IN THE COURT OF APPEAL OF BELIZE AD 2017

CIVIL APPEAL NO 30 OF 2014

KENT HERRERA
NIKITA USHER
VALDEMAR CASTILLO
VILDO MARIN
EUGENIO EK
LEONARDO VARELA Appellants

v

ALMA GOMEZ (SUPERVISOR OF INSURANCE)
DEAN BARROW (MINISTER OF FINANCE)
ATTORNEY GENERAL Respondents

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BEFORE

The Hon Mr Justice Sir Manuel Sosa	President
The Hon Madam Justice Minnet Hafiz-Bertram	Justice of Appeal
The Hon Mr Justice Christopher Blackman	Justice of Appeal

E A Marshalleck SC for the appellants.
M Perdomo, Senior Crown Counsel, S Matute and L Duncan, Crown Counsel for the respondents.

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10 March 2016, 24 March 2017.

SIR MANUEL SOSA P

[1] I have had the advantage of reading, in draft, the judgment of my learned Brother, Blackman JA, and, having done so, I concur in the reasons for judgment given, and the orders proposed, by him.

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SIR MANUEL SOSA P

HAFIZ-BERTRAM JA

[2] I have had the advantage of reading, in draft, the judgment of my learned Brother Blackman JA and, having done so, I concur in the reasons for judgment given, and the orders proposed, by him.

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HAFIZ-BERTRAM JA

BLACKMAN JA

[3] This appeal is against the decision of **Arana J** dated October 10, 2014 that there was no breach of statutory duty by the Supervisor of Insurance (the Supervisor) the first respondent, to the appellants as 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.

[4] The background to the facts considered by the trial judge as contained in paragraph 2 (i to xx) of the above judgment, are with some modifications, gratefully adopted as the factual matrix in this appeal.

[5] 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.

[6] By the terms of the EFPA Policies issued and/or maintained in Belize in favour of the appellants over the period February 2004 through May 2009, CLICO promised to pay each of the appellants in Belize a monthly annuity payment commencing and terminating on the dates specified in their respective policies, and if a policyholder died before the annuity payment commenced, to make such annuity payments to the

designated beneficiaries. The respondents contended that the terms of EFPA policies varied, as policyholders were given a choice of payment of annuity or withdrawal of funds, and that they were not privy to the varied terms in each annuity contract between CLICO and its EFPA policyholders on an individual basis.

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

[8] On April 8, 2009 the Supreme Court of Belize, upon the application of the Supervisor, ordered that CLICO be placed under provisional judicial management in Belize. The order was made final on May 19, 2009 when Mark C. Hulse of the accounting firm Baker Tilly Hulse was appointed 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.

[9] On August 10, 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.

[10] Kent Herrera and Nikita Usher ("the Herreras'") had their attorneys at the time write to the Judicial Manager and the Supervisor on August 13, 2009 to ascertain whether or not the EFPA Policies were included in the transfer that had been authorized by the court.

[11] On September 2, 2009 the Judicial Manager responded to the attorneys for the Herreras advising 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, and further that the Supervisor 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.

[12] During the months of August and September, 2009 the Supervisor informed the attorneys for the Herreras that the EFPA Policies were not a part of the portfolio that had been transferred because the EFPA Policies operated more like a financial instrument for investment purposes than life insurance. Additionally, the Supervisor informed the attorneys for the Herreras that the statutory fund would be prorated so that part of the statutory fund would be 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.

[13] On March 9, 2010 the Supervisor applied to the Supreme Court of Belize in Action No 12 of 2010 to wind up CLICO and on May 3, 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. On August 6, 2010 the Court ordered that CLICO be placed in substantive liquidation in Belize and Mark C. Hulse was appointed the liquidator in Belize.

[14] On September 7, 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. Pursuant thereto, the Liquidator paid twenty five percent (25%) of the principal of their respective policies on October 8, 2010 to the EFPA policyholders.

[15] The Liquidator's Second Liquidation Report for the period September 25, 2010 to April 26, 2011 projected that the value of the remaining balance of the assets of CLICO in Belize would be $2,538,232.45 and that the remaining balance of the liabilities of CLICO would amount to $6,501, 540.48, and that consequently there would be a significant shortfall in funds to meet the liabilities of CLICO. The report showed that of the projected liabilities of CLICO, $3,732,001.15 were the total liabilities attributed to the

policyholders of the EFPA Policies and that $2,697,137.33 was due to other creditors in priority to the claims of the policyholders of EFPA Policies. As a result, no further payments to EFPA policyholders were anticipated.

[16] 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.

[17] 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 the secured creditors and to meet the obligations of the liquidator under the agreement for the sale of the core portfolio. As a consequence, there were no funds available to make any further payment toward the liabilities of CLICO to the EFPA policyholders.

The respective contentions.

[18] In the court below, the appellants as Claimants alleged that it was the failure of the Supervisor to maintain a statutory fund to maintain annuity policies such as the EFPA, and in addition the fact that the office of the Ministry of Finance (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) resulted in damage and loss to EFPA policyholders including the Claimants/appellants. The Claimants/appellants 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. As a consequence, the Claimants/appellants therefore sought several declarations and damages for breach of this statutory duty.

[19] In rebuttal, the defendants/respondents contended that the First Defendant took all reasonable and sufficient measures available to her under the Insurance Act, and

categorically denied any recklessness on her part towards the potential financial loss of the Claimants and policyholders in general.

[20] **Arana J** at paragraph 17 of her decision dated October 10, 2014 noted the facts of the case were quite similar to those in the Privy Council decisions hereinafter mentioned, and concluded that "*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 and regulate the insurance industry and protect all insured persons generally, and not to policy holders individually."*

[21] The authorities on which Her Ladyship particularly relied are the Privy Council decisions of ***Yuen Kun-Yeu v the AG of Hong Kong*** [1987] 2 All ER 705, and ***Davis v. Radcliffe*** [1990] 2 All ER 53 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.

[22] From the above decision, the claimants appealed. The grounds of appeal are:

> (i) The learned trial judge erred in law and misdirected herself in finding that there is no statutory duty to EFPA policy holders as a distinct class (paragraph 17 of the Judgment);
>
> (ii) The learned trial judge erred in law and misdirected herself in applying the test for ascertaining liability in negligence (paragraph 17 of the Judgment) rather than construing the various provisions of the Insurance Act to determine whether the statutory duty contended for existed under and by virtue of the provisions of the Act relied upon; and

(iii) The learned trial judge erred in law and misdirected herself in failing to consider or decide or offer any or any sufficient reasons for refusing each and all of the declarations sought in the Claim and in particular the first declaration which was in terms that CLICO was engaged in the conduct of long term insurance business in Belize within the meaning of the provisions of the Insurance Act of Belize, 2004 by maintaining, selling and/or issuing Executive Flexible Premium Annuity Policies in Belize over the period February 26, 2004 when the Insurance Act of Belize, 2004 came into effect, until May 2009 when was placed under judicial management by order of the Supreme Court of Belize, an issue which at the date of trial, was no longer disputed.

[23] The appellants are also seeking inter alia, declarations that the First Defendant (the Supervisor) failed, in breach of her statutory duty to the Claimants, to exercise her statutory powers in the interest of the policyholders of CLICO by acting reasonably and in good faith to protect policyholders against the risk that CLICO would be unable to meet its liabilities and/or fulfil the reasonable expectations of policyholders in Belize including the Claimants; and that the Defendants are liable to the Claimants by way of damages for breach of any and/or all of the above enumerated statutory duties to the Claimants, for an amount equal to the face value of the EFAP issued by CLICO less the amount already received from the Second Defendant after the distribution of the statutory fund and less as well any amounts to be received by them upon completion of the liquidation of CLICO in Belize pursuant to the order of the Supreme Court dated August 6, 2010.

The Appeal

[24] At the outset of the appeal, Mr. Edmund Marshalleck SC Counsel for the appellants sought and was granted leave to argue a fourth ground, namely, that the trial judge erred in law and misdirected herself in finding that the Supervisor's actions did not amount to recklessness or bad faith. Counsel submitted that grounds one and two and the new ground four are inextricably connected as they all related to the finding of the

trial judge set out at paragraph 17 of the judgment that the statutory duty contended for does not exist.

A Preliminary Issue and Finding

[25] At the outset of the appeal, Counsel for the appellants submitted that it was incumbent on the trial judge to have granted the declaration" **That CLICO (Bahamas) Limited was engaged in the conduct of long term insurance business in Belize within the meaning of the provisions of the Insurance Act of Belize, 2004, by maintaining, selling and/or issuing Executive Flexible Premium Equity policies in Belize over the period 26th February, 2004, when the Insurance Act, 2004 came into effect, until May 2009 when CLICO (Bahamas) Limited was placed under judicial management by order of the Supreme Court of Belize"** before considering the issue of breach of statutory duty.

[26] Mr. Marshalleck further submitted that if the EFPA were not considered to be insurance business that would have been the end of the matter. However, in the circumstance that pursuant to an order of the Court, the Liquidator paid twenty five percent (25%) of the principal of their respective policies on October 8, 2010 to the EFPA policy holders before the completion of liquidation, that of itself was an admission that merited the grant of the declaration, reproduced at 23 above. In my view, Counsel was palpably upset that there had been little or no consideration of the declarations in the judgment so that, in his words they ***"just fell off the radar in the judgment", "… just fell into a vacuum"***.

[27] Mr. Marshalleck further submitted that a grant of the declaration that the company was carrying on insurance business was independent of a finding that on a true construction of the relevant provisions, there was no breach of statutory duty.

[28] Ms. Magali Perdomo Counsel for the respondents made no submissions either in writing or orally as to the foregoing contention as to the grant of the declarations, but

rather focused on what she considered the primary issue on the appeal as to the finding by the trial judge that there was no breach of statutory duty by the Supervisor of Insurance and that she had not acted in bad faith.

[29] I think there is merit in Mr. Marshalleck's submissions that as a precursor to a consideration of the issue of breach of statutory duty the first mentioned declaration referred to at paragraph 25 above, should have been granted, and **I would grant that declaration**. As Counsel rightly conceded, such a declaration that the company was carrying on insurance business was independent of a finding that on a true construction of the relevant provisions, there was no breach of statutory duty.

[30] In light of the submissions and arguments advanced at the appeal, I am of the opinion that the three issues for determination are whether (1) the statutory fund placed on trust in accordance with section 26 of the Act each constituted security for the benefit of policyholders of CLICO (Bahamas) Limited in Belize including the appellants; (2) was the trial judge correct in finding that there was no breach of statutory duty by the Supervisor of Insurance, and (3) if there was such a duty, did the Supervisor show bad faith as alleged by the appellants.

Issue A: Did the statutory fund created in accordance with section 26 of the Act constitute security for the benefit of policyholders of CLICO (Bahamas) Limited in Belize including the appellants.

[31] Counsel for the appellants submitted that as the claims of the appellants were founded entirely upon the meaning and effect of the provisions of the Insurance Act, 2004, the trial judge should have carried out an analysis of the Act. Mr. Marshalleck moreover complained that the vast majority of the written reasons for the decision (some 27 of 35 pages of the written reasons) were but a recital of the undisputed facts, and a summary of the position of the parties to the claim. Such reasoning as there was did not include an analysis of the statute.

[32] In particular, Counsel submitted that the law for breach of statutory duty required a claimant to show that (a) the injury he suffered is within the ambit of the statute; (b) the statutory duty imposed a liability to civil action; (c) the statutory duty had not been fulfilled; and (d) the breach of duty caused his injury. Mr. Marshalleck further submitted that the first, third and fourth requirements for a claim as detailed above had been met by his clients, and that consequently they were actionable by way of private law action for damages for failure to comply with the statutory requirements of the Insurance Act 2004.

[33] Mr. Marshalleck submitted that the applicable legal principles in resolving the foregoing issues were as explained by **Lord Browne-Wilkinson** in the House of Lords case of ***X (Minors) v. Bedfordshire C. C***. 1995 2 A.C. 633 at page 731: [1995] 3 FCR 337 at pages 347 and 348:

> *"The principles applicable in determining whether such a cause of action exists are now well established, although the 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 provides some other 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:* ***Cutler v. Wandsworth Stadium Ltd*** [1949] AC 398; ***Lonhro Ltd v. Shell Petroleum Co. Ltd*** (No. 2) [1982] AC 173. *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 action in damages, notwithstanding the imposition by the statutes of criminal penalties for any breach: see ***Groves v. Lord Wimborne*** [1898] 2 QB 402

Although the question is one of statutory construction and therefore each case turns on the provisions of the relevant statute, it is significant that your Lordships were not referred to any case where it had been held that statutory provisions establishing a regulatory system or a scheme of social welfare for the benefit of the public at large had been held to give rise to a private right of action for damages for breach of statutory duty. Although regulatory or welfare legislation affecting a particular area of activity does in fact provide protection to those individuals particularly affected by that activity, the legislation is not to be treated as being passed for the benefit of those individuals but for the benefit of society in general. Thus legislation regulating the conduct of betting or prisons did not give rise to a statutory right of action vested in those adversely affected by the breach of the statutory provisions, i.e. bookmakers and prisoners: see ***Cutler*** [1949] AC 398; ***R. v. Deputy Governor of Parkhurst Prison, ex parte Hague*** [1992] 1 AC 58. *The cases where a private right of action for breach of statutory duty have been held to arise are all cases in which the statutory duty has been very limited and specific as opposed to general administrative functions imposed on bodies and involving the exercise of administrative discretions."*

[34] Counsel for the appellants further submitted that the trial judge's error in finding that that there was no statutory duty owed to EFPA policyholders as a distinct class (as stated at paragraph 17 of the judgment) was contradicted by the evidence of the Supervisor under cross-examination. In that testimony, seen at pages 179 to 185 in the transcript of the proceedings, the Supervisor acknowledged the existence of such a duty because of the existence of the statutory trust established by the Act for the benefit of

policyholders and the fact that she functioned as trustee of that trust by virtue of her office.

[35] Counsel for the appellants further submitted that sections 13, 14 and 26 were inextricably linked in that section 13 specified the conditions to be satisfied before a license may issue including the requirement of solvency in accordance with section 50. Section 13 further provided for the Supervisor to refuse to licence an insurance company if one or more of the conditions to be satisfied, were not complied with.

[36] With reference to section 14, Counsel submitted that the provisions of the section are in mandatory terms and conferred no administrative discretion on the Supervisor as to whether or not to issue a certificate, as the section only permitted renewal certificates for licences if the requirements of sections 13, 24, 26 and 50 had been met, which in summary are (i) section 24 required the making of certain statutory deposits; (ii) section 26 required the establishment in Belize of a statutory fund and (iii) section 50 defined the requisite margin of solvency which is to be maintained by licensed insurance companies in Belize.

[37] Section 14 provides:

> *"(1) The Supervisor shall, subject to the payment of the prescribed fees and to section 13, furnish to every company licensed under this Act a certificate in prescribed form that the company has been so licensed, and the certificate shall state the class or classes of insurance business for which it is licensed and shall be prima fade evidence that the insurance company specified in the certificate has been so licensed.*
>
> *(2) Every certificate issued under this section shall be valid for the calendar year in which issued and may be renewed by the Supervisor for subsequent periods subject to the insurance company satisfying the requirements of sections 13, 24, 26 and 50 and upon payment of the prescribed fees."*

[38] Section 26 of the Act is central to the Appellants' claims herein and requires particular attention and emphasis. It provides for the creation and maintenance of a

statutory fund through the establishment of a trust for the benefit of policyholders of the class of insurance for which the fund is to be maintained.

[39] This fund is expressed by the law to be for the benefit of policyholders as a limited class of the public and the Appellants submit that this feature of the Act is effectively what renders the statutory functions of the Supervisor, whether touching and concerning licensing or otherwise, legal duties owed to policyholders specifically and actionable by them.

[40] The Appellants submit that the Supervisor is under 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.

[41] Section 26 provides:

> *"(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 subsections (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 assets 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 at the end of its last financial year.

(5) ...

(6) Assets required to be placed on 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 absolutely the security of the policyholders of that class as though 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)

(9)..."

And section 27 provides:

"A trust mentioned in section 26 shall be created by trust deed, the contents and trustees of which shall be approved by the Supervisor prior to creation."

[42] Counsel submitted that as a consequence of the creation of the statutory fund to be maintained pursuant to section 26, the policyholders are the legal beneficiaries of the statutory trust.

[43] Ms. Magali Perdomo Counsel for the respondents, challenged Mr. Marshalleck's assertions that the law for breach of statutory duty required a claimant to show that (a) the injury suffered is within the ambit of the statute; (b) the statutory duty imposed a liability to civil action; (c) the statutory duty had not been fulfilled; and (d) the breach of duty caused his injury. Ms. Perdomo submitted that with regard to the first requirement, postulated by Counsel for the appellants, that while the injury suffered may have been within the ambit of the statute, the preamble of the Act clearly stated that it is a statute to strengthen the regulatory framework for the insurance industry to meet acceptable international standards; to offer better protection to all insured persons generally, and not to policy holders individually.

Discussion and Disposition of Issue A

[44] As noted in paragraphs 33 and 34 above, Mr. Marshalleck for the appellants stressed that sections 13, 14 and 26 of the Act were inextricably linked in that section 13 specified the conditions to be satisfied before a license may issue including the requirement of solvency in accordance with section 50 and also further provided for the Supervisor to refuse to licence an insurance company if one or more of the conditions to be satisfied, were not complied with.

[45] With reference to section 14, Counsel submitted that the provisions of the section are in mandatory terms and conferred no administrative discretion on the Supervisor as to whether or not to issue a certificate, as the section only permitted renewal certificates for licences if the requirements of sections 13, 24, 26 and 50 had been met.

[46] Section 26 requires that "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"*.*

An examination of the provisions of Section 26, (3) (b) that states:

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

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

clearly indicate that each class of business was expected to have its own designated fund of assets to meet the requirements of the business for which coverage was being provided.

[47] In addition section 26(7) of the Act recognised that:

> "*A statutory fund of all classes -*
>
> *(a) shall be absolutely the security of the policyholders of that class as though 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."*

[48] It seems to me on the ordinary principles of statutory interpretation, the foregoing provisions are clear, and that without more the appellants were entitled to the declaration "***That in accordance with the provisions of the Insurance Act 2004, the deposits of Clico (Bahamas) Limited made in accordance with section 24 of the Act and the statutory fund placed on trust in accordance with section 26 of the Act each constitutes security for the benefit of policyholders of CLICO (Bahamas) Limited in Belize including the Appellants,*** and I would so declare.

[49] However, the foregoing proposed declaration like that previously granted at **paragraph 29 above** is not dispositive of the issues still to be determined, and consideration of those issues will now follow.

Issue B: Was there a breach of statutory duty by the Supervisor of Insurance.

[50] Mr. Marshalleck's submission on this head were two-fold. First, that there was a breach of statutory duty by the Supervisor of Insurance when certificates of renewal were issued notwithstanding the failure to comply with the requirement of section 14 (2) of the Act that ***Every certificate issued*** *under this section* ***shall be valid for the***

calendar year in which issued *and* ***may be renewed by the Supervisor*** *for subsequent periods* ***subject to the insurance company satisfying the*** *requirements* ***of*** *sections 13, 24,* ***26*** *and 50 and upon payment of the prescribed fees."***(emphasis added)**

The second was that the Supervisor was 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. Counsel was firmly of the view that the several renewals of the licence to carry on business, in the absence of the maintenance of the statutory fund as required, amounted to a breach of statutory duty by the Supervisor of Insurance, and accordingly a Declaration in those terms should issue.

[51] Counsel for the respondents however submitted that there was insufficient proximity between the Supervisor and the appellants, to justify the existence of a statutory duty owed by the Supervisor as a regulatory agency, to the appellants. Counsel relied on the statement in **Clerk and Lindsell on Torts** 20th ed. 14-41, p 934 where it was stated that "*proximity has a greater role in relation to regulatory services"* in *that negligent conduct may be the indirect cause of harm to a claimant, the direct cause being the activity which was negligently regulated, and the regulatory service will normally have no direct contact with the claimant*" such as the Supervisor in the case at bar.

[52] Ms. Perdomo submitted that courts have been reluctant in finding supervisory liability where another party has acted **more wrongfully**, as in the instant case where CLICO failed to meet its statutory obligations. Counsel commended the remarks of **Lord Brown Wilkinson** in the case of ***X (Minors) v. Bedfordshire County Council*** [1995] 3 FCR 337 at 368:*"Finally, your Lordships' decision in* ***Caparo Industries plc v. Dickman*** *[1990] 1 All ER 568, [19990] 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 n 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*** *[198812 All ER 238, [1989] AC 53 and* ***Yuen Kun-Yeu v A-G 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."*

[53] Counsel for the respondent further submitted that in order to establish breach of statutory duty, the injury suffered by the Claimant must fall within the type of harm that Parliament intended the statute to guard against. In that regard, Mrs. Perdomo cited the Privy Council case of ***Yuen Kun-Yeu*** v ***A-G of Hong Kong*** [1987] 2 All ER 705 which she considered had similar facts to the case at bar, and also relied on ***Davis v Radcliffe*** [1990] 2 All ER 53, in which the Privy Council applied its reasoning in ***Yuen Kun-Yeu.*** In ***Yuen Kun-Yeu*** depositors who had lost money on the collapse of a regulated financial institution claimed against the regulatory agency that it had negligently failed to deregister the institutions. The decision of the Privy Council as set out in **the headnote,** was that:

> "*The factors required to establish a duty of care in negligence were foreseeability of harm (which, although a necessary ingredient, could not by itself, and automatically, lead to a duty of care) and a close and direct relationship of proximity between the parties apt to give rise to such a duty, and only rarely*

would the further question of whether public policy required the exclusion of liability for breach of such a duty fall to be considered. On the facts, the crucial question was whether there existed between the commissioner and would-be deposits such a close and direct relationship as to place the commissioner, in exercise of his powers under the ordinance, under a duty of care towards would-be depositors. Although it was reasonably foreseeable that if an uncreditworthy company were to be placed on or allowed to remain on the register persons who might deposit money with it would be at risk of losing their money, mere foreseeability of that harm did not itself create a sufficient proximity between the commissioner and would-be depositors for a duty of care to arise, since the commissioner had no control over the day-to-day management of deposit-taking companies and also had to consider the position of existing depositors in deciding whether to deregister a company. Accordingly, there was no special relationship between the commissioner and the company or between the commissioner and would-be depositors capable of giving rise to a duty of care owed by the commissioner to the appellants. Furthermore, the ordinance had not instituted a far-reaching and stringent supervision system such as to warrant an assumption that all registered deposit-taking companies were sound and fully creditworthy, and accordingly the appellants' reliance on the fact of registration as a guarantee of the soundness of the company was neither reasonable nor justifiable, nor should the commissioner reasonably be expected to know of such reliance if it existed ... In contradistinction to the position in the Dorset Yacht case, the commissioner had no power to control the day-to-day activities of those who caused the loss and damage...."

Discussion and Disposition of Issue B

[54] **Arana J** in her judgment stated "*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 policy holders."*

[55] However, a close analysis of the facts in ***Yuen Kun-Yeu*** and ***Davis v Radcliffe*** makes it clear that both cases were concerned with banks and their customers. Moreover, in the case of ***Yuen Kun-Yeu*** at page 707, it is noted that "**the alternative ground of breach of statutory duty was not argued"** whereas, the issue of breach of statutory duty is central to the consideration of this matter. Additionally in my view, there is a significant and qualitative difference in the cases relied on and the instant case. Indeed, the only common factor between them, is that the aggrieved parties lost money! In this matter, the Supervisor repeatedly renewed the licence of the insurance company

over the period 2004 through 2009 notwithstanding that the required statutory trust fund was not in place. In the text **Clerk &Lindsell on Torts** referred to at paragraph 49 above, at **14-42** it is noted that "*where a regulatory agency has sufficient control over an activity and the purpose of the scheme is to protect the class to which the claimant belongs, then there may be sufficient proximity to justify a duty".*

[56] Lord Browne-Wilkinson in the House of Lords case of ***X (Minors) v. Bedfordshire C. C***. 1995 2 A.C. 633; [1995] 3 FCR 337 exhaustively considered the applicable legal principles, observing at **page 730 and 347** respectively, "*whether, if Parliament has imposed a statutory duty on an authority to carry out a particular function, a plaintiff who has suffered damage in consequence of the authority's performance or non-performance of that function has a right of action in damages against the authority*".

Further on, at page 731; page 348 he noted *"the question is one of statutory construction and therefore each case turns on the provisions of the relevant statute*"

[57] On a consideration of the submissions by Counsel for the parties, and having regard to the provisions of the Insurance Act and the principles set forth in ***X (Minors) v. Bedfordshire C. C***. cited above, I am of the view that there was breach of statutory duty by the Supervisor to the EFPA policyholders, and accordingly, I would so declare.

Issue C: If there was such a duty, did the Supervisor show bad faith as alleged by the appellants.

[58] Counsel for the appellants submitted that by repeatedly renewing the licence of CLICO in the face of non-compliance with sections 13, 14 and 26 of the Act and in repeatedly allowing additional time for CLICO to make up the required statutory fund in the clear absence of any statutory authority whatsoever so to do, the Supervisor could simply not have been acting in good faith. Further, he submitted that the appellants' claims are outside the scope of the immunity conferred by section 4(3) because the acts of the Supervisor could not have been undertaken in the honest exercise of any statutory power or function conferred by the Act. Moreover, it was his contention that the

Supervisor had acted recklessly and with indifference toward the beneficial interest of policyholders in the statutory trust fund.

[59] Section 4(3) of the Insurance Act provides that:

> "*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 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 functions conferred by or under this Act or any Regulations made thereunder."*

[60] Mr. Marshalleck further submitted that the effect of section 4(3) of the Insurance Act was to limit the scope of the immunity conferred by reference to a notion of "good faith". He urged that the Court should adopt a strict interpretation of the phrase "good faith" as used in section 4(3) in order to limit the scope of the immunity conferred and interpret the section restrictively as any taint of dishonesty whatsoever, regardless of its form, should be a disqualification from the protection afforded by section 4(3).

[61] Counsel further submitted that the purported exercise of statutory powers to renew the licence of CLICO and to provide extensions of time for the statutory fund to be made good, were in reckless disregard of the legal interests of policyholders as beneficiaries of the statutory trust fund. Counsel noted that the risk of loss to policyholders grew exponentially with the compounding of statutory non-compliance by CLICO every year, year after year, for some four years. He submitted that even if the Supervisor could have been given the benefit of some doubt in year one, no such benefit should be given by year four after CLICO had then failed to maintain the required statutory trust fund for three consecutive years.

[62] Mr. Marshalleck submitted that such reckless indifference as to the risks presented to policyholders vitiated the acts of the Supervisor, and consequently for that reason, could not be regarded as having been undertaken in good faith.

[63] In support of the foregoing, Mr. Marshalleck has cited the House of Lords decision of ***Three Rivers District Council v. Governor and Bank of England*** [2000] 3

All ER 1 at page 40, where **Lord Hobhouse of Woodborough** in considering the requisites for the tort of misfeasance in public office said:

> "*The official concerned must be shown not to have had an honest belief that he was acting lawfully; this is sometimes referred to as not having acted in good faith. In Mengel, at p. 546, the expression honest attempt is made. Another way of putting it is that he must be shown either to have known that he was acting unlawfully or to have wilfully disregarded the risk that his act was unlawful. This requirement is therefore one which applies to the state of mind of the official concerning the lawfulness of his act and covers both a conscious and a subjectively reckless state of mind, either of which could be described as bad faith or dishonest."*

[64] Counsel urged that the above stated dicta in ***Three Rivers District Council*** supports the contention that the reckless indifference of the Supervisor toward both the existence of the necessary statutory authority to act as well as toward the increased exposure to risk of loss by insured persons flowing directly from her actions constituted bad faith or dishonesty. As a consequence, the reckless acts of the Supervisor could not have been done in good faith for her to benefit from the immunity from suit conferred by section 4(3) of the Act.

[65] Counsel for the respondents in rebuttal submitted that the Supervisor at all times acted in good faith and in the protection of the policyholders by renewing CLICO's annual license, and that this position was supported by Mark Hulse, the provisional manager and liquidator who conceded under cross examination that the Supervisor had acted in good faith at all times. Moreover, the evidence of the appellants did not show any dishonesty on the part of the Supervisor nor did it show that she was reckless in the performance of her duties under the Act.

[66] Contrary to the appellants' submissions that the Supervisor was wilfully indifferent or reckless, the evidence showed that she used the provisions of the Act in an attempt to ensure compliance by CLICO as far back as 2005, by the issue of conditional licences to ensure that CLICO built its fund to provide for its policyholders.

Where necessary, the Supervisor had exercised her powers of intervention and imposed penalties, as provided for under the Act.

[67] Ms. Perdomo submitted that the Appellants' reliance on the test for recklessness as applied in the case of ***Three Rivers District Council v Governor and Bank of England*** was misplaced as that case dealt with misfeasance in public office, which had not been specifically pleaded in the instant case. Counsel further observed that **Saunders J** (as he then was) in ***Spencer v The Attorney General of Antigua and Barbuda*** (Civil Appeal 20A of 1997) held that "*the impugned acts of public officers must be infected with malice and this malice must be pleaded*."

Discussion and Disposition on the Issue as to whether the Supervisor showed bad faith as alleged by the appellants.

[68] The following extracts of **Arana J's** judgment of October 10, 2014 where she found the Supervisor had not acted recklessly in exercising her powers under the Act, considered 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*" ... *the report of the Actuary Paul Ngai dated 6th March, 2008 … bears out the fact that the 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…. 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) supports Ms. Perdomo's submission that the Supervisor had exercised her powers of intervention and imposed penalties provided for under the Act as far back as 2005 in an attempt to ensure compliance by CLICO so to build up its statutory fund for its policyholders.

[69] Notwithstanding the error by both the learned judge and the Supervisor in concluding that that the statutory fund was global in scope, as indicated by the statement "*the 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…. 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"* when the Act required that the funds be segregated in accordance with the class of business, it is now obligatory to examine whether in the totality of matters, the Supervisor acted in bad faith.

[70] Before doing so however, I am obliged to observe that I am unable to accept Counsel for the appellants' submission that the Supervisor actions constituted the tort

of misfeasance in public office for the reasons that, as rightly noted by Ms. Perdomo, it was not pleaded, and secondly no evidence was led to support such a claim.

[71] The extensive list of matters at paragraph 68 above considered by the learned trial judge, are enough in my view, to show that the Supervisor in very difficult circumstances, sought to deal with complex financial developments which were for the most part, occurring outside Belize. In 2008 and 2009 many prominent international financial institutions failed, with consequences far beyond their original places of origin and regrettably, Belize was singularly affected by matters largely outside the control and remit of public officials in Belize.

[72] Over the last 70 years, a body of jurisprudence has developed in relation to an appellate's court ability to review findings of fact by a trial judge. **Lord Thankerton** stated the principles in ***Watt (or Thomas) v. Thomas*** [1947] 1 All ER 582 at page 587

> "(i) "*Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.*
>
> *(ii) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.*
>
> *(iii) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question."*

[73] That principle was re-stated by **Lord Scarman** in ***Maynard v. West Midlands Regional Health Authority*** [1985] 1 All ER 635 at 637 and more recently by the Bahamas Court of Appeal in the matter of ***The Airport Authority v. Western Air Limited*** [2014] 2 BHS J. No. 36. In light of the principles in the foregoing authorities and on a consideration of the matter, having regard to the findings of the trial judge, who had the opportunity to observe Ms. Gomez the Supervisor as a witness, I would agree with the learned judge that the Supervisor did not act in bad faith in relation to the appellants as EFPA policyholders.

[74] In the result, I would allow the appeal in part in that I would grant the declarations mentioned in paragraphs 27, 46 and 57. I would dismiss the appeal against the finding that the first respondent acted in good faith in the exercise of her duties under the Act.

[75] I would set aside the costs order made by **Arana J** and order that each party bears its own costs in this Court and in the court below. I would further order (a) that the above order as to costs be provisional in the first instance but become final after 14 days from the date of delivery of this judgment, unless either party shall file an application for a contrary order within the said period of 14 days and (b) that, in the event of the filing of such an application, the matter of costs shall be determined on the basis of written submissions to be filed and delivered in 14 days from the filing of the application.

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BLACKMAN JA