

2009

No. 191/09-P

DEMERARA

**IN THE HIGH COURT OF THE SUPREME COURT OF  
JUDICATURE**

**In the matter of the Petition under  
section 67 of the Insurance Act  
(Act No. 20 of 1998).**

**-and-**

**In the matter of the Petition by the  
Commissioner of Insurance.**

**(Petitioner)**

**-and-**

**In the matter of the Winding up of  
Clico Life and General Insurance  
(South America) Ltd., a company  
incorporated under the  
Companies Act 1991 as amended.**

**(Respondent)**

Mr. Ashton Chase, S.C for Petitioner.

Mr. Roysdale Forde for Respondent.

**DECISION OF THE HON. MR. JUSTICE IAN CHANG  
(Chief Justice(ag.))**

**DECISION**

This Court finds that Clico Life and General Insurance (South America) Limited (Clico) as an insurer carrying on long-term insurance business and general insurance business is insolvent in terms of section 68 (1) © of the Insurance Act 1998.

In other words, the court finds that the total assets of Clico do not exceed its total liabilities by any amount – let alone by 25% of the net amount of premiums received in respect of long-term insurance business for the preceding financial year.

This court wishes to point out that it does not lie in the mouth of Clico to contend in these proceedings for winding-up that any part of its business does not qualify as insurance business within the classes of insurance business specified in the Schedules to the Insurance Act 1998. It therefore does not lie within the mouth of Clico to claim that any part of its business falls outside of and is not caught by section 46 of the Insurance Act which mandates the establishment and maintenance of a statutory fund in respect of each class of insurance business comprising of assets which do not fall in terms of value below its liabilities in respect of that class of insurance business. Simply put, Clico is estopped in these proceedings for winding up from claiming that it has been carrying on non-insurance business outside of the limits of the legal authority conferred on it by the Commissioner of Insurance. Thus, it is not open to Clico to contend in these proceedings that it has been acting illegally in contravention of the Financial Institutions Act in an effort to reduce the level of liabilities so that such liability would not

match, overtop or surpasss the level of assets of the statutory fund relating to long-term insurance business.

In the text “Illegal Transactions” by Nelson Enonchong, the learned author under the caption of “Illegal Contract as Defence “stated at page 61

“A party cannot rely on the terms of an illegal contract as a defence to a claim arising otherwise than from the contract.”

In the instant petition, the Commissioner of Insurance as petitioner has not been party to the alleged illegal transactions. Therefore, Clico as respondent is estopped from contending that part of its business transactions with third-parties was not in the nature of insurance business (and therefore unauthorized, illegal and unenforceable) in order to reduce its liabilities arising therefrom from the application of Section 46 of the Insurance Act.

Disregarding such a contention and applying the presumption of regularity (which Clico cannot rebut without pleading its own illegality against a stranger to it), this Court must find that Clico’s business with respect to Executive Flexible Premium Annuities was not illegal transactions and was caught by the obligation imposed under Section 46 i.e the

establishment and maintenance of a statutory fund to match the liability of each class of insurance business.

Disregarding the U.S\$34 million transmitted for the benefit of Clico (Bahamas) Ltd and paid into an U.S account in the U.S.A, the level of the statutory fund fell well below the level of its liabilities with respect to long-term insurance businesses.

The Bank of Guyana, which presently performs the functions of the Office of Commissioner of Insurance, in its affidavit of the 11<sup>th</sup> September 2009 (para 19) stated that the statutory funds of Clico were then illiquid. The report of Nizam Alli, Chartered Accountant showed that, as at the 27<sup>th</sup> February 2009 Clico was in deficit of \$7 billion at best and at worst \$11 billion. The Judicial Manager's report showed that up to the 28<sup>th</sup> February 2009, surrender of policies amounted to \$1.7 billion. In a later affidavit, she deposed that up to April 2009, within 2 months, 829 policyholders had surrendered their policies to the tune of \$9.6 billion. Even Mr. Ramalbo, the director who represents Clico in these proceedings, and his wife surrendered their policies to the tune of \$45 million.

The clear picture is that not only that total liabilities of Clico far exceed its assets but that the company is on a rapid decline. It does appear that this state of financial affairs was

triggered by the illegal transmission of US\$34 million (\$7 billion) externally in favour of (Clico) Bahamas Limited, its sister company. It should be noted that section 55 of the Insurance Act does not allow any insurer carrying on long term insurance businesses to invest more than 15% of its statutory fund outside of Guyana. In other words, investments abroad must not exceed 15% of statutory fund. It does appear that Clico has little or no chance of recouping this U.S \$34 million since Clico (Bhamas) Ltd has been wound up due to a deficit of assets relative to liabilities in the sum of U.S \$30 million. The \$U.S \$34 million illegally remitted abroad represents about 53% of Clico's total assets.

The actuarial reports of Canadian consultants, Cheong and Ngai, spoke to Clico being insolvent and should be wound up. Prescience Insurance Consultants in its report dated 24<sup>th</sup> July 2009 underline the urgent need for Clico to be wound up.

Although the Affidavit of local valuer, Hugo Curtis, dated 11<sup>th</sup> September 2009, placed high valuations on Clico's immovable properties in an effort to make the point that the company may still be in a position to meets its liabilities, yet when bids were invited for the purchase of such properties, the amounts in the bids fell way below the respective values stated by Mr. Curtis.

It is true that Marie Van Beek, who held the office of Commissioner of Insurance and had presented this petition in her capacity as Commissioner of Insurance, became unavailable for cross-examination after she was shot and left the jurisdiction. However, her Affidavit evidence did not for reason of her unavailability become inadmissible. The affidavit evidence, for that reason, became susceptible of being viewed as unreliable. But it did not become *ex post facto* inadmissible. A distinction must be drawn between inadmissibility and unreliability.

The opinions and conclusions of Mrs. Van Beek, although affected by her unavailability for cross-examination, had to be viewed in the light of the support they received from independent professionals whose reports were in consonance with her conclusions and opinions.

Her evidence was without cross-examination and, without more, was liable to be viewed as unreliable and disregarded. However, her evidence drew reliability and support from the reports of the independent experts whose opinions and conclusions were consistent with hers and therefore, her affidavit evidence can hardly be found to be unreliable. It is instructive to note that section 74 (5) of the Evidence Act, Chapter 5:03 provides:



“If a witness does or becomes incapable of being further examined at any stage of his examination, the evidence given by him before he became incapable is good.”

Thus, the unavailability of Mrs. Van Beek for cross-examination did not render her evidence inadmissible. Her unavailability for cross-examination was but a factor, albeit a significant factor, which went to the weight of her affidavit evidence.

On a consideration of the petition as a whole, the available material points unerringly in the direction of the insolvency of Clico in circumstances which render it against the interest of policyholders that it be allowed to continue operations- not even under judicial management.

The court therefore orders that Clico Life and General Insurance (South America) Limited be wound up. It is ordered that the Bank of Guyana be appointed liquidator to execute this order for its winding-up.



*Ian N. Chang*

Ian N. Chang

Chief Justice (ag)

Dated this 10<sup>th</sup> day of September, 2010