IN THE SUPREME COURT OF BELIZE, A. D. 2014

CLAIM NO. 81 OF 2012

	(KENT HERRERA	**CLAIMANTS**
	(NIKITA USHER	
	(VALDEMAR CASTILLO	
	(VILDO MARIN	
	(EUGENIO EK	
	(LEONARDO VARELA	
BETWEEN	**(AND**	
	(ALMA GOMEZ (SUPERVISOR OF INSURANCE)	**DEFENDANTS**
	(DEAN BARROW (MINISTER OF FINANCE)	
	(ATTORNEY GENERAL	

BEFORE THE HONOURABLE MADAM JUSTICE MICHELLE ARANA

Mr. Edmund Marshalleck, S. C., of Barrow and Co. for the Claimants

Ms. Magali Perdomo, Senior Crown Counsel, and Iliana Swift, Crown Counsel from the Attorney General's Ministry for the Defendants

-----

J U D G M E N T

1. This is a claim seeking declaratory relief and damages for breach of statutory duty brought by the Claimants against the First Defendant as Supervisor of Insurance in the Ministry of Finance, the Second Defendant as

the Minister of Finance and the Third Defendant as the Attorney General. The Claimants are all policy holders of the Executive Flexible Premium Annuity Policies ("EFPA Policies") sold by CLICO Bahamas Ltd. ("CLICO") in Belize pursuant to a licence to carry on long term insurance business in Belize under the provisions of the Insurance Act 2004.

The Facts

2. The facts are taken from the Claimants' Statement of Claim and modified where necessary by averments contained in the Defence.

   i) CLICO was a body corporate established and existing under the Companies Act 1992 of the Commonwealth of the Bahamas as British Fidelity Assurance Company Limited, now named CLICO (Bahamas) Limited, and was registered under the Companies Act, Chapter 250 of the Laws of Belize as a foreign company doing business in Belize.

   ii) By the terms of the EFPA Policies issued and/or maintained in Belize in favor of the Claimants over the period February 2004 through May 2009, CLICO promised to pay each of the Claimants in Belize a monthly annuity payment commencing and terminating on the dates specified in their respective policies, and if a policyholder dies before the annuity payment commences, to make annuity payments to beneficiaries. The Defendants allege that the terms of EFPA policies varied, as policyholders were given a choice of payment of annuity or withdrawal of funds, and that the Defendants were not privy to the varied terms in each annuity contract between CLICO and its EFPA policyholders on an individual basis.

   iii) On the 24th February, 2009 the Supreme Court of the Commonwealth of the Bahamas ordered that CLICO be placed in liquidation and on the 2nd March, 2009 it amended its order and placed CLICO in provisional liquidation because of financial difficulties being experienced by CLICO.

iv) The Claimants contend that after learning that CLICO had been placed in liquidation in February 2009, and then provisional liquidation in March 2009 in the Commonwealth of the Bahamas, the First Defendant placed restrictions on the operations of CLICO in Belize and only then conducted investigations into the workings and finances of CLICO in Belize. The First Defendant then learned that CLICO was in serious financial difficulties and had accumulated losses of some $12,263,283.00 and was in fact insolvent. This contention is specifically denied in the Defence and it is stated that the First Defendant has always acted in accordance with her statutory duties to supervise CLICO and protect insured persons pursuant to the Insurance Act. It is further stated in the Defence that the First Defendant at all times sought to ensure that CLICO met the requirements and the general conditions for licensing pursuant to the Insurance Act.

v) On the 8th April 2009 the Supreme Court of Belize, upon the application of the First Defendant, ordered that CLICO be placed under provisional judicial management in Belize. The order was made final on the 19th May, 2009 appointing Mark C. Hulse of the accounting firm Baker Tilly Hulse (Cor. 12 Baymen Avenue and Calle al Mar, Belize City, Belize) as Judicial Manager of CLICO in Belize. The Court ordered that the Judicial Manager explore ways to deal with the EFPA policies and to ascertain separately whether it will be possible to pay interest on EFPA Policies issued in Belize in recognition that the liabilities to EFPA policyholders presented obvious financial difficulties to CLICO.

vi) On the 10th August, 2009 the Supreme Court of Belize authorized the sale and transfer of the life and health insurance portfolio and regular annuity and pension portfolio of CLICO in Belize ("the core portfolio") in order to secure the interests of those policyholders.

vii) Kent Herrera and Nikita Usher ("the First and Second Claimants") had their attorneys at the time write to the Judicial Manager and the first Defendant on the 13th August 2009 to ascertain whether or not the EFPA Policies were included in the transfer that had been authorized by the court.

viii) On the 2nd September, 2009 the Judicial Manager responded to the attorneys for the First and Second Claimants informing that the EFPA Policies had not been included in the authorized transfer but that the statutory fund of CLICO in Belize

had been prorated among the various policy holders of CLICO in Belize (including the policyholders of EFPA Policies) so that a portion of the statutory fund was allocated for the benefit of EFPA Policyholders.

ix) In his letter of September 2nd, 2009 the Judicial Manager also informed that the First Defendant had indicated that she would be applying to liquidate CLICO in Belize so that the real property of CLICO in Belize could be sold and the proceeds of the sale used to pay secured creditors. The remainder of the proceeds would also be pro-rated among the policyholders of the EFPA Policies and policyholders of the regular annuity and pension portfolio in Belize.

x) On the 22nd September, 2009 the First Defendant responded to a letter of the attorneys for the First and Second Claimants dated the 13th August, 2009 informing that the EFPA Policies were not a part of the portfolio that had been transferred because the EFPA Policies operate more like a financial instrument for investment purposes than life insurance.

xi) The First Defendant wrote to the attorney for the First and Second Claimants on the 13th August, 2009 to the effect that the statutory fund would be prorated so that part of the statutory fund was set aside for the settlement of EFPA policies. The funds set aside, along with some of the proceeds of the sale of the real property held in Belize, were to be pooled together to pay out the EFPA policies. The First Defendant contends in her defense that she always maintained that a statutory fund was prorated to ensure coverage of the EFPAs along with other policyholders. The First Defendant states that she knew of the deficit in the statutory fund and that "full coverage" was not possible. The First Defendant applied to the Supreme Court of Belize in Action No 12 of 2010 on March 9th, 2010 to wind up CLICO.

xii) On the 3rd May, 2010 the Supreme Court of Belize ordered that CLICO be placed in provisional liquidation in Belize and Mark C. Hulse was appointed the provisional liquidator in Belize.

xiii) On 6th August, 2010 the Court ordered that CLICO be placed in substantive liquidation in Belize and Mark C. Hulse was appointed the liquidator in Belize.

xiv) On the 7th September, 2010 the Court ordered that the Liquidator be permitted to pay to EFPA policyholders a percentage of their investment before the completion of liquidation, the date and percentage to be set by the Liquidator after he completed his First Liquidation Report on the 24th September, 2010 and after consulting with the First Defendant.

xv) On the 1st October, 2010 the Court ordered that the Liquidator be permitted to pay to EFPA policyholders twenty five percent (25%) of the principal o f their respective policies on the 8th day of October, 2010.

xvi) On the 5th day of May, 2011 the Liquidator tendered his second liquidation report in Action No. 12 of 2010 ("Second Liquidation Report") for the period 25th September, 2010 to 26th April, 2011 to which he attached an assets and liabilities distribution projection ("Distribution Projection") wherein he projected that the remaining balance of the assets of CLICO in Belize is valued at $2,538,232.45 and that the remaining balance of the liabilities of CLICO amount to $6,501, 540.48 so that there would be a significant shortfall in funds to meet the liabilities of CLICO.

xvii) The Distribution Projection showed that of the projected liabilities of CLICO $3,732,001.15 were the total liabilities due to the policyholders of the EFPA Policies.

xviii) The Distribution Projection further showed that $2,697,137.33 must be paid to other creditors in priority to the claims of the policyholders of EFPA Policies so that no further payments to EFPA policyholders were then being anticipated.

xix) The liquidator further reported in his Second Report that the shortfall would increase as (1) the estimates in the Distribution Projection did not include the Receiver's Fees; (2) the realizable value of the disposal of buildings belonging to CLICO was reducing with the rapid deterioration of the buildings; and (3) the increasing expenses of security, utilities, properties upkeep and the liquidator's expenses continued on an ongoing business with no income.

xx) The liquidation of the assets of CLICO in Belize was, subsequent to the filing of the instant claim, completed and the projections of a shortfall proven accurate. The proceeds of sale of the assets were only sufficient to pay secured creditors

and meet the obligations of the liquidator under the agreement for the sale of the core portfolio so that there were no funds available to make any further payment toward the liabilities of CLICO to EFPA policyholders.

xxi) The Claimants allege that it is the failure of the First Defendant to maintain a statutory fund to maintain annuity policies such as the EFPA, and in addition the fact that the Second Defendant repeatedly renewed CLICO's license in Belize to sell insurance policies including the EFPA policies in Belize from 2004 to 2009 (notwithstanding that the statutory fund was never in place) which has resulted in damage and loss to EFPA policyholders including the Claimants. The Claimants claim that this failure to maintain the statutory fund amounted to recklessness on the part of the First Defendant and amounted to a breach of the First Defendant's statutory duty to the EFPA policyholders under the Act. The Claimants therefore seek several declarations and damages for breach of this statutory duty.

xxii) The Defendants contend that the First Defendant took all reasonable and sufficient measures available to her under the Insurance Act. The First Defendant categorically denies any recklessness on her part towards potential financial loss of the Claimants and policyholders in general. She argues that by maintaining the license she sought to ensure that CLICO put in place sufficient provisions to satisfy the liabilities and payments to its policyholders in Belize. She further claims that any losses suffered by the Claimants were as a direct result of the internal financial difficulties and faulty investments of CLICO, and not any failure on the part of the First Defendant.

The Issues

3. 1) Is there a statutory duty owed by the Supervisor of Insurance to the EFPA policyholders under the Insurance Act No. 11 of 2004?

   2) Can there be an action in private law for damages under the Insurance Act No. 11 of 2004?

   3) Did the First Defendant act in good faith in the exercise of her duties under the act, or did her actions amount to recklessness?

First Issue: Is there a statutory duty owed by the Supervisor of Insurance to EFPA policyholders under the Insurance Act?

Mr. Marshalleck, SC, on behalf of the Claimants argues that the First Defendant owed a statutory duty to the Claimants under the Insurance Act to ensure the availability of assets in CLICO on trust to secure CLICO's liabilities to policyholders. He submits that liability for breach of statutory duty is *sui generis* and independent of any other form of tortuous liability. To establish civil liability for a breach of statutory duty, a claimant must show that (i) the injury he has suffered is within the ambit of the statute; (ii) the statutory duty imposes a liability to civil action; (iii) the statutory duty was not fulfilled; and (iv) the breach of the duty caused his injury (***Clerk and Lindsell on Torts*** 18th Ed Chapter 11 Breach of Statutory Duty para 11-04). Mr. Marshalleck, SC, makes it clear that he grounds this claim entirely on breach of statutory duty *simpliciter* and not on negligence generally (e.g. negligent exercise of statutory powers).

4. Mr. Marshalleck, SC, argues that the Claimants have fulfilled the first requirement which must be met in order to establish statutory duty, i.e. that the injury sustained must be of a type which the statute was passed to

prevent. He submits that there can be no doubt that the Insurance Act 2004 was passed to prevent financial losses to policyholders by requiring and empowering the Supervisor to administer the regulatory requirements of the Act in a manner that would ensure the availability of assets on trust to secure the liabilities to policyholders. He also contends that there is little or no doubt that the statutory duties were in fact not fulfilled in that a multiplicity of the regulatory requirements, which were all specifically designed to provide financial security to policyholders, were repeatedly ignored from year to year without significant consequences. In addition, he argues that the failure to procure compliance with the statutory requirements has in fact resulted in losses to the Claimants. Based on this, Learned Counsel submits that the first, third and fourth requirements (as set out in the extract from ***Clerk and Lindsell on Torts*** cited above) for a claim for damages for breach of statutory duty are obvious. Mr. Marshalleck, SC, argues that the central issues for the resolution of the Court are therefore whether statutory duties claimed to exist are owed specifically to policyholders and are actionable by them by way of a private law action for damages. He submits that this issue must be resolved by way of construction of the provisions of the Insurance Act of Belize 2004. He

cites Lord Browne Wilkinson in the House of Lords in ***X (Minors) v. Bedfordshire County Council*** 1995 2 AC 633 for the applicable legal principles to be weighed by the court in order to determine whether a statutory duty exists:

> *"The principles applicable in determining whether such a cause of action exist are now well established, although application of those principles in any particular case remains difficult. The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However, a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there are a number of indicators. If the statute provides no other remedy for its breach and the parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection that the statute was intended to confer. If the statute does provide some means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action ... However, the mere existence of some other statutory remedy is not necessarily decisive. It is still possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy. Thus the specific duties imposed on employers in relation to factory premises are enforceable by an action in damages, notwithstanding the imposition by the statutes of criminal penalties for any breach. "*

5. Mr. Marshalleck, SC, further contends that the declared intention of the legislature in the introduction to the Insurance Act 2004 is not only to make provision for the benefit of the public by providing licensing and strengthening the regulatory framework but also to offer better protection to insured persons, a limited specific and readily identifiable class of the public:

> *"An Act to make new provisions for the licensing of domestic insurers; to strengthen the regulatory framework for the insurance industry to meet acceptable international standards, to offer better protection to insured persons; to repeal the Insurance Act Chapter 251 of the Laws of Belize RE 2000 and to provide for matters connected therewith or incidental thereto."*

6. Learned Counsel also draws the Court's attention to specific sections of the Insurance Act. He states that section 4(1) provides for the appointment of a Supervisor of Insurance and provides that the Supervisor *"shall be responsible for the general administration of the Act*." He contends that this section thereby imposes a legal duty on the Supervisor in mandatory terms to administer those provisions of the Act intended for the benefit of the public as well as those provisions enacted specifically for the protection of policyholders.

Mr. Marshalleck, SC, then sets out in detail his argument regarding the sections of the Insurance Act which he submits are designed to protect a narrow class such as existing policyholders specifically and not just the public in general. In this regard, he cites Sections 9 (only companies licensed by the Supervisor of Insurance may carry on insurance business), Section 10 (Penalties to be imposed by the Supervisor on companies for non-compliance with section 8, 9 and 10), Section 11 (share capital and deposit required for licensing), Section 13 (conditions for licensing including power of Supervisor to refuse to license for non-compliance), Section 14 (certificate of licensing issued by the Supervisor of Insurance), Section 24 (deposit by insurance companies), Section 26 (statutory funds) and Section 50 (Solvency and intervention) of the Insurance Act. He argues strenuously and skillfully that Section 26 of the Insurance Act which establishes the statutory fund is a feature which renders or transforms the statutory functions of the Supervisor into legal duties owed to the policyholders specifically and actionable by these policyholders:

> "***Statutory Funds***
>
> *26 (1) Every company licensed under this Act to carry on any class of insurance business in Belize shall establish and maintain a Statutory Fund in respect of all such classes of business.*

(2) The statutory fund shall be established –

(a) at the date on which the company commences the carrying on of any class of insurance business referred to in subsection (1);

(b) not later than three months after commencement of this Act, whichever is the later date.

(3) The fund referred to in subsection (1) shall be established and maintained:

(a) in the manner set out in subsection (4), (5) and (6);

(b) under an appropriate name in respect of each class of insurance business referred to in subsection (1).

(4) Every company carrying on long-term insurance business in Belize shall place in trust in Belize asset equal to its liabilities and contingency reserves, less the amount deposited on account pursuant to section 24, with respect to its policyholders in Belize as established by the revenue account and balance sheet of the company as at the end of its last financial year.

(5) Every company carrying on motor vehicle insurance business in Belize shall place in trust in Belize asset equal to its liabilities and reserves, less the amount deposited on account pursuant to section 24, with respect to its policyholders in Belize as established by the revenue account and balance sheet of the company as at the end of its last financial year.

(6) Assets required to be placed in trust pursuant to subsections (4) and (5) shall be so placed not more than three months after the end of the financial year to which the balance sheet or the revenue account, as the case may be, of the company relates.

(7) A statutory fund of all classes –

a) *shall be as absolutely the security of the policyholders of that class as thought it belonged to a company carrying on no other business than insurance business of that class;*

b) *shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of insurance of that class; and*

c) shall not be applied, directly or indirectly for any purpose other than those of the class of insurance business to which the fund is applicable.

(8) No insurance company carrying on insurance business of any class and no company of which any such insurance company is a subsidiary, shall declare a dividend at any time when the value of the assets representing each fund established and maintained by the company as determined in such manner as may be prescribed, is less than the amount if the liabilities attributed to such business.

(9) A company carrying on more than one class of insurance business in respect of which it is required to establish and maintain a statutory fund shall keep such books of accounts and other records as are necessary for the purpose of identifying –

a) the assets representing each statutory fund ; and

b) the liabilities attributable to each class of insurance business."

7. Mr. Marshalleck, SC, dissects the powers of intervention of the First Defendant (the Supervisor of Insurance) under Section 53(1) and 53(2), concluding that the clear effect of section 53 (in mandatory terms) is to empower and require the Supervisor to intervene in the affairs of the insurance company to protect the interests of policyholders:

"Section 53 (1) Subject to section 54, the Supervisor may at any time intervene in the affairs of a company licensed under this Act to carry on insurance business.

(2) The power of intervention shall be exercised where the Supervisor is satisfied that –

(a) the exercise of the power is essential in order to protect policyholders or potential policyholders of the company against

the risk of the company's inability to meet its liabilities or, where a company is carrying on long-term insurance business, to fulfill the reasonable expectations of policyholders or potential policyholders;

(b) the company has failed to satisfy any obligation imposed on it by this Act;

(c) the company has furnished misleading or inaccurate information to the Supervisor under or for the purposes of this Act;

(d) adequate arrangements have not been or will not be made for the reinsurance of risks against which persons are insured by the insurer and in respect of which he considers such arrangements to be necessary;

(e) an application for registration would be refused if such an application were made at the time of the proposed intervention;

(f) a company is deemed to be insolvent in accordance with section 50;

(g) after liability has been established that there has been unreasonable delay in the settlement of claims under policies issued by the company; or

(h) the company has failed to submit to the Supervisor financial statements and returns within six (6) months of the end of the company's financial year."

He submits that the Supervisor is therefore under a strict statutory duty to administer the provisions of the Act so that the statutory fund is established and maintained for the security of policyholders of the class of insurance in respect of which the fund must be held.

8. The Claimants' right of action therefore accrues, contends Mr. Marshalleck, SC, from the fact that the Insurance Act 2004 impliedly confers such a right on policy holders as legal beneficiaries of the statutory trust fund, to enforce the statutory duty of the Supervisor to administer the provisions of the Act so that the necessary statutory fund is kept for their benefit as required by the Act. He argues that in the case at bar, the Supervisor of Insurance proceeded to repeatedly renew the license of CLICO over the period 2004 through 2009, issuing renewal certificates to CLICO, notwithstanding that the required statutory fund was not in place, and purported to give CLICO extensions of time within which to make up the statutory fund when the Act conferred upon her no statutory authority to do any such thing. Further, albeit the Supervisor did intervene in the affairs of CLICO to secure the filing of the audited financial statements on one occasion, she manifestly failed to intervene to secure the establishment of the required statutory fund or otherwise require the immediate liquidation of CLICO.

9. Mr. Marshalleck, SC, argues that there is manifestly no authority to issue renewal certificates under the Insurance Act in the face of non-compliance with the requirements of the Insurance Act in light of the provisions of

sections 13 and 14, and certainly no authority to extend the statutorily prescribed time within which the fund must be in place as provided for by sections 26(2) and 26(6) of the Act. Further the Supervisor was obliged to and failed to intervene in the affairs of CLICO to secure the establishment of the Statutory Trust Fund and fulfill the reasonable expectations of policyholders in accordance with section 53 of the Act.

10. In addressing the issue of whether the Supervisor of Insurance can avail herself of the immunity provided by section 4(3) of the Act, Mr. Marshalleck, SC, submits that that immunity only extends to any act or matter done or omitted to be done in good faith in the exercise of functions conferred by the act. He argues that since the acts of the Supervisor could not have been undertaken in the honest exercise of any statutory power or function conferred by the Act, and the Supervisor acted with a reckless indifference toward the beneficial interest of policyholders in the statutory fund, then the Supervisor was not acting in good faith. He submits that by repeatedly renewing the license of CLICO in the face of non-compliance with sections 13, 14 and 26 and in repeatedly allowing additional time for CLICO to make up the required statutory fund in a clear absence of any statutory authority, the Supervisor could simply not have been acting in

good faith. Mr. Marshalleck, SC, urges the court to adopt a strict interpretation of "*good faith*" in order to limit the scope of the immunity conferred, and to interpret the section restrictively in accordance with the decision in ***Gulf Insurance Ltd v Central bank of Trinidad and Tobago*** [2005] UKPC 10.

Arguments on behalf of the Defence on the First Issue

11. On behalf of the Defendants, Ms. Magali Perdomo argues that there is no statutory duty owed by the First Defendant to the Claimants as there is insufficient proximity between the First Defendant and the primary tortfeasor (in this case CLICO) to justify the existence of such a duty. She submits that while questions of reasonableness and policy considerations are considered by the Courts to be relevant for other agencies such as welfare, education and police services, proximity has a greater role in relation to regulatory agencies such as the Supervisor of Insurance in this case. (***Clerk and Lindsell on Torts*** 20th ed. 14-41 p. 934). She states that the Courts have exercised certain reluctance in finding supervisory liability where another party has acted more wrongfully, in this case CLICO's failure to meet its statutory obligations; it is only where a regulatory agency has sufficient control over an activity will there be sufficient proximity.

12. In support of her contention that no statutory duty exists as there is no proximity between the First Defendant and the Claimants, Ms. Perdomo cites Lord Brown Wilkinson's approach on ***X (Minors v Bedfordshire County Council*** [1995] 3FCR 337 at 368:

> *"Finally, your Lordships' decision in Caparo Industries PLC v Dickman [1990] 1 All ER 568, [1990] 2 AC 605 lays down that, in deciding whether to develop novel categories of negligence the court should proceed incrementally and by analogy with decided categories. We were not referred to any category of case in which a duty of care has been held to exist which is in any way analogous to the present cases. Here, for the first time, the plaintiffs are seeking to erect a common law duty of care in relation to the administration of a statutory social welfare scheme. Such a scheme is designed to protect weaker members of society (children) from harm done to them by others. The scheme involves the administrators in exercising discretions and powers which could not exist in the private sector, and which in many cases bring them into conflict with those who, under the general law, are responsible for the child's welfare. To my mind, the nearest analogies are the cases where a common law duty of care has been sought to be imposed upon the police (in seeking to protect vulnerable members of society from wrongs done to them by others) or statutory regulators of financial dealings who are seeking to protect investors from dishonesty. In neither of those cases has it been thought appropriate to superimpose on the statutory regime a common law duty of care giving rise to a claim in damages for failure to protect the weak against the wrongdoer: See Hill v Chief Constable of West Yorkshire [1988] 2 All ER 238, [1989] AC 53 and Yuen Kun-Yeu v AG of Hong Kong [1987] 2 All ER 705, [1988] AC 175 … In my judgment, the courts should proceed with great care before holding liable in negligence those who have been charged by Parliament with the task of protecting society from the wrongdoings of others."*

13. Ms. Perdomo also cites the case of ***Yuen Kun-Yeu v the AG of Hong Kong*** [1987] 2 All ER 705, where the Privy Council determined that depositors who lost money on the collapse of a regulated financial institution were not entitled to relief claimed against the regulatory agency for negligently failing to deregister institutions. The Privy Council found that there was no close and direct relationship with the Commissioner in the exercise of his statutory powers to create sufficient proximity between him and the depositors which would give rise to such a duty of care. This decision was applied in ***Davis v. Radcliffe*** [1990] 2 All ER 53 where the Privy Council held that plaintiffs were not entitled to damages in an action brought against the Isle of Man Board and the Treasurer for losses suffered of funds which they had deposited with the bank, alleging that such losses had been caused by the negligence of the Board and the Treasurer in carrying out their duties under the Isle of Man Banking Act 1975. The bank had been incorporated in 1965 and had been licensed from year to year by the defendants, until its license was revoked in 1982 when the bank collapsed with a deficit in excess of 40 million pounds. Under the 1975 Act, the Treasurer, subject to directions from the Board, had power to issue a licence, with or without conditions, to refuse or to revoke a licence, to

suspend or discontinue the business of a bank and to inspect the books and documents of a bank. The plaintiffs claimed that the Treasurer owed depositors with a bank a duty to carry out his statutory functions in relation to the licensing and supervision of banks in such a manner that the depositor's funds were safe and properly managed, and that the Treasurer's breach of that duty had caused them loss. The claim was struck out on the basis that there was no relationship of proximity between the depositors who lost their money and the Board. Ms. Perdomo also cites an extract from ***The Negligence Liability of Public Authorities*** Cherie Booth QC and Dan Squires Oxford University Press at p 750 to 754.

14. Ms. Perdomo argues that, in the case at bar, the First Defendant provides regulatory services in accordance with the Insurance Act. Section 4(1) provides that the Supervisor of Insurance shall *"be responsible for the general administration of this Act and whose office be a public office*." She states that the long title to the Act also provides that the purpose of the Act is "*to strengthen the regulatory framework for the insurance industry to meet acceptable international standards; to offer better protection to insured persons* …" Learned Counsel contends that Parliament's intent was to regulate the insurance industry and protect all insured persons generally.

The purpose ought not to be interpreted as conferring a duty on the regulators to individual policyholders. She makes the salient point that the Supervisor of Insurance had no control over the day to day activities of CLICO. Any losses suffered by the Claimants were as a direct result of the internal financial difficulties and faulty investments of CLICO, and not any failure on the part of the First and Second Defendants.

15. Ms. Perdomo also rebuts the argument made on behalf of the Claimants that once the damage suffered by the Claimants falls within the term of a statute, then an action for breach of statutory duty *simpliciter* will lie. She argues that if the statute in question or some other statute expressly provides that a civil remedy does or does not lie for breach of that duty, then there is less difficulty. Ms. Perdomo submits that the Courts have adopted a narrow construction test to the imposition of civil liability for breach of statutory duty as follows: a common law action for breach of statutory duty arises only when the Claimant can establish that Parliament intended that breach of relevant statutory duty should be actionable by an individual harmed by that breach. Further, the general rule is where the Act creates an obligation and enforces performance in a specific way that performance cannot be enforced in any other manner. (***Clerk and Lindsell***

on Torts 20th ed. 9-11 at p 571-575). In further substantiating this argument, Ms. Perdomo points out that by virtue of Section 4(3) of the Act, the First and Second Defendants are immune from any action, suit or proceeding for, or in respect of any act or matter done or omitted to be done in good faith in the exercise or purported exercise of the functions conferred by or under the Act, or any regulations made there under:

> *"Neither the Minister nor the Supervisor nor any officer or person acting pursuant to any authority conferred by the Minister or the Supervisor, as the case may be, shall be liable to any action, suit or proceedings for or, in respect of any act or matter done or omitted to be done in good faith in the exercise or purported exercise of the functions conferred by or under this Act or any Regulations made thereunder."*

Learned Counsel argues that Parliament has clearly provided in this section of the Insurance Act that a civil remedy does not lie for breach of duty by the Minister or Supervisor of Insurance. She further contends that Sections 182 and 183 of the Insurance Act provides for offences and penalties where there is a contravention of the Act.

> *"182 (1) Any company or person who –*
>
> *(a) contravenes this Act, or any order or regulation made under this Act, or any direction or requirement given or made by the Supervisor (or person authorized by him under section 4(2));*
>
> *(b) causes any person to enter into, or make an application for entering into, a contract of insurance in contravention of this Act;*

(c) in purported compliance with a requirement imposed under this Act to supply information or provide an explanation or make a statement –

(i) supplies information, provides an explanation or makes a statement which he knows to be false in a material particular; or

(ii) recklessly supplies information, provides an explanation or makes a statement which is false in a material particular;

(d) where required under section 40 to produce information, books, securities or other documents, destroys, mutilates or falsifies or is privy to the destruction, mutilation or falsification of such information, books, securities or other documents, or makes or is privy to the making of a false entry in such books or documents, or fraudulently parts with or alters or makes an omission in any such books or documents, or is privy to fraudulently parting with, altering or making an omission in any such books,

commits an offence unless he can prove that he did not knowingly commit or cause such contravention or omission. Where the offence consists of a default in complying with any provision, direction or requirement, it shall be deemed to be a continuing offence so long as the default continues.

(2) Where an offence under this Act or any Regulations made thereunder is committed by a body corporate, every person who at the time of the commission of the offence was a director, manager, secretary, principal representative or other similar officer of the body corporate, or was purporting to act in such a capacity, shall be deemed to have committed that offence unless he proves that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances.

(3) If any document required by this Act to be signed by any person is false in any particular to the knowledge of any such person who signs it, that person commits an offence.

(4) Notwithstanding any limitation on the time for the taking of proceedings which is contained in any Act, summary proceedings for offences against this Act may be commenced at any time within one year from the date on which there comes to the knowledge of the Supervisor evidence sufficient in his opinion to justify a prosecution for the offence.

(5) No such proceedings shall be commenced after the expiration of three years from the commission of the offence.

(6) For the purpose of this section, a certificate purporting to be signed by the Supervisor as to the date on which that evidence came to his knowledge shall, in any such summary proceedings, be evidence of that date.

(7) Any proceedings against a company for an offence under this Act shall be without prejudice to any proceedings for the judicial management, or the winding up, of the company or of any part of the business of the company which may be taken in respect of the matter constituting the offence.

183 (1) All offences against this Act for which no penalty is prescribed shall be punishable on summary conviction, in the case of a body corporate, by a fine of twenty thousand dollars, and in the case of an individual, by a fine of five thousand dollars, or to imprisonment for a period of twelve months.

(2) In the case of a continuing offence, the offender shall, in addition to the penalty prescribed in subsection (1), be liable to a fine of five hundred dollars for every day during which the offence continues."

16. Ms. Perdomo further cites the case of ***R v Governor of Parkhurst Prison Ex P Hague*** [1992] 1 AC 58 where the House of Lords held that *"the question whether an enactment conferred private law rights of action on individuals*

in respect of its breaches depended on the intention of the legislature, and the fact that a particular provision was intended to protect certain individuals was not of itself sufficient to confer such rights." Learned Counsel indicates that, other than industrial safety cases or those relating to statutes which recognize that a breach of statutory duty ought to give rise to damages, it is hard to find cases where the court will recognize that breach of statutory duty will give rise to a remedy in damages. The Courts continue to refer to "*indicators*" that Parliament intended that a breach of statutory duty would sound in damages and the statute contains no other mechanisms for the enforcement of the duty. (**The Negligence Liability of Public Authorities** Cherie Booth and Dan Squires Oxford University Press pages 289 - 306 at 305) Ms. Perdomo concludes that the intention of the legislature in this case is clear and unambiguous and that is, to preclude civil liability. She maintains that the Supervisor of Insurance acted in good faith at all times and in protection of all policy holders by maintaining the license for CLICO. The Supervisor exercised her powers under the Act to issue conditional licenses, intervene, impose penalties and sought to ensure that CLICO made efforts to bring the statutory fund up to the requirements of the Act.

Ms. Perdomo distinguishes the case of ***Gulf Insurance Ltd v. Central Bank of Trinidad and Tobago*** relied on by the Claimants to contend that provisions of Section 4(6) of the Insurance Act should be construed restrictively, to narrow, instead of extending the scope of the immunity conferred on the First Defendant. She submits that the section considered in the Gulf Insurance case differed in that the acts in that case were acts that "purported" to be done in performance of functions conferred by statutory provisions. Lord Hoffman said that –

> *"The Board considers that the judge and the Court of Appeal gave it too wide a construction in applying it also to acts which purported to be in performance of functions conferred by the Act but which were in fact outside the powers which it conferred. This is particularly true when the acts in question deprived TCB of its property. The Board considers that provisions of this nature should be restrictively construed. They should not be treated as a license for unlawful expropriation without compensation, provided only that the acts are done in good faith and without negligence."*

Ms. Perdomo points out that in the case at bar, Section 4(6) of the Insurance Act specifically emphasizes that *"Neither the Minister nor the Supervisor nor any officer or person acting pursuant to any authority ….. shall be liable to any action, suit or proceedings for or, in respect of any act or matter done or omitted to be done in good faith in the exercise or purported exercise of the functions conferred by or under this Act or and*

Regulations made thereunder." Learned Counsel also drew a distinction in that the Privy Council found that there was direct proximity between the Central Bank as the regulatory authority and Trinidad Co-operative Bank (TCB) in that case, but that the Central bank had unlawfully disposed of TCB's Assets outside of the scope of what was provided in the statute.

Decision

17. Having reviewed the evidence, the legislation and all the authorities, I find that there is no statutory duty owed to the EFPA policyholders as a distinct class in this case. I also agree with the interpretation of the preamble to the Insurance Act urged upon this court by Ms. Perdomo, that the intention of the legislature was to strengthen the regulate the insurance industry and protect **all i**nsured persons generally, and not to policy holders individually:

> *"An ACT to make new provisions for the licensing of domestic insurers; to strengthen the regulatory framework for the insurance industry to meet acceptable international standards; to offer better protection to insured persons;…"*

I do not find that the sections referred to by Mr. Marshalleck, SC, including section 26 requiring the establishment and maintenance of a statutory fund conferred any implied duty on the Supervisor of Insurance which would be actionable by EFPA policy holders. I do agree that the fund was obviously

intended as a safety net designed to protect the interest of these policyholders, and that the absence of this safety net resulted in substantial losses to these policy holders. However, I am bound to apply the tests articulated by the Privy Council in the cases cited by Ms. Perdomo. Was there proximity between CLICO and the Supervisor of Insurance whereby the Supervisor of Insurance exerted control over the day to day management of the affairs of CLICO which would be sufficient to impose a statutory duty on the Supervisor of Insurance under the Insurance Act? Did the Supervisor of Insurance have such a close relationship i.e. proximity with the individual EFPA policyholders that would give rise to a statutory duty of care and an attendant right of those policyholders to bring action for damages for breach? Most importantly, did the legislature intend as Mr. Marshalleck, SC, argues that the Supervisor of Insurance would owe a statutory duty to EFPA policyholders under these provisions of the Insurance Act? The answers to all these questions are a resounding "No." There was no immediate control that the Supervisor of Insurance held over the day to day business of CLICO, and it is very clear from the evidence that it was the CLICO's mismanagement of its own finances that rendered the company unable to meet the payment of monies to sustain the statutory

fund which then caused damage to the EFPA policyholders and the ultimate collapse of CLICO.

I find that the facts of the case at bar are quite similar to those of ***Yuen Kun Yeu v AG of Hong Kong*** [1987] 2 All ER 705 and ***Davis v Radcliffe*** [1990] 2 All ER 53 cited by Ms. Perdomo, and in deciding this matter, I take guidance from the learning of the Privy Council handed down in those two decisions. I commiserate with the Claimants on their losses suffered in this matter, and in so doing I adopt the words of Lord Goff of Chiveley in ***Davis v Radcliffe*** [1990] 2 All ER:

> *"Their Lordships feel great sympathy for those who, like the appellants, have deposited substantial sums of money with a bank in the confident expectation that a bank is a safe place for their money, only to find that the bank has become insolvent and that the most they can expect to receive is a small dividend payable in its winding up. But, when it is sought to make some third person responsible in negligence for the loss suffered through the bank's default, the question whether that third person owes a duty of care to the depositor has to be decided in accordance with the established principles of the law of negligence. In the present case, the acting deemster, having reviewed the authorities with care, conclude that neither the members of the Finance Board nor the Treasurer owed any such duty to the appellants, and so struck out their statement of case as disclosing no reasonable cause of action. Their Lordships are in no doubt that the acting deemster was right to reach that conclusion … Indeed, they are in agreement with him that the present case is, for all practical purposes indistinguishable from the decision of their Lordship's Board in Yuen Kun-Yeu [1987] 2 All ER 705, [1988] AC 175."*

I also adopt the following reasoning of the Privy Council (as stated by Lord Goff of Chievely in finding that there was no duty on the Board and the Treasurer in ***Davis v Radcliffe***) in reaching my own determination in the case at bar that the Supervisor of Insurance is under no statutory duty to policyholders:

> *"First, it is evident that the function of the Finance Board, and indeed of the Treasurer, as established by the Finance Board Act 1961, are typical functions of modern government, to be exercised in the general public interest. These functions are, as already indicated of the broadest kind, for which parallels can doubtless be drawn from other jurisdictions. The functions vested in the Treasurer and in the Finance Board by the Banking Act must be seen as forming part of those broader functions. No doubt, in establishing a system of licensing for banks, regard was being had (though this is not expressly stated in the long title of the Act) to the fact that the existence of such a licensing system should provide an added degree of security for those dealing with banks carrying on business on the Isle of Man, including those who deposit money with such banks. But it must have been the statutory intention that the licensing system should be operated in the interests of the public as a whole and, when those charged with its operation are faced with making decisions with regard, for example, to refusing to renew licences or to revoking licences, such decisions can well involve the exercise of judgment of a delicate nature affecting the whole future of the relevant bank in the Isle of Man, and the impact of any consequent cessation of the bank's business in the Isle of Man, not merely on the customers and creditors of the bank, but indeed on the future of financial services in the island. In circumstances such as these, competing considerations have to be carefully weighed and balanced in the public interest, and in some circumstances, as counsel for the respondents observed, it may for example be more in the public interest to attempt to nurse an ailing bank back to health than to hasten its collapse. The making of decisions such as these is a characteristic of modern regulatory agencies and the very nature of the task, with its emphasis on the broader public interest, is one which militates strongly*

against the imposition of a duty of care being imposed on such an agency in favour of any particular section of the public."

I find that the intention of Parliament as expressly stated in section 4 of the Insurance Act of Belize was to exclude liability and confer blanket immunity on the Defendants and that intention is indeed clear and unambiguous from the language of the statute. In light of my finding that there has been no statutory duty on the First Defendant, I must also state that I also find that there is no private law action that can lie for damages in negligence against the First Defendant. I also do not find that the Supervisor of Insurance acted recklessly in exercising her powers under the Act especially in light of the fact that she had to take into account the effect of her actions and decisions not only on the interest of EFPA policyholders, but that of all policyholders of CLICO. I find that the evidence supports the Supervisor's position. By way of example, when I peruse the report of the Actuary Paul Ngai dated 6th March, 2008 this bears out the fact that value of the total portfolio of CLICO in Belize as of 31st December, 2007 stood at a little over 113 million dollars belonging to 9025 group and individual policyholders. Of these 9025, 96 were EFPA policyholders. The Supervisor has testified that shutting down CLICO and cancelling its licence for non-compliance with

the act would have had a disastrous effect on all of CLICO's customers, so she wrote several warning letters and issued penalties against CLICO in an effort to help the company to continue functioning and maintain its viability as a going concern, while emphasizing the importance of complying with the requirements of the Insurance Act. I find that the evidence definitely bears out the Supervisor's assertions in this regard: Exhibit ADG 22 (letter dated 23rd August, 2005 where the Supervisor exercises her powers of intervention against CLICO under the Insurance Act for non-compliance with section 55); Exhibit ADG 29 (letter dated May 10th, 2005 penalty of $100 per day imposed by Supervisor for non-compliance with Section 40 of the Insurance Act); Exhibit ADG 45 (letter dated July 9th, 2007 where Supervisor imposes penalty of $100 per day for non compliance with Section 40 for CLICO's failure to provide audited financial statements); Exhibit ADG 51 (letter dated June 5th, 2008 where penalties are imposed by the Supervisor for failure to provide "official hard copies " of audited financial statements); Exhibit ADG 52 (letter dated June 26th, 2008 where the Supervisor imposing penalty of $5300 for failure to comply with section 40(7) of the Insurance Act); Exhibit ADG 53 (letter dated July 14th, 2008 where Supervisor imposes penalty of $5300 for late submission of audited

financial report); Exhibit ADG 73 (letter dated December 11th, 2007 where the Supervisor asks CLICO how it intends to address the deficit of $3.7 million for the statutory fund); Exhibit ADG 76 (email dated January 7th, 2008 where the Supervisor advises CLICO on difficulties she has with accepting real estate to cover the value of the statutory fund and warns CLICO to name a principal representative or its licence will not be renewed); Exhibit ADG 83 (letter dated December 22nd, 2008 where the Supervisor advises CLICO that it must establish 100% of its statutory fund before its license can be issued). I agree with Mr. Marshalleck, SC, that the Supervisor could have been much more effective and forceful in dealing with CLICO, for example, as the expert witness Mark Hulse recommended she should have done so by ensuring that the statutory fund was at all times sufficient for the EFPA policyholders and not just the core portfolio. I also take note of Mr. Hulse's professional opinion expressed at paragraph 42 of his affidavit (Exhibit MCH 2) dated February 14th, 2012 in Action No. 12 of 2012 CLICO (Bahamas) Ltd v. The Supervisor of Insurance. Mr. Hulse as Liquidator of CLICO in Belize had prepared an Accounting Review of the statutory fund held by the Supervisor of Insurance for each year in the period 31st December, 2003 to 31st December, 2008. He stated, "*I noted for*

each year there was no request by the SOI to vary the balance sheet or any actuarial reports submitted by CLICO (Bahamas) Ltd, which means she accepted the categorization stated therein regarding the class of insurance for which the statutory fund was maintained."

> "31. If it appears to the Supervisor that –
>
> (a) a statement furnished to him under section 30 is in any respect unsatisfactory, incomplete, inaccurate or misleading or otherwise fails to comply with the requirements of that section; or
>
> (b) the value of the assets, or of the assets included in a particular class of assets as shown by the statement is insufficient or excessive,
>
> the Supervisor may, after considering any explanation made by or on behalf of the company, give to the company such directions in writing as he thinks necessary –
>
> (i) for the variation of the statement;
>
> (ii) for an increase or decrease in the value of the assets respectively,
>
> and the company shall within thirty days comply with any directions so given."

I agree with his observation that the Supervisor did not at any time request that CLICO vary its balance sheet pursuant to Section 31 of the Insurance Act; she was empowered to do so under the Act and regrettably she failed to do so.

However, when I consider and weigh all of the evidence I do not find that the Supervisor's actions, or failures to act, amounted in their totality to recklessness or bad faith.

While I believe that she could have been more forceful in dealing with CLICO and that all the penalties available were not effectively levied on CLICO to ensure compliance, I do not find that her actions or failure to act amounted to recklessness.

I close with a citation from an authority relied on by Ms. Perdomo which seeks to explain the rationale of the courts in dealing with the issue of liability of financial regulators. In dealing with the issue of statutory immunity, the learned authors Cherie Booth QC and Dan Squires in ***The Negligence Liability of Public Authorities OUP*** at p. 750 footnote 112 state as follows:

> "The unwillingness of the courts and the legislature to permit claims to be brought against financial regulators is in part due to the huge losses that can be caused by the insolvency of financial institutions. If the courts were to impose liability on banking regulators, they would effectively require the state to underwrite collapsed businesses and pay out enormous sums in compensation."

The learned authors go on to state at page753:

> *"The law relating to negligence liability of public authorities has changed to a significant degree since the Yuen Kun Yeu, Davies and Minories Finance cases were decided with the courts now significantly more willing to impose duties of care than they had been in the past. This does not, however, mean that the cases involving banking regulators would now be decided differently …. the principal change in the law relating to public authorities since the late 1990s has been that the courts have re-evaluated policy arguments for refusing to impose a duty of care. The courts have not, however, reconsidered the refusal to impose a duty of care on public authorities where 'proximity' cannot be established or where the claimant is unable to overcome the limitations on establishing liability in cases of pure economic loss. Both are likely to apply to claims brought against financial regulators, and ought to lead to courts refusing to impose a duty of care upon them if cases were to arise today. Negligence liability will therefore not be imposed even if a claim is not covered by statutory immunity contained in the Financial Services and Markets Act 2000."*

18. The Claim is dismissed. Costs awarded to the Defendants to be agreed or assessed.

Dated this 10th day of October, 2014

_____

Michelle Arana
Supreme Court Judge