REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2011-04702

BETWEEN

THE UNITED POLICYHOLDERS GROUP

MADAN SINGH

BASDEO RAJKUMAR

SANDRA RAJKUMAR

STACEY NOELLE WILLIAMS

CLAIMANTS

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

DEFENDANT

BEFORE THE HONOURABLE MADAME JUSTICE JOAN CHARLES

Appearances:

For the Claimants: Mr. P. Knox, Q.C., Mr. R. Maharaj, S.C., leads Ms. V. Maharaj instructed by Ms. N. Badal

For the Defendant: Mr. A. Newman Q.C., Mr. R. Martineau S.C., leads Mr. K. Ramkisson, instructed by Ms. K. Oliverie, Ms. Z. Haynes

Date of Delivery: 12th March, 2013

JUDGMENT

INTRODUCTION

[1] On 19th April 2012 I granted the Claimants leave to apply for judicial review of:

i. The decision by the Government of Trinidad and Tobago ("the Government"), communicated through the Minister of Finance, to proceed with a plan for the payment of policyholders in the Colonial Life Insurance Company (Trinidad) Limited (CLICO). Under this plan, the entitlements of "traditional" insurance policyholders in CLICO would be fully guaranteed by the Government backed by the Statutory Fund, while the entitlements of policyholders of the "Executive Flexible Premium Annuity" (EFPA) whose principal balances exceeded $75,000.00 would have no such protection. Instead, they would receive the principal balance of their policies only over a period of twenty (20) years, without interest, in the form of 'zero coupon Government bonds' and the further option of exchanging some of those bonds for units in another investment vehicle (" the CLICO Plan"); and,

ii. The continuing refusal of the Government to provide information as laid out in requests made in writing by the Claimants and reasonably required by them so that they may fully access the CLICO plan and the Government's claims for it.

[2] With the leave of the court the Claimants filed an Amended Claim Form seeking the reliefs outlined hereunder:-

i. A declaration that to implement the CLICO plan would be

unlawful; alternatively it would be unlawful unless the government puts in place suitable arrangements (whether by guarantee from itself, or a bank, or by some similar transaction) to ensure that within a reasonable time, it will in fact yield to the Claimants as it has promised, a sum equal to 100% of CLICO's contractual liability to them including interest.

ii. A declaration that the Claimants (and all EFPA policyholders in Trinidad and Tobago) are the beneficiaries of legitimate expectations engendered by representations made to them by or on behalf of the government, (a) that the government would ensure that their funds in CLICO would be safe and that it would guarantee repayment of all monies due to them; (b) that the government would make good the deficit in the Statutory Fund; (c) that the government would treat all policyholders equally; and a declaration that to implement the CLICO plan would accordingly be unfair and unlawful unless the government makes suitable arrangements to ensure it yields 100% of CLICO's contractual liability to them including interest.

iii. A declaration that in any event to implement the CLICO plan would infringe the rights of EFPA policyholders in Trinidad and Tobago to equal treatment by a public authority as guaranteed by **SECTION 4(d)** of the **CONSTITUTION OF TRINIDAD AND TOBAGO** (alternatively, would infringe them unless the government makes suitable arrangements to ensure it yields 100% of CLICO's contractual liability to them, including interest.)

iv. An order of certiorari quashing the Respondent's decision (or apparent decision) to proceed with the CLICO plan (alternatively, to quash it unless it puts in place arrangements to ensure it yields 100% of CLICO's contractual liability to them, including interest).

v. An order restraining the Respondent from implementing the CLICO plan, or any future plan under which the government would treat EFPA policyholders in Trinidad and Tobago differently from other policyholders in respect of CLICO's lack of funds, or cause CLICO so to treat them.

vi. An order that that Respondent to make good the said legitimate expectation (alternatively, so as to ensure equal treatment and compliance with the policy of the Insurance Act) must make suitable arrangements to ensure that the Claimants receive a sum equal to 100% of CLICO's contractual liability to them, including interest.

vii. Alternatively:

a. A Declaration that the EFPA policyholders have a legitimate expectation engendered by representations made to them by or on behalf of the Government on the 14th September, 2011 that the CLICO plan itself will yield the said 92% to them within a reasonable time;

b. An Order that, to make good this legitimate expectation, the Respondent must make suitable arrangements (whether by guarantee from itself or a bank, or by some similar

transaction), to ensure receipt of this 92% within a reasonable time, or alternatively, that the Respondent must itself pay this sum to them within a reasonable time;

c. An Order restraining the Respondent from implementing the CLICO plan until it has properly consulted with the Claimants and taken into account their representations upon it, and provided to them for this purpose the information and documentation requested in their letters dated the 29th April, 2011, 29th August 2011 and 19th September, 2011.

viii. An Order that the Respondent provides the Claimants with the information requested by them in letters dated the 29th April, 2011, 29th August 2011 and 19th September, 2011 set out in the schedule to this application.

BACKGROUND

[3] It should be noted at the outset that the background facts of this case are not in dispute by the parties.

[4] On the 30th January, 2009, Central Bank took control of CLICO Investment Bank (CIB) pursuant to its powers under **SECTION 44D**[1] of the **CENTRAL BANK ACT**. On the same day, the Government and CL Financial, parent company of CIB and CLICO, entered into a Memorandum of Understanding ("MOU")[2] wherein CL Financial agreed, *inter alia*, to sell assets and to apply

[1] Circumstances where Bank may take over control, etc.
[2] VM1

the proceeds to:

i. correct CIB's financial position; and,
ii. ensure that CLICO's Statutory Fund requirements were satisfied.

The Government agreed to collateralize loan financing to CLICO to meet any residual Statutory Fund deficit which might exist after the sale of the assets.

[5] The Central Bank and the Government issued a media release[3] on the same date stating, *inter alia* that:

> *"4. The Government will provide funding support to fully back CLICO and BAICO (BA) to meet any Statutory Fund deficits that might emerge after the company has made all possible arrangements to place satisfactory levels of cash and other assets into the Statutory Fund ...*
> *The Government has taken these steps to assure the investing public in Trinidad and Tobago, including depositors and policy holders of the affected companies of the safety of their investments and the requirements for stability and order in the market place."*

[6] Also on this date, the Minister of Finance made the following statement[4]:

> *"I wish to reiterate the Government's commitment to ensure that depositors' assets will not be at risk."*

[7] On the 1st February, 2009 the Government published a Question and Answer

[3] VM2, pp. 8-9
[4] VM3, p. 14

on the "Rescue of CL Financial".[5]

[8] The then Minister of Finance on the 2nd February, 2009 laid a copy of the MOU in Parliament and made a statement[6] to the House of Representatives on the actions she had since taken. She stated, *inter alia*, that the Statutory Fund deficit must be corrected and for that reason:

> "*… the Government has opted to apply the proceeds of the sales of the shareholdings of* CL *Financial and its affiliates to fund outstanding Statutory Fund obligations. It would also ensure that the group's assets are first used to meet its outstanding obligations."*

[9] **ACT NO. 4 of 2009** was passed on the 4th February, 2009 amending the **CENTRAL BANK ACT** so as to extend the Central Bank's powers under **SECTION 44D** to take control of insurance companies that are in financial trouble.[7] Pursuant to this Act, the Central Bank announced on the 13th February, 2009 that it was taking control of CLICO. In its statement[8], it explained why the Central Bank took this step:

> "*The objective of this rescue exercise is to restore confidence. But this process will obviously involve considerable public resources for which the Government and the Central Bank as regulator, 'will be held responsible' ...*
> *Invocation of these powers is designed to achieve several objectives including. .*
> *5. Providing a legal basis for advancing the funding to which the Government is committed in order to ensure the protection of*

[5] VM4
[6] VM5, p. 20
[7] VM6
[8] VM7, pp. 26-27

policyholders of CLICO...

Ladies and gentleman, the Government and the Central Bank have undertaken a number of steps including today's actions, to protect policyholders of CLICO and BA and to maintain stability and confidence in the financial system.

I am pleased to see that the steps taken so *far have already succeeded in reducing the initial concerns. There is a greater stability in the banking system as a whole and customers of CLICO … have shown tremendous maturity in responding to the current financial situation. There is still a considerable way to go and I therefore urge all members of the public to continue to support CLICO … based on the commitments made by the Government and the Central Bank .."*

[10] CLICO placed a full page advertisement[9] on the 15th February, 2009 in local newspapers stating:

"CLICO wishes to assure all its Policyholders and Clients that our normal business operations will continue.
All terms and conditions of existing policy contracts will be honored.
All Policyholders' funds are guaranteed by the Government of Trinidad and Tobago and the Central Bank."

[11] On the 12th June 2009, the Government issued a further media release[10], wherein it announced that an agreement had been reached with CL Financial Limited and the Government whereby the latter would have the power to appoint the majority of directors to the former's new board. This was done so

[9] VM8
[10] VM10

as to give CL Financial proper management and control of its assets in order to carry out the actions contemplated by the MOU.

[12] The Central Bank thereafter on the 19th June, 2009 issued a press statement[11] to the effect that:

> *"As Regulator of the Financial Sector, we wish to assure the public that: The Government of Trinidad and Tobago has committed to meet obligations of Trinidad and Tobago third party policy holders of Colonial Life Insurance Company (Trinidad) Ltd, (CLICO) consistent with the Memorandum of Understanding between the Government of Trinidad and Tobago and* CL *Financial."*

[13] The Minister of Finance on the 24th June, 2009 answered questions[12] posed to her in the House of Representatives on the statement made by the Central Bank on the 19th June, 2009. She told the House that:

> "*We guarantee the policyholders and residents of this country; that is our guarantee."*

[14] On the 13th January, 2010, the Finance Minister was interviewed in the Business Express[13] regarding CLICO policyholders who had kept their funds in CLICO beyond maturity. She was reported as saying:

> *"I would say everyone will get their money but in the context of the enormity of the situation and the fact that it will affect us all. It is not just those who*

[11] VM11
[12] VM12, pp. 38, 42
[13] VM13, 00. 46,48

invested. If you do not contain it, it can have a contagion effect for the whole economy. What it requires is the confidence of the people of Trinidad and Tobago and the patience and understanding that it is a national issue and understanding the enormity of the situation. It will require patience…
CLICO investors need not worry because 'their money is safe'."

[15] The Central Bank held a media conference[14] on the 24th March, 2010 with CLICO's Finance Director wherein it was stated that CLICO had created a plan to pay out policyholders with small balances immediately and higher balances at the rate of $100,000.00 per month.

[16] The new Finance Minister, Mr. Dookeran, on the 8th September, 2010 announced a substantially different plan than that outlined by the previous Government during his Budget Speech[15]. He made the following proposals:

"1. We will separate the insurance business from short term investment and mutual funds business to protect the insurance policyholders and the obligation to the 225,000 [pensions, life and health insurance] policyholders will be honoured, backed by the Statutory Fund.

2. To depositors in the short term investment [including EFPAs] and mutual funds, the Government will make an initial part payment of a maximum of $75,000. This is intended to bring relief to the small depositors. This will fully payoff approximately 45 per cent of the 25,000 investors in these products, including more than 140 credit unions and 15 trade unions.

3. The short term investment and mutual fund depositors whose principal

[14] VM14, pp. 55, 57
[15] VM15, p. 75

balances exceed $75,000 'will be paid through a Government IOU amortized over 20 years at zero interest. This Government IOU would be structured in such a way that it could be traded on the secondary markets, thereby creating a measure of immediate liquidity for the depositors."

[17] CLICO, on the 9th September, 2010, placed a moratorium on all EFPA transactions and all payments to EFPA policyholders.[16]

[18] On the 1st October, 2010, the Prime Minister told the House of Representatives that the CLICO plan is on hold and that the Government will set up an inter-ministerial committee to consult with policyholders.[17]

[19] The Prime Minister in her New Year's address[18] on the 1st January, 2011 stated:

"*We have announced certain plans for both CLICO and the HCU (Hindu Credit Union). We ask you to trust us and promise that when the economic circumstances change there is all likelihood that the 20 year proposal could also change."*

[20] On the 27th January, 2011, the Prime Minister stated that she will meet with the policyholders with policies in excess of $75,000.00 as soon as arrangements can be made.[19]

[21] On the 29th April, 2011 the Claimants made their first written request for

[16] DP1 annexed to the Affidavit of Delothmar Parray
[17] VM17, p. 85
[18] VM20, p. 89
[19] VM22

information.[20] The Solicitor General replied on the 17th May, 2011 asking for more time to respond to the said requests.[21]

[22] Thereafter, the Chief State Solicitor asked for a further extension of time[22] on the 6th June, 2011 to respond to the requests stating:

> *"… we are kindly requesting that you stay your hands with respect to the initiation of any legal proceedings and allow us the opportunity to conduct our investigations into the matter."*

[23] The Ministry of the Attorney General responded[23] to the Claimants' letter and stated that their request was being attended to. With regard to the Government's plan for CLICO policyholders, the letter stated that they "*have evolved over time to meet a fluid situation*".

[24] A release[24] from the Ministry of Finance on the 13th July, 2010 stated that the Minister will be attending Cabinet soon so as to obtain a decision to proceed to Parliament for the approval of bonds. These bonds are to enable the payment of policyholders and the discount rates for the bonds are still being finalized.

[25] On the 14th July, 2011, the Ministry of the Attorney General wrote[25] to the Claimants indicating that the State is attempting to facilitate their requests for information and currently engaged in seeking same. However, on the 18th

[20] VM26
[21] VM27
[22] VM29, p. 191
[23] VM31, p. 195
[24] VM38, p. 223
[25] VM32

July, 2011, the Ministry of the Attorney General stated by letter[26] that the Government has refused all the requests for information made by the Claimants. Nevertheless, on the 29th August, 2011, the Claimants wrote[27] to the Chief State Solicitor repeating their requests for information and enclosing a draft application for Judicial Review Proceedings, a copy of which was also sent to the Minister of Finance.

[26] The Minister of Finance in a speech to the House of Representatives on the 14th September, 2011 announced an 'enhanced' payout regime wherein:

> *"Investors who continue to receive annual 20-year bonds, the facilities for discounting their bonds of maturity up to ten years will remain unchanged. It is expected that the discounting rate would be in the order of 80 cents (on every dollar) resulting in a haircut for the first ten years of 20 per cent. Bonds with a maturity of 11 to 20 years may be exchanged for units in National Enterprises Limited* 2 *at a rate of dollar for dollar which means that the total return for the investor would comprise* 80 *cents (on the dollar) on bonds with maturity from one to ten years and 100 cents on the dollar for the longer term bonds through the NEL* 2 *mechanism. On this basis the average return would be in the order of 92 cents on the dollar, a significant increase over the 67 cents on the dollar implied by the original plan …"*

[26] On the 19th September, 2011, the Claimants again wrote[28] to the Chief State Solicitor requesting information and also asked the Government to confirm that the 'enhanced' offer will ensure ninety-two (92) cents on the dollar.

[26] VM33
[27] VM36
[28] VM40

[27] The **CENTRAL BANK (AMENDMENT) ACT 2011** ("CBAA")[29] was passed amending the **CENTRAL BANK ACT** so as to prohibit the institution of proceedings against financial institutions, such as CLICO, which are under the control of the Central Bank.

[28] The Ministry of the Attorney General on the 28th October, 2011 replied[30] to the Claimants' request for information contained in the letter of 18th September, 2011. Based on this reply, the Claimants wrote to the Ministry of the Attorney General on the 7th November, 2011 challenging the Government's assertion that the 'enhanced' payout plan will return ninety-two (92) cents on the dollar. They also repeated their earlier requests for information and attached a draft application for Judicial Review.[31] The Ministry replied on the 11th November, 2011 seeking an extension of time to respond to the Claimants' letter.[32] On the 25th November, 2011, the Ministry of the Attorney General responded stating that it was unable to provide a full response to the Claimants' requests for information but would try to fulfil the requests within a further two weeks.[33]

[29] The Government published a Question and Answer for the holders of short term insurance policies, such as the EFPA holders, on the 27th November, 200 detailing how a policyholder can take up its offer. It stated that offers can be taken up from the 1st December, 2011 until the 30th June, 2012.

[30] Under the new bailout plan, the Claimants must choose between either exchanging their rights against CLICO and its Statutory Fund in return for

[29] VM42
[30] VM47
[31] VM48
[32] VM49
[33] VM50

receiving the principal balance due to them over a period of twenty years without interest in the form of zero coupon Government bonds with a option to exchange the last ten years' bonds for units in a "closed end" trust known as the CLICO Investment Fund (CIF); or, leave their funds in CLICO and relying on their rights against the Statutory Fund and CLICO.

[31] This choice first had to be made by 30th June 2012; time was extended to 30th September, 2012 then later the Government further extended the time for making it to the 30th November, 2012. As of now the deadline has passed and the evidence before me is that ninety-two percent (92%) of EFPA policyholders have accepted the Government's offer.

LEGITIMATE EXPECATION

[32] The Claimants submit that the above statements amounted to clear and unambiguous promises by the Government that:

i. The policyholders' assets in CLICO would be protected by the Government and that the Government would guarantee repayments of all monies due to them.

ii. The Government would make good the deficit in CLICO's Statutory Fund; by implication that CLICO would return to stability and would be in a position to meet all its obligations.

iii. On the basis of the Government's promises and the terms of the **INSURANCE ACT** the Claimants had a legitimate expectation that (a) the Government would treat all policyholders (traditional and

EFPA) in the same way; (b) any funds made available by the Government while the Statutory Fund is in deficit will (save for certain necessary exceptions, such as meeting the running cost of CLICO) be made available on terms that they will be used to reduce the deficit in that fund for the benefit of all policyholders equally rather than for paying off traditional policyholders in full.

DEFENDANT'S SUBMISSIONS

[33] The Defendant, in written submissions filed on 5th November 2012, originally submitted that the statements attributed to the former Government could not have engendered a legitimate expectation; that there was no clear, unequivocal, unconditional promise of the Government that it would repay to the Claimants one hundred percent (100%) of the monies to which they were contractually due from CLICO or that they would be paid a sum equal to at least ninety two percent (92%) of the principal balances due them by CLICO in excess of seventy five thousand dollars ($75,000.00). They had argued that there was no evidence in this case to support any such legitimate expectation. As such, the Government did not have to justify the frustration of a legitimate expectation.

[34] However, in the course of argument before me, Mr. Newman, on behalf of the Defendant, conceded that the statements attributed to Government officials did in fact amount to promises to the Claimants which gave rise to a legitimate expectation[34]. It is to be noted that this concession would necessarily include all the legitimate expectations as outlined above by the Claimants since no limitation with respect to the scope of this concession was

[34] Transcript of 23rd November, page 16, lines 46-50, page 17, lines 1-2 and lines 14-15

indicated by Mr. Newman.

[35] In both written and oral submissions however, Mr. Newman argued that it was permissible for a decision-maker, such as the Government in this case, to adopt a different course or change its policy. He submitted that the promises were made by the previous Government on the basis of insufficient information before it as to the true state of CLICO. There was a necessity to reinforce public confidence in the financial sector and to avoid systemic failure. In those circumstances he argued, promises made cannot be binding; that the new administration, in possession of all of the information and cognizant of the disastrous consequences of a full and immediate payout to the Claimants, was justified in frustrating any expectation on the part of policyholders. The new Government was, therefore, free to breach the promises made by the previous administration once the true picture had become known.[35]

[36] He further submitted that the test to be applied in a case such as this is whether to frustrate the legitimate expectation would be so unfair that to adopt a new course would amount to an abuse of power. He relied upon the case of **R v North East Devon Health Authority ex parte Coughlan**[36] *per* Lord Woolf:

> *"Where the court considers that a lawful promise or practice had included a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that there too, the court will in a proper case, decide whether to frustrate the legitimate expectation is so unfair that to*

[35] Paragraph 52, Defendant's submissions filed on 5th November 2012
[36] [2001] QB 213 at paragraph 57

take a new and different course will amount to an abuse of power."

[37] He further submitted that the evidence before me disclosed a sufficient public interest to override the legitimate expectation of the Claimants; that both the Prime Minister and the then Minister of Finance, Mr. Winston Dookeran, identified the overriding public interest as insufficiency of funds: that the tax payers could not afford it; the country could not afford it and it would be fiscally irresponsible to do otherwise; that had the Government paid out the EFPA policyholders in full they would have had to cut expenditure on basic needs of the population such as roads, bridges, pensions.[37]

[38] He argued further that the cost to the Government to pay off all short term investment policies including EFPA policies was twelve billion dollars ($12B) from a national budget of forty nine billion dollars ($49B). The Government concluded that this was a disproportionate sum of money to be spent on approximately 2% of the population. He contended that in the circumstances the revised pay out plan offered to EFPA policyholders was in the public interest.

[39] Mr. Newman also submitted that this decision lies in the macro-political /macro-economic field; as such the court should be loathed to intervene. He cited Laws LJ in **R v Secretary of State for Education and Employment ex parte Begbie**[38]

"The more the decision challenged lies in what may inelegantly be called the macro-political field, the less intrusive will be the court's supervision. More

[37] Exhibits 'VM 15', 'VM 16' and 'VM 17'
[38] [2000] 1 WLR 1115, 1131

than this: in this field, true abuse of power is less likely to be found, since within it changes of policy, fuelled by broad conceptions of the public interest, may more readily be accepted as taking precedence over the interest of groups which enjoyed expectations generated by an earlier policy."

[40] He also relied on **R (on the application of Nadarajah) v Secretary of State for the Home Department**[39] in support of his submission that where a party claims legitimate expectation which is countered by factors relating to macro-political/economic policy the expectations' enforcement in the courts is very difficult. At paragraph 69, Laws LJ opined:

"...where the government decision-maker is concerned to raise wide ranging or "macro-political" issues of policy, the expectation's enforcement in the courts will encounter a steeper climb. All these considerations, whatever their direction, are pointers not rules. The balance between an individual's fair treatment in particular circumstances, and the vindication of other ends having a proper claim on the public interest (which is the essential dilemma posed by the law of legitimate expectation) is not precisely calculable, its measurement not exact."

He asserted that where a decision-maker frustrates a legitimate expectation in these circumstances it would not amount to an abuse of power.

[41] He went on to argue that from the evidence it is clear that Government took into account statements made by the previous administration before devising a new bailout plan.[40] Further, the new Government considered the "various statements" that were made by the former Finance Minister and other public

[39] [2005 EWCA Civ. 1363]
[40] Paragraph 192 Affidavit of Winston Dookeran filed 25th July 2012

officials with respect to the promise to the policyholders to pay them in full.[41]

[42] Mr. Newman submitted that after considering the indebtedness of CLICO and the companies in the group, there was substantial risk of systemic failure had the Government satisfied the legitimate expectation[42]. The then Minister of Finance, Winston Dookeran, in his affidavit filed on 25th July 2012 identified several of the factors that the Government took into account in determining that it could not satisfy promises made to the Claimants. In brief they were that:

i. By June 2010 the country's financial position had worsened in that the economy had shrunk by 3.5% in the previous year with non energy sectors contracting by 7.2%

ii. Falling oil and natural gas prices resulted in declining revenues and there was a budget deficit of 7% in 2008/2009.

iii. Public debt as a percentage the GDP had increased to 39.8% in 2009/2008 and unemployment had increased significantly[43].

iv. The IMF considered the country's stable outlook to be heavily dependent on the resolution of the CLICO's restructuring[44] and a key recommendation from it was the containment of additional fiscal costs in relation to CLICO's restructuring[45]. Additionally, international rating agencies had identified the CLICO issue as a

[41] Paragraphs 101, 104, 114, 117, 118,192,193, 194 Affidavit of Winston Dookeran filed 25th July 2012
[42] Paragraph 74 Affidavit of Winston Dookeran filed 25th July 2012
[43] Paragraph 80 Affidavit of Winston Dookeran filed 25th July 2012
[44] Paragraph 82 Affidavit of Winston Dookeran filed 25th July 2012
[45] Paragraph 84 Affidavit of Winston Dookeran filed 25th July 2012, "WD7"

major concern with respect to the country's financial position. The Government had in mind that a negative report from these agencies would have affected the economy and increased the cost of borrowings[46].

[43] He also submitted that the Government's response was proportionate. It weighed all the relevant factors in order to objectively determine whether the public interest required the breach of legitimate expectation. At the end of the balancing exercise, and taking into account the interest of the taxpayers of the nation, as well as the promise made to the Claimants, it came up with the revised bailout plan in order to pursue a legitimate public interest objective. He also submitted the public interest is "*the sum total of interests that do not constitute only constitutional rights. Considerations of public interest include the continued existence of the State, national security, public order and other interests*". He relied upon the case of **Grape Bay Limited v The Attorney General of Bermuda,** where the appellants challenged legislation which blocked the establishment of an American fast food chain in Bermuda. The Privy Council in that case held:

> *"Their Lordships consider that it is plain from the terms of the Act that the legislature considered it contrary to the public interest in Bermuda to allow the further opening of franchise restaurants. This may or may not have been a wise decision... The issues which they raise are pre-eminently matters for democratic decisions by the elected branch of government. The members of the legislature are not required to explain themselves to the Judiciary or persuade them that their view of the public interest is the correct one."*

[46] Paragraph 85 Affidavit of Winston Dookeran filed 25th July 2012

THE CLAIMANTS' SUBMISSIONS

[44a] The Claimants, on the other hand, submitted that the Government's decision to resile from the promises which gave rise to the legitimate expectations is unjustifiable, because it is unfair and unreasonable, if the Statutory Fund is in credit, to ask the Claimants, without telling them this, to exchange their rights against the Statutory Fund and CLICO for the new bailout plan. They argued further, that if the Statutory Fund is in deficit as alleged by the defendant then it is unfair and unreasonable to ask the Claimants to make a choice between the bailout plan and asserting their rights against the Statutory Fund without giving them relevant information about the value of the rights they are being asked to give up.

[44b] It is important to note that the defendant had been ordered on 19th April 2012 to disclose to the Claimants information relating to the status of the Statutory Fund of CLICO. By letter dated 16th November 2012, the defendant wrote to the Claimant attaching copies of estimates of CLICO's balance sheet and Statutory Fund based on the Insurance Act calculations as at December 31st 2009, 2010 and 2011. These calculations had not been audited by CLICO's external auditors nor reviewed and approved by the Central Bank. The restated 2008 figures in the attached estimates for 2009 had not been reviewed either. From the evidence it is clear that at the date of the decision (September 2011) the Claimants had not been advised as to what was in the Statutory Fund - whether it was in credit or deficit. The Claimants also submitted that the failure to disclose reliable information as to the status of the Statutory Fund inevitably means that the Defendant is unable to show from the evidence that their response was proportionate or that there was any overriding policy reason for frustrating the Claimants' legitimate expectation.

[45] Mr. Knox, on behalf of the Claimants, argued that the Government's present offer puts EFPA policyholders in an impossible situation, in that not having accepted the offer it is no longer available to them. If they keep their rights against CLICO, they will not be able to assert those rights for an unspecified period of time by reason of the Stay of any proceedings against CLICO imposed by the **CENTRAL BANK AMENDMENT ACT 2011**.

[46a] He contended that a reading of CLICO's unaudited accounts reveals that there are assets worth billions of dollars that are available to be put into the Fund but that this has not been done. He submitted that shares of Methanol Holdings (Trinidad) Limited (MHTL) worth eight billion dollars ($8B) should have been put into the Fund as well as investment securities including Government Bonds valued at 4.6 billion dollars. He submitted in the round that approximately 26.4 billion dollars should have been placed into the Statutory Fund. He went on to state that it was the duty of the Trustee of the Fund to exchange the assets so placed in the Fund for "admissible assets" as described in Schedule II of the **INSURANCE ACT**. On the basis of his calculations, the Statutory Fund should have been in credit had CLICO, under the direction of Central Bank, deposited all assets into the Statutory Fund for the benefit of the policyholders. He did not accept the Defendant's response that assets that were not admissible in the Fund could not be put into it, and that some of the items which he suggested should be included in the Fund were not available to CLICO.

[46b] He contended that the Claimants also do not know what rights the Fund may have against third parties including CLICO itself. Counsel also made the observation that no additional assets appear to have been put into the Fund since the Central Bank assumed the management of CLICO. He went on to

argue that these matters were clearly not taken into consideration by the Government in coming to its decision; however the Claimants cannot make a fair choice without understanding the true value of the assets and potential assets of the Statutory Fund.

[47] It was also submitted on behalf of the Claimants that there was no evidence adduced by the Government to show that there was an overriding policy reason for frustrating the legitimate expectation of the Claimants; that no evidence was given with respect to an overriding policy reason in September 2011 or December 2011 to justify breaking its promises. The Claimant argued that the evidence adduced by the Government in support of its contention that there was an overriding policy reason to frustrate the Claimants' legitimate expectation relate to the period September 2010. They go on further to state that even in relation to 2010 the Government has not demonstrated that its response was proportionate. Mr. Knox submitted that the plan announced in September 2011 was in fact an improvement on the earlier plan of September 2010; Mr. Dookeran acknowledged that CLICO's position had improved since September 2010 however no assessment of the public interest in August/September 2011 was given by the Government. Mr. Knox submitted that Mr. Dookeran gives no reason as to why the public interest in August/September 2011 would not have permitted the fulfilment of the promises to the Claimants.

[48] He went to submit that in fact the evidence shows that there had been a marked financial improvement by August 2011, both for the Government's outlook and for CLICO's balance sheet. He submitted the following in support of this contention:

i. Mr. Dookeran informed the House that the combined balance sheet deficit of CLICO and BA had (or at least of just CLICO) had reduced to 3.1 billion dollars (from more than double that in the previous year).

ii. The Government's fiscal position, energy revenues had been improved markedly from the lows in 2009. Further, the evidence indicated that its fiscal out turn for both fiscal years 2009/2010 and 2010/2011 was substantially better than had been budgeted for at the start of each year.

iii. The IMF report produced in March 2011[47] contains a statement of 21st January 2011 on information that had become available after the main staff report had been completed (in late 2010). According to the latest information[48], "The fiscal out turn for the 2009/2010 fiscal year (October-September) was TT $3.5 billion (2.7 percent of GDP) better than projected."

iv. The Central Bank's Economic Bulletin of July 2011[49] reported a similar result for the first 9 months of the fiscal year 2010/2011: "Provisional data provided by the Ministry of Finance suggest that the central government recorded a surplus of $1,227 million for the first nine months of the fiscal year". This was compared to a budgeted $5,505 million deficit[50] - a fiscal outturn $6.7 billion better than expected.

[47] "WD7"
[48] "WD7, p.221"
[49] VM52, Tab4, p.3
[50] VM52, Tab4, p24, Table 5, first two columns

v. The substantial improvement in fiscal 2010/2011 is confirmed by the S&P report published on 26th January 2012, which says[51]: The official estimate for the fiscal deficit in 2011 (year ended Sep. 30, 2011) was 2.2% of GDP (compared with the budgeted 5% of GDP), but the government will likely revise this figure to about 0.5% of GDP following the finalization of fourth-quarter fiscal data. This result excluded the 2% of GDP transfer to HSF. So the government's fiscal result for the year 2010/2011 was more than 4% of GDP better than it had budgeted for in September 2010.

[49] The Claimants submit that for the Government to prove an overriding public interest justifying its decision of August 2011, it was necessary for it to address the fiscal position in August 2011 and give its account of why the public interest at that time demanded that the legitimate expectation be breached. They argued that the Government was required to give an assessment, as at that time, of its own improved fiscal position and of CLICO's improved position. Further, the Government would have had to say why, even in the improved fiscal circumstances and even with CLICO's improved asset position, the public interest did not allow the government to fulfil its promise to the Claimants or to go any further than it did. Mr. Knox submitted that the Government's evidence wholly fails to do this, so for this reason alone it has failed to show either any relevant overriding policy reason, or proportionality in its response.

[50] The Claimants further submitted that even if September 2010 is the relevant date for assessing the Government's justification for resiling from its promises

[51] WD15, p345

to the Claimants, there is no overriding public interest in allowing the Government to go back on the promises, nor was its conduct proportionate for the following reasons:

i. The Government cannot rely on the expense of keeping its promises, because it knew by mid-February 2009, at the latest, that the size of the deficit in the Statutory Fund could be up to $10 billion. Further, at the time when the promise was made it was obvious that the ten billion dollars had to be taken into account in the budgetary allocation because this was obvious when the promise was made.

ii. Mr. Dookeran in his affidavit[52] points to the Government's financial position as at June 2010 as the reason to resile from the promise. At no time does he say that there had been a material change in circumstance between the time that the promise had been made and June 2010.

iii. All those factors were already known to the Government in 2009 when it made the promises to the policyholders; this is evident from Mrs. Tesheira's budget statement in the House of Representatives on 7th September 2009[53]. In January 2010 Mrs. Tesheira's repeated the Government's promise and they continued to act in accordance with same.

[52] Paras. 80(a)-(e)
[53] VM55

iv. In December 2008 to February 2009, the lowest prices for oil and gas in recent years were recorded.[54] By June 2010, the Government's energy revenue position had improved significantly because the oil price had doubled. The 2009/2010 budget presented by Mrs. Tesheira had been based on very conservative price estimates for oil and gas.[55] The budget deficit of 7% in 2008/2009 was already anticipated by Mrs. Tesheira who had predicted a deficit of 6.3%.

v. With respect to the 39.8% of public debt as a percentage of GDP this too had been anticipated by the former Minister of Finance who had predicted a rise in GDP to 39% at the end of 2009[56].

vi. As regards the employment figure of 6.7% in the first quarter of 2010, Mrs. Tesheira had predicted an unemployment rate of between 5% and 6% over the coming years.

vii. In the circumstances, the "increasingly difficult" financial position spoken of by Mr. Dookeran did not amount to a material change in circumstances such as to give a good reason in the public interest to resile from the Government's promise.

viii. He submitted further that when the Government first announced the decision to resile from its promise in September 2010 it did not give as a reason therefor that there had been a material change in circumstances[57]. On 8th September 2010 Mr. Dookeran told the

[54] VM56, VM 78
[55] VM55 p61
[56] VM55 p11
[57] VM57, VM 16

house that he was looking forward to improved economic growth and higher energy prices[58]:

> *"After 15 years of positive economic growth, our economy stumbled in 2007, registering fiscal deficits for the last two years and the first balance of payments deficit since the early 1990s was registered in 2010. However, after a significant contraction of the economy of 3.5 percent in 2009, we have benefitted from higher energy prices than expected in 2010 and will be registering a positive economic growth of 2.5 per cent in this year. This fiscal year 2010, we projected to record a fiscal deficit of 3.5 per cent of the GDP."*

ix. Additionally, the Prime Minister did not rely on material change either, when she spoke in the House on 1st October 2010[59] nor did the Government rely on this ground in response to the Claimant's letter before action[60] or in its submissions at the Leave stage for judicial review.

x. He noted that both rating agencies Moody's and Standard and Poors (S&P) reaffirmed their ratings for Trinidad and Tobago as having a stable outlook.

xi. That contrary to the Defendant's submissions, the Government did not take into account that it had made promises to the Claimants or that it was breaking them. It failed to give the promises made to the Claimants proper or any weight.

[58] VM57 p99
[59] VM17
[60] VM31

xii. Mr. Dookeran deposed that the government came up with a new plan while bearing in mind "the statements" of the then Minister of Finance of 30th January and 2nd February 2009. He also referred to the fact that the Government "knew it had made statements" at the time it took its decision to introduce the new bailout plan. He also deposed that the Government "gave careful consideration to the expectations engendered by the statements and the negative effects that might be suffered" by those who had relied on them[61].

xiii. In neither of his affidavits filed herein does Mr. Dookeran say that the previous Government had made promises which engender a legitimate expectation in law or that the new government's plan amounted to a breach in those promises. He continually spoke of "statements" made to the Claimants and of their "expectations".

xiv. Several statements had been made by the Minister of Finance and the Prime Minister of the new Government about the previous Government's promises, namely:

a. On 28th September 2010 Mr. Dookeran said "*there is a falsehood to the statement that there were guarantees*."[62]
b. On 1st October 2010 the Prime Minister said "*There was none. There was absolutely none. So when you stood out there and you held out to people saying that they were guarantee there was none*".[63]

[61] Affidavits of Winston Dookeran paragraph 191-193
[62] VM16, p80
[63] Affidavit of Winston Dookeran, WD12, p. 25

c. And on the same day the Prime Minister said "*We are under no legal obligation. I think that is the point that is to be made*".[64]

d. On 14 September 2011, when introducing the revised plan, Mr. Dookeran said "*So, Mr. Speaker, I wanted to put on record that the guarantee, of which they speak about, is not a guarantee. It was empty, hollow statement made by a government who did not know what they were doing or what they ought to do.*"[65]

[51] He submitted on this point that although the Government was well aware of the previous Government's promises to the policyholders it did not consider itself bound by them nor did it consider that it was breaking them.

[52] He went on to state that there is no evidence that the promises were identified or treated as an important factor in the Government's discussions; they are not mentioned in any of the discussions documents available, nor did the Government ever ask itself how best it could fulfil them. Mr. Knox invited the Court to find that from the evidence in this case:

i. The mandate to the Select Committee made no specific reference to the promises made and how, or how far, to fulfil them;

ii. While the Select Committee's Report, at paragraph 10, mentions that the Government's intervention created 'certain expectations', it describes them as expectations among all the stakeholders in CLICO (i.e. taxpayers, policyholders, agents and employees) – the

[64] Affidavit of Winston Dookeran, WD12
[65] VM58, p.197

expectations of the promisees are expressly treated as no different from the expectations of others;

iii. When the Select Committee's Report discusses the interests of policyholders, at paragraph 9, it makes no mention at all of the promises to them or any consequent obligation;

iv. The options discussed by the Select Committee did not include the option of paying promises in full – the "full payment" option discussed was for the payment in full of all creditors of CLICO, whether promisees or not;

v. Mr. Dookeran's account of the deliberations in choosing between the three "Options" around August 2010 does not mention the promises, still less include as a consideration the fact that they had been made, and that Option III would amount to a breach of them; and,

vi. Mr. Dookeran, at paragraph 118, says that his Statement of the 28th September 2010, was "the public pronouncement of the Cabinet's thinking on this matter" – and that statement only mentions the "guarantees" for the purpose of saying that they were not really guarantees.

[53] Lastly, Mr. Knox on behalf of the Claimant argued that the Government neither asked at any stage how it could fulfil its promises nor what would be required to fulfil the said promises; all the evidence suggests that it only considered a more costly option.

[54] Counsel submitted that Mr. Dookeran has given an account of why the Government decided in September 2010, not to pursue Option II - the full funding of CLICO and BA, and the payment in full according to the contractual terms, of all creditors. This option entailed full payment of liabilities substantially greater than CLICO's liabilities to the promisees alone, i.e. resident policyholders protected by the Statutory Fund. It also entailed a substantially greater burden than the fulfilment of the Government's other promise to make good the Statutory Fund.

[55] He further submitted that as the Government did not ask itself whether and how it could fulfil:

i. Its promise to guarantee CLICO's policyholders' Funds;
ii. Its promise to make good the deficit in the Statutory Fund; or
iii. Its promise to treat all Statutory Fund protected policyholders equally;

it cannot show that there was an overriding interest preventing it from fulfilling those promises; it simply didn't consider whether it could. The Government therefore cannot show that its conduct in refusing to give effect to them was proportionate.

THE LAW

[56] The governing principles to which I must have regard in determining whether the Defendant was justified in resiling from the promise made to the

Claimants, which amounted to the benefit of a substantive legitimate expectation, can be distilled from the following cases:

i. Paponette v The Attorney General of Trinidad and Tobago[66]
ii. R v North and East Devon Health Authority *ex parte* Coughlan[67]
iii. Nadarajah v The Secretary of State for the Home Department[68]
iv. R (Bancoult) v The Foreign Secretary[69]
v. R (Bibi) v Newham Borough Council [70]

[57] In a case such as this where the Claimant alleges a breach of a legitimate expectation of a substantive benefit by a public authority, in this case the Government, the Court has to examine all the relevant circumstances and to decide for itself whether what happened was fair. In **Coughlan** the Court rejected the notion that a bare rationality test is applicable in these circumstances.[71] The Court there recognised that a decision may pass a rationality test and therefore cannot be challenged on that ground. The Court's supervision of public authorities who are alleged to have a reached a substantial legitimate expectation cannot be limited to the Wednesbury standard of irrationality. At paragraph 66 of the **Coughlan** judgment, Laws LJ opined:

> "*In the ordinary case there is no space for intervention on grounds of abuse of power once a rational decision directed to a proper purpose has been reached by lawful process. The present class of case is visibly different. It involves not one*

[66] [2010] UKPC 32
[67] [2001] QB 213
[68] [2005] EWCA Civ 1363
[69] [2009] 1 AC 453
[70] [2002] 1 WLR 1681
[71] Coughlan, para. 65D

but two lawful exercises of power (the promise and the policy case) by the same public authority, with consequences for individuals trapped between the two. The policy decision may well, and often does, make as many exceptions as are proper and feasible to protect individual expectations ... In such a situation a bare rationality test would constitute the public authority judge in its own cause, for a decision to prioritise a policy change over legitimate expectations will almost always be rational from where the authority stands, even if objectively it is arbitrary or unfair. It is in response to this dilemma that two distinct but related approaches have developed in the modern cases."

[58] The issue for my determination therefore is not whether the decision is irrational in the Wednesbury sense but whether it amounts to an abuse of power through unfairness or arbitrariness.

[59] In the case of ***Ex parte* Preston**[72], where it was alleged that Inland Revenue Commissioners had impermissibly gone back on their promise not to re-investigate certain aspects of an individual taxpayer's affairs. Lord Scarman opined at p. 851:

"... I must make clear my view that the principle of fairness has an important place in the law of judicial review; and that in an appropriate case it is a ground upon which the court can intervene to quash a decision made by a public officer or authority in purported exercise of a power conferred by law."

From the above, it can be gleaned that unfairness can be found within or without the parameters of the law in that an act by a public authority may be lawful but still amount to unfairness.

[72] 1985 App. Cas. 835

[60] In paragraph 69 of this decision, Laws LJ further opined that reneging without adequate justification by an otherwise lawful decision from a lawful promise or practice, adopted towards a limited number of individuals can amount to an abuse of power. This case also established that the arbiter of justification is the Court. Lord Templeman, who reviewed the law extensively, came to the conclusion that unfairness amounting to an abuse of power is a matter that is reviewable by the court. This is especially so where the conduct of the public authority amounts to a breach of a representation.[73]

[61] Laws LJ held further[74] that this approach embraced "*all the principles of public law which we have been considering. It recognises the primacy of the public authority both in administration and in policy development but it insists, where these functions come into tension upon the adjudicative role of the court to ensure fairness to the individual*". He went to opine that if fairness must mean anything it must include fairness of outcome.

[62] In ***Ex parte*** **Unilever Plc**[75], it was held that for the Crown to enforce a time limit, which for years it had not insisted upon, would be so unfair as to amount to an abuse of power; there was no question of the courts deferring to Inland Revenue's view of what was fair.

[73] *Ibid.*, Para. 69
[74] *Ibid.*, Para. 70
[75] 1996 STC 681

[63] In **Coughlan**, Lord Woolf opined[76]:

> "*Where the court considered that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.*"

[64] Once the Applicant establishes that he had the benefit of a legitimate expectation that was substantial, the burden then shifts to the public authority to justify the frustration of the legitimate expectation. It is for the authority to identify any overriding interests on which it relies to justify the frustration; it would then be a matter for the Court to weigh the requirements of fairness against that interest.[77]

[65] The public body must show not only the existence of an overriding policy to justify the breach but also that its response is objectively justified as a proportionate measure in the circumstances, *i.e.* that its response is the best it reasonably can do for the promises. Proportionality is a matter for the Court; it is for the Court to weigh the options of keeping the promise against the reasons for breaching it.

[66] In **Paponette v The Attorney General of Trinidad and Tobago** Lord Dyson opined:

[76] [2001] QB 213, para. 57
[77] R (Bancoult) v Foreign Secretary

It is for the authority to identify any overriding public interest on which it relies to justify the frustration of the expectation. It will then be a matter for the court to weigh the requirements of fairness against that interest.

If the authority does not place material before the court to justify its frustration of the expectation, it runs the risk that the court will conclude that there is no sufficient public interest and that in consequence its conduct is so unfair as to amount to an abuse of power. The Board agrees with the observation of Laws LJ in R (Nadarajah) v Secretary of State for the Home Department [2005] EWCA Civ 1363 at [68]:

'The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances.'

He further opined[78]:

"*As Scheimann LJ put it in the R (Bibi) v Newham Borough Council 2002 1 WLR 237, para. 59, where an authority decides not to give effect to a legitimate expectation it must 'articulate its reasons so that their propriety might be tested by the courts'*

In **R (Bibi)**, *supra*, Schiemann LJ also held that a public authority is under a duty to consider a legitimate expectation in its decision-making process. The Judicial Committee of the Privy Council approved this principle in **Paponette** and held that where an authority, in considering whether to act

[78] Page 231, para D

inconsistently with a representation or promise which it has made, and which has given rise to a legitimate expectation, good administration as well as elementary fairness demand that it take into account the fact that the proposed act will amount to a breach of the promise. As Dyson JSC succinctly made the point:

"*To put in public law terms, the promise and the fact that the proposed act will amount to a breach of it are relevant factors which must be taken into account.*"

ANALYSIS

- *Legitimate expectation that the Government would make good the deficit in CLICO's Statutory Fund and that the Company would be returned to stability and would be placed in a position to fulfil all of its obligations*

[67] I want to start from the point that Mr. Newman on the 23rd November, 2012 during the course of oral arguments, conceded that the previous Government had made promises to the Claimants which amounted to a legitimate expectation of a substantial benefit. The Claimants were clear as to the terms of the legitimate expectation created by the promises of the previous Government; that the Government would make good the deficit in CLICO's Statutory Fund; that the Company would be returned to stability and would be placed in a position to fulfil all of its obligations including that of the Claimants.

[68] It was incumbent upon the Defendant to justify a breach of the legitimate expectation that the Government would make good the deficit in the Statutory Fund. However, no evidence has been adduced before me by the

Defendants to explain or justify why this promise was not kept. In fact, as noted earlier, although the bailout plan put the Claimants to an election to either chose the Government's bailout plan or stand on their rights against the Statutory Fund, no information was forthcoming about the status of the Fund until very late in these proceedings. Even then, the statements furnished on the 16th November, 2012 and filed on the 19th November, 2012 which showed a deficit in the Statutory Fund cannot be relied upon by this Court for the following reasons:

i. They were unaudited accounts; and,
ii. They had not been approved by the Central Bank and CLICO's external auditors;

[69] **SECTION 37(1)** of the **INSURANCE ACT** provides for the establishment and maintenance of a Statutory Fund for long-term insurance business. Further, by **SECTION 37(7)**, such insurance company is required to put in trust assets in the Statutory Fund equal to its liability and contingency reserves. There is also a requirement that quarterly returns be submitted to the Central Bank in respect of the assets in the Fund. **SECTION 46(1)** of the **INSURANCE ACT** provides that assets of a Statutory Fund shall not be invested except in the assets and in such manner as specified in the Second Schedule. However, **SECTION 46(2)** provides that the Minister may on the recommendation of the Central Bank, by Order, amend the Second Schedule.

[70] It has been established from the evidence before me that CLICO had assets worth several billion dollars which could not be put into the Fund because of the restrictions imposed by **SECTION 46(1)** of the **INSURANCE ACT**. In order to fulfil this legitimate expectation it was open to the Minister on the

recommendation of the Central Bank to amend the Second Schedule so as to include assets in the Fund not currently permitted to be in the Fund, or to explain the overriding public interest which prevented the Government from so doing. No reason has been put forward by the Defendant as to why this step was not taken in order to fulfil the legitimate expectation aforesaid.

The Claimants' argument on this point was that all assets should go into the Fund in order to satisfy **SECTION 37(1)**[79] of the **INSURANCE ACT**. In my view, given the legitimate expectation which the Defendant agreed had been created as a result of the Government's promise to make good the Statutory Fund, the Government was required to fulfil the promise or to indicate the overriding public interest which justified resiling from the promise; this they have not done. They are therefore in breach of this legitimate expectation.

[71] It is also clear from the evidence before me that from the time the new bailout plan was devised by the Government, the Claimants were asked to either give up their rights against the Statutory Fund and CLICO and take up the Government's bailout plan or stand on their rights. This was a condition of the bailout when it was first rolled out in September, 2010 and when it was revised in September 2011. An initial deadline for this plan was 30th June 2012 which was subsequently extended to 30th November 2012. Up to two weeks prior to the November 2012 deadline no information as to the status of the Fund and the rights that the Claimants were being asked to give up was forthcoming from the Government. This was so despite numerous requests from the Claimants' Attorneys before the Application for Leave was filed, after my Court Order of the 19th April 2012 granting the Claimants leave and ordering that the Defendant disclose to the Claimants the information that

[79] Every company registered under this Act to carry on long term insurance business or motor vehicle insurance business, or both,, shall establish and maintain a statutory fund in respect of each such class of business.

they sought. I consider this to be wholly unfair and in the circumstances not proportionate.

[72] Mr. Dookeran outlined the three (3) options before the Government at the time that they were deciding upon a plan to deal with CLICO[80]. None of the options involved fulfilling the legitimate expectation of making good the deficit in the Statutory Fund.

- *Legitimate expectation that the Claimants' assets would be protected and funds guaranteed*

[73] With respect to the legitimate expectation that the Claimants' assets would be protected and their funds guaranteed, I have carefully considered the matters put forward by the Defendant as justification for the Claimants' legitimate expectation of a substantial benefit under this head. In granting Leave for the Claimants to pursue Judicial Review, I held that the relevant date of decision was September 2011 when the revised plan was given by Mr. Dookeran, the then Minister. The onus fell to the Defendant to adduce evidence to show that there was an overriding policy reason for frustrating the legitimate expectation of the Claimants.

[74] As set out above, Mr. Dookeran outlined the public interest factors considered by the Government upon assuming office in 2010; however, he does not give the Government's assessment of the public interest factors in August-September 2011 which justified the breach of the legitimate expectation. Indeed, the evidence before me suggests that there was some fiscal improvement by August 2011 with respect to the Government's finances and

[80] Para. 94 of the Affidavit of Winston Dookeran

CLICO's balance sheet. As previously noted, Mr. Dookeran himself stated in Parliament that the balance sheet deficit of CLICO had been reduced to $3.1B from $6B the previous year. Additionally, the fiscal out turn for the years 2009/2010 and 2010/2011 were better than budgeted for at the start of each year. The IMF Report produced in March, 2011 noted that "the fiscal out turn for the 2009/2010 fiscal year was 2.7% of GDF better than expected". The Central Bank's Economic Bulletin of July, 2011 also recorded a surplus of $1.2B for the first nine months of the year as opposed to a budged $5.5B deficit.

[75] In light of the above, it is clear that by 2011 the circumstances had changed for the better. I bear in mind that the Defendant has to show, even in relation to 2010, that there was a material change in circumstance between the making of the promise and when they were deciding whether to resile from it. As outlined above, they have not done so. There was no new circumstance in 2010 such as to justify resiling from the promise. The previous Government was aware of all of the conditions that were present at the time the promises were made and they had actually been fulfilling those promises up to early 2010.

[76] I do not accept the submissions of Mr. Newman that this matter lies within the macro-economic/political field and for that reason I should defer to the Government's decision. As **Coughlan** illustrates, where a public authority has given a promise which has engendered a legitimate expectation of a substantial benefit and that expectation has been breached, it is for the Court to examine all of the circumstances in order to determine whether there was an overriding public interest so as to justify the breach.

[77] Mr. Newman had urged that the Government had taken into account the fact that promises had been made by the previous Government and that the new plan that the present Government was proposing would be breaking those promises. It was proposing would be breaking that promise. He insisted that the evidence showed that the Government had given the promises of the previous administration proper weight in determining that they would have to breach the promise.

[78] With respect to the public pronouncements made by the Prime Minister and the Minister of Finance which suggested that the promises made by the former Minister of Finance and Governor of the Central Bank did not amount to guarantees to the policyholders that their monies would be paid in full[81], Mr. Martineau and Mr. Newman invited me to ignore those statements, and to regard them as no more than political exchanges with the Opposition. But Mr. Dookeran himself indicated that those statements amounted to "the thinking of the Cabinet". I have to take him at his word. The statements were made in Parliament and in Mr. Dookeran's case at a Media Briefing. Indeed, until the 23rd November, 2012 that appeared to be the position of Mr. Dookeran and of the Defendant. Throughout Mr. Dookeran's affidavit, he speaks of "statements" made by the previous Government and the "expectation" of the policyholders; at no point in time does he ever acknowledge that the statements amounted to promises by the previous Government which gave rise to a legitimate expectation and that the new Government had to address its mind to the fact that it was breaching this legitimate expectation with the new plan.

[81] VM16, p80, Affidavit of Winston Dookeran WD12, p. 25, VM58, p.197

In the circumstances I hold that the Defendant has failed to show on the evidence that:

(a) it took into account the fact that promises had been made by the previous Government,

(b) that it took into account these promises during its decision making process and gave due weight to them,

(c) that it took into account the fact that the promises gave rise to legitimate expectation and that the Government's new bailout plan amounted to a breach of these legitimate expectations.

[79] In the circumstances, I hold that the Government's bailout plan was in breach of the Claimants' legitimate expectation of a substantial benefit.

[80] The Claimants also challenged the decision on the basis of illegality, inequality of treatment and irrationality. In light of the decision that I have come to on legitimate expectation, I will not go on to consider these points. It is clear that at this stage that the Government's bailout plan is almost complete. Over ninety-two percent (92%) of the EFPA and other short term investment product holders have adopted the plan and have chosen to assign their rights in the Statutory Fund to the Government. It is not necessary in the circumstances to deal with the issue of whether any aspect of the plan is illegal. I also decline to deal with the issue of the inequality of treatment meted out to the EFPA policyholders.

REMEDIES

[81a] From the evidence before me, it would appear as at the 14th November, 2012 14,271 persons or 91.4% of persons holding short term investment products (STIPs) with CLICO have signed on and accepted the Government's revised payout plan.[82] This number includes twenty two (22) of the Claimants who had originally been part of this action. As a result, the cost of giving effect to the legitimate expectation of the remaining policyholders, would be significantly reduced. It is expected that the liabilities to the remaining Claimants would be but a small portion of the obligation undertaken by the Government for the other EFPA holders. Additionally, this Order only pertains to the Claimants in this matter and does not apply to other EFPA holders at large who were not parties to this action.

[81b] During the course of argument before me, Mr. Newman submitted that the cost of the bailout plan thus far to the Government is 19 billion dollars. I also note that the policyholders who have taken up the Government's offer have assigned their rights to the Statutory Fund to the Government in exchange for the settlement of their claim. Additionally, the bailout plan contemplates that the Government will recover monies expended by the sale of some of CLICO's assets as well as the recovery of debts owed to CLICO.

[82] In the circumstances, I hold that the Claimants are the beneficiaries of legitimate expectations engendered by representations made to them by or on behalf of the Government that (i) the Government would ensure that their funds in CLICO would be safe and that it would guarantee repayment of all

[82] Affidavit of Maurice Suite, para. 5

monies due to them; and (ii) the Government would make good the deficit in the Statutory Fund.

[83] Accordingly,

i. It is Declared that the Claimants are the beneficiaries of legitimate expectations engendered by representations made to them by or on behalf of the Government that (i) the Government would ensure that their funds in CLICO would be safe and that it would guarantee repayment of all monies due to them; and (ii) the Government would make good the deficit in the Statutory Fund.

It is ordered that:

ii. The Defendant do make good the said legitimate expectation by making suitable arrangements to ensure that the Claimants, less those who have already accepted the Government's offer, receive a sum equal to one hundred percent (100%) of CLICO's contractual liability to them;

iii. Interest at the rate of three percent from September, 2010 to 12th March, 2013 be paid on the said sum.

iv. The Defendant to pay the Claimants' costs fit for two (2) Senior Counsel and one (1) Junior Counsel, to be assessed in default of agreement by the Registrar.

JOAN CHARLES

JUDGE