

IN THE SUPREME COURT OF BELIZE, A.D. 2010

ACTION NO. 12 OF 2010

COMPANIES (WINDING-UP)

In the Matter of Sections 61 and 64 of the Insurance Act (No. 11 of 2004) of the Laws of Belize.

AND

In the Matter of Clico (Bahamas) Limited (In Judicial Management) and Clico (Bahamas) Limited (In Liquidation).

BETWEEN:

CLICO (BAHAMAS) LIMITED

APPLICANT/PETITIONER

AND

**THE SUPERVISOR OF INSURANCE
ATTORNEY GENERAL**

RESPONDENTS

RF & G LIFE INSURANCE COMPANY LIMITED

INTERESTED PARTY

Judge: ABEL J (Ag)

Hearing Dates: 18th January 2013;
23rd January 2013;
6th March 2013.

Representation:

For the Applicant/Petitioner: Magali Marin Young and Ms. Andrea McSweaney Mckoy.

For the Respondents: Ms. Magalie Perdomo Crown Counsel.

For the Interested Party: Mr. Andrew Marshalleck S.C. and Ms. Naima Barrow.

Keywords: Insurance Company; Judicial Management; Liquidation; Winding-up; Insolvency; Judicial Directions; Insurance Act Chapter 251; Insurance Act 2004; Statutory Funds; Companies Act; Estoppel by Convention.

DECISION

Introduction

1. This is a case concerning the insolvency of the well known Caribbean Insurance company, formerly known as British Fidelity Assurance Ltd¹, better known as CLICO, a part of the CLFinancial Group².
2. The present proceedings concern a branch office in Belize (“**Clico Belize**”) which is a subsidiary of CLICO (BAHAMAS) LIMITED (“**CLICO BAHAMAS**”), an insurance Company incorporated in the Commonwealth of the Bahamas. **Clico Belize** which is registered in Belize as an overseas company³, was formerly under judicial management and is at present in Liquidation.
3. The questions for determination and the directions of this Court, in the present liquidation proceedings, concern the limited funds being held by the Liquidator of Clico Belize in its winding-up, how such monies should be distributed and who should benefit from such funds.
4. The Liquidator is asking this Court for directions in relation to these funds, and at the same time submitting that such funds ought to be transferred to a company (the Interested Party), to which it sold a large part of its Insurance business with the Court’s approval. The Government of Belize, by its representatives, is submitting that these funds should be transferred to certain policy holders of Clico Belize in the Liquidation.
5. Although the application was made by summons it has been adjourned from Chambers to Court, by me, for hearing.

¹ According to the Petition for the Winding up of Clico (Bahamas) Ltd., filed (and sworn to by Affidavit) herein by the Supervisor of Insurance of Belize on the 9th March 2010, this name was changed to CLICO (Bahamas Ltd on 7th April 2005 and registered in Belize as an overseas company on 15th August, 2006.

² According to the same Petition (in footnote 1 above) the ultimate parent company is CL Financial Limited incorporated in the Republic of Trinidad and Tobago.

³ See Paragraph 3 of the Petition referred to in footnote 1 above.

The Parties

6. The application in the present proceedings was brought by the Liquidator of Clico Belize, Mr. Mark C. Hulse (**“the Liquidator”**)
7. The Respondents are the Supervisor of Insurance, Ms. Alma G. Gomez (**“the SOI”**), responsible for administering insurance companies in Belize under the governing Insurance Act and the Attorney General of Belize (**“the AG”**), as the representative of the Government of Belize and also the SOI.
8. The Interested Party is an insurance company which has, during the Judicial Management of Clico Belize, purchased a substantial part of the business of Clico Belize, and clearly has an interest in the present proceedings.

The Funds

9. The funds being held by the Liquidator are the balance of funds (approximately BZ\$726,353.00) (**“the balance of the statutory funds”**) remaining after certain statutory funds (approximately BZ\$5,643,502.00.) (**“the statutory funds”**) had been split and distributed by the Liquidator in various ways with the approval of the SOI.
10. The balance of the statutory funds together with a property owned by Clico Belize within the Orange Walk district of Belize, is essentially all of the assets remaining in the Liquidation for distribution, to satisfy the substantially greater debts outstanding in the Liquidation, prior to completing the winding up of Clico Belize.
11. The question for the Court is what happens to the balance of the statutory funds among competing interests.

The Background Facts

12. For the purpose of this Judgment and to better understand the case, it is necessary to set out some of the somewhat complicated background. Although this background is intended to be generally agreed facts, it is to be considered the facts which I have found, for the purpose of this Judgment.

13. The years and Classes of insurance business which Clico Belize was licensed to carry within Belize, between 5th February 1999 and 31st December 2009 include (a) Ordinary Life (including Individual only) (b) Accident & Sickness, (c) Industrial Life, (d) Health, (f) Disability Income, (g) Pension, (h) Medical (including Individual only), (i) Critical Illness and (j) Annuities.
14. On the 30th March 2009, at the time of the application for Judicial Management of Clico Belize, the Classes of insurance business which it had been licensed to carry within Belize were (a) Ordinary Life, (b) Disability Income (c) Pension (d) Medical, (e) Health and (f) Annuities.
15. It is worth noting that the class of “Annuities” for which Certificates were provided commenced from 1st January 2008 to 31st December 2009, but within the category of ‘annuity’ was a product known as the ‘Executive Flexible Premium Annuity’ (“EFPA”).
16. The EFPA product has been the subject of litigation elsewhere in the Caribbean, but within Belize, it is now agreed by the parties, and I accept for the purpose of my decision, that it is an insurance policy in the nature of an annuity. Whether it is more in the nature of a financial product (like a certificate of deposit) than a genuine insurance policy has been a controversial question. That is because it is something of a hybrid “with the payment of high interest rates which exceeded the market rate⁴.”
17. The EFPA product was apparently being sold by Clico Belize, within Belize, for a long time without a licence and outside of the radar of the SOI, and it was not until possibly 2002/2003 that this product was licensed.
18. The EFPA product has been described by the representative of the Interested party as “toxic”, no doubt because “(1).....it would place a severe and debilitating financial burden on the insurer; (2) reinsurance is not available; and 3) matching assets would be required for its transfer. In respect of (3), matching assets equates

⁴ See Paragraph 17 of the Petition referred to in footnote 1 above.

to refunding EFPA holders their deposits.⁵” As such, the Interested Party wants to have nothing to do with it, and possibly no other insurer, would want to purchase it.

19. The other classes of life and health insurance policies that Clico Belize held can be categorised under three types of insurance contracts namely: (1) life, (2) accident, sickness and (3) annuities (excluding the EFPA product), collectively described within these proceedings as the Core Portfolio (hereinafter referred to as “**the Core Portfolio**”), and may be distinguished and is contrasted from the EFPA Product (herein after referred to as (“**the EFPA**”).
20. The statute laws applicable to insurance companies in recent years comprise a statute enacted in 1975 and known as 15 of 1975, which came into force on 19th July 1976 (herein referred to as “**the 1975 Insurance Act**”), and the other is the Insurance Act 2004 (hereafter referred to as “**the 2004 Insurance Act**”). Both are collectively referred to as: (“**the Insurance Acts**”).
21. The Insurance Acts have made provision for registered insurance companies, such as Clico Belize, to establish and maintain statutory funds for the benefit and security of each of the many different categories or “classes” of insurance business to which the Insurance Acts apply, and which was being carried on by any insurance company within Belize. This included of course, the classes of insurance businesses which Clico Belize was carrying under the Core Portfolio and the EFPA.
22. The statutory fund of each class of insurance policy under the Insurance Acts must be used exclusively for only that class.
23. The evidence presented to the Court by the Respondents suggests that the statutory fund being held by the SOI in the early part of 2009 was showing a

⁵ See also paragraph 17 of the above Petition in Footnote 1.

deficit of over BZ\$4.6 million dollars to that which ought to have been held by the SOI under the Insurance Acts⁶.

24. Also, this deficiency may have been compounded by what appears to be established, and is adverse to the various policy holders, that the statutory fund was (or funds were) not maintained in strict compliance with the Insurance Acts over the years. That is, they may not have been maintained for each of the different “classes” of insurance business to which the Insurance Acts applied (more especially as required by the 2004 Insurance Act), as they appeared not to have been strictly segregated for separate policy holders as required by the Insurance Acts.
25. In any event, on or around 24th February 2009 the Supreme Court of the Commonwealth of the Bahamas ordered that CLICO BAHAMAS be placed in Liquidation. The SOI shortly thereafter came to the conclusion that Clico Belize was in serious financial difficulties, and that it would be in the best interest of the Belize policyholders, so as to protect them, that it be placed under Judicial Management.
26. The SOI therefore applied⁷ on 30th March 2009 for the Court to grant an Order that Clico Belize be placed under Judicial Management and for an Accountant, one Mr. Mark Hulse, be appointed its Provisional Judicial Manager.
27. On the 8th April 2009⁸ Mr. Mark C. Hulse was, without any contention, appointed its Provisional Manager and this provisional arrangement was later confirmed on the 29th May 2009 and Mr. Mark C. Hulse was appointed Judicial Manager (“**the Judicial Manager**”).

⁶ See a letters from the Office of the SOI dated 22nd December 2009 and 6th May 2009 and also the Affidavit of the SOI verifying the Petition for the winding-up of Clico Belize presented herein on 9th March 2010.

⁷ Under Section 56(1) of the 2004 Insurance Act,

⁸ Under Section 57.(1) of the 2004 Insurance Act,

28. The Judicial Manager immediately started approaching potential buyers for the Core Portfolio based on his understanding that the SOI agreed that the statutory funds was attached to or would accompany the Core Portfolio.
29. It would appear that initially there was some basis for such an understanding.
30. However, this understanding was to be short-lived. As from about 5th May 2009, it appears that the SOI began to make it clear that the statutory fund, which she was holding, was a global fund for all policy liabilities (to be spread for the benefit not only of holders of policies under the Core Portfolio but also for the holders of the EFPA product). As a result of the SOI taking this position, a serious controversy and disagreement was then sparked, and which ensued for many months between the SOI and the Judicial Manager. This of course was also of interest to all affected by it. Indeed, in large measure this disagreement between the SOI and the Judicial Manager (later turned Liquidator) was re-ignited during the present proceedings.
31. The disagreement is rooted in the fact, as previously noted, that there was a deficiency of the statutory funds being maintained and held by the SOI. Also, in relation to the statutory fund, they disagreed about the nature of the two respective groups of contracts (the Core Portfolio and the EFPA) and the consequence to the statutory funds (and the holders of these products) arising from the differing views being expressed.
32. This disagreement was despite the legal and statutory provision⁹ that the management of the company “vest exclusively in the Judicial Manager, who shall have complete control of the management of the company”; (subject of course to the 2004 Insurance Act, wherein the SOI was supposed to have a role subsidiary to the Judicial Manager while both were under the general management or supervision and directions of the Court).

⁹ Under Section 57(4) the 2004 Insurance Act,

33. This debate was fed into by each side (the Judicial Manager and the SOI) obtaining legal/expert opinions about the nature of these products (particularly the EFPAs) and with differing and divergent opinions as to what should be the consequence to the statutory fund, of these policies, being held firmly within the grasp of the SOI.
34. It was in this atmosphere of disagreement that on the 29th May 2009 the provisional arrangement, in relation to the Judicial Management and the Judicial Manager, was confirmed by the Court. The terms of the Court Order are as follows:
- “IT IS ORDERED pursuant to sections 59 and 60 of the Insurance Act, No. 11 of 2004 that:*
- (1) the Judicial Manager is authorized to invite bids from local insurance companies for the purchase of the life and health insurance portfolio of **CLICO** (Bahamas) Limited (Belize Branch);*
- (2) the Judicial Manager is authorized to forward all bids to the Supervisor of Insurance, for review and approval;*
- (3) the Judicial Manager is authorized to sell the life and health insurance portfolio and regular annuity and pension portfolio of **CLICO** Bahamas Limited (Belize Branch) upon approval of the transfer of portfolio by the Supervisor of Insurance;*
- (4) the Judicial Manager is authorized to prepare a scheme for transfer of the life and health insurance portfolio and regular annuity and pension portfolio to the successful buyer;*
- (5) the Judicial Manager be appointed the authorized person to execute any transfer instrument on behalf of **CLICO** (Bahamas) Limited (Belize Branch); and*
- (6) cost be in the cause.”*
35. By this Order, the Court authorised and directed the Judicial Manager to negotiate the sale of the Core Portfolio in conjunction with the SOI.
36. Having, at least notionally, separated the Core Portfolio from the EFPA product and authorised the Judicial Manager to invite bids for the sale of the Core

Portfolio, the Court did not make any order or give any specific direction in relation to the EFPA product.

37. The Interested Party made an offer to purchase the Core Portfolio under a letter dated 12th June 2009 from G A Roe and Sons Limited under the hands of Mr. Brian Roe based on an Actuarial evaluation of Clico Belize's book as at December 2008.
38. The offer was for the Interested Party to pay BZ\$1,280,000.00 in full, along with other conditions being satisfied. These conditions included the SOI's confirmation of the reserves of the statutory funds of BZ\$5,643,502.00., which were to be transferred upon sale.
39. The Interested Party would be getting the statutory fund (BZ\$5,643,502.00.) because they were inheriting considerable liabilities along with the Core Portfolio, which amounted to between \$9,188,363.00¹⁰ and \$10,231,217.00¹¹.
40. In an effort to resolve the still brewing disagreement between the Judicial Manager and the SOI, the Judicial Manager filed an Affidavit dated 6th July 2009, in Claim No. 281 of 2009, in the Judicial Management, asking this Court to provide directions to:
 - 1) *“verify what classes of insurance are covered by the statutory fund; and*
 - 2) *direct whether the EFPAs are a financial product or an insurance product so that its ranking during liquidation could be determined.”*
41. Unfortunately this Court did not make a determination on the questions raised in relation to the statutory fund. I say unfortunately, with the benefit of hindsight because it would appear, and it may be that if the Court had answered these

¹⁰ See paragraph 19 of the above Petition in Footnote referred to in footnote 1 above.

¹¹ As set out in the later Transfer agreement.

questions, a lot of later contention and proceedings (including the present applications and proceedings) might have been avoided.

42. Be that as it may, after the SOI had subjected the Interested Party's bid to independent actuarial evaluation, and in or about 21st July 2009 had concluded that the Interested Party was in fact the best offer at that time, it was agreed by the SOI and the Judicial Manager to accept the offer of the Interested Party.
43. The Interested Party having been deemed the successful bidder, the Judicial Manager prepared a scheme of transfer with the assistance of the SOI to present to this Court for Court Approval¹² and for such scheme to be confirmed by the Court, to effect a transfer of the Core Portfolio to the Interested Party.
44. It is not clear to me however, whether the SOI did in fact confirm the statutory reserves of BZ\$5,643,502.00, which would accompany the sale of the Core Portfolio, as required by the conditional Offer of the Interested Party, but clearly the Interested Party did proceed with the purchase of the Core Portfolio, presumably doing so based on their offer mentioned above.
45. In the meantime the position of the statutory fund had still not been clarified. In the absence of any definitive determination, the Judicial Manager, it seems, by 22nd July 2009, gave in to the strong position taken by the SOI with regards to splitting the statutory fund (on the basis that there should be some form of proportionate distribution of the statutory fund between the Core Portfolio and the EFPAs). The Judicial Manager appears to have eventually accepted at this stage that the splitting of the statutory fund could (no doubt lawfully) be done.
46. Around 24th July 2009, to compensate the purchaser of the Core Portfolio for the deficiency which was created by splitting the statutory fund, it would appear that the suggestion of a promissory note first arose.

¹² Under Section 60 of the 2004 Insurance Act,

47. A discussion then ensued about how the statutory fund should be split, with three options being presented by the SOI and discussed with the Judicial Manager and others. Also discussed, I accept, was the need for any potential buyer (including the Interested Party) to accept a promissory note/guarantee to make up for any deficiency or shortfall attaching to the Core Portfolio, where the amount of the note/guarantee would depend on the price which would ultimately be obtained on the sale of the Orange Walk Property.
48. By the 30th July 2009, it was clear to the Interested Party and the Judicial Manager that the SOI intended to split the statutory fund, as previously decided by her and to assign \$3.5 million to the Core Portfolio being sold to the Interested Party, with the balance to the EFPAs.
49. It was now clear that a significant shortfall (or deficiency) might be created by the reduction of the statutory fund to the extent of the monies which was now earmarked for the EFPA holders, and the extent of the deficiency would depend on what was realised from the sale of the Orange Walk Property, and thereby the amount of any promissory note/guarantee.
50. Between August and September 2009 a Scheme of Transfer was prepared based on the split proposed by the SOI and agreed to by the Judicial Manager.
51. On the 10th August 2009, on the application of the SOI and the Judicial Manager, this Court (by Madame Justice Arana) authorised the Judicial Manager to sell the Core Portfolio¹³.
52. Both the SOI and the Judicial Manager, having prepared a Scheme of Transfer (said to be dated 7th December 2009), joined in an application to the Court for the Court to confirm the sale of the Core Portfolio to the Interested Party to effect the transfer.

¹³ No doubt made under Section 59 of the 2004 Insurance Act.

53. The Application for Court Approval of the Scheme of Transfer to the Interested Party (in the Judicial Management) was prepared¹⁴ and eventually dated the 31st December 2009.
54. The Application was ostensibly made by Mark C. Hulse, Judicial Manager and the Supervisor of Insurance, Alma Gomez, (although the short title of the application was the other way around), and it was supported by the affidavit of Mark C. Hulse, the Judicial Manager, which was sworn to on the 31st December 2009. This affidavit explained to the Court the facts that led up to the Interested Party being the successful bidder, and at paragraph 5 the Judicial Manager stated that:
- “Consequently he and the SOI met on the 21st July 2009 and agreed that RF&G Life Insurance Company Ltd [the Interested Party] was the successful bidder and agreed that the said company should purchase Clico (Bahamas) Limited [Clico Belize] life and health insurance portfolio and the regular annuity and pension portfolio [the core Portfolio].”*
55. Also stated at paragraph 12 of the Affidavit of the Judicial Manager was the following:
- “I have therefore prepared a Scheme of Transfer as contained in exhibit MCH 1, for identification and both myself and the Interested Party have signed on to the transfer agreement, which is exhibited Annex No. 2 in Volume. 1 of my report attached hereto “*
56. Exhibited to that affidavit is the Scheme of Transfer dated as of 31st August 2009¹⁵.
57. In the Scheme of Transfer, at “The Overview” states:

¹⁴ Made pursuant to Sections 59 and 60 of the 2004 Insurance Act

¹⁵ Which comprised a collection of documents including, an Index, Overview, Transfer Agreement, Asset transfer analysis, Notes to asset transfer analysis, Summary of reserves Actuarial Report, FF&G /revised Appraisal Report, Summary of policies transferred per actuarial summary reserves and policy register at 30th Agreement, etc.

“This scheme of transfer details the sales transaction to the Interested Party and states the resultant is a promissory note by GOB - Ministry of Finance, Office of the Supervisor of Insurance to buyer RF & G Life Insurance Company Limited in the amount of BZE1,379,342.”

58. In Annex No. 2, within the ‘Asset Transfer Analysis’ is set out the ‘Available Statutory Fund’ which the SOI had made available when that portfolio was sold, “\$3,500,000.00.” Clearly the funds allocated to the Core Portfolio after the split.
59. When the liabilities and the assets are considered the difference between them (as per the asset transfer analysis) created a deficit of BZE\$1,379,342.00¹⁶.
60. The liability that was being assumed is to be inferred from the Transfer Agreement, which is also comprised in the ‘Scheme of Transfer’.
61. Statutory Fund is defined within the Scheme of Transfer as meaning:

“The sum of \$3,500,000.00 been the proportionate statutory fund that CLICO-Belize maintained in respect of CLICO-Belize, Life, Health Insurance portfolio, as determined by Supervisor of Insurance.”

62. Within the Transfer Agreement, under the “Pre-conditions to completion paragraph” at 2.b it is stated that:

“Execution of a promissory note in favour the Interested Party in the sum of \$1,379, 342 payable at 9% per annum interest rate by the Government of Belize, to secure the net liability after subtracting the Purchase Price and Policy Liabilities from the Modified Net reserve and after accounting for the Statutory Fund.”

63. Within the Transfer Agreement at paragraph 9.b. under ‘Assignments & Prepayments’ is stated:

“The liquidator shall issue a promissory note in favour of the Interested Party for the sum of \$1,379,342.00.”

¹⁶ Which figure is not very cleared on the document before the Court but agreed to by the Parties

64. Paragraph 9.d.iii.2., also states that:
- “The payment due to and from the Interested Party Life in accordance with sub clause 9(d)(i),(ii), and (iii) above (adjusted to take account of the Purchase Price and the Promissory Note by the Government of Belize pursuant to clause 2 (b) to CLICO - Belize Life and Health Insurance Health insurance portfolio as agreed between Judicial Manager and the Interested Party shall be agreed on or before completion”.*
65. Both the SOI and the Judicial Manager then approached this Court (in the Judicial Management) to approve the sale of the Core Portfolio to the Interested Party.
66. The Order which was granted on the 12th February 2010 reads:
- “Upon the joint application of the judicial manager and the Supervisor of Insurance and the supporting affidavit of Mark C. Hulse filed herein and upon hearing Priscilla J Banner, Counsel for the applicants and counsel for the Respondent having made no appearance,”*
67. This court Order then “confirmed” the transfer of the Life, Health portfolio and regular annuity and pension portfolio of Clico Belize [the Core Portfolio] to the Interested Party.
68. The Interested Party has apparently paid for the Core Portfolio based on the representations contained in the Transfer Agreement as approved by the SOI and the Judicial Manager and as ratified and confirmed by the Order of this Court in the Judicial Management dated 12th February 2010.
69. The representations made to the Court undoubtedly included as a pre-condition to completion and Assignments & Prepayments that the Government of Belize and/or the Liquidator would execute and/or issue a promissory note/government guarantee in the sum of \$1,379,342.00. They also provided the bases on which this Court made the Order dated 12th February 2010.

70. The Liquidator and the Interested Party on the one hand, and the SOI and the Government of Belize on the other, now attach different and divergent significance to the agreement to split the statutory fund and also of the representations to the court and the consequential Order which this Court should make.
71. Following the making of the Order by the Court on the 12th February 2010, the Liquidator commenced negotiations with the Bank holding the mortgage, for the release of the Orange Walk buildings to be sold. The highest price which has been offered for these buildings at auction is BZ\$350,000, but it has not been accepted by the Judicial Management, so this property is still owned by Clico Belize.
72. Based on the Petition which the SOI presented to this Court on the 9th March 2010¹⁷, on the 3rd May 2010, the Judicial Manager, by an Order of this Court of that date, was appointed Provisional Liquidator for Clico Belize in the present winding up proceedings and directions were also given in the winding-up. This Provisional arrangement was confirmed on the 6th day of August 2010, when the provisional order of liquidation was made final for the winding up of Clico Belize. The provisional liquidator was also confirmed as Liquidator of Clico Belize.
73. Further, it would appear that the statutory fund, during the period of Judicial Management and the early days of the Liquidation, was under the complete control of the SOI, which would have given the SOI considerable leverage in any discussions with the Judicial Manager, turned Liquidator.
74. On the 7th September 2010, on the application of the Liquidator, Mr. Justice Awich in the present liquidation proceedings, Ordered that the SOI release the said statutory fund to the Liquidator, and thereafter this was handed over to him.

¹⁷ Under Section 64 of the 2004 Insurance Act and deemed the commencement of the winding-up by Section 135 of the Companies Act.

75. The Court has been informed, and it appears to be generally agreed by all the parties to these proceedings, that the holders of the EFPA products, as creditors in the Liquidation, have since been paid a dividend of \$0.25 in each \$1.00 in the Liquidation. This was out of the monies¹⁸ which had been allocated to the EFPAs, following the split of the statutory fund by the SOI with the subsequent agreement of the Judicial Manager.
76. The Court has also been informed that the Liquidation is now near its end. The balance of the statutory fund and the Orange walk property are the last assets remaining, out of which to satisfy the outstanding obligation under the Scheme of Transfer which remains to be satisfied.
77. The Court has been informed that the Interested Party, is now firmly committed to the purchase of the Core Portfolio, based on the events which have occurred (including having taken a transfer of the Core Portfolio), and they are now willing (albeit reluctantly) to accept the Orange Walk property along with the balance of the statutory fund (\$726,353.00), in full and final settlement of their agreement with the Judicial Manager, to purchase the Core Portfolio. In the alternative, they are insisting that a promissory note/guarantee be given by the Government of Belize to make good the eventual shortfall of \$1.3 million created by the split in the statutory fund.
78. Apparently, in different proceedings the Interested Party has commenced an action against the Liquidator, Mr. Mark. C. Hulse (in his individual and personal capacity), Ms Alma D. Gomez¹⁹ (in her individual and personal capacity) and the AG²⁰ for the sum of BZ\$1,379,342.00 being the deficiency caused by splitting the statutory fund.
79. This latter action is awaiting the outcome of the present application brought by the Liquidator. It is hoped that the present application for directions, in the Liquidation, will finally resolve the impasse that has arisen in the Liquidation by a

¹⁸ The statutory fund minus the \$3.5 million.

¹⁹ The SOI.

²⁰ The Government of Belize.

determination that the balance of the statutory fund in the Liquidator's hand could be used to satisfy the debt to the Interested Party.

The Present Application

80. The present application filed by the Liquidator on 20th April 2012, seeks the following relief:

- 1) A Declaration that the decision and action of the Supervisor of Insurance to split the statutory fund between the EFPAs and the policyholders of the core portfolio (life, health, and ordinary annuity) was not made in accordance with section 26 of the Insurance Act, No. 11 of 2004, and is therefore illegal, null and void.
- 2) Further or in the alternative, a Declaration that no statutory fund was maintained by Clico Belize (Bahamas) Limited with respect to the EFPAs in breach of section 26 of the Insurance Act, No. 11 of 2004.
- 3) Further or in the alternative, a Declaration that the statutory fund maintained by Clico Belize (Bahamas) Limited for the period 2003 – 2008 was for the life, health and ordinary annuity portfolio only.
- 4) An Order that the Scheme of Transfer dated 7th December, 2009 be rectified to allow the statutory fund in possession of the Liquidator to be applied to the life, health and ordinary annuity portfolio as a consequence of the foregoing declarations.
- 5) An Order that the Liquidator pays to the Interested Party as the purchaser of the life, health and ordinary annuity portfolio the sum of \$726,353.00, being the balance of the statutory fund held by the Liquidator, and transfers to the Interested Party the building in Orange Walk Town, Orange Walk District, Belize with appraised

value of \$875,000.00 to satisfy the balance due on the promissory note to RF & G for the sum of \$1,379,342.00.

- 6) An order that RF & G Life Insurance Company Limited be added as an interested party to be heard.
 - 7) Damages.
 - 8) Costs.
 - 9) Any further or other relief as may be just.
 - 10) Liberty to apply for consequential orders.
81. It is noteworthy that there has never been an application by the Judicial Manager²¹ to cancel or vary, either unconditionally or on conditions which the Court thinks just, the order or Scheme of Transfer (as a contract or agreement) on the basis that it is detrimental to the interest of the policyholders. I will return to this point in due course.
82. The urgency of the situation to the Liquidator and for the Liquidation is brought out by the way in which the present proceedings have progressed. The Liquidator's application is supported by the 4 Affidavits of the Liquidator (Mr. Mark C. Hulse), two Affidavits of an insurance specialist (David Thurlow); one Affidavit of Rhonda Lecky and one of Silvino Rosado (both of the Interested Party) all amounting to voluminous document filed between the 14th February 2012 and the 11th January 2013.
83. The opposing evidential position of the Respondents is contained in the single Affidavit of the Supervisor of Insurance filed on 4th December 2012 in response to an "unless order"²² permitting her to file such an Affidavit.

²¹ Under Section 61 of the 2004 Insurance Act,

²² That if SOI and the AG failed to file an Affidavit they would not be permitted to oppose the Application of the Liquidator.

84. The Court also had the benefit of ‘Submissions on Behalf of the Applicant’ dated 29th November 2012, ‘Supplemental Submissions on Behalf of the Liquidator’ and ‘Reply Submissions on behalf of the Respondents’ both filed on 15th January 2013.

Issues in the Case

85. It will be observed that the controversy in the present proceedings has been couched in the following terms:

For which class or for whose benefit (which policyholders) the statutory fund was established and therefore who should be, or should have been, the beneficiaries of it in the events which have occurred (within the present winding-up of Clico Belize and the transfer of the core portfolio to the Interested Party)?

86. The application was also couched in terms that rehashed old arguments, as to whether the EFPA was an insurance policy to which the Insurance Acts (and provisions relation to statutory funds) apply or whether it was some other investment product, to which it did not. Also, that the EFPAs were not insurance policies and therefore not entitled to benefit from the statutory fund which was established under the Insurance Acts.
87. If one went behind the harsh tone of the filed Affidavits and submissions (which were highly contentious, even acrimonious), as the parties clearly had by the hearing date, it was clear (and the parties agreed) that it was not necessary to resolve the conflicting nature of the evidence by the cross-examination of the witnesses and without determining the counter allegations of bad faith and the credibility of the main protagonists. That the central issues could be resolved by reference to the documentation which was before the court. It was therefore on this basis that the background facts in the earlier part of this Judgment were readily extracted, and form the basis of this Judgment.

88. The order sought at (4) and (5) of the Application seems to me to be more at the root of the real and alive controversy between the Liquidator and the SOI: namely to obtain directions from the Court (or indeed Court approval) for the transfer to the Interested Party, of the balance of the statutory fund (\$726,353.00.) and the building in Orange Walk Town, Orange Walk District, Belize, to make good the deficiency to them under the Scheme of Transfer. This transfer will, of course, have the effect of diverting the cash sum of BZ\$726,353.00 from being distributed to the holders of EFPA policies.
89. I therefore requested the assistance of Counsel involved in the case to provide a short list of issues (to be limited, if possible, to three (3)) around which their respective submissions and the Application turned, and also a Core list of Documents upon which each of the Parties relied in relation to such issues. This was done and the Court is grateful to Counsel on behalf of the Applicant and the Interested Party for formulating an issue on which they both agreed and supplying a list of nine (9) core documents upon which they relied, to determine the applications before the Court.
90. The single issue as formulated and submitted to the Court by the Applicant and the Interested Party is as follows:
- Whether the order of the Court approving the scheme of transfer presented at the instance of the Judicial Manager and the SOI which required the Liquidator to issue a promissory note to make good the shortfall in the statutory fund, requires that the Liquidator make good the obligations of Clico Belize under the promissory note in the course of the liquidation.
91. Although the Respondents were not able to narrow the issues as requested (and I did not insist that they do so) they nevertheless, appeared to have been content to responding to the issue as formulated by the Applicant and the Interested Party.

92. The Respondents also helpfully provided the Court with core documents upon which they relied to determine the applications which are before the Court and they have non the less been cogent and fulsome in their oral submissions to the Court which was extremely helpful in my understanding their case.
93. In relation to the central issue formulated by the Liquidator and the Interested Party, a central area of controversy between the Liquidator and the SOI in the present proceedings is, whether the SOI and/or the Government of Belize agreed to provide a guarantee and/or promissory note to the Interested Party (or any purchaser of the Core Portfolio) to cover the shortfall in the statutory deposit.
94. The vexed question that remains for the Court's decision is whether, in the insolvency of Clico Belize, and the present winding-up proceedings, the balance of the statutory fund should be distributed to the Interested Party, as the purchaser of the Core Portfolio or whether such funds should be allocated otherwise, such as for the benefit of the holders of the EFPA policy.

The Case for the Applicant/ Interested Party

95. The position of the Applicant/Interested Party can be summarized as follows.
96. The EFPAs had to be separated from the Core Portfolio in the Judicial Management because of its toxicity.
97. Within the Judicial Management of Clico Belize it soon became clear that its liabilities exceeded its assets leading to it being put into liquidation and this was due to the inadequate statutory funds which were maintained by Clico Belize under the supervision of the SOI.
98. It was agreed by the Judicial Manager and the SOI and approved by the Order of this Court, in the Judicial Management of Clico Belize, that the Core Portfolio would be sold to the Interested Party for a consideration which included the statutory fund (whether the deficiency created by splitting it was made up by a promissory note or a guarantee)

99. All the applicable provisions to the sale of the Core Portfolio have been complied with.
100. The agreement to sell the Core Portfolio is still in an executory form as all the terms have not been fully complied with i.e. the statutory fund (or its equivalent) has not been transferred to the Interested Party.
101. The Liquidator, upon his appointment, was met with the obligation of Clico Belize created during the Judicial Management stage, which had been approved by order of this Court.
102. The Government is denying that they gave the SOI the authority to bind them to any promissory note/guarantee and they are not prepared to honour any such arrangement.
103. Mr. Hulse (the former Judicial Manager and present Liquidator) in his personal capacity is exposed to legal action from the Interested Party because of actions which he took in the Judicial Management to make good the deficiency of BZ\$1,379,342.00 (and so is Ms. Alma Gomez, the SOI in her personal capacity) and Clico Belize and this Court are also placed in an embarrassing position.
104. The Liquidator has, in the Liquidation, the sum of \$BZ\$726,353.00 together with the Orange Walk property, both of which the Interested Party will accept in full and final satisfaction of the debt due to them from Clico Belize under the Court approved Order in its Judicial Management stage.
105. There is no option available to the Liquidator, now that the statutory fund has been prorated and partially distributed, but to use the balance of the statutory fund in the Liquidation (and in the hands of Liquidator) to satisfy the court approved obligation to the Interested Party.
106. The Liquidator cannot be left in the impossible situation of not meeting an obligation made during the Judicial Management with the sanction of the Court other than for the Liquidator to make the payment out of his own pocket (which is not a realistic option).

The Case for the SOI/Government of Belize

107. The position of the SOI/ Government of Belize can also be summarized as follows.
108. It is accepted by all parties that the EFPA product is an insurance product along with the Core Portfolio.
109. The statutory fund was maintained for the benefit of EFPA holders and the holders of the Core Portfolio policies.
110. The SOI did all that was reasonably possible to keep the statutory fund in accordance with the liabilities for all policy holders and in accordance with the Insurance Acts.
111. The split or proration of the statutory fund was based on a mathematical, rational, proper, holistic and fair actuarial calculation and apportionment based on the assets and liabilities of Clico Belize (prior to Judicial Management) and what portion of the statutory fund would be required for each class; and on how each set of policy holders (including EFPA holders) had contributed to the fund.
112. The proration of the statutory fund was agreed to by the Judicial Manager and the Court Order which approved the sale of the Core Portfolio to the Interested Party and was based on the proration.
113. This Court should therefore honour the proration of the statutory fund and the agreement reached by the SOI and the Judicial Manager and on which the Court Order was based.
114. It is evident from the contemporaneous documentation that the promissory note/guarantee was included in the Order of the Court by mistake or oversight (the SOI did not believe at the time that the Court Order made reference to a promissory note/guarantee) and it was not approved by Government and it will not be provided by them. In any event, it could never have been intended that the promissory note/guarantee would be secured out of any part of the statutory fund as it had been already allocated by the split.

115. The question of a promissory note/guarantee is a separate issue involving an agreement between two private companies (Clico Belize and the Interested Party) and the Government of Belize and the SOI are not signatories to that agreement or arrangement.
116. Therefore Clico Belize, the Liquidator, the Interested Party are required (and the Court ought) to honour the agreement to the holders of EFPA policies by transferring the balance of the statutory fund to them (the EFPA holders) as the agreed destination for such funds.
117. Handing over the balance of the statutory fund to the Interested Party (effectively the holders of policies of the Core Portfolio) would excessively and unfairly benefit the holders of policies in the Core Portfolio and the equity therefore lies with not allowing this transfer.
118. There may be legal problems from the holders of EFPA policies.
119. The option always exists for the Liquidator to approach CLICO BAHAMAS for them to make good the deficiency.

Applicable Law

120. It is clear that the SOI and/or the Government of Belize on the one hand and the Liquidator and/or the Interested Party on the other hand are able to make sound arguments in relation to their respective positions, but it is the Interested party and the holders of the EFPA who stand to lose or gain from their arguments.
121. Fortunately for the Court, the position of the holders of the EFPA, who were not specifically represented in these proceedings, have been well articulated and represented by Counsel for the SOI/AG, to whom I am grateful for her firm representation of the interests of both the Respondents and the holders of the EFPAs, and the forceful views she expressed on their behalf, as without such views the Court may have felt that an important party's (the holders of EFPAs) interests were not represented.

122. The applicable law is largely contained in the statutory regulation of companies in general, insurance companies in particular and the principles of contract law, in relation to the following:
- a) The Companies Act, Chapter 250, Revised Edition 2000, Laws of Belize. (**“the Companies Act”**)
 - b) the Insurance Acts,
 - c) An understanding or Agreement between the Judicial Manager and the SOI about the splitting of the statutory fund.
 - d) The terms of Agreements made between the Judicial Manager and the Interested Party and embodied in a Scheme of Transfer dated 31st December 2009 (**“the Scheme of Transfer”**), confirmed by an Order dated 12th February 2010. (**“the Court Order dated 12th February 2010”**).
 - e) Equitable principles which may be applicable.

The Legal Framework

123. The Insurance Acts generally applies to Clico Belize.
124. In particular the Insurance Acts make provision for registered insurance companies to establish and maintain a statutory fund for each of the many different categories or “classes” of insurance business to which both of the Insurance Acts apply²³ and which was being carried on by any insurance company from within Belize.
125. The classes set out in the 1975 Insurance Act includes the following:
- a) ordinary life insurance business;
 - b) accident and sickness insurance business;
 - c) any other class of insurance business.

²³ 8 in number in relation to the 1975 Insurance Act and 9 in number in relation to the 2004 Insurance Act

126. Included in the classes of insurance to which the Insurance Acts applies is the category of “*long-term insurance business*” which includes life insurance business.
127. The Insurance Acts also stipulates that statutory funds to be established and maintained in relation to long-term insurance business were to consist of a trust fund, to be created by trust deed, of assets equal to its liability, and contingency reserves with respect to local policy-holders, as established by the revenue account for the company for the last preceding financial year.
128. Specifically for the purposes of these proceedings, the somewhat complex and highly specialised provisions of the 2004 Insurance Act, applies to Clico Belize in relation to the provisions of this Act. These concern the SOI, the Licensing of Insurance Companies (particularly provisions relating to statutory funds their investment and Prohibitions relating thereto, Judicial Management and Winding-Up) and Pensions, Annuity Plans and Schemes.
129. The classes set out in the 2004 Insurance Act²⁴ include the following:
- a) Long-term insurance business (which includes ordinary life insurance business) , life, permanent personal accident and health and group life insurance businesses, as well as bond investment business and insurance business carried on by the insurer as incidental only to any of the classes of business referred to in ordinary life, industrial life and bond investment business)
 - b) Health Insurance business;
 - c) Private pension and annuity plans and schemes;
 - d) All other classes of insurance not listed above but as are specified on the licence issued by the SOI.
130. “**Life insurance business**” is defined in the 2004 Insurance Act to include “*policies of insurance upon human life, or the granting of annuities upon*

²⁴ Under S. 2 of the 2004 Insurance Act and as specified in the First Schedule of the Act.

human life,”. “**Long term business**” is defined to include “ordinary life insurance business” and insurance business carried on by the insurer as incidental to such business. “**Statutory fund**” is defined to mean a statutory fund maintained by the company under section 26 of the 2004 Insurance Act²⁵.

131. The SOI, under the 2004 Insurance Act is²⁶:

“...appointed by the Minister and subject to the directions of the Minister shall be responsible for the general administration of this Act and whose office shall be a public office.”

132. The 2004 Insurance Act also provides²⁷ 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 the functions conferred by or under this Act or any Regulations made thereunder..”

133. The 2004 Insurance Act specifically provides²⁸ that:

“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;*

²⁵ All under Section 2 of the 2004 Insurance Act.

²⁶ Under Section 4 of the 2004 Insurance Act.

²⁷ Under Section 4(3) of the 2004 Insurance Act.

²⁸ Under Section 26(7) of the 2004 Insurance Act.

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”*

134. Section 26(9) of the 2004 Insurance Act also provides:

“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.”*

135. Thus the statutory fund of each class of insurance policy under the Insurance Acts was considered as exclusively to be used for only that class.

136. It is clear that under the 2004 Insurance Act the person having immediate responsibility for the supervision, oversight and direction of the establishment, maintenance and conduct of the statutory funds is the SOI, subject to review of the Minister responsible for insurance²⁹, and of course subject to review by the Supreme Court (despite the attempted or apparent ouster of the Courts jurisdiction by the Act)³⁰.

137. Section 56 - 63 of the 2004 Insurance Act makes provision for the Judicial Management of insurance companies (including Clico Belize while it was under Judicial Management), including:

a) the application for judicial management

b) the Order for judicial management

c) appointment of a Judicial Manager to efficiently and economically manage the affairs of the Insurance company under the direction and control of the Court (while providing the SOI with information which she requires to enable her to make applications to the court herself).

²⁹ See Sections 27, 28, 30, 31, 32, 33 and 174 of the 2004 Insurance Act.

³⁰ Under Section 174(5) of the 2004 Insurance Act.

- d) reports by the Judicial Manager to enable the Court to make appropriate orders in the general interests of the policyholders of the company.
138. This Court is empowered, after hearing the SOI, the Judicial Manager and any other person, to make an order binding on all persons.³¹
139. The order which can be made by the court, exceptionally requires, in the case of an order to transfer the business of a company to some other company, that the Judicial Manager first prepares a scheme of arrangement (which has to contain the terms of the agreement under which it is proposed to effect the transfer and provisions necessary to give effect to it).³² Thereafter an application has to be made to the SOI and her approval of the scheme of arrangement obtained. This approval of the SOI is subject to a prescribed procedure by which the SOI's review and approval may be reconsidered and overruled (as it were) by the Minister responsible for insurance³³.
140. The 2004 Insurance Act provides that any Order by the Court for the transfer of the business of a company to some other company, and of an approved scheme of transfer, until confirmed by this Court, will have no effect on the management of the company and on the Judicial Manager, and will not be binding on all persons until the same has been confirmed by this Court³⁴.
141. However, the 2004 Insurance Act also provides that an application may be made to this Court by the Judicial Manager or any interested person, at any time for the cancellation of an Order made by the Court under section 57(1); and the Court³⁵ may cancel the Order if it appears to the Court that the purpose of the Order has been fulfilled or, that it is undesirable for the Order to remain in force.
142. But any such cancellation of an Order by the Court is attended by fairly drastic consequences as the court is then required to divest the Judicial Manager of the

³¹ Section 59(2) of the 2004 Insurance Act.

³² Section 58 and 170 of the 2004 Insurance Act.

³³ Section 170, 171, 172, 173 and 174 of the 2004 Insurance Act.

³⁴ Section 60 of the 2004 Insurance Act.

³⁵ Under Section 63(1) of the 2004 Insurance Act.

management of the Company and such management is then vested in the board of directors or other governing body of the company. Clearly a power that any Court will utilize in only a narrow range of, not defined, circumstances.

143. The 2004 Insurance Act, in addition to making provision for Judicial Management also makes provision for Winding-Up of an insurance company under Sections 64-70.

144. The 2004 Insurance Act provides that a company may be wound-up, in accordance with the Companies Act, on the petition of the SOI. The grounds on which a company may be wound-up include that that the company is unable to pay its debts, and, that it is just and equitable that the company be wound-up.³⁶

145. The 2004 Insurance Act also provides³⁷ that on making an Order for the winding-up of a company the Liquidator shall act under the authority of the Court and:

“may apply to the Court at any time for instructions as to the manner in which he shall conduct the winding-up or in relation to any matter arising in the course thereof.”

146. Section 65(8) of the Insurance Act, which deals with Court’s directions to the Liquidator, provides the following:

“The court shall give to the Liquidator such directions as may appear necessary or desirable for the purpose of the winding-up”

147. It has been rightly submitted that the reason why the approval of the scheme of transfer had to be by a joint application of the Judicial Manager and the SOI is because under section 170(1) of the Insurance Act, it had to be approved by the Supervisor of Insurance.

148. Section 170(2) provides:

³⁶ Section 130(1)(e) and (f) of the Companies Act

³⁷ Section 65(3) of the 2004 Insurance Act.

“An application for the approval of a scheme shall be made to the SOI by or on behalf of any company engaged in the transfer or amalgamation, and an application with respect to any matter connected with a scheme or a proposed scheme may be made at any time before it is approved, by any person who, in the opinion of the Supervisor is likely to be affected by the scheme or the proposed scheme.”

149. The Companies Act contains no provision for the Judicial Management of insurance companies; only those in relation to winding-up of insurance companies (subservient to those contained in the Insurance Acts).
150. As noted above the grounds on which a company may be wound-up include the fact that the company is unable to pay its debts, and, that it is just and equitable that the company be wound-up.³⁸
151. The Companies (Winding-UP) Rules, 1909 of England apparently apply to the proceedings in the winding-up under the Companies Act and therefore apply to the winding-up of Clico Belize.
152. It is clear that the companies Act provisions, as they relate to winding-up of Clico Belize, following the provisional order of Liquidation and the provisional appointment by the Liquidator, is in respect of winding-up by the court only (and not voluntary winding-up or winding-up subject to the supervision of the court).
153. Also, that the court may have regard to the wishes of the creditors as to all matters relating to a winding-up³⁹.
154. The Liquidator is an officer of the court⁴⁰, and once appointed with the sanction of the court, has the power to carry on the business of the company, so far as may be necessary for the beneficial winding-up thereof⁴¹; and without the sanction of

³⁸ Section 130(1)(e) and (f) of the Companies Act

³⁹ Section 138 and 141 of the Companies Act

⁴⁰ Section 169 of the Companies Act

⁴¹ Section 147(1)(b) of the Companies Act.

the court to make a promissory note in the name and on behalf of the company and to do all such things as are necessary for winding up the affairs of the company and distributing its assets⁴²; all subject to control of the court.

155. The Liquidator may therefore, apply to the court in relation to any particular matter arising under the winding-up,⁴³ but otherwise, shall use his discretion in the management of the estate and its distribution among the creditors⁴⁴.

156. In the case of *Amalgamated Investment and Property Co Ltd (in Liq) -v- Texas Commerce International Bank Ltd* [1981] 2 WLR 554 Lord Denning MR, enunciated an equitable principle of estoppel by convention where he stated:

” When the parties to a transaction proceed on the basis of an underlying assumption – either of fact or of law – whether due to misrepresentation or mistake makes no difference – on which they have conducted the dealings between them – neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.”

157. This principle was also fairly recently outlined by Lord Steyn in *Republic of India v India Steamship Co* [1998] AC 878, 913-4 (*“The ‘Indian Endurance’*”), where he stated the same principles of estoppel by convention as follows:

”..... where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption: The August Leonhardt [1985] 2 Lloyd's Rep. 28; The Vistafjord [1988] 2 Lloyd's Rep. 343; Treitel, Law of Contracts, 9th ed., at 112-113. It is not enough

⁴² Section 147(2(d) and (g) of the Companies Act.

⁴³ Section 154(3) of the Companies Act.

⁴⁴ Section 154(4) of the Companies Act.

that each of the two parties acts on an assumption not communicated to the other. But it was rightly accepted by counsel for both parties that a concluded agreement is not a requirement for an estoppel by convention."

Jurisdiction of the Court

158. It is clear that the Liquidation of Clico Belize is beleaguered by the impasse which has arisen in the Liquidation and that completing the winding-up of this company, cannot move forward without directions from this Court, as to the position of:
- a) the agreement to split the statutory fund
 - b) the Order previously made by the Court on the assumption of a promissory note being provided by the Government or the Liquidator, to make up the deficiency of fund due to the Interested Party under the Scheme of Transfer and transfer Agreement dated 12th February 2010, approving such Agreement and Scheme.
 - c) the balance of the statutory fund in the hands of the Liquidator.
159. By the present Application, the court is being asked to exercise its insolvency jurisdiction (that is the Court sitting as an insolvency Court).
160. The Liquidator and the SOI are now accepting that the present Application should be considered as being brought under Section 65(3) or Section 65(8) of the 2004 Insurance Act. As noted above this latter Section expressly provides:
- "The Court shall give to the liquidator such directions as may appear necessary or desirable for the purpose of the winding-up"*
161. Counsel for the SOI initially took the position that this Court did not have locus standi to make the Order sought by the Liquidator based on the way the Declarations were sought, in terms of a declaration that the SOI somehow unilaterally acted unlawfully in splitting and prorating the statutory fund.

162. The Respondents however, at the hearing, were prepared to accept that the Liquidator does indeed have the right to ask for directions in the liquidation; and explained their earlier position (of not having locus standi) on the basis that they were merely responding to a Liquidator, who was effectively challenging the Court Order dated 12th February 2010, which they assisted in applying for, and then saying it was the SOI.
163. The submissions which have been presented by the two sides, offer the Court two different conclusions to arrive at based on two different interpretations of the facts.

The Court's Resolution of the Issues

164. As is noted in the introduction to this Judgment and as can be seen from the above background, and the cases of the protagonists to the present dispute in the Liquidation of Clico Belize, the matter for determination by this court involves a number of perplexing considerations.
165. As is often the case in the winding-up of a company, where there are insufficient funds in the Liquidation, difficult decisions have to be made as to the priority which should be accorded to creditors of the company in Liquidation. This case is a somewhat unusual instance of such a case, and unusually, involves the case of a person whose alleged debt arose during the Judicial Management of an Insurance company.
166. The conundrum presented to this Court for decision is on the one hand whether the Court should honour the terms of a Court Order made during the Judicial Management. On the other hand, this Court is being asked to honour a liability or debt which arose prior to the Judicial Management and/or Liquidation of Clico Belize. It seems to me that when the position is presented in this simple way it is obvious on which side of the argument this court must, as a matter of principle or policy, come down.
167. It would be a sad and most unfortunate day when a Court exercising insolvency jurisdiction over a company would be seen to be going behind or against an Order

of this very Court, which was made in compliance with applicable and special procedures confirming a sale of assets of a company under Judicial Management, to a third party, in favour of giving priority to a debt which pre dated the Judicial Management or Liquidation. It seems to me that no such creditor can take priority to obligations created by a Judicial Manager.

168. To create such a precedent would create insurmountable problems for any future Judicial Manager or Liquidator trying to deal with the assets of a troubled company. Such an order would be sending a signal to the world that such dealings with the assets of such a company, under a Court Order, is as potentially risky, hazardous and even perilous, as if dealing with a company acting outside of applicable statutory procedures or without the supposed comfort of an order of the Supreme Court.
169. Also, this Court is being asked to ignore a Court Order on the basis that the facts, on which the Court order was made, now appear to be erroneous and that one of the contending parties wishes to resile from it. Such a situation, it seems to me, to be analogous to an estoppel by convention, as described by Lord Denning MR, above at paragraph 156 and outlined by Lord Steyn in *Republic of India v India Steamship Co* [1998] AC 878, 913-4 ("*The 'Indian Endurance'*").
170. Based on this principle (of estoppel by convention) the court will not allow the SOI to go back on the agreement with the Judicial Manager and the Interested Party. Such an agreement, and representations to the Court, clearly formed the basis on which this Court relied to confirm the sale of the Core Portfolio to the Interested Party.
171. It is also reasonable to assume that the Interested Party also relied on the representations made in the agreement and it would be clearly unjust to allow the SOI to simply deny the representations on the basis that it was a mistake or error and to go back on such representations.

172. The Interested Party, and this Court acted on such representation and agreement, by entering on the agreement; and this Court made an Order which the Interested Party was entitled to believe was binding on all parties and enforceable at law.
173. It also seems to me that the position of the Respondents is fatally flawed as it advances its position based on a liability created prior to Clico Belize being put under Judicial Management as against a liability which arose within the Judicial Management (while under the Courts management) and on which the interested party relied.
174. Thus, in this latter case the liability was created and therefore arose subsequent to Clico Belize being put under Judicial Management, and moreover is an obligation which the present Liquidator inherited, while Clico Belize was under such Judicial Management. It so happens in this case that the same person held both positions but it could easily have been a different person.
175. Perhaps not so importantly, is the point that if this Court were to take the position advanced by the Respondents, it would necessarily be having to give priority or precedence to a decision or agreement made by the protagonist outside of the supervision of the Court (about how the statutory fund should be split) and of which the SOI, a party with a subordinate statutory position to the Judicial Manager, clearly held sway, as against an Order of the Court which was clearly premised upon a consensus.
176. I am also strengthened in my view by the fact that the split of the statutory fund was based on a proration which was, it seemed to me, a rational reconstruction, by actuaries, and not in conformity with the statutory fund which ought properly to have been established and maintained, in accordance with the statutory provisions of the applicable Insurance Acts.
177. I am not entirely persuaded by the SOI's claim that the statutory fund was prorated on a mathematical, rational, proper, holistic and fair actuarial calculation and apportionment based on the assets and liabilities of Clico Belize (prior to Judicial Management). This was not what the 2004 Insurance Act intended. Also I am not entirely happy that the class of Long-term insurance business under

which the EFPA product was included (annuity plans and schemes) was covered by the statutory fund. Also that the statutory funds had been segregated into a fund for separate classes (including EFPA holders) each of which had contributed to the fund. The function of the actuary of splitting the fund was clearly, in my view, post hoc, and an act of rational reconstruction and not the prospective act which the Insurance Acts (particularly the 2004 Insurance Act) intended.

178. Rather it seems to me, and I believe, that Counsel for the SOI confirmed in her submissions, that the proration was based on an actuarial report which included prorated calculations which came up with an apportionment. Again this is a euphemism for a rational reconstruction of how the statutory fund ought or could properly be segregated, but not what was intended or done in accordance with the Insurance Acts (particularly the 204 Insurance Act).
179. Thus the SOI, who was responsible for the oversight of the statutory fund, and its compliance with the Insurance Acts, is in the invidious position of possibly attempting to remedying her defaults, after the event, and of making good the deficiency in the statutory fund (which ought to have been maintained in a precise manner) to obviate the present and clear difficulty.
180. I remain firmly convinced that the difficulty of this case has been largely created because the statutory fund was maintained in a deficient state of which the Judicial Manager and Liquidator had no control, but largely inherited. And that the SOI, possibly working under difficult circumstances of a non-compliant Clico Belize, operating outside of her radar, in her attempt to compensate the loosing parties for the deficiency in the statutory fund, was doing her best to spread the available funds across the full range of policy holders.
181. These actions are clearly motivated by commendable considerations, but which really put the Judicial Manager (come Liquidator), at risk in his management position in the Judicial Management and the Liquidation of Clico Belize.
182. The Promissory note and the suggestion of a Government guarantee were clearly heroic efforts, on the part of the Judicial Manager and the SOI, to find a way to make good the deficiency which had been created by the insufficiency of the

statutory fund. The parties were clearly trying (or hoping) to get the Government on board to step in to underwrite the losses which policy holders would inevitably have to suffer by reason of the deficiency of the statutory fund. However, without the cooperation of Government to assist in the way that the SOI and the Judicial Manager/Liquidator may have hoped, this was bound to fail.

183. In the event of the Government not accepting such liability, the Judicial Manager/Liquidator cannot, it seemed to me, be left in the situation of having to carry the liability of his court appointed functions. Especially, when he had sought the directions of the Court and those directions were not given promptly, or at all.
184. Also I accept, as I believe the facts establish, that there can be no liability attaching to the Government to give any promissory note or provide any Government guarantee.
185. I have seen nothing which suggests that the Government is legally bound to provide any such promissory note or guarantee; and I do not believe, though I do not decide this case on this basis, that the ‘understanding’ on which the Court order was based (referencing a Government promissory note/guarantee) was made in circumstances by which the SOI, could be said to be acting as the Government’s agent and could bind the Government of Belize to providing such promissory note or government guarantee.
186. I rather suspect, and I so find, that the mention of a promissory note or government guarantee was either an oversight in the voluminous documentation, or was inserted by way of wishful thinking to solve a very difficult situation which existed for the Judicial Management.
187. It also seems to me that it is somewhat disingenuous of the SOI to claim, as was submitted on her behalf, that the agreement between the Judicial Manager and the Interested Party, (and approved by the Court on the application of the Judicial Manager and the SOI) was an agreement merely between two private parties: namely Clico Belize (in Judicial Management) and the Interested party. Or that neither the SOI nor indeed the Government of Belize was a signatory to such an Agreement. Clearly the SOI at the time of the Agreement was holding an ace

card in having possession of the statutory fund and, it is clear to me, she was not averse to leveraging such a card in her negotiations with the Judicial Manger, in the direction of the position which she preferred.

188. In the circumstance of the present case I find that the only proper solution is for this Court to Order that the obligation of the Liquidator in the Liquidation of Clico Belize may be met by him out of the balance of the statutory funds based on the Court approved Scheme of Transfer.
189. It follows that the holders of the EFPA product, will have to be satisfied with the monies they have so far received in the Liquidation, which may be more than that to which they may properly be entitled; and moreover that which they would have received had the Judicial Manager had his way.

Conclusions

190. For the reasons set out at length in this judgment, I conclude and direct as follows:
1. I do not believe that it is necessary to grant the Declaration sought by the Liquidator that the decision and action of the SOI to split the statutory fund between the holders of EFPAs and the policyholders of the Core Portfolio was *illegal, null and void*. The Liquidator and the SOI are now accepting that I do not have to rule as to the legality of the split to give appropriate directions to the Liquidator in the Liquidation of Clico Belize. In the event, it is clear that I would have had some difficulty in concluding that splitting the statutory fund was entirely satisfactory, but that it was nevertheless made with the agreement of the Judicial Manager and that this Court sanctioned it, and therefore cannot be said to have been illegal, null and void.
 2. I also find that it is not necessary for me to grant the Declaration sought that no statutory fund was maintained by Clico Belize with respect to the EFPAs in breach of section 26 of the 2004 Insurance Act. This is despite my many misgivings about this. Again, the Liquidator and the SOI are

now accepting that I do not have to rule on any such breach of Section 26 of the 2004 *Insurance Act*, to give appropriate directions to the Liquidator in the Liquidation of Clico Belize.

3. I also do not believe that it is necessary for me to grant the Declaration sought that the statutory fund maintained by Clico Belize for the period 2003 – 2008 was for the Core Portfolio only. Yet again, the Liquidator and the SOI are now accepting that I do not have to make any such ruling to give appropriate directions to the Liquidator in the Liquidation of Clico Belize.
4. I am, however, able to find, and I direct, that the Liquidator be permitted to transfer to the Interested Party for their use and benefit, along with the Core Portfolio and the Property at Orange Walk, the balance of the statutory fund of approximately (\$726,353.00.) to make good the deficiency to them (the Interested Party) under the Scheme of Transfer and to satisfy the terms of the Court Order dated the 12th February 2010, as against making a further distribution to the holders of EFPA policies.
5. I therefore make the Order that the Liquidator may pay to the Interested Party as the purchaser of the Core Portfolio, the sum of approximately \$726,353.00, being the balance of the statutory fund held by the Liquidator, and transfer to the Interested Party the building in Orange Walk Town, Orange Walk District, Belize with a real value of BZ\$350,000.00 (and an appraised value of \$875,000.00) to satisfy the balance due to the Interested Party in the sum of \$1,379,342.00.
6. I do not make the requested Order that the Scheme of Transfer dated 7th December, 2009 be rectified to allow the balance of the statutory fund to be applied to the Core Portfolio as requested, as I do not believe, and I have not been shown to have the power to rectify the Court Order dated the 12th February 2010.

7. The Orders which I make is on the basis that such orders appear to me both necessary and desirable, as the Liquidation Judge, to give such directions and make such Orders in the Liquidation, as are desirable or necessary for the purpose of the winding-up.
8. In view of the above it follows that I do not believe that it is either necessary or desirable to make an order for Damages as claimed in the application before me.
9. I also do not make any order for Costs save that the Liquidator may of course have his reasonable costs of the present Application to be paid out of the Liquidation; and I assume that some monies have been put aside by the Liquidator to cover such costs as well as the costs of finally winding-up this troubled Company.
10. The Liquidator may of course apply for consequential orders in the Liquidation.

COURTNEY A. ABEL
SUPREME COURT JUDGE (Ag)
6th March 2013