the principle on the basis of any personal characteristic of the creditor. The Court may treat creditors in different classes differently, but, he respectfully contended that it cannot treat creditors in the same class differently.

Criticism of the Plan

[25] Sir Richard put forward the following criticisms of the plan.

i. There was doubt that NEWCO would qualify for an insurance license since the pro forma balance sheet showed a zero balance.

ii. The Financial Services Commission (FSC) by supporting the plan lost its impartiality since it appeared to impliedly warrant that a license would be issued in circumstances where NEWCO might not properly qualify.

iii. The plan was contingent on the Central Bank of Barbados' ability to make financing available for operating expenses. The JM's evidence showed a history of non-performance by governmental agencies. The letter produced by Mr. Goodman from Republic Bank showed a zero balance.

iv. No formal contract existed between Government, NEWCO and NLICO. There was no evidence of the terms of the loan by the Central Bank and no evidence of the terms of the bond proposed for the exchange of CIL assets to NLICO. Such an exchange would weaken NEWCO as the bonds can carry no higher rating than that of Barbados in a financial market, which is "junk status".

v. There was no evidence that the shareholders of CIL have been made aware of the proposed divestment of its assets. Recognising that, in insolvency/bankruptcy situations, the interest of the shareholder is the

last consideration. Under the Constitution of Barbados persons (Companies) have a right not to be deprived of their property without due process including a right to be heard.

Mr. Thorne Q. C's Submissions

[26] Mr. Thorne Q.C. posited that his submissions were largely procedural in nature. Mr. Thorne Q.C submitted that the process by which the Ministry of Finance proposed a continuation of the portfolio of CIL by transfer of funds from the Central Bank of Barbados to NEWCO is fundamentally flawed. **Sections 59** to **63** of the **Insurance Act** gave guidance procedurally and substantively as to the stage at which the present proceedings were "located." **Section 61** of the **Insurance Act** obliged the JM to give a report or evidence as to the prioritized treatment of policyholders over the holders of other instruments. That report must be received by the Court and an opportunity given for a hearing pursuant to **section 62(1) (a)** of the **Insurance Act**.

[27] The process by which the Court was invited to function deprived the Court of its authority and placed the rights and interests of the policyholders at further risk. It was likely that the proposals were capable of occasioning further loss to policyholders since the affidavits in substance did not reveal the long-term viability of the proposed new entity.

Submissions of the JM

[28] Mr. Alleyne submitted that, in considering the Government's proposal instead of its initial application for liquidation, there are three issues which arise for determination, namely:

a) Whether this Court is empowered to approve the Government's proposal under the **Insurance Act**;

b) Whether the Government's proposal is discriminatory and as such the Court is prohibited from approving same; and

c) Whether the Court should reject the Government's proposal on the ground it does not provide a *pari passu* distribution to the policyholders of CIL?

Issue One

[29] Counsel submits that, under Section 62 of the **Insurance Act**, the Court is empowered after hearing all persons to make an order giving effect to the course of action it believes to be most advantageous to the policy holders of CIL. The source of the proposal, which the Court is entitled to consider is not fettered by the Act (refer to section 61). The question that arises therefore is what factors should guide the Court's determination under section 62. There is only one consideration and it is submitted that the

question is "what is most advantageous in the general interests of the policy holders".

[30] The Judicial Manager submits further that there are two proposals before the Court; (1) the liquidation proposal and (2) the Government's Proposal for the acquisition of a portion of CIL's business. The viability of the Government's proposal is not impacted by the present shortfall of CIL's assets to liabilities but, to the contrary, a new entity would be created so that policyholder liabilities would be backed by sufficient assets of such character to satisfy the statutory fund requirements. In contrast the previous offers from private investors and the counter offer from the ECCU did not provide as great a return nor address the interests of as wide a policyholder base as the Government's proposal.

Issue Two

[31] The Government's proposal makes provision for the transfer of a portion of CIL's Insurance Business to a new Insurance Company while ring fencing another portion of CIL's business and maintaining the same in Judicial Management temporarily. The ECCU argues that this proposal is discriminatory and at variance with the purpose of judicial management as well as in breach of the Inter American Human Rights Convention. Further to this argument, the individual policyholders argue that Government's plan

is discriminatory given that the treatment of corporate policyholders is different from that of individual policyholders.

[32] The Judicial Manager also submits that the Court, subject to Section 61 (1) (a) of the **Insurance Act,** is empowered **"**to authorize the transfer of all or any part of the insurance business in pursuance of a scheme". Section 62 expressly provides, that the decision of the Court on the report of the Judicial Manager "shall be binding on all persons and shall have effect notwithstanding anything in the instruments of the company or other rules of the company or in any contract". Accordingly, the **Insurance Act** itself did not require or contemplate that all business of an insurance company must be treated in the same way. This view is supported by ***Re Insurance and Superannuation Commissioner v Occidental Life Insurance Co of Australia and Regal Life Insurance Limited*** **[1991] FCA 118 (Occidental*)***.

[33] A similar approach, counsel submitted, was taken in the case of ***Insurance and Superannuation Commissioner v Regal Life Insurance Limited*** **[1994] FCA 1034 (Regal Life)** which the ECCU seeks to rely on as providing an authoritative statement against discrimination. In ***Regal Life*** the Court referred to ***Occidental*** and discussed the interpretation of the word "courses" under the equivalent of section 61 and 62 of our **Insurance Act**. The

circumstances in ***Regal Life*** however are distinguishable .... submits from the present application.

[34] The issue in ***Regal Life,*** the Judicial Manager submits, was whether certain policyholders, who were transferred from the beleaguered insurance company during the course of the judicial management, should have been considered by the judicial manager when making his final recommendation. There the Court held that, since these policyholders were transferred, they were no longer policyholders of the insurance company and as such their interest should not have been considered by the JM when making his final determination. There, after the transfer of the majority of the policies, one major policyholder remained with the insurance company. However, the judicial manager made a proposal that the remaining assets of the Statutory Fund be made available to all policyholders including those whose policies which were transferred out to another company. In denying that proposal, the Court found that the effect of its implementation would be to reduce the benefits payable to the remaining policyholder and that this was not in concert with the requirements of the act which required that the proposal give effect to the course of action "most advantageous to the general interests of the owners of the policies of the companies".

[35] The Judicial Manager therefore submits that the present proposal for CIL can be easily distinguished from that in ***Regal Life***. In the present matter, there was no proposal to take account of the interest of former policyholders to the detriment of existing policyholders. Unlike ***Regal Life***, the Government proposal dealt with the relevant and subsisting business of CIL and as such could not be described as discriminatory. In the circumstances therefore, it was unnecessary to look at the issue of applicability of the Inter American Human Rights Convention.

Issue Three

[36] The Judicial Manager submits that the ECCU argued that the Government's proposal should also be rejected on the ground that it does not accord with the established *pari passu* principle, which should be applied in cases of insolvency. That assumption is at variance with the established cases which apply the principle in circumstances of liquidation rather than insolvency simpliciter and further ignores clear judicial statements, which have consistently held that it is not necessary that the principles of *pari passu* should apply in judicial management.

[37] The Judicial Manager relied upon **Re Wan Soon Construction [2005] SGHC 102 (Re Wan Soon) and Hitachi Plant Engineering and**

Construction Co Ltd v Eltraco International Pte Ltd [2004] 4 LRC 1 (Hitachi).

[38] Counsel also submits in **Hitachi**, the Court of Appeal held (although it was not strictly necessary to do so on the facts of the case itself) that the *pari passu* principle did not apply in schemes of arrangement (pursuant to s 210 of the Companies Act or, in the context of a judicial management, s 210 read with "s 227X (a))" (our emphasis).

[39] Mr. Alleyne posited that, in ***Hitachi*** the Court explained the rationale as to why it is not necessary to automatically apply the *pari passu* principle in Judicial Management. Creditors under a judicial management are protected as the statute has sufficient protections when a scheme of arrangement is proposed. One such protection would be that there was scope for the creditors to object to the scheme. S**ection 62 (1) (a)** of the **Insurance Act,** provides safeguards for policyholders as it permits the court to consider all views, whilst not limiting the options that a Court could implement in the best interest of the policyholders. ***Hitachi*** further confirms that the application of the *pari passu* principle has been limited in several jurisdictions throughout the world.

[40] Mr. Alleyne further submits that the absence of a *pari passu* distribution in the Government's distribution is not fatal given the ample mechanisms in the **Insurance Act** to assess the appropriateness of the scheme. There are therefore adequate protections for policyholders as secured by the legislation whilst maintaining sufficient flexibility to permit the Court to approve a flexible solution.

Conclusion of Judicial Manager's Submissions

[41] In summary the Judicial Manager submits that the policyholders only have two viable options for consideration; the liquidation of CIL or the scheme as proposed by the Barbados Government. The proposal of the Barbados Government provides a realistic opportunity for the policyholders of CIL to achieve a markedly improved return than that associated with liquidation and submitted, therefore, the Court ought to rule in favour of the proposal.

[42] Mr. Odle filed brief written submissions entitled "Other Persons' Written Submissions" which are not dissimilar to those of Sir Richard.

The Law

[43] **Section 60** of the **Insurance Act** provides:

> **"60.** Where at any time, on the application of the judicial manager or of any person, appearing to the court to have an interest in the matter, it appears to the court

(a) that the purpose of the order for the judicial management of the company or of part of the business of the company has been fulfilled; or

(b) that for any reason it is undesirable that the order should remain in force, the court may cancel the order and on cancellation the judicial manager shall be divested of the management which shall again vest in the board of directors or other governing body of the company".

[44] **Section 61(1) and 62** of the **Insurance Act** provides as follows:

"**61.** (1) The judicial manager shall conduct the management of the insurance company with the greatest economy compatible with efficiency and shall, as soon as practicable, file with the court a report stating which of the following courses is in the circumstances, in his opinion, most advantageous to the general interest of the policy-holders of the company and seeking an order accordingly

(a) the transfer of all or any part of the insurance business of the company to some other insurance company in pursuance of a scheme prepared by the judicial manager and annexed to the report;

(b) the carrying on of its business by the company either unconditionally or subject to such conditions as the judicial manager may suggest;

(c) the winding-up of the company; or

(d) such other course as he considers advisable.

(2) The judicial manager shall forthwith, after filing the report, furnish a copy of the report to the Supervisor.

(3) The report or a copy of the report shall be open for inspection by any person during official hours, at the registry of the court in which the report is filed or at such place as the Supervisor determines.

62. (1) The court shall on the hearing of an application made under section 60*(a)* after hearing the Supervisor, the judicial manager and any other person who in the opinion of the court is entitled to be heard; and *(b)* after considering the report of the judicial manager, make an order giving effect to the course whether similar or not to any of the courses mentioned in subsection (1) of section 61 that it considers in the circumstances to be most advantageous to the interests of the policy-holders of the company.

(2) The order of the court shall be binding on all persons and shall have effect notwithstanding anything in the instruments constituting the company or in

the articles of association or other rules of the company or in any contract".

Issue

[45] The sole issue before the Court is whether it ought to make an order giving effect to the course of action proposed whether similar or not to any of the courses mentioned in section 62 (1) which it considers to be most advantageous to the interests of the policyholders of the company.

In other words whether the Court ought to make an order

(a) transferring all or part of the insurance business of the company to some other insurance company in pursuance of a scheme proposed by the JM and annexed to the report or

(b) the carrying on of its business by CIL either unconditionally or subject to such conditions as the JM may suggest;

(c) the winding-up of the Company or

(d) such other course as the JM considers advisable.

Discussion

[46] I consider it convenient to deal with the procedural issue raised by Mr. Thorne Q.C. at an early stage so that we can get to the heart of the matter before the Court. The Court agrees that the provisions of the **Insurance Act** (particularly sections 59 to 63) are designed to preserve the integrity of the process and to give to all interested persons the opportunity to be heard prior

to making a decision as to which course is most advantageous to the interests of the policy holders of the Company (sections 62 (1) (a) and (b)).

[47] To this end, on 06 February 2015, the Court ordered (the Order) that the report of the JM be made available for public viewing and that any person desiring to be heard in respect of the JM's report shall do so by sending written notice to the Registrar of the Supreme Court (RCS) on or before the 18th of March 2015. It is pursuant to those advertised notices that the Grenada Ports Inc., the ECCU and the six persons represented by Mr. Thorne Q.C. were heard by this Court and given every opportunity to cross-examine the JM and the deponents of the several filed affidavits and to present their cases. I am satisfied therefore that the integrity of the process and the rights of the interested persons to be heard were secured by the Order and that section 61(3) of the **Insurance Act** was fully complied with.

[48] The JM, by application filed 01 June 2015 applied to this Court to have the judicial management ended, the company wound up and the JM appointed as liquidator. In oral evidence given on 02 July 2015, the JM informed the Court that, after meeting with the officials of the Ministry of Finance and Economic Affairs, and the other named persons, he was now of the opinion that the proposal of the Ministry was the preferred option and he was lending

his support to it. It was based on a proposal first put in August 2013 for a regional solution.

[49] Section 61 of the Act requires the JM to set out the course he considers most advantageous to the general interest of the policyholders in his report, which he did in his final report filed 15 December 2014.

[50] Section 62 of the Act empowers the Court to make an order giving effect to the proposed course(s) after hearing (1) the Supervisor of Insurance (now the FSC, (2) the JM and (3) any other person who, in the opinion of the Court, is entitled to be heard after considering the report of the JM. The Court may make any order under section 60 after hearing these persons. It is not mandated that the course adopted must be the course suggested by the JM.

[51] I am of the view and hold, therefore, that, if the course suggested by the Ministry of Finance and Economic Affairs has the support of the JM, he may support it and alter his view with respect to the suggestion of winding-up provided that he gives to the Court credible evidence upon which he changed his opinion. He has done so in this case.

Discriminatory Treatment

[52] Sir Richard submits that the proposal favours the Barbadian policyholders over the EC policyholders and is inherently discriminatory. In their written

submissions filed 13 July 2015 and 12 August 2015 the ECCU and Grenada Ports Authority refer to the inability of the JM and the Technical Core Committee of the ECCU (TCC) to reach an accord on the way forward for a region-wide plan which included a proposal to place all ECCU based real estate assets into an ECCU trust which would issue interest-bearing bonds valued Bds $95 million to CLICO such bonds being guaranteed by the ECCU governments. It was alleged that the JM failed to respond to certain questions from the TCC including the cost of the guarantee, valuation of assets and the proposed terms of the bond including the interest rate and maturity profile resulting in the inability of the ECCU to properly consider the proposal and to reach an agreement with the JM.

[53] The ECCU and Grenada Ports Authority filed affidavits in this matter deposed to by Ian Evans and Timothy Antoine, filed on the 1st day of June 2015. None of these allegations were deposed to by any of the deponents so that they could be cross-examined on them. Consequently the Court was not able to make any finding on these issues based upon the credibility or lack thereof of the ECCU and Grenada Ports Authority's principal deponents. Submissions are not evidence but must be buttressed by viva voce or affidavit evidence.

[54] It must be pointed out that Sir Richard sent a letter dated the 24th day of September 2015, addressed to the Registrar of the Supreme Court, enclosing a draft of a second affidavit of Mr. Antoine. The Court had ordered the filing of submissions on the 5th day of August 2015. No leave was sought for the filing of any further affidavits by Sir Richard. Accordingly, the draft unsigned, second proposed affidavit has no evidential value in these proceedings.

[55] The JM was cross-examined extensively by Sir Richard, Mr. Thorne Q.C, and Mr. Frank Odle, and Mr. Thorne's junior counsel in Mr. Thorne's absence. The JM gave oral evidence that he entered into negotiations with the TCC, which bore no fruit. He further stated that there was no agreement from the other JMs on the issue.

[56] I saw and heard him give his evidence. He was forthright and credible and was unshaken in his testimony. I consider him a witness of truth upon whose evidence I can rely. I accept his evidence as true.

[57] This matter involves a company with regional reach. It is desirable to find a regional solution to the problem. Such a solution would require consensus by all leaders of the territories for which the JM has been appointed and of the other territories where other persons have been appointed JMs. From the evidence before me, it does not appear that a regional solution is in sight.

[58] In the face of the submission that a regional solution is desirable, one would have expected that some proposal(s) for such an exercise would have been suggested by the ECCU and the Grenada Ports Authority even at this late stage. None has been forthcoming.

[59] In the interim, all sources of liquid financing for the continuation of the judicial management of CIL have dried up and the spectre of the winding-up of the company looms large. The only source of the funding of the continuation of the judicial management is the Government of Barbados. No other has been put before the Court for continued financing from the ECCU or Grenada Ports Authority to assist in this exercise. It appears to me, therefore, that a regional solution has no immediate or short-term prospect of fruition not even as a temporary measure.

[60] None of the parties seem to desire that the Company to be wound up save and except those persons represented by Mr. Thorpe QC.

[61] Sir Richard submitted that the current proposal would transfer the traditional and restructured individual EFPA Barbadian policies to a new insurance company whilst the policies of the EC policyholders would remain with the beleaguered CIL and the liabilities related to the Corporate EFPA policies issued in Barbados would be exchanged for preference shares in NLICO,

which was an entity with no apparent value and then extinguished. He also submitted that the proposal sought to change the nature of their contract and not merely the terms of them and was not permissible without the consent of the affected policyholders.

[62] BIPA, through counsel, has indicated its consent to the proposal. Its members have therefore consented to an alteration of their contractual rights with CIL. They have agreed to accept shares in the new company. The alternative is liquidation through which they will suffer significant loss. It is for them to decide if they wish to accept the risk, that this new company may not be viable.

[63] Mr. Thorne's clients have objected to the proposal, with the only alternative proposed, being to wind up the company. Under section 62(1) of the Act, the court shall on the hearing of an application made under section 60 make an order giving effect to the course whether similar or not to any of the courses mentioned in subsection (1) of section 61 that it considers in the circumstances to be most advantageous to the interests of the policyholders of the company.

[64] In my opinion, this plan is the most advantageous to the general interests of the policyholders, including the six persons represented by Mr. Thorne Q.C.

[65] Sir Richard submitted that the proposal is a Barbados only plan. I do not share his opinion. The JM has given evidence that the proposal contemplates a Phase Two, which will require the financial support of the OECS governments.

[66] The Government of Barbados will be required to commit $215MM and the EC Governments $95MM with a further $150MM from the Government of Barbados for the benefit of the EC policyholders. In these circumstances I cannot accept the submission of the ECCU and Grenada Ports Authority that there is discrimination based upon national origin. If there is no plan, CIL will naturally fold up. None of the interested parties has put forward any plan save continuous dialogue suggested by Sir Richard. In such a circumstance, continued funding is required for the judicial management. Sir Richard's clients have not made any proposal for assisting in the funding.

[67] I agree with Mr. Alleyne's submission that, if regard is had to the affidavit evidence of Mr. Bignall, the proposal relates to policyholders on the Barbados Register and that Phase 2 relates to the OECS territories. The origin of the policyholder cannot be the basis of the determination of the treatment meted out to them. The basis is non-co-operation by other interested parties.

[68] The policyholders' interests will be dealt with in different ways. The division, however, is not strictly along the lines of national origin. As identified by Sir Richard, the traditional policyholders will have their policies transferred to a new insurance company, while the individual EFPA policyholders, also Barbadian, will receive their principal back with future interest over a 10 year period. Corporate and government EFPAs are to receive shares in two property trusts based on the principal balance outstanding of their EFPAs. There is therefore differentiation within the national grouping as well. It cannot therefore be maintained that the division is along national origin, rather than that the proposal is seeking to address as wide a range of policyholders as possible.

[69] Section 60 (1) of the **Insurance Act**, gives the court the discretion to act in such a way as may be contrary to the instruments constituting the company or its articles or other rules of the company or in any contract. I consider that the proposal is unfortunately entitled – 'The Barbados First Plan'. It appears to me, however, to be the transfer of part of the insurance business of the company to a new proposed company in pursuance of the scheme promulgated by the Ministry and supported by the JM. In ***Occidental*** **the** Court opined as follows:

"Judicial management like other forms of administration of companies, notably winding up, receivership and official management, are mechanisms for administering the affairs of companies by agencies outside the control of the board of directors of the company and its shareholders. Judicial management of life insurance companies would vary considerably from case to case; some would be comparatively simple and take only a short time; whereas others, like those with which the court is concerned here, are very complex and may take a substantial length of time before they are completed. In some cases it may be clear that the business of the company should be transferred to another company; but in other cases it may be appropriate that at one time the business of the company should be dealt with in a particular way, or part of the business of the company wound up, and at some later time another part of the business be dealt with in a different way."

[70] I consider this opinion is applicable to the **Insurance Act of Barbados**, whose nature and purpose is similar to the Australian Act. It would be ideal if the interests of all policyholders of the same class could be maintained via the same source; however, judicial management presupposes a need to find

an alternative that is most advantageous, though not ideal, as a viable mechanism for administering the affairs of the company.

[71] In light of the foregoing, it is my opinion that the partitioning of the categories of policyholders is not discriminatory in these circumstances. Rather I am of the opinion that the measures being proposed by the Government of Barbados, which, at present, is the only contributor to a restructuring plan, are appropriate in the circumstances and the most advantageous to the interests of the policyholders of the company. The JM gave evidence that, if CIL was liquidated, there would be a potential loss of $625m being the difference between the value of realizable assets of $180m and liabilities of $805m. The alternative route of liquidation is not beneficial to any of the parties involved.

Fraudulent Preference

[72] **Section 70 (1)** of the **Bankruptcy and Insolvency Act Cap 303** states:

> *"70. (1) Every conveyance or transfer of property or charge made on property, every payment made, every obligation incurred and every judicial proceeding taken or suffered by any insolvent person in favour of any creditor or of any person in trust for any creditor with a view to giving such creditor or any surety or guarantor for the debt due to such creditor a preference over the other creditors is, where it is made, incurred, taken or suffered within the period beginning on the day that is 3 months before the date of the initial bankruptcy event and ending on the date the insolvent person*

became bankrupt, both dates included, deemed fraudulent and void as against the trustee in the bankruptcy."

[73] Fraudulent preference is clearly defined in the statute. The proposal as put forward by the ministry and supported by the JM, does not fall within the definition of fraudulent preference as given above. Further, in order to prove fraudulent preference, evidence of a desire to favour one creditor over another must be proven. Such a desire cannot be ascribed to the formulators of the proposal in these circumstances. The burden of proving that desire is on the Grenada Port Authority and the ECCU. They have failed to do so.

Pari Passu

[74] Further, as it relates to the principle of *parri passu*, this principle provides that all creditors shall be treated equally, but more specifically that all unsecured creditors within a class shall be treated equally, with their debts abating on a pro rata basis where there is a shortfall of assets. Mr. Alleyne argued that the principle does not appear to apply to judicial management. In **Re Wan Soon, Andrew Phang Boon Leong JC** clearly opined:

"24 It is clear that the pari passu principle applies with regard to unsecured creditors in the context of a winding up. In the English Court of Appeal decision of In re Atlantic Computer Systems Plc.[1992] Ch. 505 at 527, Nicholls LJ (as he then was), who

delivered the judgment of the court, observed that "[t]he basic object of the winding up process, in the case of an insolvent company, is to achieve an equal distribution of the company's assets among the unsecured creditors" (and see, in the local context, the Singapore Court of Appeal decision of Hinckley Singapore Trading Pte Ltd v Sogo Department Stores (S) Pte Ltd [2001] 4 SLR 154 ("Hinckley Singapore Trading") at [8], where In re Atlantic Computer Systems Plc. is cited and applied, as well as the Singapore High Court decision of Joo Yee Construction Pte Ltd v Diethelm Industries Pte Ltd [1990] SLR 278 at 288, [18]).

25 However, I was not persuaded that the principle ought to apply in the context of judicial management as well. Indeed, what authority there appeared to be seemed to point in the opposite direction: see, in particular, the Singapore Court of Appeal decision of ***Hitachi Plant Engineering & Construction Co Ltd v Eltraco International Pte Ltd [2003] 4 SLR 384*** *("Hitachi Plant Engineering") (reference may also be made to In re Atlantic Computer Systems Plc at 527–528).*

[75] The learned trial judge in ***Re Wan Soon***, did not state the basis for his opinion. I am of the opinion that the *pari passu* principle would

unnecessarily fetter the powers of the Court under section 61 of the **Insurance Act**. Support for this view may be found in the ***Hitachi*** case, where **Yong Pung How CJ** opined, (paragraphs 81 & 84):

> *81 "…one has to remember that a scheme of arrangement is a corporate rescue mechanism. As with other corporate rescue mechanisms, such as judicial management it seeks to rehabilitate the company and achieve a better realisation of assets than possible under liquidation: see generally Walter Woon Company Law (2nd edn, 1997) p 627 and Ch 17. Such a rescue mechanism may need, in order to be effective, to discriminate against creditors for example by repaying bigger creditors proportionately less than small creditors are repaid. Dictating that the assets should be distributed in a pari passu manner would not only decrease the flexibility now available to planners of schemes but it may also put a dampener on what the scheme of arrangement could achieve and sound the death knell of the company prematurely.*
>
> *84… We find these authorities to be persuasive. Instances where a scheme of arrangement proposes to depart from the provisions of the insolvency regime will be rare. The actual circumstances and*

facts of each case will determine if such a scheme should be sanctioned. Further cases will decide when and under what circumstances such a departure will be allowed in Singapore. Suffice it for us to say, for the purposes of the present appeals, that in England the courts have sanctioned schemes of arrangement which potentially infringe the pari passu rule EVEN in instances where the company is insolvent or is facing liquidation. A fortiori a departure from the pari passu principle should be allowed in other rescue mechanisms outside the insolvency regime."

Autonomy of Subsidiaries

[76] Sir Richard posited his arguments on the premise that all of the policyholders, corporate or natural Barbadian or Eastern Caribbean were members of the same class and were unsecured creditors of CIL which was registered in Barbados with branches in the Eastern Caribbean registered as external companies. For legal purposes, he submitted, there was one entity with access in several jurisdictions. This reasoning is not supported by legal authority and, in my view, is unsound. It seems to suggest that entities registered as external companies in the OECS lose their separate identity as legal persons under the principles enunciated in **Salomon v Salomon & Sons Ltd [1897] AC 22 Eng HL**. That is not the law. In addition, even if

the companies in the OECS were subsidiaries of the Barbados company, they would still have autonomy. In **Commonwealth Caribbean Company Law, A. Burgess, (now Burgess JA)** (pg 90-91) states:

> *"Typically, a corporate group is made up of a holding company and its subsidiaries. A holding company is defined in Commonwealth Caribbean Companies Acts as one, which controls its subsidiary. This control is usually achieved and expressed by the holding company owning sufficient shares in its subsidiary to determine who are the directors of the subsidiary and how the affairs of the subsidiary is conducted. Often, the holding company controls a number of subsidiaries and the respective businesses of the companies within the group are managed as an integrated whole and in economic reality constitute one economic unit. These are referred to as affiliated companies in Commonwealth Caribbean Companies Acts.*
>
> *The question as to what is the legal status of a holding company and subsidiaries within a corporate group was extensively considered in the recent English Court of Appeal decision in* ***Adams v Cape Industries plc.*** *In this case, it was reaffirmed that English law has not developed any distinct body of rules*

applicable to groups and that the Salomon principle applies equally to companies within a corporate group.

The Court of Appeal, after a review of the existing cases held that in English law, each company in a group is a separate entity… In reaching this conclusion, Slade LJ, who delivered the judgment of the Court, stated: "There is no general principle that all companies in a group are to be regarded as one. On the contrary, the fundamental principle is that 'each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate legal rights and liabilities' ***The Albazero [1977] AC 774, 807*** *per Roskill LJ.*

Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities.

Generally speaking there is nothing in Commonwealth Caribbean company legislation to displace the law as stated by Slade LJ that companies in a corporate group are to be treated

as separate legal entities. The provisions in the Acts in Anguilla, Antigua, Barbados… which allow a holding company to consolidate in its financial statements the accounts of each of its subsidiaries are not intended to in any way subvert the Salomon principle."

[77] Judicial management orders were made in the different jurisdictions in which CIL operated by the courts in those jurisdictions. Whilst Mr. Toppin has been appointed JM by the courts of Grenada, Anguilla, Antigua, St. Vincent and Dominica, other JM's have been appointed for Montserrat, St. Kitts and St. Lucia. I am of the opinion that the opinion of Burgess JA is a sound exposition of the law applicable to Barbados, and I concur in his opinion. Accordingly, I reject the submission of Sir Richard on the applicable law.

JM's Failure to Disclose Offer to Purchase

[78] Sir Richard submitted that the JM failed to disclose an offer to purchase the company by Youe Capital and that the JM should be discharged as a result. In support of his submissions, he averred that an offer was made to BIPA Inc., which gave Youe Capital a due diligence form. BIPA Inc. has no authority to represent the JM. The JM's evidence, in response to cross-examination, is that he never received any such offer and was not aware of

any. The burden of proving the allegation is on Sir Richard's client and their evidential basis for this submission fails to prove the allegation. The JM was vigorously cross-examined and I found him to be a witness of truth. Accordingly the submission is rejected.

Barbados only Plan

[79] With respect to Sir Richard's submission that the plan is a Barbados Only Plan and that there is no second act to it, I do not agree. Such a submission brings into question the bona fides of the Government's stated position that it is committed to a phased solution to the problems of CIL and the Government's commitment, through the Ministry, to Phase 2 of the RRP. No sufficient evidence has been put forward by Sir Richard's clients to support their contention, which I accordingly reject.

Findings

[80] I do not find that the different treatment of the policyholders is discriminatory along lines of national origin. The JM may use a number of methods to seek to facilitate a solution most advantageous to the policyholders. In so doing he may treat different parts of the company in different ways in order to achieve the most advantageous outcome for as wide a cross section of the policyholders as possible, and the court may

approve such an action. This form of differentiation and the need for it has been noted in ***Hitachi***.

[81] I further find that the *pari passu* principle, does not apply in this circumstance.

Disposal

[82] I hereby make an order

i. Approving the proposed Scheme 1 (Option One), by the Ministry of Finance and Economic Affairs (the Ministry) for the future conduct of the business of CIL on the basis that the proposal is the most advantageous to the interests of the policy holders of CIL.

ii. This order is in terms of the draft order submitted to, and approved, by the Court as amended, a copy of which will be annexed to this decision.

William J. Chandler
High Court Judge