The Republic of Trinidad and Tobago

In the High Court of Justice

Claim No. CV2012-05191

BETWEEN

CL FINANCIAL LIMITED

First Claimant

AND

COLONIAL LIFE INSURANCE COMPANY (TRINIDAD) LIMITED

Second Claimant

AND

PROMAN HOLDING (BARBADOS) LTD

First Defendant

PROCESS ENERGY (TRINIDAD) LIMITED

Second Defendant

AND

LAWRENCE DUPREY

Third Defendant

Appearances

Claimants: **Fyard Hosein SC** and **Deborah Peake SC** leading Kerwyn Garcia and Sasha Bridgemohansingh instructed by Luana Boyack

1st and 2nd Defendants: **Christopher Hamel Smith SC** leading Jonathan Walker and David Hamel Smith instructed by Catherine Ramnarine

3rd Defendant: No appearance

Before the Honourable Mr. Justice Devindra Rampersad

Dated 30 September 2021

FINAL JUDGMENT

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Background

1. This case seeks to set aside a Purchase & Sale Agreement dated 3 February 2009, which the court will refer to as **the PSA,** and the subsequent sale and transfer of shares between the first claimant, which the court will refer to as **CLF** in this judgment, and the first defendant, which the court will refer to as **Proman**. The PSA was an agreement to sell to Proman 84,986,145 ordinary shares in the second defendant for the sum of US $46,500,000. That sale was completed and the shares were transferred. At the time, the second defendant's name was CLICO Energy Company Limited but since Proman's subsequent acquisition of it, its name was changed as in the pleadings and the court will refer to it as **PETL**. The PSA was executed on CLF's behalf by the third defendant, whom the court will refer to as **Duprey** and who was the Chairman of CLF at that time.

2. As a result of that PSA, Proman is now the sole owner of the second defendant. The claimants now seek to have the PSA set aside because:

    2.1. **The shares forming the subject matter of the PSA where alleged to be legally and beneficially owned by both CLF and the second claimant, which the court will refer to as CLICO, as a result of an Agreement for Sale and Declaration of Trust dated 31 December 2006 and executed 3 May 2007[1] between CLF and CLICO for 17% of PETL's shareholding**.

        2.1.1. The claimants assert that Duprey, acting as Chairman of CLF, did not have the authority to enter into the PSA on CLICO's behalf. In response, Proman asserts that the purported sale of 17 % of PETL's shares by CLF to CLICO was in breach of PETL's Shareholder's Agreement and as such, was unlawful. For that

[1] Annexed to the witness statement of Jennifer Frederick as "JF16"

reason, Proman and PETL assert that CLF remained the owner of those shares and as such had the authority to sell same through its authorized agent and Executive Chairman, Duprey;

2.2. ***Additionally or alternatively Duprey acted fraudulently, illegally and in breach of trust and his fiduciary duties and the PSA ought to be set aside because***:

2.2.1. Prior to the execution of the PSA and continuing thereafter there was in existence a Memorandum of Understanding made between the Government of the Republic of Trinidad and Tobago, which the parties and the court have referred to as **the GORTT**, and CLF dated 30 January 2009 (the MOU). According to the claimants, the MOU imposed certain requirements upon CLF when disposing of assets. Those requirements were circumvented by Duprey's actions ;

2.2.2. The PSA was executed for a consideration of US $46,500,000.00. By valuation dated December 2008, CLICO's 17% shareholding in PETL was given an estimated value of US $68 million. A valuation commissioned by the claimants and dated 7 December 2012 further fixed the fair market value of the 51% shares in PETL, the shares forming the subject of the PSA, at US $130 million. For that reason, and having regard to the state of the PETL's balance sheet for the period ending 31 December 2008, it is asserted that the PSA was executed for a consideration significantly less that the fair market value of the shares in circumstances where Duprey ought to have been aware of the same;

2.2.3. Duprey's fraudulent/illegal acts were allegedly done with the knowledge and collusion of Proman.

2.3. ***Proman has acted in a manner that is oppressive or unfairly prejudicial to the interests of the claimants/shareholders of PETL and as such they are entitled to relief pursuant to section 242 of the Companies Act***.

2.4. ***Negligence .***

The Parties

3. CLF is a limited liability company incorporated under the laws of Trinidad and Tobago. At the material time, CLF owned over 95% of the issued share capital of CLICO. CLF is, and was at all material times, the parent company of a group of companies known as the CLF Financial Group of Companies that includes CLICO, British American Insurance Company Limited, which the court will refer to as **BA**, and CLICO Investment Bank, which the court will refer to as **CIB**. CLF's affiliate companies by way of substantive shareholdings include Republic Bank Limited [**RBL**], Methanol Holdings Trinidad Limited [**MHTL**], Caribbean Money Market Brokers Limited [**CMMB**], Home Construction Limited and PETL.

4. CLICO is a limited liability company incorporated under the laws of Trinidad and Tobago. CLICO is and was all material times, registered under the Insurance Act, Chapter 84:01 ("the Insurance Act") to carry on insurance business and is and was at all material times regulated by the Central Bank of Trinidad and Tobago (CBTT) under the relevant provisions of the Insurance Act. Since its incorporation in 1936, CLICO has carried on insurance business in Trinidad and Tobago.

5. Proman is a company incorporated under the provisions of the laws of Barbados. It falls under the umbrella of the Proman Group, the holding company for which is Proman Holding AG. Other companies in the group, apart from Proman, include **Proman AG** and **OPAG**. The original shareholders' agreement between CLF in

relation to the PETL shares was with Proman AG who later transferred those shares, with the consent of CLF, to Proman.

6. PETL is and was at all material times a company incorporated under the laws of Trinidad and Tobago, formerly named Clico Energy Company Limited as mentioned above. As at February 3, 2009, the claimants say that the shareholders of PETL were as follows:

   6.1. CLF – 34%

   6.2. CLICO – 17%

   6.3. Proman – 49%.

   Proman says that the CLICO's alleged entitlement to this 17 % is in dispute and that the true shareholding then was 51% CLF and 49% Proman.

7. PETL had shares in the following companies at the relevant time:

   7.1. Caribbean Nitrogen Company Limited ("**CNC**"), an ammonia production plant in Trinidad;

   7.2. A 27.2% stake in Nitrogen 2000 Limited ("**N2000**"), also an ammonia production plant in Trinidad;

   7.3. A 48.75% stake in Southern Corporation Company ("**SCC**"), a methanol marketing company based in Texas which markets methanol originating from Trinidad; and

   7.4. A 67.50% stake in Industrial Plant Services Limited ("**IPSL**"), a plant services company which provides services to the CNC, N2000 and a Trinidad methanol and ammonia derivatives production facility.

8. Duprey, was at all material times, a director of CLF and CLICO, the chairman of CLF and the chairman of CLICO as well as a CLICO appointed director of PETL. Proman

relied on him being an Executive Chairman – something that seemed to have been accepted across the board prior to the end of January 2009.

9. Gita Sakal, whom the court will refer to as **Sakal**, was the Corporate Secretary of CLF as well as the Corporate Secretary and a Director of PETL.

10. The following persons gave evidence at the trial for the claimants and the emboldened version in brackets would be the manner in which those parties would be referred to in this judgment:

    10.1. Karen Nuñez-Tesheira [**Nuñez-Tesheira**], who was the Minister of Finance for the period November 2007 to May 2010.

    10.2. Wendy Ho Sing [**Ho Sing**] who was the Executive Chairman of CLICO over the period June 5 2015 to June 8 2017. She was also the Deputy Inspector of Financial Institutions at the time of the Memorandum of Understanding.

    10.3. Jennifer Frederick [**Frederick**] who was Director of Compliance and Internal Audit of CLF. She also served as the Corporate Secretary of CLF.

    10.4. Marcus Wide [**Wide**] who was an insolvency practitioner in relation to CLF.

    10.5. Kathleen Mohammed [**Mohammed**] was the CAT Reporter at the Commission of Enquiry into the failure of CLF, CLICO, CIB, BA, CMMB and the Hindu Credit Union Co-operative Society Limited which will be referred to as the **Colman Enquiry**.

11. Joseph Cassidy was the majority shareholder of the Proman Group of companies which includes Proman and was also a director of PETL, CNC, N2000, SCC, IPSL and MHTL.

12. David Cassidy held the position of Managing Director at Proman Group from the date of incorporation to April 21, 2017 and was also Director of Consolidated Energy Limited from May 19, 2014 to April 21, 2017.

13. Other parties referred to in this judgment are as follows:

13.1. Daniel Eggenberger [**Eggenberger**] was a Director of Proman from date of incorporation and remained a director as of September 20, 2018. He was also a Director of Consolidated Energy Limited (**Consolidated Energy**) from October 22, 2008 and remained a director as of September 30, 2018.

13.2. Markus Gresch [**Gresch**] was a Director of Proman as of October 22, 2008 and also a Director of Consolidated Energy from October 22, 2008 to March 25, 2009 and again from July 22 2011.

13.3. Claus Cronberger [**Cronberger**] was the CEO of PETL at the material time.

13.4. Rampersad Motilal [**Motilal**] was the CEO of MHTL and also a director on the Board of CLF.

13.5. Andrew Claudius Musaib-Ali [**Musaib-Ali**] was the director of CLICO from September 7, 1998 to November 1 2001 and a director of CLF from February 6, 2009 to February 12, 2010.

13.6. Bosworth Monck [**Monck**] was, at all material times, a director of CLF.

13.7. Micheal Carballo [**Carballo**] was at all material times, a director of CLF.

14. Karen Ann Gardier was a director of CLICO from May 2, 2005 to February 6, 2009.

15. Clinton Ramberansingh was the CEO of IPSL and also a Director on the Board of CLF.

16. Steven Pollard was the CEO of Caribbean Nitrogen Company Limited, Nitrogen (2000) Limited and together with CNC.

Issues

17. The parties filed an agreed list of issues. To my mind, the main questions would be:

17.1. Whether the purported assignment by CLF to CLICO of certain PETL shares under an Agreement for Sale and Declaration of Trust both dated 31 December 2006 was valid/lawful?

17.2. Whether the Duprey had actual and/or ostensible authority to enter into the PSA and/or to bind CLF and/or CLICO?

17.3. Whether the Memorandum of Understanding (MOU) signed between CLF and the Government of Trinidad and Tobago (the GORTT) created any binding obligations and/or was of any legal effect (i) on the parties thereto and more particularly (ii) on third parties and/or (iii) on the PSA?

17.4. If the MOU created binding obligations: (i) what were the obligations of CLF (ii) whether the PSA breached these obligations and, if so (iii) what consequences flow from such breach?

17.5. Whether in any event the PSA was (i) undertaken with a view to evade or circumvent the provisions of the MOU and if so, (ii) what are the consequences of this?

17.6. Whether in entering into the PSA, Duprey acted in breach of his fiduciary duties as a director as set out in Section 99 of the Companies Act? More specifically, whether the PSA was injurious to the commercial interests of the claimants and or entered into for improper purposes?

17.7. If the sale of the PETL Shares was unlawful and or in breach of trust, whether Proman had actual or constructive knowledge of this and or knowingly assisted Duprey in committing a breach of trust and or conspired with and or colluded with him to commit a breach of trust and or breach of fiduciary duties?

17.8. Whether (i) the defendants and/or each of them acted in a manner which effected a result by which the business or affairs of PETL have been carried

on in a manner and/or (iii) the powers of the directors of PETL have been exercised in a manner that is oppressive or unfairly prejudicial or that unfairly disregards the interests of the claimants as (previous) shareholders of PETL?

17.9. What was the fair market value of the PETL Shares at 4 February 2009?

17.10. In the event that the claimants are successful in this action, to what reliefs are they entitled?

The Court's Judgment

18. The trial in this matter lasted for twelve days and the papers comprised over 12,000 documents including pleadings, agreed and unagreed documents and witness statements with exhibits, some of which were duplicated in the bundles of agreed and unagreed documents.

19. It would be impractical to include each and every issue, collateral issue and or point of interest. Instead, the court has focused on the main issues to come to a finding on the claim. In doing so, the court produced a shortened version of its reasons since this principal judgment is over 150 pages long and may be difficult reading for readers whose main concern might be the court's views on the matters. That short version was delivered to the parties on 30 September 2021 and it gave the Order that the court has made in this matter.

20. This full judgment, with a full discussion of all of the case law and issues that the court viewed to be relevant, is now set out and although in reviewing the same there may be minor variations and corrections of the shortened version and a fuller exposition of the court's thought process, the final decision and order remains the same.

Abuse of Process

21. In the amended defence[2], Proman asserted that CLF's current position is inconsistent with that of ***CV2009-00651 Central Bank of Trinidad and Tobago and Colonial Life Insurance Company Ltd v CLF Financial Limited*** and therefore constitutes an abuse of process and it should be estopped from making any allegations.

22. The claimants' attorneys, in their submissions[3], stated that the previous proceedings did not include any of the defendants in the current claim and further, the matter was wholly discontinued by notice of withdrawal dated 27 October 2009. Therefore, the claimants were not estopped from maintaining the current claim. The defendant, however, did not address this abuse of process and estoppel issue in its filed submissions and therefore the court did not feel compelled to consider it.

[This page ends here]

The Evidence

The claimants' evidence

[2] Paragraph 4

23. In support of its claim the claimants filed witness statements from 5 witnesses namely:

23.1. Nuñez-Tesheira;

23.2. Frederick;

23.3. Ho Sing;

23.4. Wide; and

23.5. Mohammed.

24. In addition to the above witnesses of fact, the claimants also relied on the valuation reports of Andrew Robinson.

The Colman Commission of Enquiry Transcripts

25. In his Report on the Hindu Credit Union HCU Report dated 16 July 2014[4], the Honourable Sir Anthony Colman described the Commission of Enquiry that he was appointed to conduct as follows:

> *"A1. By an Instrument of Appointment dated 17 November 2010 H.E. Professor George Maxwell Richards, TC, CMT, Ph.D, President of Trinidad and Tobago, appointed The Hon. Sir Anthony Colman as Commissioner under Section 2 of the Commissions of Enquiry Act. Chap. 19.01, to enquire into the failure of CLF Financial Ltd, Colonial Life Insurance Company (Trinidad) Limited, Clico Investment Bank Ltd, British American Insurance Company (Trinidad) Ltd, Caribbean Money Market Brokers Ltd (collectively the "CLICO Companies") and the Hindu Credit Union Co-operative Society Ltd and specifically into (i) the circumstances, factors, causes and reasons leading to the January 2009 intervention by the Government of Trinidad and Tobago for the rehabilitation of the CLICO Companies and (ii) the*

[4] http://www.ttparliament.org/documents/2243.pdf

causes, reasons and circumstances leading to the deterioration of the financial condition of the CLICO Companies and the Hindu Credit Union ("HCU"), which threatened the interest of depositors, investors, policy holders, creditors and shareholders of those companies in accordance with Term of Reference attached to this Report at Appendix A."

26. The Commission heard evidence and submissions for 85 days out of which 27 days related to the HCU and the remaining 58 days were spent in relation to CLICO[5]. That Commission yielded 2 reports namely the one on HCU, referred to above, and the other on CLICO. In respect of the latter, witness statements were presented on and behalf of Michael Carballo, Gita Sakal and Rampersad Motilal, amongst others, and they were faced with cross examination on those statements. That cross examination included cross examination conducted by Mr. Christopher Hamel Smith SC on behalf of Proman, who was also represented by Mr. Hamel-Smith SC at the Commission for a period of time.

27. The claimants provided multiple Hearsay Notices in relation to the transcripts of the evidence of Sakal, Motilal and Carballo.

28. In this court's written ruling on the evidential objections raised, this court ruled that the evidence above was admissible under section 40 of the Evidence Act. Therefore, reasons advanced for the failure to produce these witnesses at the trial, on the grounds that Carballo had refused to give evidence in these proceedings and Sakal and Motilal could not be found despite using reasonable diligence, were ruled to not be necessary since the transcripts of their evidence were properly admissible otherwise. The court opined, however, that it was not convinced of the reasons presented for the non-attendance of those witnesses directly but, nevertheless, the evidence in their transcripts were admissible.

[5] Ibid at paragraph A8

Obviously, their non-attendance deprived the court of hearing and seeing them give evidence first hand and Senior Counsel for Proman and PETL expressed a similar concern, after describing the admission of their evidence to have been on the most technical of grounds.

29. Senior Counsel for Proman complained, justifiably, that the transcripts were incomplete and amounted to cherry picking by the claimants since the cross-examination by other parties, including himself, were excluded. As a result, the court was handicapped as it did not have his cross examination of these parties except for that of Motilal. At that point, the court invited Senior Counsel to consider whether he wished to put in the rest of the cross-examination in so far as they were relevant since it was because of their irrelevancy that Senior Counsel for the claimants, Mr. Hosein, said that he chose to exclude the entirety of the cross examination. Mr. Hamel –Smith indicated that he would look at it and let the court know. Maybe through inadvertence, the court did not return to the point and it was not raised any further. However, the court notes that the Proman was given an opportunity to consider the impact of the missing cross examination and to have it put into evidence if it was thought necessary subject to any cross examination arising out of that exercise. Since that opportunity was not availed of, the court is of the respectful view that any criticism of the selective annexed transcripts must be viewed against this background and dismissed.

Criticism of the Claimants' evidence

30. It was submitted that the claimants suppressed or concealed important and relevant material:

    30.1. There was a critical document which proved that CLF had provided to the Central Bank a listing of CLF's assets prior to the signing of the MOU. This was an email from Carballo sent on Thursday, 29 January 2009 at 12:08 PM to Ho Sing at the Central Bank;

30.2. The claimants failed to disclose the action brought by CLICO and the Central Bank which was premised to a major part on Duprey exercising significant, if not overwhelming, control over CLF and CLICO;

30.3. The claimants' attorney-at-law misrepresented the confidentiality of the arbitration award in the arbitration proceedings between the claimants and one of Proman's affiliate with respect to MHTL. In fact, the award was not confidential and senior counsel placed reliance in his submissions on a letter purportedly attached to the submissions as "A". Regrettably, however, it was not so attached and did not form a part of the record in these proceedings. The upshot of the submission, though, was that as a result Proman was wrongfully prevented from cross-examining Mr. Robinson, the claimants' valuator, on a key part of his experience in determining the appropriate discount for lack of marketability and which therefore related directly to his creditability on this very important issue;

30.4. The claimants' expert did not present his material in an objective and fair manner but instead, selected choice snippets without indicating the full picture to the court. It was submitted that he misapplied material and took some material out of context. He ignored clearly relevant material and resorted to other material that was not applicable or appropriate. He deliberately cropped diagrams from the Energy Map of Trinidad and Tobago in order to omit those years when the volume of gas had been in short supply in order to distort or create a misleading impression that there was no risk to the ammonia companies' operations.

The defendants' evidence

31. Proman and PETL were represented by the same counsel and firm of attorneys and presented evidence from two of Proman's directors - Joseph Cassidy and his son David Cassidy.

32. Duprey did not participate in the trial. On the morning of the second day of the trial, Mr. Russell Huggins, attorney-at-law, attended, amicus curiae, and presented a letter from the third defendant indicating his inability to attend the trial. Of course, the third defendant still had an attorney on record and who still remains on record up to today. That attorney did not attend court at the trial nor did he present anything to the court that would be of assistance to it in relation to the third defendant. No application was made to come off record and, despite his obligations under the Legal Profession Act and the provisions of the Civil Proceedings Rules 1998, as amended, counsel for Duprey did not fulfill his duty as an officer of the court. Duprey's said letter, presented by Mr. Huggins, did not assist the court with respect to the evidence that it had to deal with. The letter contained a reason for the third defendant not attending the trial – due to his challenged health at the time – but it was not supported by any medical evidence to that effect so very little weight was placed on the same as the letter seemed to be more of an afterthought rather than a genuine attempt to assist the court. The court will speak about the third defendant's non-attendance and failure to participate later on in this judgment.

The National and International Situation at the time

Karen Nuñez-Tesheira

33. From November 2007 to May 2010, Nuñez-Tesheira was the Minister of Government in Trinidad and Tobago with the responsibility for Ministry of Finance. She was responsible, among other things, for finance-related matters of

the Government of Trinidad and Tobago (GORTT), which included at the time, financial institutions, securities industries, credit unions and insurance legislation. With respect to policy, she was responsible for the development and reform initiatives in the financial section, as well as policy regarding financial institutions, securities and insurance industry.

34. In her witness statement[6], Nuñez-Tesheira referenced the fact that although the GORTT did not have a full understanding of the financial state of CLF and its affiliated companies, the GORTT's policy was to contain the systemic and contagion risk which the CLF group of companies posed to the economy of Trinidad and Tobago. She further stated that there was an ongoing global financial crisis and that oil prices had virtually collapsed. Consequently, the GORTT recognised the need to protect policyholders and depositors of CLICO and CIB respectively and it was for those principal reasons that GORTT made the decision to intervene to ensure the financial integrity of CLICO and BA. Further, the GORTT appreciated that because of the downturn in the world economy at that time, the sale of assets would not necessarily take place in the short term[7].

35. In fact, the GORTT was satisfied that an intervention by itself and CBTT in CLICO, BA and CIB was necessary for the following reasons:

    35.1. Key companies in the CLF Group, namely CLICO, CIB and BA were experiencing serious solvency issues with assets of the companies within the Group being too encumbered to meet liquidity needs and deficits in CLICO's, CIB's and BA's respective Statutory Funds being in the order of several billions of dollars.

[6] At paragraph 12

[7] This is a crucial assertion as it went to the expectation that while assets were to be sold, it was not to have been sold to the detriment of the companies involved

35.2. Those solvency issues created a real potential for systemic risk to the financial system given that the CLF Group owned assets reportedly worth in the vicinity of TT$101 billion, which was the equivalent of 76% of GDP, of which 43% was owned by companies in the Group that operated in the financial sector.

35.3. Among those companies was RBL whose stability could have been threatened by insolvency within the Group, news of which could have triggered a run on the bank.

35.4. The risk to the financial system was heightened by the tremendous exposure of other key institutions in the country such as First Citizens Bank Limited, the Unit Trust Corporation [UTC], the National Insurance Board [NIB] and the National Gas Company [NGC].

Joseph Cassidy

36. At the time of the events that gave rise to this action, Joseph Cassidy was the majority shareholder of the Proman Group and a director of PETL, CNC, N2000, SCC, IPSL and MHTL as mentioned before.

37. By the time Proman purchased CLF's shares in the company, PETL had ceased taking an active role in the development of projects. As such, while it continued to provide some support services for some of the related companies, PETL was essentially an investment holding company for the investments in CNC, N200, IPSL and SCC.

38. Joseph Cassidy stated in his witness statement that some of the principal factors that he understood to adversely impact the CLF Group (and CLICO in particular) and contributed to its liquidity crisis included:

38.1. A change in the regulations affecting financial institutions. Prior to 2008 RBL was the main financier to the CLF Group. However the enactment of

the Financial Institutions Act brought sweeping changes including reducing the permitted exposure to a related party. These changes and the consequences of them for the CLF Group were summarised in a letter from RBL to CLF dated 5 December 2008.[8]

38.2. The world financial markets crashed which occurred in 2008. The effects of this crash were severe and far-reaching. It triggered a global financial crisis that resulted in the collapse of significant institutions such as Lehman Brothers, Bear Stearns and AIG. For the CLF Group, the most immediate consequence of this crash in the world financial markets was that it became virtually impossible to raise any capital or financing on the international market.

38.3. The collapse of commodity prices which occurred in late 2008. By this time, the CLF Group was heavily reliant on the dividends that it received from its investments in the petrochemical sector. In the years before the financial crisis, commodity prices were steadily increasing. However, by the beginning of the fourth quarter of 2008 these prices started to collapse rapidly – in the case of ammonia, falling from a high of US$900 per metric tonne in September 2008 to US$100 per metric tonne in January 2009[9]. This collapse had not been predicted, and no one knew whether, or to what extent, commodity prices might decline even further or how long it might take before commodity prices began to recover from this decline. This precipitous drop in commodity prices negatively affected what had previously been a reliable source of revenue for the CLF Group and

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[8] A true copy of this letter dated 5 December 2008 was annexed to the witness statement of Joseph Cassidy and marked "JMC12"

[9] The evidence in fact revealed that the low point was in December 2008 and was on the slow rise by January 2009.

significantly reduced the value of its investments in the energy sector, which in turn had implications for CLICO's statutory fund. This severe drop in price affected the value in companies in the ammonia and methanol industry and is best illustrated by the drastic decrease in value in the share price of those international ammonia and methanol producers which were also publicly traded companies. Between the period 30 June 2008 and 2 February 2009 the share prices for these public traded companies decreased drastically with the decrease ranging between approximately 60% to 75%.

39. In the case of CLICO, at a meeting held on 16 January 2009[10], CLICO informed the Central Bank that as at 31 December 2008, there was a deficit in CLICO's statutory fund of $2.5 billion.

40. It was noted that according to a memorandum from the Inspector of Financial Institutions to the Governor of the Central Bank dated 12 February 2009, a draft computation that was prepared by CLICO was presented to the Central Bank during the week of 26 January 2009 and showed that the Statutory Fund deficit was TT5.1 billion as at 31 December 2008, but that by letter dated 10 February 2009, CLICO revised this deficit to TT$10.3 billion. These figures were in line with a review of CLICO's financial position by the accounting firm KPMG Canada, which had been appointed to examine the books and records of CLICO and provide an evaluation of the deficiencies in its financial conditions. As reported in a document entitled, "Note on Comprehensive Approach to CLF Financial, CLICO and related matters," KPMG found that the deficiency in CLICO's balance sheet (taking into account the impairment of assets and correcting for the understatement of

[10] The minutes of this meeting held on 16 January 2009 was annexed to the witness statement of Joseph Cassidy and marked "JMC14"

liabilities) was $4.5 billion while the deficiency in its statutory fund was $9.1 billion.[11]

David Cassidy

41. At the time of the events that gave rise to this action, David Cassidy held the position of Managing Director at Proman AG.

42. David Cassidy stated that the transaction took place during the collapse of the world financial markets in 2008 and there was severe and extreme impact that this had on the commodity markets in late 2008. In fact, he stated that this crisis was considered by many to have been the worst financial and economic disaster since the Great Depression in the United States of the 1930s and triggered the longest recession in the United States since World War II. It became virtually impossible to get credit and share prices plunged.

43. He further described the market crash by stating that major investment banks like Lehman Brothers and Bear Stearns were put out of business overnight, while the largest insurer in the United States, AIG, required a bail out from the United States Government and was eventually sold off. The values of companies in the commodity business were also severely affected and this may be seen from the sharp collapse in the prices at which shares in publicly listed companies that produced ammonia or methanol were traded. According to information that was available through Swissquote[12], between 30 June 2008 and 2 February 2009, the

[11] A copy of this memorandum entitled *"Note on Comprehensive Approach to CLF Financial, CLICO and related matters"* was annexed to the witness statement of Joseph Cassidy and marked "JMC15"

[12] A Swiss based bank that collates and provides market information, including stock prices, to investors

prices at which shares in the following public companies were traded decreased as follows[13]:

43.1. Methanex – by 74.66%

43.2. Yara – by 69.40%

43.3. PCS – by 61.26%

43.4. Norsk Hydro – by 68.35%

43.5. Celanese – by 77.09%.

Conclusion

44. It is patently obvious from this evidence from these three major players in this matter that these were highly unusual and unprecedented times – "*the worst financial and economic disaster since the Great Depression*" as noted by David Cassidy. That was over seventy years ago.

45. The local economy was placed in extreme jeopardy by the potential collapse of the CLF Financial Group together with its brand and name at a time when much of the world's financial markets were already on their knees. As emphasized by Nuñez-Tesheira, the GORTT's intervention was seen as crucial to the support of the financial system and therefore quick and decisive action had to be taken to prevent its collapse.

PETL

46. Joseph Cassidy gave a history of the company in his witness statement. That history is not important to the issue for this court's determination and the court

[13] Copies of the pricing information for traders in shares of these companies over the period June 2008 to 2 February 2009 were annexed and marked "DJC2" to the witness statement of David Cassidy.

does not feel compelled to delve into it. What the court does recognize, however, is that at the material time, PETL was a holding company whose primary income was derived from dividends from shareholding in its investments. In addition, it earned some income from the provision of technical and project management services though that was a less prominent aspect of the company. As noted in the valuations before the court, PETL provided technical and project management services to companies in the petrochemical industry and had investments in the following companies[14]:

46.1. A 30.28% stake in CNC;

46.2. A 27.2% stake in N2000;

46.3. A 48.75% stake in SCC; and

46.4. A 67.50% stake in IPSL.

47. PETL was a high yielding dividend providing company to its shareholders and that fact is not in dispute. As a result, at the time, it was a valuable asset in the CLF Group and, importantly, it was not encumbered or pledged in any way so that it was available for immediate disposal.

The Shareholders' Agreement (SHA)

48. CLF and Proman AG, at the time, signed a shareholders' agreement [the **SHA**] on 21 November 2000. That was meant to regulate their relationship in respect of their PETL shareholding. As Joseph Cassidy said in his witness statement:

> *"34. …. Proman AG and CLF had a Shareholders' Agreement ("the PETL SHA") which sought to regulate their respective rights and responsibilities as shareholders of PETL. The terms of the PETL SHA dealt with a variety of*

[14] These companies were defined above in "The Parties" section

governance matters for the company and in particular set out the circumstances in which one shareholder would be required to sell its shares to the other, restricted either shareholder from transferring or selling any of their shares without the prior written consent on the other and provided that each shareholder had the option to exercise pre-emptive rights anytime that the other shareholder was considering selling their shares"

49. The SHA acknowledged the initial subscription of 10 million shares in the proportion of 51% to CLF and 49% to Proman AG. The SHA provided, amongst other things:

> *"6.1 **<u>No Transfer Permitted</u>** - Except as hereinafter provided in this Agreement, no Shareholder shall transfer by sale or gift, or in any way bequeath, or encumber by pledge, assignment, mortgage or charge, or otherwise dispose of or cease to be the holder of (the foregoing being collectively referred to in this Article as a "transfer") any of the Shares of which it is at any time the registered or beneficial owner, without the prior written consent of the other Shareholders, **which consent shall not be unreasonably withheld**.*
>
> *6.2 **<u>Party to Shareholders' Agreement</u>** – In the case of any permitted transfer to any person other than another Shareholder, no such transfer shall be made, shall be effective or shall be registered on the books of the Company onto the proposed transferee becomes a Shareholder Party to this agreement by executing this Agreement and or such other instruments as counsel for the Company shall advise as being necessary or desirable."*

50. This obviously put restrictions upon both shareholders in relation to purported transfers to third parties as, in this case, CLICO. The court, however notes, that consent for the transfer to third parties cannot be unreasonably withheld and the court further notes that Proman has never indicated any reason to withhold

consent at all. It therefore lies with the claimants to satisfy the requirements of this section of the SHA to complete the transfer if they so desire.

51. The next important portions of the SHA are set out below as they inform the process to be followed in the event of bankruptcy and the right of first refusal. Only the portions relevant to this case are reproduced.

52. Article 7 deals with the situation that must have been playing in Proman's collective representative's minds as to whether CLF was going to be declared bankrupt or was going to take steps to voluntarily dissolve or windup in light of its liquidity problems and that of the other associates in the group. For that reason, the correspondence amongst the major thinkers in Proman prior to the sale involved a consideration of whether CLF had reached a default position and that was reflected in the wording used in the eventual SPA.

> *"ARTICLE 7 – BANKRUPT AND DEFAULTING SHAREHOLDER*
>
> ***7.1 <u>Events of Default</u>*** *– In the event that a Shareholder commits any of the following acts, such as Shareholder shall be deemed a "Seller":*
>
> *(a) is declared bankrupt, makes an assignment for the benefit of creditors and has a receiving order made against it, or*
>
> *(b) has taken steps to voluntarily dissolve or wind-up, or a court of competent jurisdiction requires it to be wound-up; or*
>
> *…*
>
> *7.2 Option to Purchase Shares*
>
> *(a) Option to purchase shares – The other Shareholders shall have the option but not the obligation to purchase some or all of the Shares owned by the Seller, unless otherwise agreed among them, on a pro rata basis equal to the percentage of the aggregate number of Shares of all classes*

then held by each Shareholder other than the Seller, which option shall be exercised by giving written notice to the Seller and to the Company within thirty (30) days (the "Option Period") of receipt of the written notice and confirmation referred to in Section 7.1 hereof. The Shares shall be purchased for a price and in the manner calculated and set forth in Sections 7.3 through 7.6 hereof.

….

7.3 Purchase Price *- The purchase price for any Shares to be purchased pursuant to the provisions of this Article 7 shall be equal to the Fair Market Value of such Shares at the date that written notice is given by the purchasing Shareholders or the Company as the case may be (hereinafter referred to as the "Purchaser") of their/its intention to purchase the Shares of the Seller. If the Purchaser and the Seller are unable to agree within a period of 14 days following the expiry of the Option Period, or the Subsequent Option Period if there is one, as to the Fair Market Value of the Shares to be purchased, such determination shall be made by the auditors of the Company (the "Auditors") within a further 30 day period. The Auditors shall use generally accepted valuation principles and definitions of Fair Market Value, being that highest value at which two unrelated Parties may transact having no compulsion or obligation to do so in a free and open market.*

7.4 Additional Valuation *– If the Parties do not agree with the valuation made by the Auditors within fifteen (15) days of the receipt of the same, or if such valuation is not provided within the 30 day period referred to in Section 7.3 hereof, then within fifteen (15) days of such date, the Purchaser (acting collectively if there is more than one Purchaser) shall nominate a representative, and the two representatives so nominated shall nominate a third representative and a majority of the three representatives shall*

select a qualified appraiser ("Qualified Appraiser") to make the necessary Fair Market Value determination. If either the Seller of the Purchaser fail to appoint their representative within a further ten (10) days or if the representatives fail to appoint a Qualified Appraiser within a further ten (10) days, then such appointments shall be made by the President of the Institute of Chartered Accountants for Trinidad and Tobago and the cost of the Qualified Appraiser shall be borne equally by the Purchaser and by the Seller. For the purposes of this Section as Qualified Appraiser shall be an international investment bank, investment dealer or financial institution having generally recognised expertise in share valuations.

….

7.6 Valuation *– In this Article 7, the Auditors and any Qualified Appraiser are referred to as a "Valuator". In conducting any valuation under this Article 7, the Valuator:*

….

(b) shall determine the fair market value per share of the Shares as of the appropriate date without taking into account the effect of any of the provisions of this Agreement or any premium for control or discount for minority interest.

…."

53. Article 8 deals with the consideration of the contemplated sale of shares by one shareholder. The SHA provided in this article for a mandatory offer to be made to the other shareholder.

"ARTICLE 8 – RIGHT OF FIRST REFUSAL

8.1 <u>Terms of Refusal Right</u> *- No Shareholder shall entertain offers for the purchase of its Shares nor make agreements for the sale, transfer or assignment of its Shares except as provided in Article 7, or except upon compliance with this Article 8 and subject to the terms and conditions hereinafter set forth:*

(a) Either Shareholder (hereinafter in this Article 8 referred to as the "Offeror") which desires to sell all or any of its Shares shall give notice of such proposed sale (hereinafter in this Article 8 referred to as the "Notice") to the Company and to the other Shareholder and shall set out in the Notice the number of the Shares that it desires to sell (hereinafter in this Article 8 referred to as the "Offered Shares") and terms upon which and the price at which it desires to sell the Offered Shares (such price being hereinafter in this Article 8 referred to as the "Purchase Price");

(b) Upon the Notice being give, the other Shareholder (hereinafter in this Article 8 referred to as the "Offeree") shall have the right to purchase all, but not less than all, of the Offered Shares for the Purchase Price and on such specified terms;

(c) Within 30 Business Days of having been given the Notice, if the Offeree desires to purchase the Offered Shares, it shall give notice to the Offeror and to the Company;

…..

(e) If the Offeree does not give notice in accordance with the provisions of Section 8.1 (c) that is willing to purchase all of the Offered Shares, the rights of the Offeree, subject as hereinafter provided, to purchase the Offered Shares shall forthwith cease and determine and the Offeror may sell the Offered Shares to any person within 180 days after the expiry of the 30 Business Day period specified in Section 8.1 (c) for a price not less than

the Purchase Price and on other terms no more favourable to such person than those set forth in the Notice, provided that the person to whom its Shares are to be sold agrees prior to such transaction to be bound by this Agreement and to become a Party hereto in place of the Offeror with respect to the Offered Shares. If the Offered Shares are not sold within such 180 day period on such terms, the provisions of this Article 8 shall again take effect and so on from time to time.

…."

The Declaration of Trust

54. The claimants have said that they executed a Declaration of Trust and an Agreement for sale between CLF and CLICO on 3 May 2007 that was in fact effective since 31 December 2006.

55. The said declaration of trust was annexed to the witness statement of Frederick as "JF16".

56. It provides, in essence, that in consideration of value received by CLF, CLF declared that it had sold to CLICO, and was CLICOs trustee in respect of 17% of CLF's then shareholding in PETL, which comprised of 23,062,710 ordinary shares.

57. Minutes of a meeting of the Board of Directors of PETL held on 24 April 2007 at 2:30pm was produced in evidence. The minutes record that the persons present at that meeting were Duprey, Joseph Cassidy, Kastner and Cronberger, who were all directors of PETL, along with Sakal who was the corporate secretary of CLF and PETL at that time and David Cassidy, who was there by invitation.

58. At that meeting it was resolved that Cronberger, who was prior thereto seconded to PETL from Proman, be offered full-time employment with PETL. It is therefore

clear that Mr. Cronberger was originally a Proman employee who was brought across into PETL's full-time employment without objection.

59. Importantly, the Minutes record:

> *"50.4.1 <u>TRANSFER OF SHARES</u>*
>
> *It was noted that shareholder CLF Financial Limited ("CLF") has transferred 17% of its interest to Colonial Life Insurance Company (Trinidad) Limited ("Clico"). The shares will be held in trust for the benefit of Clico and a copy of the Declaration of Trust is to be provided to the Company. The transaction was effected on 31 December 2006."*

60. Therefore, all of the parties who had to know about this Declaration of Trust and CLICO's 17% interest in PETL were present and informed. No objection was raised and no complaint was put forward or recorded in relation to the failure to abide by the provisions of the SHA or to create a trust to bypass its requirements or the fact that there was no consent by Proman AG[15] or that the proper procedure had not yet been followed. Any attempt to suggest that Proman AG was not properly or officially informed would be artificial since the parties who were present were clearly the main driving forces behind the company i.e. Joseph Cassidy and his son David Cassidy. To suggest that their knowledge of this event could be compartmentalized in such an artificial way i.e. that their knowledge at the time could only be ascribed to their knowledge as a director and invitee of PETL and not to their knowledge as directors of Proman AG or otherwise would be, and is, illogical and unreasonable. Therefore, despite the fact that the Cassidys indicated that they were unaware of the actual terms of the declaration of trust because they were not given a copy of it does not detract from the fact that they knew of its intent and purport and did not object.

[15] Which was Proman's predecessor in title of its 49%

The Shares in Question

61. The PSA, dated 4 February 2009, related to 84,986,145 ordinary shares in the second defendant.

62. Duprey, purporting to act on behalf of CLF, entered into the PSA on behalf of CLF to sell Proman 84,986,145 ordinary shares in PETL at a price of US$46,500,000.

63. In pursuance of the PSA, Duprey executed share transfer forms for the said shares on or around 4 February 2009 and thereafter, the relevant share certificates for the said shares were cancelled and the sum of US$46,500,000 was transferred by Proman on 10 February 2009 as consideration for the transfer for the said shares to CLF's Fiduciary and Escrow Account opened by Mr. Marcus Gresch, a director of Proman.

64. The Claimants say in their re-amended statement of case:

> 10. The PSA took place against a background wherein, as at February 3, 2009,
>
> (a) CLF was the legal owner of 84,986,145 shares in Clico Energy;
>
> (b) of the 84,986,145 shares which Mr. Duprey on CLF's behalf purported to sell, CLF held 23,062,710 shares on trust for CLICO;
>
> (c) 5,266,005 Clico Energy shares were held by CLICO in its own name;
>
> (d) further, of the 51% shareholding that was sold by CLF, CLF was only entitled to the legal and beneficial ownership of 34% thereof;
>
> (d) the remaining 17% comprised shares that were owned by CLICO either beneficially or both legally and beneficially.

Discussion

64.1. The court was not able to confirm the amount of shares that CLF and CLICO purportedly had in PETL from viewing actual company returns. The valuations done by Mr. Robinson and Mr. Hill were not focused on PETL

share numbers. Rather, they were both concerned with valuations of percentages in PETL - CLF's alleged 51%. Therefore, there was no direct evidence from these valuations in relation to the number of shares involved.

64.2. However, the evidence that the court does have is that:

64.2.1. At 31 December 2007, CLICO had 23,062,710 shares or 17% ownership, CLF had 46,125,420 shares or 34% ownership and Proman AG, the former holder of Proman's portfolio in PETL, had 66,474,870 shares or 49% ownership[16]. Of course, Proman relies upon the fact that this separation of the CLICO and CLF shares is an issue for this court to determine since it only recognizes CLF as the legal owner of the aggregate of those shares amounting to 69,188,130;

64.2.2. On 23 January 2008, a Shareholder Support and Subscription Agreement ("SSSA") was signed amongst CLICO, CLF, PETL and Proman AG[17];

64.2.3. As a result of subscriptions under that SSSA, on 23 July 2008, CLICO was issued 5,266,005 shares in its own name, CLF was issued a further 10,532,010 shares and Proman, then Proman AG, was issued a further 15,178,485 shares as per the Share Certificates then issued and all signed by Duprey and Sakal[18];

64.2.4. The 84,986,145 shares purchased by Proman therefore comprised the following:

---

[16] See Exhibit "WHS 24" – CLICO's Valuation dated December 2007

[17] This will be discussed in greater detail later on

[18] See exhibit ""JF 26"

Date	**CLICO**	**CLF**	
31/12/2007	23,062,710	46,125,420	**69,188,130**
23/07/2008	5,266,005	10,532,010	**15,798,015**
	28,328,715	**56,657,430**	**84,986,145**

64.2.5. This analysis is clearly at odds with the pleaded case for the claimants set out above. At paragraph 10, the claimants say that all 84,986,145 shares were owned by CLF legally but, in that same paragraph, it is pleaded that CLICO owned 5,266,005 shares in its own right.

64.2.6. Bearing that in mind, and having regard to that inconsistency, the court treats the pleaded position to be a mathematical error since it is clear that the claimants have differentiated the 2 sets of shares – the ones held by CLF in its own right and in trust for CLICO, and the ones held by CLICO in its own name in the sum of 5,266,005 shares arising as a result of the SSSA. The latter were the only shares allegedly issued to CLICO in its own name and therefore it stands to reason that it ought not to have formed part of the 84,986,145 shares which is the subject of the PSA, according to the claimants. If the court takes the claimants' case at its highest in this regard, the most that CLF was holding for itself and in trust for CLICO was 79,720,140 shares[19] with the balance of 5,266,005 shares being held by

[19] 84,986,145 - 5,266,005 = 79,720,140 shares

CLICO itself. There is no suggestion that CLICO ever sold its 5,266,005 shares to Proman.

64.2.7. The court notes that Proman does not accept the validity of the share certificate for the latter amount issued in the name of CLICO.

65. Apparently, in its Annual Return filed on March 16, 2009 though, PETL recognized CLICO as a shareholder of record as at 28 September 2008 in relation to the 5,266,005 ordinary shares issued to Clico in consequence of Clico's discharge of its obligations under the said Shareholder Support and Subscription Agreement[20].

66. It does seem rather contradictory, therefore, for Proman to dispute the issuance of the share certificates on 23 July 2008 to CLICO despite recognizing that, by that same process, its portfolio of shares in PETL, along with CLF's portfolio, increased and was taken into account in the PSA. That dispute also flies in the face of the said Annual Return.

The Support and Subscription Agreement (SSSA) and its effect

67. In this court's estimation, this document is a crucial one. It was mentioned above in the preceding section but the court must now look at it in its entirety to put it in the proper context.

68. A decision was taken in 2007 for PETL , through its 100% owned subsidiary CE Limited, to contemplate investing with others in the acquisition of a company, Eurotecnica. As Joseph Cassidy said in his witness statement:

[20] Reference is made to the suggestion that Clico Energy's Annual Return for 2008 was annexed and marked "H" to the letter dated 14 May 2012 from J.D. Sellier and Co. to Daniel Eggenberger of Proman Holdings Ltd. and attached as "XX" to the claimant's re-amended statement of case filed on 21 December 2015.

"113. …. This investment was to be financed by a loan from the bank HypoSwiss, however in order to repay this loan an equity injection of $50M, spread over a period of 5 years was required from the shareholders.

114. At 24 October 2007 PETL Board Meeting, the transaction was discussed and it was agreed that Sakal (being the PETL corporate secretary) would draft a Shareholder Support Agreement ("the SSSA") setting out the schedule for the shareholders to pay in the US $50 million in equity over 5 years beginning in June 2008 as required by the loan agreement necessary to purchase Eurotecnica.

115. On 23 January 2008, the SSSA, as drafted by Sakal, was circulated to the shareholders for execution. The "Whereas" section of the SSSA listed the shareholding in the "issued and outstanding shares" in PETL as: (1) CLF with 34%, (2) CLICO with 17%, and Proman AG with 49%.

116. The SSSA further stated that the shareholders agreed to pay an aggregate subscription price of US $50 million, with each shareholder to receive an additional share for every TT$1 that shareholder contributes towards that aggregate subscription amount. The first US $5 million subscription was set for 30 June 2008 with Proman paying US $2,450,000, CLF paying US $1,700,000 and CLICO paying US $850,000. "

69. Obviously, the importance of this document and this evidence cannot be understated. Before considering the document, the court must look at the above quoted evidence which acknowledges the following things:

69.1. Mr. Cassidy acknowledged CLICO being a shareholder notwithstanding the fact that Proman AG had not consented to the transfer of the shares under the declaration of trust;

69.2. Proman AG acknowledged CLICO's shareholding to be a 17% share in PETL;

69.3. CLICO's contribution/subscription of US $850,000 was 17% of the total subscription payable at that time of US $5 million which was in keeping with its acknowledged shareholding.

70. The document itself – the SSSA - was dated 23 January 2008 and was signed amongst CLICO, CL, PETL and Proman AG. The document was relied upon by Joseph Cassidy as evidence of Duprey executing a document on his own with the intent to bind the parties involved – the claimants in this action - of which he was a part.

71. The SSSA went about acknowledging the shareholders in PETL being the parties mentioned including CLICO in the percentages mentioned above and stating that PETL had agreed to facilitate and support borrowing by its subsidiary, CE Limited, through the equity contributions to be made pursuant to it. The document provided:

> *"2) Upon receipt of the subscription amounts the Directors of the Company[21] shall direct the registrar to issue shares in the capital of the Company to each of the shareholders to evidence their subscription. Each shareholder shall receive one (1) share for every TT $1.*

72. In his witness statement, Joseph Cassidy acknowledged that PETL's accountant, Salvatary Lopez, confirmed the payment of the subscriptions in the amount mentioned above.

73. Salvatary Lopez, Finance and Accounting Manager at PETL sent an email dated 1 July 2008 at 1:36 pm to Duprey, jmc@proman-gmbh.de[22], Karen Ann Gardier of CLICO, Sakal and Cronberger. The subject of the email was *"Equity Injection"* and in her email, Ms. Lopez advised that the equity injection under the shareholder

[21] "The Company" was defined to be PETL in the document

[22] The email address of Joseph Cassidy

support and subscription agreement had been received from all shareholders. Ms. Lopez advised that she was attaching an Excel spreadsheet file giving full details and that share certificates associated with this equity injection would be issued in due course by Sakal. The Excel Spreadsheet attached to the email showed that CLICO held a 17% shareholding in PETL and had made an equity injection of USD $850,000 and that it was to have been issued 5,226,005 shares in PETL. That was not disputed by anyone at the time.

74. Therefore, under this provision of the SSSA, the issuance of the shares, and the share certificates which followed dated 23 July 2008 mentioned above, were in obvious compliance.

75. Rather interestingly, paragraph 10) of the SSSA provided:

> *10)* ***None of the authorization, execution, delivery or performance by the Company of this Agreement, including, without limitation, the issuance of the shares as provided herein*** *, requires any approval or consent of any governmental or regulatory authority or agency having jurisdiction (except as has already been, or at or prior to the time of closing will be, obtained)* ***nor is in conflict with or in contravention of the Company Constating Documents (including the provisions attaching to the common shares), resolutions of the directors or shareholders of the Company*** *or the provisions of any indenture, instrument, agreement or undertaking ….”*
>
> *[Emphasis added]*

76. By the document, therefore, it has to be said that the parties were effectively agreeing not to be bound by any restrictions otherwise set out in PETL’s constating documents including, arguably, the SHA. The provisions of this SSSA showed a clear intent to supersede any constating documents and resolutions.

77. The signatories to the SSSA on behalf of CLF and CLICO was Duprey. The signatories on behalf of PETL and Proman AG were indecipherable to this court but it was obviously duly signed as Joseph Cassidy spoke to it without objection. Therefore, all of the parties agreed to be bound by the terms set out therein along with all of the recitals and descriptions. It has to be noted that there was never any step taken to object to or complain about the composition of the document either before it was signed or at any point thereafter. Therefore, all of the above matters were well known to all of the signatories to the SSSA including all of the assertions as to shareholding, rights to share certificates, etc.

78. Despite that, however, Proman disputes CLICO's entitlement to the 5,266,005 PETL shares in its own name on the grounds that:

    78.1. CLICO had never been recorded as a shareholder of PETL and therefore was not entitled to be offered or issued any shares in the company;

    78.2. CLICO never executed or became a party to the SHA and as such, PETL had no authority to issue a share certificate in CLICO's name and any such certificate that was issued to CLICO would have been in breach of the Shareholders' Agreement unlawful and void and neither PETL nor Proman were obliged to recognize it.

79. Subsequent to this SSSA, it is undisputed that dividends were paid to CLICO. In fact, in Ho Sing's witness statement, she stated[23] that following the equity injection, CLICO continued to receive dividend payments from PETL. Further, there was a chain of emails between 7 May 2008 and 9 May 2008 between Sakal and the said Karen Ann Gardier of CLICO in which Sakal requested to be advised on what currency CLICO would like to receive the PETL dividends. Sakal, as stated, was, amongst other things, the corporate secretary of PETL at the time.

[23] At paragraph 18

80. By letter dated 2 April 2009, Proman, for the first time, and after the completion of the PSA, wrote to CLF indicating that they observed that Sakal "purported" to issue a share certificate No. 26 to CLICO for 5,266,005 ordinary shares in Clico Energy. This was the first purported challenge to what had gone before and it was obviously after the fact of the impugned transaction in these proceedings.

81. In its amended defence, at para 24, Proman stated that on or about 24 April 2007, CLF informed the directors of PETL that it had transferred 17% of its interest in PETL to CLICO by assigning the beneficial interest in those shares to CLICO and that these interests would be held in trust for the benefit of CLICO.

82. Further, though, it went on to say that the actual terms of that assignment of interests and the circumstances in which it was made were not disclosed to this defendant at that time and were only discovered by the defendant after the sale of the PETL shares. It also went on to aver that it played no part in the issuance of the PETL share certificates and at all material times, any share certificate that was to be issued in respect of the 5,266,005 shares should have been issued to CLF to hold on trust for CLICO and the defendant was entitled to believe that this was the case.

83. Obviously, though, from the matters mentioned above especially in relation to the SSSA and the email from Ms. Lopez, Proman ought to have known or have been expecting such an issuance to CLICO and never objected.

84. In any event, Proman says that even if CLICO was the legal and beneficial owner of the said 5,266,005 shares then CLF and or Duprey were authorized to sell the said shares under and by virtue of a resolution of the CLICO Board of Directors dated 30 January 2009.

Conclusion

85. The combined effect of the SSSA and the information discussed at the April 2007 meeting along with the returns that were filed in October 2008 confirms that Proman and its predecessor had no issue with the 17% transfer of CLF's shares to CLICO or the issuance of the further 5,266,005 shares after CLICO's subscriptions were paid up under the SSSA. The attempts by Proman to disassociate itself from the same after the fact of the transfer of the PETL shares when questions were raised in relation to that 17% were too late in the day. Proman produced no evidence whatsoever to suggest that there was any valid reason in any event to deny CLICO's right to have the 17% shares registered. The only substantive suggestion was that it was not done because CLICO did not want to pay the stamp duty on the transfer.

86. Having regard to the facts before the court, however, the court is convinced that the transfer may still be registrable if that is what the claimants wish to do at this time and all that may need to be done is CLICO pay the requisite stamp duty and or penalties which have accrued in relation thereto should they decide to go that way. That is still possible and does not create any illegality. However, this view is just a preliminary one upon which the parties have not submitted and therefore it is not intended to be a pronouncement of the applicable law in relation to any such intended transfer if any such intention is in fact manifested.

87. The court therefore finds that Proman and CLF are estopped from denying CLICO's right to the 17% of the shares in PETL and the further 5,266,005 shares.

The Memorandum of Understanding (MOU)

88. Mrs. Nuñez-Tesheira's evidence in chief was in the form of her sole witness statement filed on 5 October 2018. Her evidence focused primarily on her actions and information coming to her during her tenure as Minister of Finance during the

period November 2007 to May 2010 with particular emphasis on the MOU which she executed on the GORTT's behalf. The other signatory, Duprey, did not give evidence and so the only evidence of the court has in respect of this document and the relevant intentions is that of Nuñez-Tesheira.

89. Nuñez-Tesheira came across to the court as a candid and generally composed witness. For the most part, her evidence was not shaken by cross examination although the court was left to question her failure to annex to her witness statement minutes of a meeting on 25 January 2009 at which the third defendant was in attendance and which, according to her, eventually led to the execution of the MOU. More would be said about this below.

90. She confirmed that she was the Minister of Finance for the period November 2007 to May 2010 and as that Minister she was responsible for, inter alia, the supervision, control and direction of all matters relating to the financial affairs of the State. In that regard her evidence was relevant to four pertinent matters:

90.1. The facts leading to the execution of the MOU;

90.2. The GORTT's understanding of the authority of third defendant in executing the MOU;

90.3. Her understanding of the obligations imposed by the MOU; and

90.4. The relevant facts in existence to the extent of her tenure as Minister of Finance subsequent to the execution of the MOU. This information provides important foundation for the evidence of the other witnesses.

The facts leading to the execution of the MOU

91. On 14 January 2009, a letter dated 13 January 2009 was forwarded to Nuñez-Tesheira's attention from the office of the then Governor of the Central Bank of Trinidad and Tobago Mr. Ewart Williams (the Governor). The letter was under a

CLF letterhead and signed by Duprey as Group Executive Chairman. That letter outlined the 'liquidity situation' of CLF as a result of what was described as the severe global financial crisis and went on to state:

> *"We are in the process of realigning the asset-liability structure of the Group to better match the current liquidity situation. This is a complex action plan that we are embarking on immediately, including initiatives such as merger of certain entities within the Group strategic partners and/or sale of certain assets in order to raise liquidity.*
>
> *As you would appreciate, these initiatives would need some time before they yield the desired results. In the event that the financial crisis deepens in the local market we may need urgent liquidity support to be made available to the Group.*
>
> *In this regard, we would like to discuss the approach of the Central Bank toward supporting the financial sector and by extension the CLF Financial Group, if conditions were to deteriorate."*

92. During cross examination, Nuñez-Tesheira confirmed that the period starting September 2018 was at the start of what was known as the global economic crisis because many economies were in financial crises and she would have known this because she was the Minister of Finance. That crisis was so severe and great that it had the possibility of having severe implications for Trinidad and Tobago, as set out above. She accepted however that there would have been need for concern as there was a steep and dramatic plunge in the prices of commodities. She assumed that the steep and dramatic plunge included the prices for petrochemical products including ammonia and methanol as it affected the price of oil although she was not sure because those companies were privately owned.

93. Nuñez-Tesheira gave further evidence that there was a global change in the price of stock on the stock exchange which resulted in the business failure of two

international and major investment banks which was a worrying development. She however insisted that the natural resources of the country coupled with competent leadership meant that "*we were in a position to be prepared to weather the storm*". It was admitted that the failure of the companies impacted on the expectations of establishing an international financial sector which was an important initiative to diversify and that the business failures mentioned would have had a detrimental effect to the confidence of investors. Further, with the crisis continuing in late 2008 and early 2009, there was increased risk to investors.

94. Subsequent to receiving the third defendant's letter, and acting on the instructions of the Honourable Prime Minister, Nuñez-Tesheira met with representatives of CLF and the Governor to determine what Duprey was requesting, the liquidity position of CLICO Investment Bank (CIB) together with the overall financial state of CLF and the extent of the GORTT intervention required. The chain of events which followed the letter were that:

    94.1. A meeting was convened on 16 January 2009 and the attendees included Nuñez-Tesheira, the Governor, Mr. Ram Ramesh, Chief Financial Advisor in the Office of the CLF Group Executive Chairman, and the Permanent Secretary of the Ministry of Finance. During cross examination it was confirmed that Duprey was not present at that meeting but that Mr. Ramesh emphasized the strong asset base of the CLF Group and CIB and requested that the accounts held by State Enterprises with CIB which had matured, or which were approaching maturity, be re-invested in CIB;

    94.2. On 22 January 2009 the Governor prepared and issued to Mrs. Nuñez-Tesheira a memorandum captioned "A Proposed Approach- CLICO/CIB" which stated that CIB "is illiquid and most likely insolvent", that CLICO was in breach of the statutory fund requirement and proposals were made addressing the key concerns set out therein;

94.3. On or about 23 January 2009, the Governor forwarded to Nuñez-Tesheira a copy of a document titled "CLF Financial Group Companies Strategic Options for Liquidity Support 23 January 2009" which was prepared by CLF. This document provided a background and context to the then situation at CLICO and indicated that the "Group holds strong and viable assets," and that "long term assets need time to convert into liquid cash[24]". This document also suggested several options for resolving the financial problems;

94.4. On 24 January 2009, Nuñez-Tesheira convened another meeting at the Ministry of Finance. According to the minutes of that meeting, in attendance were representatives of CLF, representatives of Republic Bank and the Permanent Secretary of the Ministry of Finance. Again, Duprey was not present at that meeting. Although there were minutes of the meeting, during cross examination the witness indicated that there was about an hour of the meeting that went unrecorded although she accepted that that fact should have been recorded in the minutes. Further, it was stated that representatives of Republic Bank Limited were present because of the shares CLF had in that bank and the fact that they would be affected. It was also stated that she insisted at that meeting that Duprey make himself available to meet with her and the members of the Central Bank. The meeting was stood down for contact to be made with Duprey, who was out of the jurisdiction – so crucial was he to the equation – and he confirmed his ability to fly in for the meeting the next day;

94.5. A further meeting was held on 25 January 2009, with representatives of CLF including Duprey. Nuñez-Tesheira stressed that at that meeting the need for the GORTT and the Central Bank to have a full understanding of

[24] This was an important observation recognizing that there was no need for fire sales or forced sales.

the financial state of CLF and all its subsidiaries and affiliates was emphasized. However, the witness failed to attach the minutes of that meeting that was prepared by the Central Bank and which ought to have been forwarded to her in her capacity as Ministry of Finance.

The failure to produce the 25 January 2009 Minutes

95. A rather peculiar situation arose in relation to these minutes. According to this witness in cross examination, the meetings of 16 January, and 24 and 25 January 2009 formed a significant part of the discussions and deliberations that formed the context in which the MOU was finalized and executed. Bearing that in mind, and having regard to the fact-finding exercise that the court has to engage in, it is rather remarkable that the minutes of 24 January were included, in which demands were made by the Honourable Minister of Finance to have Duprey attend yet, when he does attend on 25 January, even though minutes were taken, those minutes were not agreed to, were not attached to this witness' witness statement and were objected to during the course of cross examination. It gave the impression that there was something that the claimants were not prepared to show to the court of their own volition and that, to my mind, puts doubts as to the claimants' bona fides in this regard.

96. Looking firstly at the 24 January meeting, it started off without notes being taken but after about one hour or so, according to this witness, she directed that notes be taken of the meeting as she thought what was being said was very important. The notes began with Nuñez-Tesheira identifying the view that she held that if CLICO's assets were not enough, it meant looking as well at CLF Financial assets, both within and without, and she went on to say that they may have to go to, and

beyond, CLF to the principal shareholder[25]. She insisted that Duprey needed to come speak to them because he held the key. Nuñez-Tesheira agreed with Sakal, who was present, that Duprey had control and that he was a key person who needed to be there. In fact, she insisted that he be there by the next day. Crucially, she also mentioned:

> *"We are looking at the assets of CLF Financial. The State would put its resources to get to the bottom. If we know that we will reach there, let us reach there now. Let us bring transparency, if not, the discussion will do more damage than good, therefore in asking tomorrow, we ask that we have a clear idea of the assets, that must be part of the discussion tomorrow. I will ask the Governor and the PS whether they are thinking of any particular assets."*

97. The tone of the meeting, therefore, was clearly as the witness said in her cross examination – she was deeply interested in the assets that CLICO and CLF had and she had to speak to Duprey about it since he was the person in control.

98. Against this background, therefore, it is clearly quite suspicious as to the motives for not annexing the minutes of the meeting of 25 January to Nuñez-Tesheira's witness statement and for not agreeing to the use of the same at the trial. This is especially so since she had mentioned the importance of the 2 meetings to the extent that she insisted upon the meeting of the 24 January being minuted, belatedly though it was. Obviously, therefore, the following day's meeting would have been even more important since Duprey was present as per Nuñez-Tesheira's request.

99. Those minutes were presented at the trial by Mr. Hamel-Smith SC and were put forward by him to be shown to Nuñez-Tesheira. Mr. Hosein SC objected on the

[25] From the manner in which the discussion ensued between herself and Sakal, it seems that reference to the principal shareholder may have been reference to Duprey, though it was not clarified.

ground that this was not an agreed document, she was not the maker of the document and there was no appropriate hearsay notice put in in respect of it. The court ruled that it would allow the document to be shown to her since, as alleged by Mr. Hamel-Smith, she was present at that meeting and was best placed to say whether what was said at the meeting was reflected in those minutes. The court bore in mind that the 25 January stood on the same footing as the 24 January minutes in that in neither case did the witness prepare the document nor was either of them the subject of any hearsay notice by the first and second defendants.

100. The document was allowed and it was put into evidence through this witness as she not only recognized the document from having seen it before but clearly contemplated that it ought to have formed a part of her evidence in the same manner that the minutes of the 24 January had. In fact, she had referred to the meeting in her witness statement at paragraph 11 so one would have expected the contemporaneous document to have found its way before this court. Nuñez-Tesheira opined after some time that the reason why she did not make an issue of it not being exhibited was because she formed the view that paragraph 11 effectively summarized the gist of the meeting. Respectfully, that was not her call to make.

101. It must be noted that it seems that part of the minutes at the end are missing. No explanation was given for that.

102. The court finds it rather disquieting that such objection was raised by attorney at law for the claimants despite the fact of what had been said before in relation to this meeting, as well as the meeting the day before. The court is also concerned that the document was available and contemplated by the witness but rather than put the document before the court for its own reading and consideration, it was considered more prudent to rely upon the summary described at paragraph 11 of

her witness statement. Even though, in cross-examination, she said that she was not aware of any conscious decision to not include it in her witness statement, it is obvious that one was made especially since objection was raised to the document being put into evidence by the claimants' attorneys at law.

The 25 January 2009 meeting

103. At that meeting, Duprey was present along with members of a CLF team including Ram Ramesh, Carballo, Carlos John and Sakal. Nuñez-Tesheira was there along with the Permanent Secretary in the Ministry of Finance, Allison Lewis. The Governor of the Central Bank was also present together with his team which included Carl Hiralal, Ho Sing, his head of legal, Nicole Chapman, and Shelley Collymore and Ossie Nurse, both from the Ministry of Finance.

104. Nuñez-Tesheira opened the discussion with Duprey by referring to his letter written in January to the Governor[26] dealing with the circumstances relating to the request for assistance with liquidity. She complained about not getting a clear picture of the assets and liabilities of CIB and CLICO and BA in order to address the liquidity gap.

105. In response, Duprey indicated that "we"[27] have had some financial constraints as "our" foreign credit lines were cut (obviously referring to the global financial crisis) and they were unable to raise money in the local market[28]. He then proceeded to

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[26] Dated 13 January 2009 and exhibited as "KNT2" to her witness statement. In that letter, the third defendant complained about the strain on liquidity which the CV a global financial crisis had caused on the local financial system. He pointed out that CLF Financial had been disproportionately impacted and they had done a review of the Group's assets and projected liquidity needs. As a result, he said that quote "… we may need urgent liquidity support to be made available to the Group". He therefore wished to discuss the approach of the Central Bank towards supporting the financial sector and by extension the CLF Financial Group

[27] He does not define the "we" but it seems that he is really speaking about, at the very least, CLICO, CLF, CIB and BA

[28] This supports what Proman was saying was a motive for lending their long time business partner.

talk about a plan that he had which would involve the sale of assets, a disposal plan to satisfy the liquidity and the Statutory Fund requirements and continue operations. Part of that plan included hiring Mr. Andre Monteil, the previous chairman, to come up with a plan to solve the problem i.e. the liquidity problem.

106. The tenor of the response from Nuñez-Tesheira was for Duprey to provide a plan by Tuesday i.e. 2 days later. She sought clarification from him about liquidating assets as she queried whether that meant that he would be taking the proceeds of such sale. He did not answer that question directly.

107. He did say that the full value of the assets was not pledged although some of it would have been encumbered and he suggested that the difference between the value of the assets and the encumbered portion was about 30 to 40%. It was clear that he was talking about going into the market, getting sales and then dismantling the company. Nevertheless, it is clear from the portions of the minutes which was presented in evidence that no final decision was taken at that meeting. Instead, Nuñez-Tesheira was pleading for facts about the status of the companies. As she said:

> *"As we sit on … … January 25, we are trying to get a sense of the portfolio, trying to understand."*

108. She was interested in finding out what assets were there to meet the issue i.e. the gap in liquidity. To her, there was no certainty or clarity with respect to the sale prices of the assets and she needed that. What were the assets? How were the assets encumbered? How much was pledged? What assets were there to liquidate?

109. On the other hand, Duprey was talking about selling assets and dismantling the company and restructuring it into a much smaller company as part of his business plan. But, he was relying on Mr. Monteil to provide that help and information.

110. In cross examination, Nuñez-Tesheira suggested that she really did not pay attention to what Duprey was proposing by way of his business plan as he did not seem to be grasping how serious the situation was and he was being unrealistic. She said he was speaking but she did not pay attention to what he had to say. She repeated this on more than one occasion, dismissing Duprey's input insofar as it failed to address her specific query as to the status of the assets. It was suggested to her, however, that, in fact, she was responding to what he had to say which implied that she *was* paying attention. In response, she suggested that all she was doing was reflecting his statements. As she said, her concern really was not about what his plans were for CLF but how they were going to address this issue. The issue for her was obviously the issue of the threat of systemic risk which would arise out of a loss of confidence causing a run on these companies in a scenario where they did not have the liquidity to meet any such situation.

111. Therefore the court is left with the distinct impression that the end of this meeting there was no direct meeting of the minds. Nuñez-Tesheira had one thing on her mind – the identification of the assets in a situation where the government was going to put in taxpayers' money to bolster the finances of Duprey's companies. On the other hand, Duprey was still trying to save the companies by having Monteil come up with a business plan to do so and that plan included selling off assets.

112. The court must confess, though, that it has great difficulty in accepting that Nuñez-Tesheira was not paying attention. It is obvious that she was doing more than just reflecting his statements. In any event, to reflect statements means that one must be paying attention to what is being said first before it can be reflected. Maybe she was not interested in what he had to say. Maybe she had closed her mind to

what plans he had. Maybe she had already formed a view as to what had to be done but this court cannot come to the position that she did not pay attention to what he had to say. That was the whole point of him being there and why he was requested to attend.

113. Nuñez-Tesheira indicated that she saw no issue with not attaching the minutes of the 25 January 2009 meeting and stressed that the meeting, along with the others, were about getting answers from CL because they were not being truthful about the state of affairs of the assets. She also stressed that it was not just the meetings that led to the MOU. There were a number of factors. As a matter of fact, the memorandum from the Governor dated 22 January 2009 explained that:

> *"The CLF Financial Limited group (Group) is the largest privately-held conglomerate corporations in the entire Caribbean. (source: Annual Report 2007 for me Goup). It Is divided Into four industry sectors – Financial Services (Colonial Life Insurance Company (Trinidad) Limited (CLICO), British American Insurance Company Limited (BA), CLICO Inveshnent Bank (CIB), Colfire, CMMB, Republic Bank Limited (RBL)), Energy (MHTL, MHIL, Primera Oil and Gas, Caribbean Petrochemicals), Real Estate (HCL, Tobago Plantations, Valpark ShoppingPlaza) and Manufacturing and Distribution (Angostura Holdings, Bum Stewart Distillers, CLF World Brands, Lawrenceburg Distillers Indiana).*
>
> *……..*
>
> *Mr. Ramesh confirmed that unfunded withdrawal requests will amount to $1.3 billion in January; $1 billion in February and could reach $4.4 billion over the next six months. Most of these requests are to the CIB and are from institutional investors. Some public enterprises also have large deposits in CIB (one public enterprise is exposed to the tune of$33 billion).*

In the week ended January 16 alone, there were net requested withdrawals of $238 million."

114. The Governor then went on to indicate the proposed way forward by way of a detailed plan for CIB and a broad direction to deal with CLICO. At paragraph 12 of her witness statement the witness indicated that policy was "*to contain the systemic and contagion risk which the CLF group of companies posed to the economy of Trinidad and Tobago, particularly at a time when there was on-going global financial crisis and oil prices had virtually collapsed. In addition, GORTT recognised the need to protect policy holders and depositors of CLICO and CIB respectively. It was for those principal reasons that GORTT made the decision to intervene to ensure the financial integrity of CLICO and BA (over which at that time the CBTT, did not have the statutory power to intervene), and CIB."*

CLF's 27 January 2009 Meeting

115. After this 25 January meeting, a special meeting of the Board of Directors of CLF was called. Duprey and other directors were present namely Anthony Fifi, Roger Duprey, Motilal, Clinton Ramberansingh, Bhoe Tewari, Carballo and Monck. The minutes of that meeting were produced[29].

116. Duprey was the one who called the meeting and he indicated that he felt it necessary to do so to appraise the Board of the financial difficulties facing the subsidiaries. There were discussions on the global financial crisis and its impact on the CLF group. It was indicated that CIB, CMMB and JMMB were having serious liquidity issues and there were ongoing discussions with First Citizens Bank Limited for the disposal of those companies to them. With respect to CLICO and BA, they were also having serious liquidity problems and regulatory issues in that they had not been able to meet their statutory fund requirements.

[29] Annexed to the witness statement of Jennifer Frederick as "JF 33"

117. It was then disclosed that meetings had been ongoing with the Central Bank on behalf of CLF with a view to obtaining liquidity support. After discussing plans to dispose of RBL shares and the appointment of Stone Street Capital and MG Daly, attorneys-at-law, the Board voiced its disapproval of the contract related to those plans.

118. A resolution was then passed constituting a committee of the Board comprising Carballo, Motilal, Tewarie and Sakal:

118.1. To review that contract; and

118.2. To **all** sign further agreements or contracts in connection with the disposal of CLF assets.

119. It is obvious that, by this resolution, Duprey's alleged executive chairmanship was curtailed and the signatory right in relation to the disposal of CLF's assets was taken away from him and given to the committee that was formed. It was also obvious that despite the fact that talks had already begun 2 days before with respect to the potential sale of the PETL shares with Joseph Cassidy, Duprey did not bring it up at all at the meeting. If, as was touted at this meeting, the state of the group was as dire as it was, then it stands to reason that the sale of an asset such as the PETL shares, which was an unencumbered high-value asset that was available for sale immediately, ought to have been a priority for the Board's consideration and discussion. However, despite the appointment of the committee, as will be seen later on, Duprey proceeded to negotiate with Joseph Cassidy with the assistance of Sakal without the Board's knowledge.

The Contents of the MOU

120. The MOU was prepared by the Central Bank and was signed on the morning of 30 January 2009.

121. The parties to the MOU were the Minister of Finance acting on behalf of the GORTT and CLF acting for itself and its agent for its affiliates – CLICO, CIB and BA.

122. Nuñez-Tesheira spoke about the negotiation of the MOU. There was no indication that she had any part in that as she specifically mentioned in cross-examination that it was negotiated by the Central Bank Governor and his legal team with the law firm of M G Daly and Monteil and his company on behalf of the CLF Financial Group.

123. The recitals set the context of the document:

> *"WHEREAS:*
>
> *(a) The financial condition of CIB, CLICO and BA threatened the interest of depositors, policyholders and creditors of these institutions and pose danger of disruption or damage to the financial system of Trinidad and Tobago;*
>
> *(b) CLF has asked for the GORTT's intervention in the rehabilitation of CIB, CLICO and BA in the interest of and for the protection of depositors, policyholders and creditors of these institutions; and*
>
> *(c) GORTT and CLF have agreed to enter into this Memorandum of Understanding whereby steps would be taken to correct the financial condition of CIB, CLICO and BA and to protect the interest of depositors, policyholders and creditors of these institutions."*

Discussion 1

123.1. Nowhere in these recitals is there any mention of any concern for the financial condition of CLF nor any desire to protect depositors, policyholders or creditors of institutions other than CIB, CLICO and BA.

123.2. Further, the recitals do not address any threat brought about by CLF to the financial system of Trinidad and Tobago so that, at first blush, the tenor of

the document seems to focus on CLF's affiliates' difficulties rather than CLF's situation. It is arguable though that CLF's position is interwoven in the plights of its affiliates.

124. The document goes on to set out the following terms of agreement:

"1. CLF agrees to take steps to correct the financial condition of CIB, CLICO and BA by:

a. selling all of its shareholdings in Republic Bank Limited (RBL);

b. selling all of its shareholdings in Methanol Holdings (Trinidad) Limited (MHTL);

c. selling all of its shareholdings in Caribbean Money Market Brokers Limited (CMMB);

d. Selling all or any of their other assets as may be required to achieve the said correction.

The proceeds of the sale of assets referred to in clause (a), (b), (c) and (d) above will be applied to satisfy the Statutory Fund requirements for CLICO and BA under the Insurance Act, 1980[30]

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[30] Section 37 of the Insurance Act provides for the creation of the Statutory Fund:

"37. (1) 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.

(2) The statutory fund shall be established at the date—

(a) on which the company commences to carry on either class of business referred to in subsection (1); or (b) of the commencement of its financial year next after the commencement of this Act, whichever is the later date.

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

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

and the balancing of the third-party assets and liabilities portfolio of CIB.

2. In the event that there is a shortfall after the application of the proceeds realized from the sale of the assets set out in clause 1 (a), (b), (c) and (d) above, CLF warrants and undertakes to provide collateral which may include a secured charge on the fixed and floating assets of CLF, CLICO and BA sufficient to secure any financial assistance to be provided by GORTT in respect of that shortfall for the purpose of maintaining public confidence and stability in the financial system. "

[Emphasis added]

Discussion 2

124.1. From very early on, the shares in Republic Bank Limited and MHTL were held out by Duprey for sale as part of the arrangement with the GORTT. What is not clear, however, is why no mention was made of the PETL shares. That, from the evidence that the court received, was a high yielding, high-quality asset that was not encumbered and was available for immediate sale. Then, why not make it part of the stated portfolio for

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

(4) Every company carrying on long-term insurance business in Trinidad and Tobago shall place in trust in Trinidad and Tobago assets equal to its liability and contingency reserves with respect to its Trinidad and Tobago policyholders as established by the balance sheet of the company as at the end of its last financial year.

(5) Every company carrying on the motor vehicle insurance business in Trinidad and Tobago shall place in trust in Trinidad and Tobago assets equal to its liability and reserves less the amount deposited on account of such business pursuant to this Act with respect to its Trinidad and Tobago policyholders as established by the revenue account of the company as at the end of its last financial year.

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

immediate disposal through this arrangement with the GORTT? As the evidence unfolded, it seemed that Duprey did not want to disclose this possible sale even though he had already begun talks with Joseph Cassidy with a view to a sale of the shares[31]. As at the date of the MOU, it is clear that there was not yet any agreement in relation to the sale of the PETL shares in place but conversations had begun on 25 January – less than a week before the signing of the MOU.

124.2. It is interesting that clause 1 (d) of the MOU is couched in the terms that are set out therein. Clauses 1 (a), (b) and (c) all refer to the sale of "its shareholdings" in the companies named therein with the "its" referring to CLF obviously. However, clause 1 (d) talks about the sale of "all or any of ***their*** other assets" with the word "their" highlighted and emphasized by this court. Obviously, therefore, CLF was agreeing to sell not only its assets but also the assets of CIB, CLICO and BA.

124.3. That agreement to sell, however, was not a blanket permission. It was not a "blank cheque". The purpose of the sale of "all or any of their other assets" was to correct the financial condition of CIB, CLICO and BA with the limitation that the proceeds were to be applied to satisfy the Statutory Fund requirements for CLICO and BA and to balance the third party assets and liabilities portfolio of CIB. The specific purpose of any such agreed sale was therefore plainly stated to be limited as agreed and was not at large.

125. Moving on, the document, which obviously has to be read as a whole, set restrictions on the sale of the assets of CIB, CLICO and BA. For the court's purposes

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[31] Sakal gave evidence in cross-examination at the Colman Commission of Enquiry that she was instructed by Duprey not to disclose this sale to anyone and that shroud of secrecy was obvious as the evidence also revealed that the CLF and CLICO Boards only became aware of it after the fact.

in this judgment, the court will consider the restrictions in relation to the sale of CLICO assets.

126. Those restrictions are set out at paragraphs 10 and 11.

> *"CLICO and BA:*
>
> *10. CLF shall establish and make full and true disclosure to GORTT regarding the Statutory Fund position of CLICO and BA based on the valuation and admissibility requirements of the Insurance Act, 1980 for the year ended December 31, 2008.*
>
> *11. For the discharge of its obligations herein in respect of CLICO, CLF will sell, dispose of or collateralize the following assets as required to ensure that the Statutory Fund requirements for CLICO and BA are satisfied:*
>
> *a. Shareholdings in RBL owned by CLF and the other members of the CLF group of companies and not required for the discharge of the obligations at clause 6 above;*
>
> *b. Shareholdings in MHTL owned by CLF and all other members of the CLF group of companies, to GORTT with an option for CLF to repurchase on terms to be agreed; and*
>
> *c. Other assets of the CLF group of companies, of such quality and value as agreed to by the GORTT and as may be required,*
>
> *and CLF shall provide the relevant board resolutions as specified in clause 19[32] in relation to such sales.*

[32] Senior counsel for the first and second defendants submitted, correctly to my mind, that reference to clause 19 is in fact mistaken and it ought to be referenced to clause 17 instead.

Discussion 3

126.1. Obviously, before CLF could sell any of CLICO's assets, the Statutory Fund position had to be established as at the end of 2008. That necessarily would have included the need to provide the balance sheets and revenue accounts up to 31 December 2008 as provided under sections 37 (4) and (5) of the Insurance Act.

126.2. After the provision of this information, the shortfall, if any, in the Statutory Fund would have to be established and then assets would have to be identified of such quality and value as agreed to by the GORTT and as may be required after the sale of the RBL and MHTL shares.

126.3. The intent, therefore, must have been for the sale of any other assets to be invoked later on down the line to meet the requirements of this clause of the MOU.

126.4. Most crucially, however, is the imposition of the mandatory provision for the production of relevant Board resolutions under clause 17 of the MOU which was a practice that was hitherto not enforced as per the evidence before the court. There is no doubt that prior to this requirement being inserted into the MOU, Duprey had free reign to transact as he saw fit. If there was any such accepted course of business that had been established over the years through that prior interaction, this clause broadcast an immediate restriction.

126.5. In fact, Joseph Cassidy exhibited several emails from Joanne Julien, an attorney-at-law with MG Daly and Company following up the resolutions for all of the named companies that very day, exhibiting how crucial they were for the completion of the process.

126.6. Obviously, this clause 11 was a further qualification of the power given under clause 1 (d) thereby imposing a restriction on CLF's complete discretion to sell CLICO's assets.

127. Clause 13 of the MOU spoke about the proposed restructuring of the business of CLICO and BA:

> *"13. CLF agrees that CLICO and BA will restructure its business and operations to conform to traditional life insurance business lines in a manner approved by the Central Bank. This restructuring will also include a reconstitution of the Board of Directors, Board Committees and senior management. Until such time as the restructuring is completed, CLF agrees to the appointment of a Manager of CLICO and BA selected by the Central Bank to oversee the operations of these companies and also recommend any necessary changes to the structure. GORTT shall approve the selection of the members of the Board of Directors and of senior management and, as far as possible by mutual agreement with CLF, appoint the Chairman of the Board.*

128. The MOU continued:

> *"14. In consideration of its significant financial exposure to CIB, CLICO and BA, GORTT will receive appropriate shareholdings in CLICO and BA.*
>
> *…*
>
> *16. The Memorandum of Understanding does not preclude (a) the Central Bank from requiring that CLF, CIBA, CLICO and BA take any other action which in the opinion of the Central Bank is desirable; or (b) the Central Bank taking such action as the Central Bank may*

think fit under the provisions of the Financial Institutions Act, the Insurance Act or the Central Bank Act or any of them.

Discussion 4

128.1. Clauses 13, 14 and 16 made it obvious that the GORTT was taking a big step in the management of the CLF Group that required, in return, certain obligations which included restructuring and repopulating the companies' administration. Those requirements ought, to this court's respectful opinion, to have put anyone reading the MOU upon notice that restructuring would be done and a reasonable question to have arisen at that time would be what if anything had been done as yet to restructure the companies and how would it affect any sale of assets to third parties. In particular, how was this restructuring of CLICO going to affect CLICO's interest in the PETL shares which Proman had notice of? Proman however, did not ask any such question as far as the evidence reveals.

128.2. Clause 16 in particular imposed the stated expectation that the Central Bank was free to step in to take such action as *it* thought desirable which was an obvious restriction on the autonomy of these companies, including CLF. If the companies' autonomy was being restricted, how was that going to impact upon any sale that was being negotiated at that time? Proman did not ask any question about this either.

129. Clause 17 warranted that the signatories for CLF on the MOU were duly authorized with the expressed requirement for the production of the Board of Directors' resolutions from all of the named companies appointing CLF to sign the MOU and to enter it on their behalves. A timeframe of one week was given for compliance in default of which the MOU would be rendered null and void.

130. The MOU imposed, under clause 18, a duty on CLF to make full and fair disclosure of all CLF companies and their assets and liabilities to be provided by the date specified by GORTT after consultation with CLF. The court has evidence that a listing of assets was sent prior to the execution of the MOU on 29 January 2009. This requirement, however, obviously envisioned something more as that listing did not include full and fair disclosure of assets and liabilities. In any event, the date specified was a date to be specified in the future and, until that date, the whole process was obviously still in motion.

131. Clause 19 provided for the production of detailed monthly progress reports by the 25th day of each month to highlight the progress of the disposal of assets. Proman has suggested that this sufficiently allowed for the sales that were envisioned and for an opportunity to report about it on the 25th next occurring. However, that does not take into account the fact that the sales were to be conducted in the manner and for the purposes identified in the MOU.

132. In addition to highlighted obligations, CLF was also required, by clause 19, to provide the GORTT monthly progress reports highlighting the progress or the disposal of the assets by the 25th day of each month. According to Nuñez-Tesheira, the requirement to provide reports was never meant to circumvent the need for them to get prior approval. It was her understanding further that any other asset which was unencumbered and of value was to be used to realize the value need for the Statutory Fund.

133. Clauses 20 to 22 provided:

> *"20. CLF will instruct the Boards of the CLICO and BA to seize any new inter-company transactions, any increases in salaries of directors and senior officers, any payments of dividends, bonuses, share options and any disposal of assets without a schedule provided to GORTT for its prior approval.*

> *21.* *CLF agrees and will instruct without any reservation or restriction its shareholders, directors, senior officers and staff members to give full and fair disclosure of any and all information requested by GORTT in whatever medium so requested and within the timeframe set for delivery of the said information.*
>
> *22.* *GORTT may call on CLF to do or effect any of the above obligations within such timeframe as may be specified by GORTT after consultation with CLF."*

Discussion 5

133.1. Obviously, once again, the curtailment of CLF and its affiliates' autonomy is most apparent together with the infusion of the GORTT's powers of intrusion and imposition.

133.2. One could reasonably expect a question to arise by any third party doing business with CLF as to whether any information had been requested and whether that information had been complied with. Or whether these clauses had been complied with and the impact upon any sales to third parties. No such question was asked by Proman.

Nuñez-Tesheira's Cross Examination on the MOU

134. The major contention in relation to that MOU was that CLF Financial was not candid with her in that she was not told by them about the preemptive rights in relation to MHTL[33]. Her attention was then drawn to an email sent on 29 January 2009 at 12:01 PM from Motilal to Karen-Ann Gardier, Sakal, Carballo and Duprey at CLF, and, amongst other persons, Jo-Anne Julien at MG Daly and Company. That email dealt specifically with excerpts of MHTL's Security Agreement and

[33] Paragraph 33 of her witness statement

Shareholders Consent and Agreement which also drew attention to the limitations on the individual shareholders' ability to assign, transfer or pledge their shareholdings in MHTL. The assertion was therefore made by Mr. Hamel Smith SC that notification of the restriction was given to someone on the negotiation team before the MOU was signed.

135. In response, Nuñez-Tesheira confirmed that she herself had never seen that email and that no one from the GORTT, specifically the Ministry of Finance, was copied on the same so that, according to her, the "paymaster" i.e. the GORTT, was not informed and was not kept in the loop. She also acknowledged that the email was not sent to anyone at CBTT. Therefore, she did not become aware of this restriction until 9 February 2009, after the sale to Proman.

136. Nuñez-Tesheira was at pains on day two of the trial to confirm that the decision to sign the MOU to take steps to correct the financial condition of CIB, CLICO and British American was in the context of CLF coming to the government because of the systemic risk that CLICO and CLF Financial posed to the country. That is what is reflected in the recitals according to her.

137. It was during this discussion in relation to the MOU on day two that Nuñez-Tesheira tended to adopt a different tone from the day before which gave the impression that a deliberate reflection of her first day's evidence had been done. For example, one may look at the following exchange[34]:

> *"Q But what I am asking you is that this was more than a power, because this actually imposed an obligation on them to sell the assets?*
>
> *A No, you are putting it – – no, Mr. Hamel-Smith, if you are going to reflect, and you said I did sign the agreement and you are correct, I did and*

[34] Page 37 of the transcript at line 7

you did not, so I am saying to you that that provision was intended to ensure that …"

She continued[35]:

"Q And that is your perspective?

A And I was the Minister of Finance, and guess who signed this? Guess who signed this. Guess who signed this. Guess who was the paymaster…."

138. She continued after this exchange to be concerted in her effort to get her point across rather than to answer the question which was being asked. It was already understood that the MOU was signed in a context and, as this court indicated to the witness while she was being cross examined, that context was a given one as described in the recitals. Mr. Hamel Smith SC then tried to have her speak about whether the MOU imposed a requirement to sell assets but rather than confine her answer to that question, the witness continued saying what she thought she had to say about the context rather than answer the question directly apparently without bearing in mind that the court had already established with her the fact that the context had already been laid out and agreed. The witness found it essential to emphasize, however, that the power of sale had to be exercised in conjunction with the Government and was not one which could have been exercised on its own.

139. Nuñez-Tesheira's attention was drawn to clause 20 of the MOU which required CLF Financial to instruct the boards of CLICO and BA to cease doing certain things but that the same did not extend to other boards of companies within the CLF group apart from CLICO and BA. In response, she accepted that observation but went on to say that in the context and objective of the agreement that would have

[35] Page 53 of the transcript at line 17

been understood in relation to other boards, especially since the restriction applied to the parent company. This seemed to be an obvious implication that there would have been some sort of trickle-down effect.

140. Cross-examination then focused on the care taken with respect to the dates on which the monthly reports were to be submitted with specific reference being made to situations when the designated day i.e. the 25th day of each month fell on a weekend or public holiday. That care was then looked at in relation to clause 20 in which no mention was made of companies other than CLICO and BA. Nuñez-Tesheira fell back in response to the implication referred to above.

141. When Mr. Hamel Smith SC then tried to take Nuñez-Tesheira through the implication in relation to the reports becoming due on the 25th day of each month which would therefore mean that the first report would have been due on 25 February 2009, the witness went through a long unsolicited explanation that resulted in a re-assertion that anything that CLF Financial was going to do had to be done with the approval and understanding of GORTT. In other words, it was not as though they had free reign to just do whatever they liked and then just file a report at the end but, instead, whatever was done during the course of the month had to be done with the GORTT's knowledge and approval.

142. She went on to say that in the context and objective of the agreement, that would have been understood in relation to other boards, especially since the restriction applied to the parent company. This seemed to be an obvious implication that there would have been some sort of trickle-down effect.

143. There was no such specific statement in relation to CLF though.

144. Essentially, at the end of the day, Senior Counsel for Proman suggested that the premise of the MOU was simple:

144.1. CLF was to take steps to fix the financial condition of CLICO, CIB and BA;

144.2. It was to do this by selling assets;

144.3. As part of its commitment to sell assets it was agreeing to sell assets that GORTT directed it to sell; To assist the GORTT in being able to decide what directions to give, and to know the size of the potential hole that it was facing, CLF was committing to disclose to GORTT information as to the CLF group's assets;

144.4. It was also committing to report to GORTT how these sales were progressing, and to do monthly;

144.5. GORTT was committing to look at providing collateralized loan financing in the event that a hole remained after CLF had sold off assets;

144.6. CLF was agreeing that a Central Bank nominee would be able to oversee the operations of CLICO so that they could be in a position to make recommendations as to how the business operations going forward should be structured;

144.7. To prevent the deficit from getting any bigger, CLICO and BA would not engage in new transactions which either increased expenses or reduced their assets without GORTT approval.

145. He concluded that nothing in that scheme either expressly or by implication, restricted CLF from selling its own assets without GORTT's approval.

146. With respect to Duprey's postion in the whole mix, Nuñez-Tesheira confirmed that she understood that Duprey was the Group Executive Chairman of CLF and that he exercised effective control and authority. She knew of Duprey as the employer of her late husband and that he had a huge amount of experience despite being plagued with a number of issues in the media. From her perspective, at the time Duprey was the person in control of that group at that time hence the insistence for him to meet with her personally.

The Minister of Finance's understanding of the obligations imposed by the MOU

147. According to Nuñez-Tesheira during cross examination, the MOU was executed to ensure it contained what the GORTT wanted. CLF was unregulated and would not have a legal obligation to sell assets for a statutory fund but for the MOU. The purpose behind the MOU was to ensure assets were sold *in conjunction with* the GORTT to ensure the liquidity issues were resolved. She wanted to make sure that CLF had the power to sell assets to repay the GORTT. It was never intended that CLF could go off on its own and sell. If they did then they did not need the GORTT. The obligation to sell was for the purpose of repaying the GORTT. The obligation to sell must have been executed with the knowledge and consent of the government. When asked whether that stipulation applied to CLF, Nuñez-Tesheira indicated that since CLF was signing it and made the commitment, and since it applied to their companies, it applied to the parent company.

148. That evidence was in line with chapter 12 of her witness statement which went on to state:

> *1. Accordingly a key pan of the GORTT's policy was to ensure that the sale of assets in CLF and its affiliates, if necessary, to repay GORTT's financial support should take place in a strategic and orderly manner so as to optimize the price obtained. The GORTT also appreciated that because of the downturn in the world economy at that time, the sale of assets would not necessarily take place in the short term.* ***Furthermore, the GORTT was committed to ensuring that its approval be obtained prior to the sale of each asset.*** *This policy was to form an integral part of any financial support to the CLF Group. I intimated to the meeting, and particularly to Duprey that the GORTT was prepared to provide support to CLICO, CIB BA but it required the financial information about the state of CLF and its subsidiaries.*

149. There was obviously no evidence to contradict this understanding, to the extent that it is relevant to the principles of interpretation of a written contract.

The Relevant Facts in Existence Subsequent to the Execution of the MOU

150. Subsequent to the MOU being executed, on that day, there was a press conference explaining the MOU to the public held at noon that very day[36].

The Media Release

151. This was followed by a media release issue that same day which indicated that the government had reached an agreement with CLF for the provision of a package of financial support for the group's financial services companies. The release went on to indicate:

> *"The objectives of the agreement between the Government and CLF Financial as follows:*
>
> *1. To stem the increasingly serious liquidity pressures being faced by the financial services companies within the Group – i.e. CLICO Insurance Company Limited (CLICO), CLICO Investment Bank (CIB), British American Insurance Company Limited (BAICO) and Caribbean Money Market Brokers Limited (CMMB);*
>
> *2. To maintain public confidence in these institutions which constitute a significant part of the country's financial services industry, and*
>
> *3. To ensure the continuing stability and integrity of the financial system.*

[36] See exhibit "JF 34" which is an email from Sakal sent at 11:08 AM on 30 January 2009 to Duprey and the other directors of CLF

The key elements of the agreement between the Government and CLF Financial are as follows:

1. *The Central Bank will assume control of CIB under the provisions of Section 44D of the Central Bank Act.*

2. *The third-party liabilities and assets (to meet these liabilities) of CIB will be transferred to First Citizens Bank Limited[37].*

3. *CLF financial will sell, liquidate or collateralize its assets and allocate the proceeds to meeting in full all the requirements of the Statutory Fund for both CLICO and BAICO, thereby protecting in full all its insurance and pension fund clients.*

4. *The Government will provide funding support to fully back CLICO and BAICO to meet any Statutory Fund the defeatists that might emerge after the company has made all possible arrangements to place satisfactory levels of cash and other assets into the Statutory Fund in order to ensure the short as well as medium and long-term liquidity and stability of CLICO.*

5. *Specifically, CLF Financial will divest itself of all of its 55% holding of Republic Bank Limited and shares in Methanol Holdings Trinidad Limited (MHTL). The Government of Trinidad and Tobago through institutions such as NIB and First Citizens Bank Limited will gain control of the Republic Bank shares while the Government will gain control of the MHTL shares.*

The Agreement calls for Government's shareholding in Clico, it's participation in the Board of Directors and in the Management of the company and a change in the current business model. Ultimately, once

[37] A local bank wholly owned by the State at that time

CLICO has returned to stability, it will be listed as a public company on the Trinidad and Tobago Stock Exchange.

***The Government has taken these steps to assure the investing public in Trinidad and Tobago, including depositors and policyholders of the affected companies of the safety of their investments and requirements for stability and order in the marketplace**."*

[Emphasis added]

152. Moving out from a behind-the-scenes negotiation, the GORTT stood up front and centre to support CLF and CLICO and CLF's other affiliates with the stated intention to give the public the confidence and security that it was fully backing the group. This is a rather extraordinary step taken by a government since it had no legal obligation to do so having regard to the fact that CLF and its affiliates, including CLICO, were fully private companies. However, it is obvious that the parties were of the view that the situation was so dire that extreme measures were necessary.

153. The court notes that in the CBTT's response to a proposal submitted by Stone Street Capital entitled "*Resolving the Problems Currently Being Encountered by the CLF Financial Group*"[38], CBTT estimated CLICO's Statutory Fund deficit at TT $3.7 billion and that figure had to be clarified[39]. Further, to meet the immediate liquidity needs of CIB and CLICO in the short term, CBTT proposed to open a temporary line of credit pledging the RBL shares showing the extent to which the GORTT was willing to step in to shore up the inundated group. There was therefore immediate access to financing that was previously not open to CLF and its affiliates.

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[38] See JMC 27

[39] It was in fact increased later on

154. It must be noted that mention was made in the Press Release of the Central Bank taking control of CIB under section 44D of the Central Bank Act. The court notes that it is a matter of public knowledge that this MOU was signed on Friday, 30 January 2009 as mentioned above. By the next Monday i.e. Monday, 2 February 2009, the GORTT moved two Bills in Parliament to amend the Central Bank Act and the Insurance Act to deal specifically with this particular situation that had developed with the CLF group. Those amendments were substantially aimed at addressing the steps that had to be taken to implement the plan set out in the MOU[40] since the previous incarnations of the Central Bank Act and the Insurance Act were insufficient to allow that. The Bills were laid in Parliament on Monday 2 February 2009 and were fast tracked to the extent that they were assented to by Friday, 6 February 2009[41].

155. Therefore, it was apparent to the public – through the press conference, the press release and the steps taken in Parliament - that the GORTT was moving assiduously to maintain public trust and confidence in the CLF group as a whole in order to prevent systemic risk and a systemic collapse of the national financial system. As Nuñez-Tesheira said[42], unchallenged:

[40] The Central Bank Act was amended by Act No. 4 of 2009 (assented to on 6 February 2009), for example, to extend the ambit of its assistance from merely financial institutions carrying on traditional banking business to include what was happening in the CLF group companies:

> *"5. The Act is amended in section 44D, in subsection (1)—*
>
> *(a) in paragraph (a), by deleting the words "depositors or creditors" and by substituting the words "depositors, creditors,* ***policy holders or members****"; and*
>
> *(b) by deleting subparagraph (v) and substituting the following: "(v) to provide such financial assistance to companies which carry on the business of banking* ***or business of a financial nature as licensed under the Financial Institutions Act, 2008, as it considers necessary to prevent the collapse of the institution,*** *other than an insurance company regulated under the Insurance Act or a society registered under the Cooperative Societies Act.".*

[41] See http://www.ttparliament.org/publications.php?selectedYear=2009&activeTab=0&mid=29&filterBy=Go

[42] Para 18 of her witness statement

"18. Immediately after the Cabinet meeting I attended a press conference which was convened with Governor Williams, Duprey and me to explain the execution of the MOU to the public. The press conference was held at the main conference on the 8th floor of the Ministry of Finance. I recall that I expressed to the Governor the importance of presenting a united front. Public confidence and trust that GORTT and CBTT had a proper handle on the situation was absolutely critical, for without the country's confidence in GORTT's ability to manage the potential crisis, there was no doubt in my mind that we would have witnessed ***serious damage to the financial system and ultimately the entire economy of Trinidad and Tobago****."*

Conclusion

156. There is no doubt in the court's mind that this MOU was not legally binding for the several reasons raised and submitted by senior counsel for Proman but was meant to be a roadmap. There is no doubt, though, that the GORTT was already acting on it – supporting the Group financially and in the public eye in a tremendous and unprecedented show of support at all levels. That roadmap set up certain markers, mileposts and conditions which had to be fulfilled as discussed above failing which the GORTT would have considered the same to be null and void and would have withdrawn from the support it was giving. Therefore, noncompliance carried grave consequences and could have jeopardized the steps taken by the GORTT to shore up CLF and its affiliates.

157. Therefore the MOU presented any third party doing business with CLF and its associates an obvious impediment against the highly unusual background of a State stepping into to prop up a private company which was threatening national systemic risk. It put any third-party, such as Proman for example, on immediate

notice that this was not business as usual and further inquiry was required. To do otherwise would be a willful default or may even be seen as reckless.

CLF's 31 January 2009 Meeting

158. Jo-Anne Julien, attorney-at-law at MG Daly and Company who was very much involved in the drafting of the MOU, called for the required shareholders resolutions (which were apparently drafted by her) on several occasions on Friday, 30 January[43]. Copies of the resolutions were attached to the emails that she sent.

159. At 11:08 AM on 30 January, Sakal wrote[44] to the Board of Directors of CLF, including Duprey, informing them:

> *"Dear Directors, see attached. This attachment is the outcome of negotiations with the CBTT authorized by the Chairman. You will be required to sign the resolution or alternatively attend an emergency meeting of the Board.*
>
> *I could only answer a (sic) limited questions as most of the details were handled by Stone Street with the authority of the Chairman. please (sic) contact the Chairman for full details. Also listen to the 12.00 news."*

The court infers that the attachment referred to was the executed MOU since, by then, it had been signed.

160. At 11:41 AM, Sakal wrote to the Directors, again by email, calling upon them to confirm their availability for an emergency Board meeting the next day at about 11:30 AM upon the request of Duprey.

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[43] By emails sent that day at 7:52 AM, 8:28 AM, 10:50 AM, 12:55 PM, 4:48 PM

[44] JF 34

161. The meeting was held on 31 January 2009 in CLF Financial's boardroom and the minutes of the meeting held on 27 January 2009[45] was unanimously approved, confirmed and adopted. Of course, that included the appointment of the 4-person committee mentioned therein to, amongst other things, ***all sign further agreements or contracts in connection with the disposal of CLF assets***.

162. The purpose of the meeting was, as stated by Duprey, to approve the MOU. The Board seemed to be taken aback as it felt that nothing in the MOU favored the CLF group and that it was specifically designed to destroy the company rather than protect its assets. Duprey's choice of Stone Street Capital was questioned along with his choice of legal advisors. The minutes go on to reveal:

> *After much hesitation and deliberation, members reluctantly agreed to sign a resolution to approve the MOU which was signed previously by the Chairman on Friday the 30th, January 2009. In signing the resolution which was required under the MOU to ratify that act of the Chairman members expressed their concern and acted only because they felt it necessary to protect the interest of the policyholders.*
>
> ***The Committee formed to approve any and all material future transactions of CLF comprising Messrs. Carballo, Motilal,Tewarie and Sakal was reconfirmed and this was noted in the resolution*."**
>
> *[Emphasis added]*

163. Once again, without explanation, Duprey chose not to disclose the negotiations that were then ensuing between himself and Joseph Cassidy in relation to the PETL shares. As mentioned, Sakal, who was aware of it, said that she was instructed to not disclose it and she complied in loyalty to her employer as opposed to the

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[45] See above

GORTT. As mentioned as well, Duprey failed to attend court and therefore the court is deprived of his explanation.

The Removal of Actual Authority

164. Clearly, therefore, a combination of the resolution passed at the meeting on 27 January 2009, the MOU and the resolution passed at the meeting on 31 January 2009 including the reconfirmation of the appointment of the Committee to approve any and all material future transactions of CLF directly stripped Duprey of his ability to sign any agreements or contracts in connection with the disposal of CLF assets and gave it to the Committee.

165. Although much was made of the fact that he alone signed the MOU, and not for that matter the sub-committee that was set up, it was clear that his signature alone was not sufficient to carry the MOU any further. Whatever their motives were, the Board ended up ratifying the signing.

The Days following, and After

166. On February 9, 2009, the Governor, the Permanent Secretary of the Ministry of Finance and Nuñez-Tesheira met with members of CLF's committee responsible for overseeing the sale of assets including Sakal and Motilal. It was indicated that members of the committee also included Dr. Tewarie and Carballo. The meeting was requested by that Committee to alert the GORTT and CBIT to the situation regarding the MHTL shares and the fact that the MHTL Shareholders' Agreement imposed restrictions on the transfer and sale of those shares in that shareholders had a pre-emptive right of purchase before sale to any third party.

167. At the said meeting, Sakal agreed, in accordance with clause 18 of the MOU to produce, by the following day, 10 February 2009, a list of assets that could be sold. Sakal was reminded of this undertaking by Nuñez-Tesheira on 10 February 2009.

168. PETL was listed on a list provided by Sakal under cover of letter dated 18 February 2009 with the notation,

> *"An agreement for sale of this company has recently been entered into, CLF owns 34% and CLICO owns 17%. Details of this agreement are not yet available."*

169. The Ministry of Finance requested details of the asset sale transaction and reminded CLF of its obligations under the MOU by letter dated 25 February 2009 and 6 March 2009. In relation to the letter of 6 March, 2009, Nuñez-Tesheira, in her witness statement, noted that:

> *"30. The Ministry's letter of March 6, 2009, also broached the issue of the reported sale, on February 3, 2009, of CLF's shareholding in PETL for the sum of USS46,500,000.00, which included 17% of the shares in that company held in trust for CLICO. The point was made that the parties thereto were claiming that the sale and purchase of the shares to the remaining shareholder in PETL had resulted from the triggering of a forced sale/purchase rights provision under a pre-existing shareholder's agreement in circumstances which did not appear to trigger such rights. The further point was made that the sale of PETL was in breach of clauses 6(c) and 11(c) of the MOD, which required that the quality and value of assets to be sold be agreed with GORTT and that such agreement had not been obtained. The letter demanded that CLF apply the proceeds of sale of its portion of the purchase price, being the sum of US$31,000,000.00 (i) toward correcting the financial condition of CIB, CLICO and BA, (ii) to ensure the balancing of the third-party assets and liabilities portfolio of CIB; and (iii) to ensure satisfaction of the statutory fund requirements of CLICO and BA, in accordance with the provisions of Clauses 1, 6 and 11, respectively, of the MOU."*

170. The GORTT could not acquire the shares of CLF's subsidiaries as anticipated because they were either encumbered or subject to shareholder pre-emptive rights. The GORTT subsequently entered into negotiations to gain control of the board of CLF which was effected on 12 June 2009. A response was forthcoming to the Ministry on 25 April 2009 which was described as the only report provided by CLF pursuant to the MOU.

171. Up to May 2010[46], when Nuñez-Tesheira ceased to hold the position as Minister of Finance, she said that the GORTT had provided support to the CLF group in the sum of approximately $12 Billion. That evidence was unchallenged. So too was her allegation[47] that there had been "*sales of various assets of CLF after obtaining the approval of the GORTT*" during her tenure.

Timeline leading to the PSA and up to its completion

172. Before proceeding into this discussion, the court must note the evidence given by Sakal at the Colman Commission of Enquiry to the effect that all of the communication between the parties during the crucial periods of time were not before the court and were not produced. As she indicated then, quite understandably, conversations took place by telephone, the records of which were not before the court. This court has no doubt that there were communications between the parties that are not before the court including especially those that were oral. Duprey, for example, has not come to this court to say what he knew or to be questioned or cross examined on anything that may have been said.

[46] Paragraph 2 of her witness statement

[47] Paragraph 41

173. On or about 25 January 2009, the same day as the second meeting with the Minister of Finance, Sakal, on the instructions of Duprey attended a golf tournament in Tobago known as the Proman Golf Tournament with a view to inquiring from Joseph Cassidy whether he would be interested in buying the shares in PETL. Discussions were held between Sakal and Joseph Cassidy in this regard.

174. On 27 January 2009, an email chain among Sakal, Joseph Cassidy and Cronberger, with the subject stated to be "*Meeting",* indicated that there was a scheduled meeting relative to PETL. More specifically:

174.1. Sakal emailed Joseph Cassidy stating:

"Mr. Cassidy, please let me know when it is convenient for you to meet with us in Florida. We are looking at 25% of Clico Energy."

174.2. Joseph Cassidy replied:

"Gita, from coming Saturday…"

174.3. Joseph Cassidy then emailed Cronberger that same day:

"Claus could you please look out the old valuation we had done for Clico Energy and mail me the summary/conclusion…"

174.4. Cronberger replied to Joseph Cassidy:

"Joe, I am pressing Jerome to get a new long term forecast as quickly as possible. Then we should be able to revise our valuation at least internally. But I am not sure if we can get it done before the weekend."

174.5. Obviously, by this date, not only had Duprey and Sakal been speaking to the representatives of the GORTT and the Central Bank for assistance, but they had also committed to dealing with specific shares – in RBL and MHTL - without mentioning anything about the PETL shares.

174.6. They both would have known that this assistance was requested as a matter of urgency and that proposals and negotiations were going on for some sort of assistance from the GORTT which would have entailed some sort of direct intervention and control by the GORTT.

174.7. This information – the immediacy of the situation – must have been at the forefront of their minds. On the other hand, Joseph Cassidy was a long-standing business partner of Duprey and there is no doubt that there may have been in person conversations which were not reduced into a paper trail. This means that the court does not have direct evidence of what was said on the golf course on 25 January nor what was said privately on private calls between the parties during that period.

174.8. Notwithstanding this lack of information, the court also notes the urgency with which Proman then moved to get this transaction going as can be seen in the pressure expressed by Cronberger in the email above.

175. On 29 January 2009, Sakal emailed Joseph Cassidy stating under the subject "CLF – Urgent", as follows:

> *"Obviously not business as usual. Things critical. However the Central Bank has a fixed and floating debenture over CLF itself to the tune of 1.6 billion (TT$). This has implications. They are now almost completed the gathering in info on the group. The debenture gives them the power to sell. Please*

call me when you get a chance. I need to speak to you before you meet with the Chairman. He likes to play down the crisis."

176. On 30 January 2009, the MOU was executed.

177. On 30 January 2009, the date of CLF's entry into the MOU and after the signing, certain emails passed between Sakal and Joseph Cassidy, whereby the latter was informed of matters in connection with the MOU. Joseph Cassidy promptly responded, effectively indicating that there would be an assiduous effort on his part to get out "default notices" and to exercise "pre-emption rights." Going through the day more carefully:

177.1. Shortly after midnight that day, from the emails that the court has before it, it is clear that Jo-Anne Julien, attorney-at-law at MG Daly and Company, indicated the schedule for the signing of the MOU later that morning along with a cabinet meeting thereafter and followed by a media conference. She indicated at the same time that she would be preparing the resolutions to be signed by CLF, CLICO and BA and that none was required for CIB since it was going to be taken over.

177.2. Julien did in fact forward the resolutions later on that same morning and she continued following it up for execution and presentation to ensure compliance with the terms of the MOU. As mentioned above, Sakal sent out copies of the signed MOU to the Board of Directors of CLF prior to the media conference at 12 noon.

177.3. In the meantime, at 10:01 AM, Cronberger sent his valuation of PETL to Joseph and David Cassidy saying:

"Joe, David

Attached is our internal valuation based on new forecasts.

A summary with comparison to last June is attached. I have also included the worksheets in case you want to look at the assumptions. We left the discount factor unchanged."

Discussion 2

177.3.1. This is the valuation that would later be sent off to Dr. Till Reuter for his "fairness opinion" and upon which the offer for purchase, and the eventual sale, was based.

177.3.2. As one would see from the analyses and criticisms set out below in relation to the valuation exercises provided by the Hill's valuation and the Robinson valuation, detailed examination of the valuation process was necessary. However, Cronberger was not called as a witness to substantiate or verify in any way how he came to the very important figures that he did;

177.3.3. This failure to call Cronberger created concern to this court especially when one considers that Reuter as well was not called as a witness to substantiate his work and Hill did not attend to substantiate his.

177.4. At 2:33 PM, Sakal, in an email to Bosworth Monck, one of CLF's Directors, stated:

"It is too late. We cannot be disposing or transferring things an MOU has been signed with the GORTT."

177.4.1. It was obviously clear to Sakal on 30 January at 2:33 PM that, as a result of the MOU, nothing could be disposed of or transferred. Therefore, any sale to Proman would be contra the same and therefore, as argued by the claimants, had to be done surreptiously.

177.5. By 9:54 PM that night, presumably Swiss time which would have made it 4:54 PM TT time, Dr. Till Reuter prepared and sent his "fairness opinion" opining “*valuation levels in the range of 80 – 100m for 100% of the company*". This opinion was based on his analysis of the Cronberger valuation which was forwarded by Cronberger at 10:01 AM (TT Time) that same morning.

177.6. Later that evening, at 5:35 PM, Sakal informed Joseph Cassidy:

*“**The Chairman has appointed Monteil’s company to negotiate on behalf of CLF without CLF Board approval… With this MOU (which and the resolution which Claus will send) Monteil’s company has the right to negotiate**. The GORTT has already announced that they will now have MTHL shares. We will have a buy back option but that is impossible…*

*Note that **I have not been part of negotiations of the MOU** because Monteil’s view was that I supported the energy investments which “bust down” the company. **It is highly likely if at our board meeting tomorrow, if the Chariman continue with this pie in this sky talk and insist that Monteil continue to represent us, then I will resign. I will only stay on for a while to discuss the strategies we talked about with Claus…Claus and I***

will work and if it's the last thing I do is to ensure that GOTT does not get control.

***The Chairman will be seeing you on Sunday. He asked that you pick him up in the airport (AA flight)**."*

Discussion 4

177.6.1. Clearly, Sakal was indicating to Joseph Cassidy that there was a monumental change in CLF with Andre Monteil and Stone Street Capital being appointed to "negotiate";

177.6.2. The only resolution that was referred to and in the domain of the participants at the time was the resolution prepared by Julien. No other resolution is mentioned anywhere else so it has to be inferred, when read together with the fact that it related to the MOU, that the resolution referred to in the email was the CLF resolution which, amongst other things, appointed Monteil – see the words used – "*With this MOU (which and the resolution which Claus will send) Monteil's company has the right to negotiate";*

177.6.3. Sakal went on to indicate that she had discussed strategies with Cronberger. It must be remembered that Cronberger, who is a major representative of PETL, did not attend to give evidence in this matter despite the fact that he was a major participant in what transpired. More will be said about this later on. Those strategies that were discussed, however, are not before the court so that, once again, it is obvious that there were machinations going on behind the scenes in respect of which there is no paper trail;

177.6.4. Further, the fact that Duprey requested Joseph Cassidy to collect him from the airport on Sunday, which would have been Sunday 1st February 2009, means that once again, these two long-standing business partners with such a close relationship that one would request the other to collect him from the airport upon his return from Trinidad to Florida suggests that, again, there were conversations that were carried on without a paper trail before this court. It would be naïve of anyone to believe that if Joseph Cassidy did in fact collect Duprey at the airport on Sunday that they just would have spoken about the need for liquidity without mention of what had transpired over the previous few days.

177.7. At 1:18 AM on 31 January 2009, which would have been 8:18 PM on the night of 30 January 2009 TT time, Erwin Keutner of Proman in Switzerland emailed Joseph Cassidy and David Cassidy and sent a thread of emails under the subject "Press Conference in Trinidad on CLF Financial Group". Of particular interest is the email sent by Tara Wong as part of that thread under the same subject heading in which she said:

"Good day Mr. Keutner,

Just for your information as I am certain you knew it was coming

At this present time (1:45 PM) there is a press conference among: The Central Bank Governor, Minister of Finance, Mr. L Duprey, International Insurance Investor and the Manager of First Citizens Bank (Government Bank).

This conference is to basically inform the public that the Government will be taking control of "selected companies" within the C.L.Financial Group to bail them out financially. One of them being MHTL."

[Emphasis added]

Discussion 5

177.7.1. Obviously, this email serves to confirm what would have been obvious and that is that this writer – Tara Wong – was of the firm view that the Cassidys were aware that something was coming.

177.7.2. This is consistent with conversations going on beyond the ambit of the written evidence that is before this court.

177.8. Joseph Cassidy then responded to Sakal's earlier email by his email sent at 8:38 PM as follows:

"Thanks Gita, I will do everything I can to get out the default notices and exercise of pre-emption rights for both MHTL and CE by Monday. Also, I will travel to Trinidad on Monday. Regards, Joe."

Discussion 6

177.8.1. Obviously, Joseph Cassidy was contemplating a strategy to counteract the MOU and to bypass any steps that may be taken under the MOU by the GORTT to acquire the PETL shares;

177.8.2. That contemplated strategy manifested itself in the PSA by way of mention only but that mention suggested that it was a driving force even though it was not relied upon as the basis for the PSA.

178. On 31 January 2009, at 10:50 AM TT time (15:50 Swiss time), David Cassidy wrote to Cronberger, Markus Gresch and their counsel Jeffrey Chambers as follows:

> *"Claus, Markus … Can we get Jeff up to speed on everything… benefit agreement, trust deed, all shareholders agreements so that Markus and Jeff can bounce ideas off of each other. I think it is clear that it would be unfair to be Gita into any position where she might feel uncomfortable.*
>
> *Jeff… I believe you have a copy of the Consolidated Energy and MHTL shareholders agreements and the MOU between CLF Financial and GORTT* ***but nothing else****??*
>
> *All… we need to establish our tactics quickly and make sure that all of our ducks are in a row.*
>
> *We have so far assumed that the first step is to issue a notice of default. Against us is that the Governor of the Central Bank specifically stated that CLICO was not bankrupt. However, CLICO's situation is clearly not that of "a going concern".*
>
> *Also, we need to tighten up our position on all SHAs.*
>
> *On that note, GMC… we are trying to get you a final version of MHIL (sic) (original and new ammendment (sic)) for you and LD to sign tomorrow.*
>
> *Jeff… have you spoken to GMC about this … might be better as you are on the same time zone."*
>
> *[Emphasis added]*

Discussion 7

178.1.1. It must be noted that Jeffrey Chambers, Proman's American attorney-at-law, was given the documents mentioned above in the email but there is no direct reference to the SSSA. For the

reasons set out above, the court is of the respectful view that, notwithstanding the assertion made by the witnesses for Proman that the intention was to have the SSSA unwound, the document itself along with the evidence of the payment of dividends were matters that Mr. Chambers ought to have considered in his advice. He has not attended to give evidence and has therefore not attempted to stand by his advice in the apparent absence of the effect of the SSSA.

179. Sakal emailed Joseph Cassidy at 11:31 AM in response to emailed questions of earlier that day about PETL:

> *"I will get back at about 6:00 pm this afternoon – meetings all day – Central Bank has already taken over CIB. Tomorrow it may be Clico. Will update you later."*

180. By 11:07 AM TT time (or 4:07 PM Swiss time), David Cassidy informed Cronberger:

> *"Just to let you know what we are thinking on the offer… and your input was valuable.*
>
> *We are going to offer LD*
>
> *60% of the $152 mio valuation for fungibility/firesale etc.*
>
> *This works out at 152,595.80 x 0.60 = 91,557.48 x .51 = 46,694.31*
>
> *Keep that under your hat for now"*

Discussion 8

180.1. Immediately, one notes a substantial discount of 60% for "fungibility/firesale etc." This, of course, does not conform with the language used by Reuter in his "fairness opinion". There is no mention of these words in his report. Instead, he estimated a 50% deduction because "most company valuations came down more than 50% since summer 2008

and further declines are expected." Then, he applied a discount in the range of 20% to take account of the pre-emption right under paragraph 8 of the SHA.

180.2. Proman sought to shy away from the concepts of "fungibility/firesale" at the trial preferring Dr. Reuter's "fairness opinion".

181. In the meantime, at 11:19 AM, Joseph Cassidy wrote to Cronberger and copied Gresch, David Cassidy and Kastner:

> *"An offer of $50 million for 51% looks very reasonable under the circumstances???? $22,663, based on book value and the rest as share premium ???"*

182. Cronberger responded very shortly after at 11:55 AM (or 4:55 PM Swiss time):

> *"I think so too. Also if we compare this to our valuation and an adjustment of 35% due to fungibility of shares (empirical data ranges from 30 to 40%) the offer is in a reasonable range."*

Discussion 9

182.1. One may well wonder why Cronberger is getting involved in this conversation which, respectfully, does not seem to have anything to do with him other than to provide internal PETL figures. The court remembers, however, Sakal's mentioned evidence that Cronberger was Proman's representative in PETL and his involvement in this conversation seems to lend credibility to that assertion.

182.2. His inclusion in the conversation and his pivotal role in the determination of the figures which the parties used, including Reuter, made it imperative for him to attend before the court to justify his figures. He did not.

183. On February 2, 2009, Sakal sent a notice to all the directors of CLICO and directed them amongst other things:

> *"Not to dispose of or enter into any agreement for the disposal of ANY assets without firstly providing a schedule or details on the proposed disposal to CLF and GORTT for approval."*

184. On 2 February 2009, Eggenberger emailed Sakal and Cronberger, attaching a letter from Proman to CLF, and directed to the attention of Duprey. The letter, the subject reference of which was "*Clico Energy Company Limited",* was a purported notification of default and stated:

> *"The liquidity or insolvency crisis being faced by CLF Financial Ltd and its affiliates has come to our attention from recent press reports. This letter is to give notice that CLF Financial may, as a result of these circumstances, be in default under Article 7 of the Company's Shareholders Agreement dated November 21, 2000 ("Shareholder's Agreement". We remind you that, in event of such a default, Proman Holding (Barbados) Ltd (successor to Proman AG's shares under the Shareholders Agreement) has the option to purchase CLF Financial's shares in the Company, and intends to exercise that right…"*

185. In the meantime, by letter dated February 3, 2009, Consolidated Energy Limited (CEL) purported to accept an earlier offer of Duprey on behalf of CEL to sell and purchase the entire shareholding of CLF and CLICO in MHTL.

186. By email dated 3 February 2009, at 7:45 am, Sakal emailed Duprey among others stating that any transfer of company property such as cars etc at that time was prohibited unless the committee of the board gives its approval. This would obviously be a reference to the 27 January and 31 January sub-committee.

187. Additionally, on 3 February, 2009, a meeting among Sakal, Motilal, Joseph Cassidy, Jeffery Chambers (Attorney at Law for Proman) and Cronberger took place at MHTL's office. Duprey, was at the time in Florida, but communicated with the aforementioned persons remotely. The meeting was to continue the discussions for the sale of the PETL Shares. Proman ultimately offered CLF US$46.5 million for the 51% shareholding in PETL, after which Sakal and Motilal left the meeting room to discuss with Duprey privately. Sakal then returned to advise Proman that the price had been agreed to. There is no evidence of a counter proposal or negotiation of any kind.

188. In her evidence at the Colman Enquiry, Sakal said that Motilal was not present for the discussions involving the PETL shares and that he left the meeting after discussions were had in relation to MHTL. This therefore was a crucial point to resolve. The reason for its importance was highlighted in the prominence that his alleged presence played in the submissions for Proman that Sakal and Motilal – both being members of the CLF Committee appointed on 27 January and confirmed on the 31 January 2009 – knew of the sale of the PETL shares by Duprey and raised no objection. Neither Sakal nor Motilal attended before this court to give evidence and therefore the court has no cogent evidence for Motilal in particular in this regard other than the record of his cross examination before the Colman Enquiry[48]. Sakal's evidence was as mentioned before. On the other hand, Joseph Cassidy was adamant that he was present and this formed one of the bases of his assertion that there was nothing in the circumstances to have caused him to question Duprey's authority.

[48] This will be discussed below

Motilal

188.1. Other than Sakal, Proman also relied upon the presence of Motilal to give the impression of Duprey's authority. A central part of the defence raised by Proman was that neither Sakal nor Motilal raised any concern despite being present and being aware of the transaction. The court has already pointed out Sakal's motives which was to ensure that the GORTT did not get the shares, if it was the last thing that she did. Motilal, however, is an enigma in the situation. Sakal said that he was not present in the discussion about PETL - he was there only for the MHTL discussion.

188.2. Motilal gave evidence in the Colman Enquiry. He was, at the time the CEO of MHTL and a Director of CLF. He was also a member of the four-person Committee appointed on 27 January by CLF. At the Colman Enquiry, Motilal stated that he was not present when PETL was discussed as he left after the discussion about MHTL. He was cross-examined by several attorneys at law including senior counsel for the claimants, Mr. Hosein SC, and for Proman, Mr. Hamel-Smith SC. He was questioned about the meeting and he gave details to Mr. Hosein in which he said that the first time he knew about the PETL sale was on 15 February 2009 when a Board meeting was held. Even though he was part of the sub- committee, he did not feel compelled to query the sale which he intimated was done without the approval of the Board contrary to the appointment of the sub-committee. He spoke about the board room where the meeting on 3 February was held which, according to him, doubled as a spillover area for his work. He spoke about a meeting and he then went on to say that he was not present for the PETL discussion. He said that he was aware that Proman was interested in purchasing the shares but he was not aware that CLF was interested in selling at the time. Mr. Hamel-Smith SC suggested to him that the reason why he said nothing about it was because he was not

surprised and that the reason why he was not surprised was because he was aware of the sale. Motilal refuted that suggestion and Mr. Hamel Smith left it for the Commissioner to make a finding on the evidence. Just to say, though, any such finding would not bind to this court but the court has the evidence given by Motilal tested under cross-examination.

188.3. It seems more likely than not that Motilal did not know the details of what was happening as was asserted by Sakal and by himself. Of course, the Cassidys assert otherwise but, in light of Sakal's compromised position, it seems to be in their interest to find someone less culpable to bring into the mix. The court does not accept, on the balance of probabilities, that Motilal was present having regard to the evidence of Sakal and Motilal who were tested on the same before the Colman Enquiry. That is because the court is of the respectful view that the Cassidys were motivated to present this position for the reason just given and that there were other persons who were present on the day at the meeting such as Jeffrey Chambers or Cronberger who could have attended to substantiate this allegation, along with the crucial roles that they played in the transaction, but did not.

189. Additionally at this meeting, a draft of the PSA was prepared by Sakal, naming CLF as acting for itself and for CLICO and recognizing the interest of CLICO in the said PETL Shares and in which draft CLICO was a proposed signatory. However, as appears from the draft the references to CLICO were later deleted although there continued to be references to “Sellers”, obviously referring to both CLF and CLICO.

190. Further, a letter in response to Proman’s “default notice” of the preceding day was prepared by Sakal on behalf of Duprey. This letter dated 3 February 2009 informed Proman that the CBTT had already intervened into the affairs of CLICO and provided Duprey’s unreserved acknowledgment of Proman’s right to

purchase under Article 7.2 of the Clico Energy Shareholders Agreement. This letter further stated, "*We would be extremely pleased to enter into immediate discussions with you with a view to selling our entire 51% shareholding in Clico Energy Company Limited.*" Duprey subsequently signed this letter upon his return to Trinidad on the evening of 3 February 2009.

191. Following Duprey's letter dated 3 February 2009, Ms. Rosanna Rampersad, located at PETL's offices on 3 February 2009, emailed Sakal and Cronberger at 1:24 pm. The email was headed "Share Transfer CLF Proman" and attached a 1 page Share Transfer document wherein CLF purported to agree to transfer to Proman 84,986,145 shares in PETL in consideration of the sum of US $46,500,000. The blank signature space had Duprey signing for CLF and Eggenberger signing for Proman.

192. On 4 February 2009, the Minister of Finance wrote to Duprey referring to the MOU and advising, inter alia, that *"The Boards of CLF and BA are to cease any inter-company transactions, any increases in salaries of directors and senior officers, any payments of dividends, bonuses, share options and any disposal of assets* ***without a schedule provided to the GORTT for its prior approval****."*

Discussion 10

192.1. This was a clear corroboration of the inference and understanding that Nuñez-Tesheira spoke about in relation to approval for CLF asset disposal.

193. By letter dated 4 February 2009 to the Minister of Finance, the day that the PSA was being finalized, Duprey, on behalf of CLF, stated:

> *"I can confirm in accordance with clause 20 of the MOU that the Boards of both Clico and BA have not undertaken…any disposal of assets without a schedule provided to the GORTT for its prior approval…*

CLF have started and will continue to explore ways of realizing assets however recognizing that it is not in the interests of the GORTT or any other party to the MOU for there to be a fire sale of assets. ***It follows that in discussion with a valuer appointed by the Central Bank to act as independent advisor as to value of assets, there will be a sale for the best obtainable price of CLF's assets****. The receipts from any sales will, after prior obligations have been met, be contributed to Clico or BA in order for them to be able to continue to further regularize their financial position."*

[Emphasis added]

Discussion 11

193.1. Duprey's recognition of his own undertakings under the MOU and his clear intent to deceive the GORTT by lulling it into a state of comfort that assets would not be sold without proper valuations being done is as clear as day. His dishonesty manifests in the highlighted portion because by that time, he was already concluding the business of the sale of CLF's interest in PTEL without any such valuation as mentioned. This was utterly reprehensible.

194. On 4 February 2009 at 11:21 am, Ms. Jacqueline Frost of CLF wrote to Karen Ann Gardier advising her that Duprey requested the Clico Energy Share Certificate No. 26 for 5,266,005 shares issued in July 2008 to be delivered to their offices that day.

195. On 4 February 2009 at 12:22 pm, Mr. Cassidy emailed Mr. Marcus Gresch (a director of Proman), copied to Sakal, to say, *"Please communicate directly with Gita regarding the bank account. Email her any documents that are required and* ***telephone her only on her mobile****."*

[Emphasis added]

196. On 4 February 2009 at 12:24 pm, Sakal emailed David Cassidy the signature page of the PSA already signed by Duprey, but asking him to make amendments to the PSA as agreed. Shortly thereafter at or around 1:05 pm, David Cassidy emailed Mr. Cronberger the signature page of the PSA, bearing the signature of Mr. Daniel Eggenberger, and that of David Cassidy as a witness. Mr. Cronberger, then, at 1:23 pm, emailed Sakal the signature page of the PSA.

197. On 4 February 2009, at 4:32 pm, Sakal emailed Joseph Cassidy and Cronberger, under the subject reference "URGENT – call me":

> *"The GORTT is (sic) requested from Clico a schedule of all asset disposal from January 2009.* ***The (sic) pointed out to the MOU which instructs to cause any disposal of assets without a schedule provided to GORTT. The related (sic) to 17% of Clico Energy Shares which Clico has on its book and for which they had applied to Central Bank for approval for the Statutory fund. To avoid any repercussions I would suggest that we discuss with a view to suspending the transaction****…"*
>
> *[Emphasis added]*

198. Meanwhile, on the MHTL front, in response to the letter of 3 February 2009 (aforementioned) where Consolidated Energy Limited (CEL) purported to accept an earlier offer of Duprey on behalf of CEL to share and purchase the entire shareholding of CLF and CLICO in MHTL, Duprey, on 5 February replied:

> *"We wish to point out that all further correspondence related to Colonial Life Insurance Company (Trinidad) Limited must be directed to the attention of:*
>
> *Mr. A Claude Musaib Ali*
>
> *Managing Director*

Mr. Musaib Ali has been appointed by the Central Bank of Trinidad and Tobago and the Ministry of Finance to manage all affairs of the company, including any disposal of assets.

***With respect to the shareholding of CLF Financial Limited (CLF), I have drawn your correspondence to the attention of the current CLF Board at a meeting held today and I must inform you that under the terms of the Memorandum of Understanding dated January 30, 2009, CLF gave an undertaking to the Minister of Finance that any disposal of assets from that date must receive the prior written approval of the Ministry of Finance**."*

[Emphasais added]

Discussion 12

198.1. Again, this is a crucial admission from the hand of Duprey which Proman ought to have paid attention to. More will be said about this later on.

199. On 5 February 2009[49], by letter to Michael Beck of CEL, in which CLICO was copied, Duprey advised that:

> *"We wish to point out that all further correspondence related to Colonial Life Insurance Company (Trinidad) Limited must be directed to the attention of: Mr. A. Claude Musaib- Ali Managing Director. Mr. Musaib-Ali has been appointed by the Central Bank of Trinidad and Tobago and the Ministry of Finance to manage all affairs of the company, including any disposal of assets."*

[49] Annexed to the witness statement of Wendy Ho Singh and marked "WHS27"

200. By memorandum dated February 6, 2009 and signed by Duprey which was sent to "Chairman, Chief Executive Officer, General Manager and Managing Director of all CLF Financial Subsidiaries" and which similarly stated:

> *"PLEASE BE ADVISED that effective immediately you are to place a freeze on…DISPOSING OF ANY ASSETS OR ENTERING INTO ANY AGREEMENT TO DISPOSE OF ASSETS other than in the ordinary course of business WITHOUT FIRST NOTIFYING CLF FINANCIAL LIMITED.*
>
> *THIS IS IN KEEPING WITH AN UNDERTAKING GIVEN TO THE GOVERNMENT OF THE REPUBLIC OF TRINIDAD AND TOBAGO AND THE CENTRAL BANK."*

201. The aforementioned Memorandum also directed that notification was to be sent to a "COMMITTEE OF THE BOARD OF CLF FINANCIAL LIMITED".

202. By the minutes of the meeting of the Board of Directors of CLICO dated 9 February 2009, it was stated that the number of shares held by CLF for CLICO in PETL was 28,328,715. [50]

203. The purported sale and purchase of the Clico Energy Shares was completed on or around February 10, 2009 when the purchase monies were paid into an escrow account and by virtue of the aforesaid, Proman became the sole registered member of PETL, formerly Clico Energy.

After the Completion of the PSA

204. CBTT assumed control of CLICO pursuant to section 44 D of the CBA with effect from 13 February 2009.

[50] True copy of the minutes of the Board of Directors of CLICO is annexed to the witness statement of Wendy Ho Singh and marked "WHS28"

205. On 15 February 2009, the then Financial Director of CLF, Carballo and a member of the CLF Committee, emailed Sakal of CLF, stating, in relation to PETL (which was known as CLICO Energy at the time):

> *"I am being advised that we have entered into a sale agreement for Clico Energy. CLF and Clico are joint shareholders and given the MOU and issues with valuations, I am concerned. Can you update the position as I do not want to be making assumptions on assets values and arrangements made otherwise. Did the sale agreement get approval at the CLF and Clico Board? Please update me urgently."*

206. On 16 February 2009, the following emails were sent:

206.1. At 9:48 am, Sakal emailed Cronberger:

> *"in your capacity as CL/Clico and managing director of Clico Energy you will soon be called upon to report. I also confirmed that you are a CLF appointed director and MD with most knowledge of the company. I confirmed that a copy of the MOU was handed to yourself and Proman's attorney Jeff [Chambers]. The GORTT is looking adherence to the MOU which external counsel for CLF both local and UK have confirmed is valid.*
>
> *This means that the validity of the [sale] of shares could and may be questioned. It will therefore be absolutely essential for the valuations to be reasonable and in this case not less than what is contained in 7.3-7.6 of the agreement. Please confirm that the valuations you presented are in accordance with the referred to sections".*

206.2. At 9:56 am, Cronberger queried which agreement Sakal was referring to.

206.3. At 9:58 am, Sakal stated:

"Fair market value per shareholders agreement"

206.4. At 7:59 am, Cronberger emailed a response to Sakal stating that the valuation he sent her was based on the discounted cash flow model with a fungibility discount and purported to confirm that the valuation presented was in accordance with the referred sections of the SHA.

206.5. At 11:16 am, Sakal emailed all CLF directors stating:

"It is my opinion that the less said at this point the better. The Governor has suggested to the nation that instead of using the policy holders' monies to invest in state fund assets, the monies were used to finance projects for CLF. Michael has confirmed to certain persons that 5 billion went to drinks and 5 billion to Florida real estate. Do you want us to confirm this to the population? My concern is the policy holders and to ensure that GORTT meets its commitment to release funds to pay them. At this time my recommendation is for us to do as little as possible to upset this delicate undertaking. CLF in its heavily leveraged position has little choice at this time."

206.6. At 11:15 am, Cronberger emailed Sakal asking:

"Gita

How shall we handle requests from Clico?"

206.7. Sakal responded 6 minutes later at 11:21 am:

Well based on my email I suggested that following January 30 Duprey had no authority to sell CLICO's portion. The (sic) maintain the Share Cert etc and at this time have no knowledge of the transaction. The GORTT has KPMG Canada to value assets. We are putting Duprey in a further very bad situation which could now destroy his public image further. I suggest you

seek guidance from others. My suggestion will be to reverse the CLICO portion of the transaction. It could turn out real nasty."

206.8. At 11:24 am, Cronberger emailed a response to Sakal:

"OK".

206.9. At 11:31 am, Sakal pleaded:

"I strongly recommend we reverse the CLICO portion of the transaction. GORTT has been given, even by Carballo of our office a listing showing that CLICO has 17% I may be able to defend the CLF portion. Even though the CLF Board when the look at the valuation which we had not send prior, will may be resigning over this.

At this time I have to protect the Chairman and save credibility. If GORTT does anything to change its mind about paying policyholders based on this, then we are dead. Need answer soon. Call on my cell with answer."

207. On 17 February 2009, at 5:28 am[51], Sakal emailed Cronberger with a copy to Proman's attorneys and to Joseph and David Cassidy, Duprey and Andrew Mitchell Q.C. stating:

"There is no argument that the Trust Deed[52] was a valid document. The MOU and the reputation of the Chariman and the future of CLICO is what is being questioned.

Firstly following the signing of the MOU and by signing the MOU the chairman, with the advise (sic) of certain financial and legal experts gave

[51] Annexed to the witness statement of Wendy Ho Singh and marked "WHS30"

[52] This is in obvious reference to the Trust Deed between CLF and CLICO in relation to the 17% share in PETL

undertakings. Please refer to the MOU a copy of which was passed to Jeff. So as for CLF the signing like others is ok. For CLICO post MOU and from 30th January it is NOT. The risk of not reversing is to drive the proverbial last nail in his coffin in addition to what is happening to his credibility he will now face the risk of the public being told that he is selling assets in breach of the MOU… ***Proman knowing a bit of the present situation****… should, in consideration of the person who has supported and given his all to the energy business out of respect to the gentleman reverse the transaction as it relates to the 17%... This is my final appeal for the Chairman's sake…"*

[Emphasis added]

208. Also by letter dated 17 February 2009[53], Sakal wrote to Musaib-Ali, the then Managing Director of CLICO with the subject "CLICO ENERGY COMPANY LIMITED ("CE")" and she stated as follows:

> *"Instructions were given to the Escrow Agent for the transfer to CLICO's USD account No. 1583741 at FCB the sum of USD 15.5 million representing proceeds from the sale of shares of CLICO Energy ("Shares") to PROMAN.*
>
> *As you are aware CLF held 17% of the shares of CE in trust for CLICO.*
>
> *In exercising its Option to Purchase the Shares, the purchasing Shareholder relied on Section 7 of the Shareholder's Agreement entered into on the 21 November 2000 "BANKRUPT AND DEFAULTING SHAREHOLDER"*
>
> *I attached hereto for your consideration the following:*
>
> *A copy of the Shareholder's Agreement – Exhibit 1*
>
> *A copy of the Valuation – Exhibit 2*

[53] Annexed to the witness statement of Wendy Ho Singh and marked "WHS29"

A copy of the Share Purchase Agreement – Exhibit 3

Should you have any questions concerning the above please contact Mr. Claus Cronberger, General Manager of CE, who is also CLICO's representative on the Board of CE."

209. On 25 February 2009, proceedings were issued by the CBTT and CLICO against CLF in relation to the sale of CLICO's stake in PETL. However, the said proceedings were discontinued on 28 October 2009.

210. By letter dated 13 March 2009, Musaib-Ali wrote on behalf of CLICO to PETL, Proman and CLF respectively[54]. In his letter to Proman, Musaib-Ali referred to the agreement for sale dated 3 February 2009 and advised Proman that CLICO was the legal owner of 5,266,005 shares in PETL represented by Share Certificate No. 26 dated 23 July, 2008. Musaib-Ali also advised Proman that CLICO had not entered into any agreement to sell, nor had it voluntarily sold or otherwise disposed of the said shares. Musaib-Ali requested that Proman confirm by 17 March 2009 that the 5,266,005 shares did not form part of the transaction effected by the agreement for sale dated 3 February 2009.

211. In his letter to PETL, he acknowledged receipt of the letter dated 23 July 2008 and the enclosed share certificate which advised that CLICO was the holder of 5,266,005 shares in PETL. By this letter Mr. Musaib-Ali put PETL on notice that CLICO had not entered into any agreement to sell nor had CLICO sold, gifted or otherwise disposed of the said shares. Musaib-Ali also requested that PETL confirm by 17 March 2009 that CLICO was the registered holder of the 5,266,005

[54] Annexed to the witness statement of Wendy Ho Singh and marked "WHS32"

shares in PETL and that CLICO was duly entered in the Register of Shareholders of the Company.

212. In Musaib-Ali's letter to CLF, he referred to Sakal's letter of 17 February 2009 and the enclosed documents which evidenced the sale to Proman of 51% of Clico Energy shares, which included the 17% shareholding held by CLF in trust for CLICO. He also informed CLF that CLICO was in possession of a copy of a share certificate No. 26 dated 23 July 2008 for 5,266,005 shares held by CLICO in PETL. Musaib-Ali advised CLF that CLICO had not entered into any agreement to sell, nor had CLICO voluntarily sold or otherwise disposed of the said shares, and he asked CLF to confirm by no later than 17 March 2009 that the said 5,266,005 shares represented by share certificate No. 26 did not form part of the sale referred to in the letter of 17 February 2009.

213. In response, by letter dated 17 March 2009, PETL responded to Musaib-Ali and indicated that all company records were previously held at CLF and that the former Company Secretary had undertaken to deliver all the Company's records as soon as possible. PETL also indicated that the documents had not been received and it was therefore unable to provide the information requested in the letter. However, it was indicated that without reference to the records of the company, the understanding was that CLICO was not a registered member of the company and that CLF had sold and transferred all the shares that it held in the company. PETL also requested a copy of the letter and shareholder certificate to which Musaib-Ali referred.

214. By letter dated 17 March 2009, Eggenberger of Proman also responded to Musaib-Ali's letter. Eggenberger stated that the SHA did not permit the transfer of shares to non-members who had not agreed to be bound by the shareholder agreement. He also stated that to his knowledge only Proman's predecessor corporation and CLF had ever been registered members of PETL. The letter also stated:

"(1) The PETL corporate documents require that "issues of shares shall be made on such terms and conditions…as shall be determined by the Company in General Meeting." We have no record or knowledge of any General Meeting authorising the issuance of PETL shares that you reference to CLICO.

(2) For CLF to have transferred any of its shares in PETL to CLICO would have required that the rights of pre-emption conferred by the PETL shareholders agreement to have been exhausted by CLF first offering the PETL shares to Proman. No such offer has ever been made by CLF to Proman.

In the circumstances, it would appear that any issuance of PETL shares directly to Clico or to any transfer by CLF to Clico would have been erroneous. However, we would be happy to meet with you and CLF at an early date in an effort to clear up the situation concerning the share certificate no. 26 dated 23rd July 2008 and the 5,266,005 shares in PETL said to be represented by that share certificate."

215. Cronberger wrote to Musaib-Ali via letter dated 27 March 2009. He informed Musaib-Ali that PETL received corporate documentation form the previous company secretary which appeared to be incomplete. He stated that he noticed that the company's annual return was amended on 16 March 2009, showing shares in the name of CLICO. By this letter, Mr. Musaib-Ali was informed that the return pre-amendment only had CLF and Proman as shareholders. Copies of the original and amended returns were also enclosed with the letter.

216. By letter dated 2 April 2009, Proman wrote to CLF referring to a number of alleged serious breaches and deviations by Sakal from the requirements of the SHA and the PSA dated 3 February 2009. Proman informed CLF that although it was aware,

at the time of executing the PSA, that CLICO had a beneficial interest pursuant to a trust arrangement between CLICO and CLF, it was unaware that Sakal had purported to issue a PETL Share Certificate to CLICO for any PETL shares. Proman also stated that notwithstanding CLF's obligations to CLICO under the trust and any other agreement between CLF and CLICO, CLICO never became a shareholder of PETL because it never satisfied the requirements under the SHA.

The Proposed "Buy Back" of CLICO's 17%

217. By letter dated 1 February 2010, Eggenberger wrote to Dr. Euric Bobb, the then Chairman of CLICO, informing him that Proman would like to confirm its agreement to sell CLICO a 17% stake in PETL for a sum of USD $15,500,000 and a 17% stake in the Caribbean Petrochemical Company Limited for the sum of USD$2,040.00. By this letter, Eggenberger suggested aiming to complete the entire transaction by the end of March 2010.

218. By email sent on 1 February 2010 from David Cassidy to Dr. Bobb, David Cassidy attached a copy of the offer letter.[55]

219. By email on 2 February 2010 at 9:46am, Dr. Bobb advised Ms. Pat Christopher, Corporate Secretary of CLICO "to prepare a formal reply which I will send both by email and courier per request in David Cassidy's email."[56]

220. By letter dated 10 March 2010, Dr. Bobb wrote to Eggenberger and formally accepted the offer to purchase a 17% minority shareholding in PETL for the sum of USD $15,500,000 the identical sum received by CLICO for this block of shares in February 2009. In this letter, Dr. Bobb also stated that he was looking forward to

[55] Annexed to the witness statement of Ho Sing and marked "WHS40"

[56] Annexed to the witness statement of Ho Sing and marked "WHS41"

the completion of the transaction by 15 April 2010 subject to the conditions set out in the letter being satisfied or waived.[57]

221. By email dated 31 March 2010, Dr. Bobb wrote to David Cassidy informing him that he resigned from the Boards of CLICO and CLF earlier that day and that Carolyn John would continue contact on the subject. That email was in response to an earlier email of the same date in which Mr. Cassidy informed Dr. Bobb that consent from KfW was formalised and as agreed Proman would continue to assume all of the obligations under the Assumptions Agreements leaving CLICO with no exposure to the CNC and N2000 debt.[58]

222. By email dated 22 April 2010, Ms. Carolyn John, the then Managing Director of CLICO, informed David Cassidy that she was the contact person at CLICO relative to the Process Energy transaction and asked that he let her know what the current status was.

223. David Cassidy responded via email sent on 3 May 2010 informing Ms. John that he officially received acceptance of the offer from Euric Bobb on 10 March and that on 17 March 2010, he sent drafts of the Sale and Purchase Agreement and Shareholders Agreement for PETL for comments. He stated that this was also followed on 23 March by the due diligence documentation that was requested as it regarded PETL and that during that time he also secured the consent of the lenders for the transaction and copies of waivers were sent on 31 March 2010. He informed Ms. John that he had not received any correspondence other than the official acknowledgment and looked forward to hearing from her.

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[57] Annexed to the witness statement of Ho Sing and marked “WHS42”

[58] Annexed to the witness statement of Ho Sing and marked “WHS44”

224. By email sent on 24 May 2010, Ms. John informed David Cassidy that she completed the review of the draft Shareholder's Agreement and requested a copy of Schedule "C" referred to in the email and the due diligence submission. David Cassidy then informed Ms. John via email sent on 2 June 2010 that Schedule "C" should have been completed by CLICO and that the due diligence would be sent with his next email.

225. By email sent on 8 July 2010, Ms. John wrote to David Cassidy informing him that she had not heard from him and would like to know the status of the transaction to transfer the 17% shareholding in PETL back to CLICO.[59]

226. By email dated 9 July 2010, David Cassidy responded to Ms. John's email stating that he had not heard anything from CLICO since the election and perhaps it might make sense for them to understand the business model going forward. He informed Ms. John that PETL had its reservations during and after the period surrounding the 30 January 2009 MOU[60].

227. By Minutes of the Meeting of the Board of Directors of CLICO held on Tuesday 12 October 2012[61], the Board was informed that CLICO owned 17% in PETL and subsequent to the signing of the MOU, the then Chairman sold CLICO's shares to the other shareholder, Proman. The minutes also state that discussions were being held with Proman in an effort to reverse the sale – however, these discussions had been suspended.

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[59] Annexed to the witness statement of Ho Sing and marked "WHS46"

[60] Annexed to the witness statement of Ho Sing and marked "WHS47"

[61] Annexed to the witness statement of Ho Sing as "WHS49"

228. By pre-action protocol letter dated 14 May 2012, CLICO, through its attorneys at law, wrote to Proman and PETL setting out its claim and calling upon them to return its 28,928715 ordinary shares in Clico Energy.[62]

229. By letter dated 2 July, 2012, Proman and PETL through its attorneys at law, responded to the letter dated 14 May 2012 denying CLICO's claims.[63]

Whether Duprey had Actual and or Ostensible Authority

The Law – The Companies Act – s. 25

230. Before engaging in any further analysis of the facts, it is important to understand the law that the court must bear in mind when applying the appropriate standards and considerations.

231. In considering the Act, it seems clear that Duprey, prior to the MOU and the matters raised therein and the intervention of the GORTT had extensive powers to the extent that Proman could legitimately rely on his "say so" alone to represent the will and actions of CLF and its subsidiaries. What the court has to consider, however, is whether the MOU, and what transpired as a result of it changed that.

232. Senior counsel for Proman relied upon section 25 of the Companies Act which provides:

> *"25. A company or a guarantor of an obligation of the company may not assert against a person dealing with the company or with any person who has acquired rights from the company—*

[62] This letter dated 14 May, 2012 is annexed to the witness statement of Ho Sing as "WHS51"

[63] Annexed to the witness statement of Ho Sing as "WHS52"

(a) that any of the articles or Bye-laws of the company or any unanimous shareholder agreement has not been complied with;

(b) that the persons named in the most recent notice sent to the Registrar under section 71 or 79 are not the directors of the company;

(c) that the place named in the most recent notice sent to the Registrar under section 176 is not the registered office of the company;

(d) that a person held out by a company as a director, an officer or an agent of the company has not been duly appointed or had no authority to exercise the powers and perform the duties that are customary in the business of the company or usual for such a director, officer or agent;

(e) that a document issued by any director, officer or agent of the company with actual or usual authority to issue the document is not valid or not genuine; or

(f) that the financial assistance referred to in section 56 or the sale, lease or exchange of property referred to in section 138 was not authorised,

except where that person has, or ought to have by virtue of his position with or relationship to the company, knowledge to the contrary.

233. Senior Counsel for Proman submitted:

"Based on the provisions of section 25, Proman is only precluded from relying on the implied, or ostensible, authority of Duprey to bind CLF where it knew that Duprey had no authority, or it ought to have had knowledge that Duprey had no authority by virtue of its (Proman's) relationship to CLF."

234. The court was provided with a helpful authority out of New Zealand of ***Equiticorp Industries Group Ltd (In Statutory Management) v The Crown (Judgment no 47)***[64] in which the phrases "*position with or relationship to*" and "*ought to know*" and the relationship between them both was discussed[65].

235. The relevant provisions under s. 18 C of the Companies Act 1955 in New Zealand provided:

> *"18C. Dealings between company and other persons —*
>
> *(1) A company or guarantor of an obligation of a company may not assert against a person dealing with the company or with any person who has acquired any property, rights, or interests from the company that –*
>
> *(a) The memorandum or articles of the company have not been complied with:*
>
> *(b) A person named in the particulars sent to the Registrar under section 200 of this Act as a director or secretary of the company –*
>
> > *(i) Is not a director or secretary of the company, as the case may be; or*
> >
> > *(ii) Has not been duly appointed; or*
> >
> > *(iii) Does not have authority to exercise a power which a director or secretary of a company carrying on business of the kind carried on by the company customarily has authority to exercise:*

[64] [1998] 2 NZLR

[65] See discussion at pages 722 - 725

(c) A person held out by the company as an officer or agent of the company –

(i) Has not duly been appointed; or

(ii) Does not have authority to exercise a power which an officer or agent of a company carrying on business of the kind carried on by the company customarily has authority to exercise:

(d) A person held out by the company as an officer or agent of the company with authority to exercise a power which an officer or agent of a company carrying on business of the kind carried on by the company does not customarily have authority to exercise, does not have authority to exercise that power:

. . .

unless that person knows or by reason of his position with or relationship to the company ought to know of the matter referred to in paragraphs (a), (b), (c), (d), (e), or (f), as the case may be, of this subsection.

236. Smellie J, in a complex and very technical matter which took over 200 days of evidence to complete in New Zealand's longest civil trial ever, held that:

236.1. The phrase "relationship to" extends[66] beyond insiders to the company but is limited to those with an ongoing relationship as per the reasoning of Gleeson CJ in ***Story v Advance Bank Australia Limited*** (1993) 10 ACSR 699 at p.710[67];

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[66] At page 722 - 723

[67] *"It is impossible exhaustively to state the facts or circumstances that might give rise to or involve a relevant connection or relationship. Obvious examples would be dealings between the company and the person who is a director or shareholder or employee… However, the provision is not limited to such cases, and while it is*

236.2. The phrase "ought to know" differs from the common law concept of "put upon inquiry" and requires something more[68];

236.3. The wording of these two phrases conveys that "*what the person ought to know is determined by his or her position with, or relationship to, the company. Thus facts which would put a person on inquiry at common law are irrelevant unless they can be said to form part of the relationship between the person and the company."*[69]

237. Thirteen years later, French J, in the case of ***Levin Meats Limited v Perfect Packaging Limited***[70] opined that:

> *"[63] It was also common ground that knowledge, for the purposes of the proviso, was wider than actual knowledge and would include imputed or deemed knowledge such as wilfully shutting one's eyes to the obvious, wilfully and recklessly failing to make such inquiries as an honest and reasonable person would make, knowing of circumstances which would indicate the facts to an honest and reasonable person, and knowing of circumstances which would put an honest and reasonable person on inquiry.*[71]*"*

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necessary to attend to the language of the statute, it is unlikely that Parliament intended a radical narrowing of the qualification to the common law rule."

[68] At page 725 where he relied on the dicta in relied upon the dicta of the Victorian Court of Appeal in ***Brick and Pipe Industries Limited v Occidental Life Nominees Pty Ltd*** (1992) 2 VR 279 at page 359:

" *Although s 68A was undoubtedly inspired by the rule in Turquand's Case and is in a sense a codification of it, the section does not incorporate the concept of being "put upon inquiry" and we are obliged to have regard to the assumptions, as defined by the section, which the respondents were entitled to make subject to the exceptions in sub – s (4)"*

[69] Ibid

[70] (2011) 10 NZCLC 264,950 (HC) at paragraph 63

[71] ***John Farrar (ed) Company and Securities Law in New Zealand (Brookers, Wellington, 2008)*** at 121-122.

238. The Canadian Business Corporation Act carries a similar provision:

> *Authority of directors, officers and agents*
>
> *18 (1) No corporation and no guarantor of an obligation of a corporation may assert against a person dealing with the corporation or against a person who acquired rights from the corporation that*
>
> *(a) the articles, by-laws and any unanimous shareholder agreement have not been complied with;*
>
> *(b) the persons named in the most recent notice sent to the Director under section 106 or 113 are not the directors of the corporation;*
>
> *(c) the place named in the most recent notice sent to the Director under section 19 is not the registered office of the corporation;*
>
> *(d) a person held out by a corporation as a director, officer, agent or mandatary of the corporation has not been duly appointed or has no authority to exercise the powers and perform the duties that are customary in the business of the corporation or usual for a director, officer, agent or mandatary;*
>
> *(e) a document issued by any director, officer, agent or mandatary of a corporation with actual or usual authority to issue the document is not valid or genuine; or*
>
> *(f) a sale, lease or exchange of property referred to in subsection 189(3) was not authorized.*
>
> *Marginal note: Exception*
>
> *(2) Subsection (1) does not apply in respect of a person who has, or ought to have, knowledge of a situation described in that subsection by virtue of their relationship to the corporation.*

239. Obviously, therefore, similar phrases are found in the 3 jurisdictions and the authority relied upon by Senior Counsel for Proman – "*Canadian Business Corporations Law", McGuinness, 2nd Edn* – posits:

> *" it becomes clear that even outright prohibitions against directors or officers exercising certain powers will no longer bind a person dealing with the corporation, at least where the creditor lacks actual knowledge of the contravention. Moreover, it is not necessary for the creditor to inquire whether the directors of a corporation have passed a resolution authorizing the dealing in question, provided the document is regular on its face, and if certified copies of a purported resolution of the directors are obtained, the creditor may rely upon those certified copies."*

Discussion on "ought to know"

240. The thing is, though, the court has to consider, for itself, what exactly it understands by the words "ought to know" in the local context. Obviously, the earlier use of the word "knows" in the proviso in section 25 speaks to actual knowledge so that the phrase "ought to know" denotes something other than that actual knowledge. It is clear to this court that what is known or what ought to have been known at a particular time must relate to knowledge which is available and ascertainable at that relevant time and which pertains to an existing relationship between the company and the third party being an outsider to the company.

241. The court is not attracted to the narrow definition relied upon by Smellie J. What does it mean to say that it is something more than "put on inquiry"? Obviously, using the language of the section, it speaks about knowledge that a person ought to have arising out of known facts and circumstances and that is wide enough to cover the French J definition set out in ***Levin*** supra. Why is it that a person ought to know something? Obviously again it is because of the existence of

circumstances which ought to have piqued one's interest sufficiently such as to cause the ordinary reasonable honest person to make inquiries i.e. to put one on inquiry. Therefore, to my mind, the attempt to distance the meaning of the phrase "ought to know" from "put on inquiry" seems very strained to me and seems more a case of semantics. Accordingly, the court is more than willing to adopt the more encompassing approach of French J.

242. It is precisely that question that the authorities such as ***East Asia Company Ltd v PT Satria Tirtatama Energindo (Bermuda)***[72] seek to address. The Privy Council addresses the very question of how a court is to deal with the issue of "ought to know" sufficiently as to consider whether there is knowledge that would cause an honest and reasonable person to question whether there is any ostensible authority. Senior Counsel for Proman suggested that the court ought to be careful with any consideration of this case of ***Satria*** since it is based on the Bermudian Companies Act which has no equivalent to our section 25. Therefore, bearing that in mind, the court is aware that it may well face the criticism that ***Satria*** could not be addressing an issue which did not manifest in the matter before it i.e. what does the phrase "ought to know" mean, since the word does not appear for consideration in their legislation.

243. The court is of the respectful view that when one has to consider that phrase in the context of section 25, one has to consider all of the facts and circumstances available to the third party at the time for the court to decide whether there was a state of affairs which a party ought to know arising out of those facts and circumstances. In doing so, the court would necessarily have to deal with whether or not there is sufficient material before it to consider whether the third party can rely on any ostensible authority or whether there is some information which would challenge that reliance.

[72] [2019] UKPC 30, [2020] 2 All ER 294, 94 WIR 213, [2019] 4 LRC 646, [2019] All ER (D) 164 (Jun)

244. Smellie J cited the Victorian Court of Appeal, mentioned above, which suggested that their equivalent section of their legislation was a codification of the Turquand principle. That portion of the quote may be a fair comment.

The Turquand principle – the Indoor Management Rule

245. Having regard to the similarity of the wording in Canada, the court is of the respectful view that the learning in "Company Law of Canada"[73] describes the position aptly:

> *"Application of rule in Royal British Bank v Turquand*
>
> *What is within the apparent scope of the authority of an officer or agent appointed under any particular title, such as manager, general manager, secretary, etc. is a question of fact rather than of law: Foley v. Commercial Cars Limited (1922), 52 O.L.R. 174 (C.A.) 178.*
>
> *A person dealing bona fide with the apparent agent of the corporation acting within the apparent scope of his authority is entitled to the benefit of the rule in Royal British Bank v. Turquand (1856), 6 E.& B.327. Under that rule persons dealing with a corporation were fixed with notice of the public documents of the corporation and with knowledge that its agents cannot do anything inconsistent therewith; they were not bound to inquire further and to determine whether the internal proceedings which might have been taken to confer authority on an agent or officer acting within the apparent scope of his authority were in fact taken.*

[73] Fraser & Stewart, 6th Edn, 1993, Carswell

Every corporation has an implied power to act through its agents, since being an artificial person it "cannot act in its own person, for it has no person": Ferguson v. Wilson (1866), L.R. 2 Ch. App 77 at 89. "

246. Obviously, this leaves matters of regularity to be sorted out within the inner workings of the company's offices and administration without a third-party having to consider whether those matters have been dealt with regularly unless they knew or ought to have known otherwise.

247. The learning goes on to state[74] that:

> *"A person cannot set up an ostensible or apparent authority unless he relied on it making the contract or supposed contract: Rama Corp. Ltd v. Proved Tin & General Investments Limited (1952) 2 Q.B. 147 where Slade J. said at p. 149:*
>
> > *"Ostensible or apparent authority which negatives the existence of actual authority is merely a form of estoppel, indeed, it has been termed agency by estoppel, and you cannot call in aid and estoppel unless you have three ingredients: (i) a representation, (ii) a reliance on the representation, and (iii) an alteration of your position resulting from such reliance."*

The application of the principles in Satria

248. Bearing the principles set out above in mind, the court is guided by what was said by the Board in ***Satria***:

> *"[75] …, ostensible authority is a relationship between a principal and a third party created by a representation made by the principal, which the third party can and does reasonably rely upon, that the agent of the*

[74] At page 127

principal has the necessary authority to enter into a contract on its behalf: The Raffaella [1985] 22 Lloyd's Rep 36, para 41. This may be thought to lead naturally to the conclusion that if the third party has reason to believe that the agent does not have actual authority and fails to make the inquiries that a reasonable person would have made in the circumstances to verify that the agent has authority, then the estoppel cannot arise, for in such a case reliance on the representation would hardly be reasonable."

249. To my mind, section 25 does not remove this basic tenet of agency law. If that proposition is accepted, then the other principles of agency law in relation to the definition of whether there is ostensible authority must also apply. The Board continued:

> *"[76] Certainly, this was the conventional view and it is reflected in a long line of authority. For example, AL Underwood Ltd v Bank of Liverpool [1924] 1 KB 775 concerned a director of a company who took cheques belonging to the company, some crossed and some uncrossed, drawn in favour of the company, indorsed them, and paid them into his own account with the defendant bank. The bank, sued for conversion by the company, sought to rely upon the ostensible authority of the director and, in respect of the cheques which were crossed, the protection afforded by s 82 of the Bills of Exchange Act 1882. Bankes LJ explained at pp 785, 788-789 that* ***the conduct of the bank established not only negligence but also such an absence of ordinary inquiry as to disentitle it from relying upon the director's ostensible authority, and that was so in respect of all of the cheques****; it also removed the protection given by s 82 in respect of the crossed cheques. Scrutton LJ reasoned at pp 792-793 that the defence of ostensible authority failed because the director was acting and purporting to act for himself as principal; and* ***the defence under s 82 failed because***

***it was negligent. Atkin LJ held at pp 797-798 that the defence of ostensible authority failed because the director was doing something unusual which ought to have attracted the attention of the bank's employees; and the defence under s 82 failed because the bank was negligent**."*

[Emphasis added]

250. In this case, the third party's negligence and the unusualness of the transaction eroded the claim of ostensible authority.

> *"[77] The Houghton case [1927] 1 KB 246 involved a dispute between the parties as to whether the defendants were bound by an agreement said to have been entered into on their behalf by one of their directors. One of the key issues was what the plaintiff's representative, Mr Dart, thought and did. As appears from the passage of his judgment cited at para 63 above, Sargant LJ, with whom Atkin LJ agreed, held that it could not be assumed, as a matter of internal management, that the director's actions had been authorised. However, Bankes LJ explained at pp 260-262 that the claim failed because Mr Dart had not relied upon the ostensible authority for which he had contended and because he had been put on inquiry as to the extent of any authority which the director possessed.*
>
> *[78] In Morris v Kanssen [1946] AC 459, 475, Lord Simonds described the limits of the indoor management rule and explained that the principle of ostensible authority cannot be invoked by a person who is put on inquiry:*
>
>> *"An ostensible agent cannot bind his principal to that which the principal cannot lawfully do. The directors or acting directors or other officers of a company cannot bind it to a transaction which is ultra vires. Nor is this the only limit to its application. It is a rule designed for the protection of those who are entitled to assume,*

> *just because they cannot know, that the person with whom they deal has the authority which he claims. This is clearly shown by the fact that* ***the rule cannot be invoked if the condition is no longer satisfied, that is, if he who would invoke it is put upon his inquiry****.* ***He cannot presume in his own favour that things are rightly done if inquiry that he ought to make would tell him that they were wrongly done****."*

[79] In Rolled Steel Products (Holdings) Ltd v British Steel Corpn [1986] Ch 246, 284-285, Slade LJ said that the nature of a proposed transaction may put a third party on inquiry as to the authority of the directors of a company to effect it. Further, Browne-Wilkinson LJ, at p 304, provided this helpful exposition of the lim-its of the principle of ostensible authority and the indoor management rule:

> *"As an artificial person, a company can only act by duly authorised agents. Apart from questions of ostensible authority, directors like any other agents can only bind the company by acts done in accordance with the formal requirements of their agency, eg, by resolution of the board at a properly constituted meeting. Acts done otherwise than in accordance with these formal requirements will not be the acts of the company. However, the principles of ostensible authority apply to the acts of directors acting as agents of the company and the rule in Turquand's case, 6 E & B 327 establishes that a third party dealing in good faith with directors is entitled to assume that the internal steps requisite for the formal validity of the directors' acts have been duly carried through.* ***If, however, the third party has actual or constructive notice that such steps had not been taken, he will not be able to rely on any***

***ostensible authority of the directors and their acts, being in excess of their actual authority, will not be the acts of the company**."*

[80] The Armagas case [1986] AC 717 concerned the sale of a ship by the defendants to the claimants and a three-year charter back to the defendants. One of the issues before the court was whether a senior employee of the defendants had ostensible authority to enter into the charter on their behalf. The Court of Appeal, in a decision upheld on further appeal to the House of Lords, held that he did not. Robert Goff LJ made clear in the course of his judgment at p 734 that various extraordinary features of the charter were such as to put the claimants on inquiry as to the employee's lack of authority, and he cited in this regard the passage in the judgment of Bankes LJ in the Houghton case at [1927] 1 KB 246, 260-262 to which the Board has referred.

*[81] In Criterion Properties plc v Stratford UK Properties LLC [2004] UKHL 28; [2004] 1 WLR 1846, para 31, Lord Scott reiterated that apparent authority can only be relied upon by a person who does not know that the agent has no actual authority. But, he continued, **if a person dealing with an agent knows or has reason to believe that the transaction is contrary to the commercial interests of the agent's principal, it is likely to be very difficult for that person to assert with any credibility that he believed that the agent had apparent authority, and lack of such a belief would be fatal to a claim that he did**.*

*[82] Finally, in Wrexham Association Football Club Ltd v Crucialmove Ltd [2006] EWCA Civ 237; [2008] 1 BCLC 508 **an issue arose as to whether the claimant football club, acting by a director and its secretary, had executed as a deed a declaration of trust which said that the club held the freehold of the club ground as trustee for the defendant**. Sir Peter Gibson, giving the lead judgment, explained at paras 45 and 46 **that the***

***defendant was put on notice that the director was entering into the transaction for an improper purpose and in breach of his fiduciary duty and so could not rely upon his ostensible authority**."*

Conclusion

251. Therefore, in conclusion, this court is of the respectful view that in considering the proviso to section 25, apart from obvious actual knowledge, the court must construe the phrase "ought to know" broadly enough as encompassed by the definition given by French J – a definition which includes the discussion in ***Satria***. To my mind, section 25 allows the third party to proceed without having to make inquiries of their own unless there is knowledge to suggest that those inquiries ought to be made - whether actively and directly by way of actual knowledge or constructively by way of what that third party ought to have known from the available and applicable facts and circumstances as discussed above.

Duprey's Ostensible Authority

252. In these very dire public circumstances, Proman and Duprey, with the knowledge and complicity of Sakal at the very least, conducted their negotiations. As the court has found above, Duprey clearly had no actual authority to engage in these negotiations with effect from 27 January 2009.

253. Additionally, the court is satisfied that Duprey and Sakal were fully aware that Duprey was not authorized to conduct the sale for several reasons including:

253.1. The appointment of the four-person CLF sub Committee on 27 January and reconfirmed on 31 January 2009;

253.2. The email from Sakal to Bosworth Monck, that:

> *"It is too late. We cannot be disposing or transferring things on MOU has been signed with the GORTT"*

253.3. Sakal's Memorandum to CLICO and the CLF subsidiaries on 2 February 2009.[75]

253.4. The letter of 4 February 2009 between the Ministry of Finance and Duprey and Duprey's response;

253.5. The letters from Duprey of 5 February which acknowledged sales were to be done by Musaib-Ali, not him and that disposal of CLF assets needed approval from the GORTT;

253.6. The letter to Mr. Beck dated 5 February 2009 sent by Duprey to Beck at Consolidated Energy informing him of the appointment of Claude Musaib-Ali and that no sales were to be done without the GORTT's approval.

Constructive Knowledge/Collusion?

254. With respect to Proman, the court notes the following indicators of Proman's knowledge.

255. David Cassidy accepted, after taking great effort to try to play down the importance of the mention of the appointment of the CLF sub-committee to deal with CLF's assets, that he was aware of the same but could not verify if it were true or not. The court commends the excellent analysis of this aspect set out at paragraphs 148-156 of the claimant's submissions and accept them as establishing that David Cassidy knew of the said sub-committee. That analysis is too lengthy and detailed to replicate in these submissions. Suffice it to say that the submission accords with this court's impression on the subject and is of the respectful view on a balance of probabilities that David Cassidy knew at least by 31 January 2009,

[75] Para 71

if not before, that such a Committee had been formed and that any dealings with CLF in respect of assets ought to have been done with the Committee. This, to the Court's mind, is a most significant fact.

256. By email dated 29 January 2009, Sakal told Joseph Cassidy:

> *" Obviously not business as usual. things critical However the Central bank has a fixed and floating debenture over CLF itself to the tune of 1.6 billion (TT$). This has implications. They are now almost completed the gathering in info on the group. The debenture gives them the power to sell Please call me when you get a chance I need to speak to you before you meet with the Chairman He likes to play down the crisis."*

256.1. Sakal was clearly sending out a warning that things had changed. According to her, it was not business as usual. Therefore, as far as he would have been aware, by this email, he was told that there were restrictions with respect to the disposal of CLF's assets by reason of the debenture. Whether or not he knew what she was speaking about in relation to this debenture, or if it were even true, he must have gotten from the email that there were obvious restrictions to bear in mind and there is nothing to suggest that he was disabused of that suggestion or made any attempt to find out about it. He did not speak about whether he called Sakal as she asked in the email and therefore the court gets the impression, once again, that even though he was following the ball, the full path was not disclosed to the court. There were obviously things that were happening other than as per the paper trail before the court which were not disclosed.

256.2. Joseph Cassidy admitted at paragraph 60 of his witness statement that he became aware of the MOU on the very day that it was signed when he got an email from Sakal which he said was sent at 5:35 PM. He also received a copy of the MOU by email from Cronberger.

257. In her email, which is in fact dated "Friday, 30 January 2009 06:35 PM", Sakal said:

> *"The Chairman has appointed Monteil's company to negotiate on behalf of CLF without CLF Board approval (sic) Rampersad and others are mad because Monteil focus is getting rid on energy and Republic (sic)"*

257.1. Clearly, therefore, the Chairman – Duprey – was acting out of the ordinary and, notwithstanding the assertions made as to his executive chairmanship, Sakal was asserting that he was doing so without the Board's approval. As a result, the clear inference is that the Board's approval was something that was required in some form or fashion.

258. She continued:

> *"With this MOU (which and the resolution which Claus will send) Monteil's company has the right to negotiate etc. It is evident that the Chairman has put the Company's future into the hands of Monteil. The GORTT has already announced that the (sic) will now have MHTL shares …. In his press statement the Chairman said that he in any event wanted to finish with financial services and focus on drinks overseas In negotiations he apparently gave instructions to give MHTL and energy."*

258.1. Sakal was therefore telling Joseph Cassidy to expect two things from Cronberger – the MOU and the resolution. She was telling him that there were discussions in relation to Republic Bank Limited, MHTL and "energy" and that Duprey had given instructions to give over MHTL and "energy" to the GORTT. The only company in the group that the court can think of to which the name "energy" could apply in the circumstances of what was transpiring at the time is PETL and the court is convinced that that is what Sakal was talking about. She continued again, after indicating that she had been excluded from the MOU negotiations, that she would resign if Duprey

insisted that Monteil continued to represent them along with the fact that the CLICO management was due to be changed the next week:

> *"Claus and I will work and if it's the last thing I do is to ensure that GOTT (sic) does not get control"*

258.2. Obviously, therefore, Sakal was upset and was resentful of Monteil's participation in the progress. She was aware that Duprey gave instructions to give MHTL and "energy", which the court has taken to mean PETL, shares to the GORTT and she vowed to work with Cronberger to ensure that the GORTT will not get control. All of this was what she informed Joseph Cassidy of in her email so he was aware that Sakal was being excluded from the process involving the GORTT but that she was intent on working towards excluding the GORTT from MHTL and PETL. More importantly, it must have been obvious that despite the GORTT's intervention, Sakal was obviously bent on subverting Duprey's stated intention at that time and possibly the GORTT's. That would have been an obvious red flag that Sakal had intentions which may or may not have been less than transparent to the GORTT and therefore he could not blindly follow what she was saying from there on in. It was clear, though, that he was on board with her stated intention - to deprive the GORTT of control - and so could not claim bona fides or failure to be put on inquiry. Obviously, her interest was not aligned with the GORTT – perhaps understandably so – but this was not business as usual in light of the government intervention. That intervention was public knowledge and was clearly known to Mr. Cassidy. So to ignore the unique circumstances and the obvious red flags while pinning one's hopes on a perceived prior course of action which had endorsed Duprey's Executive Chairman status seems deliberately blind to the unfolding crisis.

259. At 22:57 that same night, however, Cronberger emailed David and Joseph Cassidy with the subject "MOU". The email reads:

> *"see attached. I understand Monteil alone negotiated the deal."*

259.1. The attachments were not disclosed by Joseph Cassidy and the court is very concerned by this. Obviously, as Sakal had mentioned, two things were to be sent to him – the MOU and the resolution. However, having not disclosed exactly what was sent by way of attachment, David and Joseph Cassidy have failed to be full and frank with the court in what is a potentially very crucial document. Did they receive the resolution as mentioned? If so, what did the resolution say? This is a particularly crucial bit of evidence having regard to the fact that Cronberger did not attend to give evidence even though he was a very important figure in this matter. Having failed to disclose the document, the court is free to infer that the resolution was in fact sent along with the MOU and that David and Joseph Cassidy were aware of the contents. Importantly, however, the facts revealed that if the resolution referred to the CLF resolution, that was not finalized until 31 January in a meeting already discussed and in which the sub- committee was confirmed.

260. According to him, he was shocked to see it as he had not been told about it before by Duprey. Notwithstanding the fact that it was submitted on the Proman's behalf that it was entitled to rely upon Duprey's continued apparent authority, a perusal of the MOU ought to have raised a number of red flags as discussed above including the provision at paragraph 17 as to warranties and Board sanctioned execution of the MOU evidenced by a written resolution

261. The ramifications of this clause, upon a plain and simple reading of it, are crucial. Firstly, upon reading the clause, Mr. Cassidy ought to have seen that despite the fact that Duprey had signed the document as the sole signatory, that signature would have been ineffective if he did not provide a Board of Director's resolution

upon signing or within one week thereof. Obviously, therefore, Duprey's pre-MOU authority had shifted as his signature alone was not sufficient to bind CLF, CLICO or any of the other entities that were mentioned in the MOU.

262. Therefore, something had obviously changed insofar as Mr. Cassidy had indicated that prior thereto, Duprey's say-so was sufficient. Now, it must be that Board resolution was absolutely required.

263. Further, as set out above in the discussion on the MOU, there were several red flags in the clauses which Proman ought to have made an inquiry about but chose not to.

264. Proman knew that there was a declaration of trust re: 17% of the shares in favour of CLICO which they had never objected to or complained off but in relation to which they had paid dividends to CLICO. Joseph Cassidy spoke about his belief that the SSSA was unwound but that does not detract from the fact that the SSSA itself declared a recognition that CLICO had a 17% interest in PETL, and that was acknowledged in writing by Proman, and that recognition persisted up until January 2009. Therefore, at the very least, Proman knew and recognized and signed to that fact but seemed to have chosen to deliberately ignore it in order to push the transaction through on a perceived technicality as to ownership which they hung on to.

265. Proman would also have known that CLICO was expected to meet certain deadlines and perform certain conditions under the MOU and that CLICO's assets could not be disposed without compliance with the MOU. To have done otherwise would obviously impact upon CLICO negatively and therefore, it follows, that a sale of CLICO' assets without the knowledge and approval of the GORTT could jeopardize the MOU, as recognized by Sakal. Therefore, any such sale could not be in the best interests of CLICO and, by extension, CLF. By imperilling CLICO in that manner, potentially, Proman and Duprey were placing CLICO in jeopardy.

266. Importantly, Proman would also have known that CLF was being allowed to sell assets under the MOU *for a specific purpose*, that is to satisfy its Statutory Fund requirements for CLICO and BA under the Insurance Act, 1980 and to balance third-party assets and liabilities portfolios of CIB. To my mind, it is insufficient to suggest that they could purchase and that it would be up to CLF to account for what happened to the money. In this case, the evidence reveals that Proman knew that the monies were not going to be used only for the Statutory Fund requirements having regard to the evidence that Joseph Cassidy gave so any attempt to assert otherwise was a deliberate attempt to be disingenuous.

266.1. Joseph Cassidy asserted that Duprey asked for assistance to settle a temporary liquidity crunch which was likely to become public soon[76]. The conversation that Mr. Cassidy had with Sakal on the evening of 24 January 2009 – the very same evening that she had met with the Minister of Finance who had requested a meeting with Duprey the very next day – was in respect of her suggesting that a good first step would be a sale of CLF's shareholding in the company to create some liquidity. So that, even though it was suggested that the sale was intended to meet liquidity problems such as paying staff, etc. and possibly staving off financial difficulty with PETL, the MOU and the press release clearly stated the purpose for which CLF assets were to be sold.

266.2. As a result, Proman ought to have been put on notice that, in light of the GORTT's intervention and the MOU, any purpose other than the sale of assets for the satisfaction of statutory fund requirements would, ostensibly, have been beyond the power given to CLF to sell assets under the MOU. Further inquiries therefore ought to have been made and Proman ought to have been put on notice at least in so far as the sale was

[76] Paragraph 44 of his witness statement

to have been effected for the purpose indicated by Duprey. In submissions, counsel for Proman argued that they were helping a company that they were familiar with and attempting to protect a company in which they had an interest PETL. This was clearly, however, outside of the scope of the MOU and the permissions given under it.

267. Proman would also have been aware, or should have been aware but did not ask for confirmation, that the shares were being sold to them by Duprey against the background of the MOU, and its requirement for Board approval, without any apparent or stated Board approval. Their attention should also have been piqued by the fact that there was no disclosure of any counter offer or any counter valuation in a sale of this magnitude against the background of this serious national situation which seemed highly unusual. Instead, Proman used Reuter, whose credentials may have been known to them but were not fully described to this court, and who had done work for them before. Further, there was obviously no transparency in the valuation process since Cronberger did not attend to give evidence to substantiate his valuation and process of valuation. There is no evidence that the valuation was shown to Duprey or Sakal – not that they had to – but it all leads to a feeling of deliberately closing one's eyes to what ought to have been obvious in the situation.

268. The claimants have suggested that the reason for Joseph Cassidy referring to getting out default notices and exercise of pre-emption rights as set out in his email sent at 8:38 PM on the night of Friday 31st 2009 was because there was the possibility that Duprey would not be able to go through with the sale of the shares in light of the MOU and the circumstances arising out of it, including the appointment of the subcommittee. Duprey's immediate response on 2 February obviously set the ground for a default notice which never came.

269. David Cassidy sought to suggest the prompt for the default notice and the recitals in the PSA was because of what was happening with the MHTL shares. However, the email threads before shows that this could not be so and the implication is that the parties were concerned that they needed a mechanism to force the sale if it became necessary hence the reference to the default notice rather than free sale. The court is of the respectful view that reference to the default notice procedure in the PSA was really a smokescreen to justify the basis and circumstances of the sale at that time since there was no evidence that the default threshold had been reached as described in Article 7 of the SHA.

270. Further, by the time of the MOU, the Press Release and Sakal's email, the defendant knew that CLICO's management was changing.

271. Proman was also aware of Sakal's reservations and pleading in relation at least to the CLICO share of the sale after the fact of the signing of the share transfer and the PSA ***but before the completion of the sale*** by the payment of the funds. Nevertheless, Proman did not make any inquiry whatsoever clinging on to this, by then, sinking notion of Executive Chairmanship despite the obvious change in circumstances.

272. Crucially, Proman knew that CLICO had 5,266,005 shares of its own quite apart from the 17% share held in trust by CLF but never challenged its validity at any point in time ***prior to*** the sale. The shares were issued pursuant to the provisions of an agreement that Proman had signed to i.e. the SSSA, and it is difficult to see how Proman could resile from that situation or position unless that agreement was declared to be void ab initio. No such application was made.

273. For the avoidance of doubt, this court is of the respectful view that those shares which were represented by a separate share certificate, did not form part of the trust CLF held for CLICO. To the court's mind, Proman could not have been so mistaken since it had waived any objection to the issue of those shares in the terms of the SSSA described above and by their conduct, such as, for example,

their acquiescence in the payment of dividends to CLICO and their failure to challenge the shares despite being aware of their issuance as described above. Joseph Cassidy said in evidence that the SSSA agreement was unwound because the sale upon which it was premised did not go through BUT that was not pleaded and the court must disregard that evidence in light of the provisions of Pt 10.6 of the CPR. In any event, whatever may be the position, this Court was not called upon to set aside that share certificate so it remains on the records subject to the completion of the registration process with PETL.

274. Both Cassidys knew of the appointment of Claude Musaib-Ali to the CLICO Board as Managing Director by means of the letter sent from Duprey to Beck in respect of the MHTL shares on 5 February 2009 – after the signing of the share transfer and the SHA but before the completion of the transaction through the payment of funds. They were also aware, by that same letter, that any disposals of CLF assets had to be approved by the GORTT. They were aware or should have been aware because Joseph Cassidy raised the issue of the MHTL shares with Duprey when he met with Duprey in Florida on 1 February 2009[77]. He would therefore have been very much interested in what was happening with respect to that issue. The letter itself was copied to Eggenberger at OPAG (Barbados) Limited and both Joseph and David Cassidy admitted in cross-examination that they were aware of it.

275. This in fact, David Cassidy went on to discuss in cross-examination:

> *"Q And, therefore, you were aware, were you not, that as a consequence of this letter of the 5th February, 2009, Duprey was saying that CLF could not dispose of its shareholding in MHTL or in Methanol*

[77] See paragraph 70 of Joseph Cassidy's witness statement

Holdings (Trinidad) Limited because of the Memorandum of Understanding of the 30th January, 2009?

A I was aware that's what that letter said, but that's not what I was aware Duprey was thinking at any time. I know what it says here"

Respectfully, whatever he may have thought that Duprey was thinking was not expressed anywhere – by Duprey or anyone else – so the court only has the plain words of the letter that speaks for itself.

276. All of this was happening before the transaction was completed on 10 February 2009.

277. As Senior Counsel for the claimants aptly put it in the submissions which the court has broken up into separate paragraphs in respect of each point:

277.1.1. "The knowledge of the Sub Committee on the part of David;

277.1.2. The knowledge of the February 5, 2009 Beck Letter that was sent to Consolidated Energy in respect of the Aborted MHTL Transaction which glaringly disclaimed the authority of Duprey to dispose of CLF and CLICO assets;

277.1.3. Sakal's stridently expressed doubts over the "CLICO portion of the transaction";

277.1.4. the haste and recklessness displayed on the part of all parties; the palpable lack of due diligence on the part of Sakal and Duprey, who did not even have an independent valuation of the 51% shareholding;

277.1.5. the execution of the Share Transfer Certificate even before the SPA had been executed and before the closing date;

277.1.6. the past practice of treating CLICO as a shareholder;

277.1.7. the knowledge that the CLICO manager had been appointed by the 4th of February and that a new CLICO board was imminent; and

277.1.8. the knowledge of the MOU and the fact that sale was at least arguably in breach of same,

are indeed only some of the wider array of facts in this case that overwhelmingly show Proman's knowledge that the sale by Duprey was not authorised by either CLF or CLICO and indeed quite likely could not have been authorised, in light of the potential fraud on creditors and policyholders, that Duprey's actions entailed."

278. All of this was happening before the transaction was completed on 10 February 2009. This course of action, to this court, showed a blind desire to get the transaction completed no matter what and, as the claimants' attorneys submitted, defend the purchase after. It cannot be that Proman did not know what was happening. Instead, Proman may cling to the position that the documents were signed on 4 February before much of this information became known to them. That was not good enough. That was the obvious inquiry that they should have made before launching into this transaction but which they refused to do despite their duty to do so as mentioned in relation to the application of section 25 of the Companies Act supra.

Can the Sale be Impeached?

279. Senior Counsel for the Proman said

"22. On its reading and understanding of the MOU, however, Proman honestly believed (and continue to believe) that the MOU did not preclude CLF from continuing to discuss the proposed sale of the PETL Shares to

Proman, or from agreeing to sell those shares. On the contrary, Proman honestly believed (and continues to believe) that the MOU provided that CLF would have to sell its assets (including its most valuable assets) and would have to do so before GORTT would be willing to offer additional financing as the lender of last resort. As such, there was no reason for Proman to believe, and it did not believe, that the purpose of the PSA was to evade the obligations of the Claimants under the MOU"

280. The submission went on to say:

> *"24. Proman also acknowledges that it had additional significant concerns arising out the MOU itself. In particular, Andre Monteil ("Monteil") was very well connected politically and Proman (like others, including members of the CLF Board at that time) had suspicions and concerns about the role of Monteil in the process by which the MOU was negotiated and about what Monteil's true intentions and agenda might be, particularly with respect to the energy related investments in which the CLF Group and Proman were co-investors . These concerns were aggravated when Proman learnt that Duprey had agreed in the MOU to sell the CLF Group's shareholding in MHTL to the GORTT, in apparent disregard of the pre-emptive rights in favour of Consolidated Energy, an affiliate of Proman. This also made Proman become concerned that there was a risk that GORTT might also try to acquire CLF's shares in CLICO Energy as well in breach of Proman's rights."*

281. The difficulty that the court has with this concern is that, as mentioned, clearly, Proman's position was protected by the SHA and despite the stated apprehension, the right of pre-emption was capable of enforcement just as in the case with MHTL. In fact, Proman had already lined up a strategy under Article 7 of the SHA, mentioned above, to proceed in the event that there was going to be some sort

of compulsory acquisition. Therefore, this concern seems to be out of proportion to the remedy that was available and the step taken.

282. Counsel's assertion thereafter was:

> *"25. ….There was therefore nothing untoward, much less dishonest, about Proman continuing to pursue the proposed sale by CLF of the shares in PETL in circumstances where Proman did not believe that the MOU prohibited such a sale and where it was in its (Proman's) own perceived commercial interest to acquire such shares to mitigate any risks associated with it being saddled with a co-shareholder that was in financial peril and any risk that the GORTT might subsequently seek to acquire those PETL Shares for itself following the pattern it appeared to have set in the MOU with respect to the MHTL shares."*

283. Counsel proffered that since the SHA did not allow for CLICO's beneficial interest to be recognized, CLF could validly sell the same without recourse to any MOU restriction.

284. In fact, the essence of the Proman's position is stated as follows:

> *"259. Proman was entitled to rely on the ostensible authority of Duprey; the absence of any objection or concern from the Group Counsel (Sakal) and another CLF Director (Motilal, who was also a member of the so-called committee for the disposal of assets); and the provision of the MOU which suggested that CLF was constituted as CLICO's agent for the purposes of the MOU, which included the sale of the assets belonging to CLF, CLICO and the other companies in the CLF Group."*

285. On the other hand, CLICO received and used the benefits of the proceeds of sale, including the interest earned thereon while it is being held in escrow and in a holding account.

286. Senior Counsel for Proman said:

286.1. On a proper appreciation of the evidence, this was a transaction in which CLF needed to raise funds urgently; it elected to do so by liquidating assets; one of those assets was the PETL shares, and the proposal to sell those shares was first initiated by CLF; Proman was entitled to buy the shares by reason of its pre-emptive rights and was in a position to do so quickly to provide CLF (and CLICO) with a much needed cash injection; it dealt with persons who were, on the face of things, the responsible and appropriate officers to represent CLF; they made sure that aside from Duprey and Sakal, at least one other director (Motilal) was aware of the proposed sale and there was an absence of any concern being raised or flagged by any of these three persons; and before making its offer, Proman obtained independent expert input to confirm the fairness of the price. This is wholly inconsistent with a party conspiring to defraud either by keeping the transaction a secret, preventing the asset from being controlled by the GORTT or having a sale at an undervalue.

286.2. The only reasonable interpretation to be derived from a reading of the MOU was that the GORTT was **not committing** to provide **any funding** until **AFTER CLF had sold assets**.

286.3. So, the MOU allowed sales of assets, restricted specific limitations to BA, CLICO and CIB, did not impose any major restrictions on CLF's operations, and provided collateralized loan financing to CLICO and BA to meet Statutory Fund deficit AFTER the discharge of the obligations at clause 11 of MOU.

287. The tenor of Proman's approach was as if this was a normal business transaction. This was not. This was the Government of Trinidad and Tobago notifying the

national public and the world at large that it was standing behind the CLF Financial group. The words set out in the last paragraph of the Media Release are worthy of repetition:

> *"The Government has taken these steps to assure the investing public in Trinidad and Tobago, including depositors and policyholders of the affected companies of the safety of their investments and requirements for stability and order in the marketplace."*

288. By doing so, in light of the MOU, the ship with respect to the GORTT's commitment to provide funding had already sailed.

289. This was an unusual situation where Duprey was purporting to sell shares that everyone had acknowledged belonged partially to CLICO as mentioned above and CLICO's assets were under the restrictions set out in the MOU. The technicality of the registration of the shares had been bypassed by the SSSA, the payment of dividends and the issuance of the further 5M shares without complaint or objection. Obviously, CLICO acted upon the representations and acknowledgments set out in the SSSA and contributed further monies towards the Eurotecnica share purchase. It was a common venture amongst the three entities based an acceptance of a certain state of affairs which Proman cannot now seek to resile from out of convenience due to the technical argument they have proffered.

290. Respectfully, this is not a case of Proman acting in good faith without notice. This is a case where it is obvious that Duprey and Sakal at the very least were determined to not have the PETL shares go to the GORTT in line with the selfsame desire by Proman. Obviously, the parties i.e. Duprey, Sakal and Proman sought to rely on technicalities and a lack of paper trail to mask the level of knowledge that Proman had in relation to the curtailment of Duprey's powers. But the court is

satisfied on a balance of probabilities that there was information available to have induced that knowledge as envisaged under s. 25 of the Companies Act.

291. The interesting thing is that because of the SHA, Proman had no reason to fear the loss of the PETL shares to the GORTT. One can understand the concern that would have arisen in relation to the MHTL which had been pledged under the MOU and which had similar SHA restrictions. Obviously, by the time that the PETL shares were being negotiated between Duprey and Proman, MHTL shares were already pledged and added to the MOU so the level of secrecy is understandable in case the same thing happened to PETL. Even though the Cassidys indicated that there was no secrecy on their part, it was obvious that Duprey and Sakal were not highlighting PETL, even though the court accepts that its existence as a CLF asset was disclosed by Carballo prior to the MOU being signed. It seems that the parties acting on behalf of the GORTT did not have the same analytical, diligent and comprehensive approach or appreciation in that very urgent and compacted timeframe to the very serious ramifications and possible permutations involved and seems to have relied upon a certain understanding with Duprey, all the while being undermined by him. However, a more likely explanation is that they just did not know the true impact of the Carballo disclosure in such a short time as did Duprey and Proman. They had not yet had the time to get to such an understanding and so obviously relied on pursuing the objectives in good faith. Duprey obviously had other plans though.

292. There was no real evidence of the need for the urgency. Joseph Cassidy spoke about his concern in relation to the company PETL and how things and the liquidity problems may have impacted upon it and its staff. Those fears seem to have been misplaced as there was no evidence that PETL was undergoing any such upheaval. In the meantime, however, the GORTT was ready to stand behind CLF and its affiliates – CLICO in particular. Doubtlessly, the MOU was prepared and entered into to shore up the Duprey brand because of the national and international

implications. The CLF group was in trouble financially but the GORTT had decided to stand with it and therefore financing was secured, at least in the immediate short-term.

293. Proman could still have gotten what it wanted though i.e. control of the company and protection from control by the GORTT, Monteil and “his friends”, by the exercise of the first option to purchase. The fly in the ointment, however, was the valuation process. Obviously, just as transpired in the MHTL, the process may have been prolonged as the valuation price was negotiated using international best practice standards and detailed analysis. The fact that Andrew Robinson participated in the MHTL Arbitration exemplifies the gamble that Proman was willing to take, as Senior Counsel for the claimants put it, to do the transaction and look to defend it rather than await a valuation process which may have been more costly. As can be seen from the information before this court in these proceedings, Andrew Robinson valued the shares at more than twice the price that Proman paid. So that although Proman was protected in terms of their entitlement to purchase the shares in preference to it being handed over to the GORTT and thereby were able to protect the legacy from possible poor management or “sales to friends", as Joseph Cassidy feared, here was an opportunity to negotiate a price between friends in what was apparently Duprey’s last hurrah. The court has gotten the distinct impression that there was a concerted effort between Duprey and Joseph Cassidy to get the transaction over the line before the GORTT fully realized what was happening and that they were ably assisted by Sakal who, with Cronberger, were determined to prevent it falling into the GORTT’s hands.

294. In the circumstances, the court is of the respectful view that Proman knew of the existence of the sub-committee for the disposal of assets and the renewed requirements for shareholders resolutions thereby curtailing Duprey’s prior

ostensible authority and also failed to make any inquiry whatsoever on the evidence before this court as to whether or not he was authorized to enter into this SPA in the very unusual, and arguably unique, circumstances that prevailed at the time. The court is of the respectful view that Proman careened blindly towards completion even after becoming aware of the appointment of Claude Musaib-Ali and the need for approval for the disposal of assets by the GORTT belonging to CLICO under the MOU and Duprey's similar undertaking in respect of CLF's assets. They knew of the trust with respect to CLICO's 17% along with the 5 million other shares that were issued.

295. In those circumstances, and for all of the reasons given above, the court is of the respectful view that not only did Duprey not have the actual authority to enter into this SPA but he also had no ostensible authority to do so and Proman closed their eyes to all of this to rely on technicalities.

296. For completeness, the court goes on to find that any purported noncompliance by CLF with the SHA in failing to have Proman's consent and following up on the registration of CLICO's interest in the PETL register was effectively and definitively waived upon the execution of the SSSA and the payment out of dividends. Proman would therefore be estopped from any denial of the validity of CLICO's 17% interest since by signing the SSSA, it had effectively approved of and given consent to CLICO's interest – a fact that seemed to have been omitted by Proman's counsel, Chambers, as he was apparently not given a copy of it as mentioned before. Registration in the records of PETL would therefore have been a mere formality, subject to the execution of the relevant share transfer and payment of stamp duty, and penalties (if possible) if the claimants deem it necessary to complete the process. Therefore, Proman was fully aware that it could not transact in relation to CLICO's 17% interest without compliance under the MOU.

297. The court therefore finds that the claimants have proven their case in relation to knowledge of Duprey's lack of authority in respect of all of the parties involved. As a result, the PSA is void and the shares must be returned in the circumstances.

The Expert Evidence

298. By notice of application filed on 4 November 2016, the claimants applied to the court for permission to:

298.1. Call Mr. Andrew Robinson, (hereinafter referred to as "Robinson") the lead valuation partner at Deloitte LLP as an expert witness on their behalves and put into evidence the Deloitte LLP, 7 December 2012 preliminary Valuation Report of the 51% equity holding of PETL as at 3 February 2009; and

298.2. Put into evidence a full expert report of Deloitte LLP.

299. By notice of application filed on 7 November 2016, the defendants applied to the court for an order granting permission to call Mr. James Mike Hill (referred to hereinafter as "Hill") of Hill Schwartz Spilker Keller LLC as an Expert Witness and to use his Expert Report dated 20 March 2012 ("the Hill Report" or "the HSSK Valuation") in evidence.

300. Permission was granted on both counts.

301. The claimants filed the Deloitte LLP, 7 December 2012 preliminary valuation report of the 51% equity holding of PETL as well as the full expert report of Robinson dated 14 May 2018 on 18 May 2018.

302. The first and second defendants had filed the Hill Report as part of their case since 3 April 2013.

303. On 19 May 2019, after the trial had begun, Hill Snr indicated that, due to his advanced age, being 76 years old at the time, he was unable to participate in the trial. Consequently, Proman made an application during the trial on 20 May 2019 to substitute Hill with Alex Tittel, who was named as part of the team that had prepared the Hill Report. Tittel was listed on the report as follows:

> *"Alex Tittel received his Bachelor of Administration in Psychology from Rice University and his Master of Business Administration with a finance focus from the Jesse H Jones School of Management at Rice University. Mr. Tittel has ten years of financial consulting and financial services experience, including four years working directly in business valuation. Prior to joining HSSK, Mr. Tittel worked for the merger and acquisitions group at Northern Star Generation, the business valuation and financial consulting group at Herrera Partners, and the commercial banking and corporate finance groups at BBVA Compass Bank. Mr. Tittel has learned the Accredited Senior Appraiser certification in Business Valuation from the ASA[78] and currently serves as Treasurer for the Houston Chapter of the ASA."*

304. The court refused the application primarily on the ground that it was not satisfied with the expertise of Titell in the context of the assistance that it would have needed in relation to the Hill Report and the general concept of the valuation of the PETL shares.

305. Again, during the course of the trial, on the 27th May 2019, Proman proposed the appointment of a new expert - Dr. Manuel Abdala. Concerns of abuse of process were raised by the court and the other side. Again, the application was dismissed on the grounds, amongst other things, that the appointment of any new expert at that time would mean an adjournment of the trial to allow the claimants' expert

[78] American Society Of Appraisers

to comment on and consider the same with possible responses and counter responses.

306. Therefore, the court has before it the reports mentioned along with the viva voce evidence of Robinson who attended and was cross-examined at length by senior counsel for Proman. There was no cross examination in relation to the Hill Report.

Similarities/concessions in respect of the expert reports

307. All three valuations sought to value PETL using the Discounted Cash Flow ("DCF") method of valuing companies.

308. The DCF valuation method is a method of evaluating an asset using the concept of the time value of money by valuing the asset as the present value of its expected future cash flows adjusted appropriately for other risks and assumptions. In the case of a company, the process involves determining the cash flow that the company expects to receive in the future and to discount these cash flows to their net present value using an appropriate discount rate. This discount rate reflects the cost of capital based on the present financial situation and the inherent risk associated with the asset. Accordingly, by the application of this discount rate, the sum of the future cash flows will invariably be larger than the present value, which is calculated by discounting those future cash flows in order to arrive at their present value.[79]

309. The determination of the discount rate or cost of capital is a process that involves the consideration of a number of facts. Some of these factors, such as the beta and risk free rate, are determined from empirical data published by broadly accepted sources, while many others call for the application of judgment on the

[79] See the defendants submissions at paragraph 283

part of the valuator. Robinson, during his cross examination, accepted that the assessment of these factors is more an art than science and that the best one can do is to provide an estimate since it is not an exact science.

310. Accordingly, it was stated that there is no standard formula and it is invariably the case that two valuators are not likely to arrive at the same value.

311. In the claimant's submissions, it was accepted that the definition "fair market value" adopted in the Hill Report was materially the same as "market value" as defined at 6.4 of the full expert report and that these definitions are consistent with the 'purchase price' as defined at Clause 7.3 of the Shareholders Agreement.[80]

312. In the defendant's submissions at paragraph 333, it was agreed that a discount was warranted for the economic environment in early 2009.

313. With the exception of the company specific risk premium, during his cross examination, Robinson accepted that Hill's position on each of these areas was reasonable and sensible[81]:

313.1. The market risk premium (which is the same as the equity risk premium) of 5.7[82]

313.2. An unlevered beta of 1.16[83] and

313.3. A country risk premium of 3%[84]

314. With regard to the size premium, both Robinson and Hill used the same data course namely, ***Ibbotson* 2009 Valuation Yearbook**. This is a publication that lists

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[80] See paragraph 314 of the claimant's submissions

[81] The defendants submissions at paragraph 375

[82] Transcript dated 24 May 2019 pages 62 -63

[83] Transcript dated 24 May 2019, page 65

[84] Transcript dated 24 May 2019, page 66

the relevant discount rates for companies depending upon the decile within which they fell.

315. Robinson accepted that the exercise of deciding which decile should be applied for the purposes of assessing a size premium was circular or iterative because the valuer essentially needed to estimate the value of the company in order to know which decile should apply, which in turn could affect the value of the company. Further, he accepted that the deciles were very broad categories and that Hill's estimated value of PETL put it very near to the boundary between 9th and 10th deciles and that in those circumstances, Hill's approach and application of a 3.74% size premium was not unreasonable.[85]

316. It was also noted that the difference in the discounts for lack of control and lack of marketability accounted for an approximately 5% difference in value between the two reports – even before any adjustment is made to Robinson's report to take into account the matters raised above, including his position with regard to the discount for the economic environment that existed at the time and the additional factors that in the Robinson 2018 Valuation, he considered resulted in a discount for lack of marketability. The defendants submitted that such a difference is well within the margin of appreciation to be afforded in the exercise of determining whether the sale was at a gross undervalue.

317. It was stated at paragraph 357 of the claimant's submissions that both Mr. Hill and Mr. Robinson had regard to restricted stock studies in arriving at the appropriate discounts for lack of marketability.

[85] Transcript dated 24 May 2019, page 70

318. As it relates to the calculation of the WACC, it was not in dispute that the tax rate was 35% and that the defendants accepted Robinson's use of 11% industry debt to equity.

319. At paragraph 401 of the defendants' submissions, it was also stated that in his cross examination on the market risk premium (or equity risk premium) Robinson suggested that the rate oscillates and asserted that a reasonable range would be between 3.5% to 6% and therefore follows from his evidence that Robinson was of the view that it would not be unreasonable for a valuator to use the rate of 6% for the market risk premium in valuing PETL.

320. It was submitted that Robinson agreed in his cross examination that a risk premium of 3% would be within the range of what a valuator would accept as reasonable and not inappropriate to use.[86] Further, with regard to size premium, while Robinson used the figure of 2.70% in his report, in cross examination, he accepted that a size premium of 3.74% was not unreasonable.[87]

321. The defendants also accepted at paragraph 406 of their submissions that in the calculation of the WACC[88], Robinson 2018 valuation used an equity to capital ratio of 90%, a debt to capital ratio of 10% and a cost of debt ratio of 5.50%.

The Advisory Report

322. Robinson authored an Advisory Opinion dated 7 December 2012 and, following disclosures of further documents by the defendants, rendered a Full Expert Report dated 14 May 2018.

[86] Transcript dated 24 May 2019, pages 65-66

[87] Ibid, pages 69-70

[88] Weighted Average Cost of Capital

323. In his report, he estimated that a reasonable valuation for a 51% stake in PETL at the valuation date, 3 February 2009 was US $110 million – US $150 million. Further, that in absence of any other information, the best value of a fair market value would lie around the midpoint of US $130 million.

324. He considered the fact that PETL is a holding company whose primary income is derived from dividends received from its investments and the value range is based on two overall approaches:

324.1. A 'consolidated approach'

324.2. A 'sum of the parts approach' ('SOTP')

325. In his Advisory Report, Mr. Robinson also reviewed the Reuter valuation and stated that this valuation appears not to represent a full valuation, but an adjustment to a third party's valuation by applying two high level discounts – namely:

325.1. A discount for comparable market performance which reduces the value of 100% of the equity of PETL from US $150 million to between US $100 million and US $120 million

325.2. A discount for Pre-Emption right which reduces the US $100 million to US $120 million to US $80 million – US$100 million or US $70 million – us $90 million ;

326. The following issues with the Reuter valuation were also addressed:

326.1. Dr. Reuter's use of a third party valuation, which contains a number of potential errors that underestimated the value of PETL;

326.2. Dr. Reuter's application of two discounts which are unnecessary.

327. Further, of the discount that was applied by Dr. Reuter for Comparable Market Performance, Robinson says that no further supporting information for this

discount is provided and Dr. Reuter assessed the discount at such a high level that it excludes any detailed understanding of the PETL business plans. It was also stated that Dr. Reuter applies a much greater discount than the 50% benchmarks he quotes.[89]

328. Robinson noted that the primary differences between his valuation and the Reuter valuation are:

328.1. The differences between the third party valuations upon which the Reuter valuation is based. He states that these differences are primarily due to:

328.1.1. Differences in forecasts used in the valuation: Robinson used the latest forecasts available prior to the Valuation Date whereas the third party valuations which is dated 31 December 2008 appears to use different forecasts; and

328.1.2. Differences in the discount rate. The Reuter valuation does not include any explanation of the discount rate set out in the third party valuations making it impossible for Robinson to comment in detail on these differences.

329. Robinson also stated that Reuter applied the following discounts to third party valuation which he considers to be inappropriate:

329.1. A discount of 20% to 33% to which Dr. Reuter explains is meant to reflect the fact that he considers the third party valuation to be too high relative to another valuation as at June 2008. He considered that Dr. Reuter does not provide sufficient support for this discount; and

329.2. A discount of 30% to adjust for lack of marketability. He considered this discount to be too high and that Dr. Reuter did not provide sufficient support for this discount.

[89] Paragraphs 2.13-2.15

330. It was submitted that in the absence of any assistance by Dr. Reuter (and no credible explanation was given for the failure of the defendants to call him as a witness to explain his opinion or valuation) as to why he failed to attribute to surplus cash balances at the investment companies and omitted key cash flows in accordance with management projections and applied the discount rates that he did without any explanation for same and without sufficient support for his discount, the court should not attach any weight to the fairness report supplied by Dr. Reuter.

331. It was concluded that at the date of purchase of CLF and CLICO's 51% shareholding in PETL, there was no independent valuation on which Proman could conclude a sale at fair market value.

The Main Differences between the Robinson 2018 Valuation and the Hill Report

332. The defendants, at paragraph 372 of their submissions, summarised the main differences as follows:

332.1. Hill applied different discount rates in building up his weight average cost of capital ("WACC") which resulted in Hill using a WACC of 19.8% while Robinson calculated the WACC to be a low of 14.3%, a high of 15.8% and used a midpoint of 15.1%.

332.2. Hill applied a 15% discount for lack of control while Robinson applied no discount for this;

332.3. Hill applied a 25% discount for lack of marketability of the shares (at the PETL level), while Robinson's discount for this factor was 10%

332.4. Hill applied a discount of 5% for combined lack of control and lack of marketability in its valuation of the shares held by PETL in its various underlying investments;

332.5. The cash flows projected by Hill included certain turnaround expenses that had been paid in full in 2008 while Robinson netted out from day 1, cash that was restricted as being required under the Ammonia Businesses debt obligations ("the restricted cash").

332.6. In arriving at their cash projections for the full year 2009, Hill relied on the price forecasts of the management of the Ammonia Business management price forecasts while Robinson relied on forecasts published by Blue Johnson and Fertecon;

332.7. In terms of ammonia price projections beyond 2016, Hill assumed that this would increase at the rate equal to the US long term inflation rate, which was higher than that assumed by Robinson and the management of the ammonia business;

332.8. Differences in the treatment of working capital.

333. Senior Counsel for Proman concluded that the value of the company as assessed by Mr. Hill and set out in the Hill Report was both reliable and reasonable and confirms that the price that was paid by Proman for the shares was not manifestly unjustifiable but within the margin of appreciation[90] that could be assessed by a fair minded and independent valuator who was being guided by the objective and authoritative material on the topic.

334. In assessing Robinson's discussion of the differences between his opinion and Hill's, the discussion boiled down to an analysis of the discounts used/not used and the reasons for that.

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[90] See ***Clydebank Football Club Ltd v Steedman*** 2002 SLT 109 per Lord Hamilton at para 76; ***Progress Property Company Ltd v Moorgarth Group Ltd*** [2011] 2 All ER 432 (see para 31).

Gross Undervalue?

335. Proman says that the claimants cannot comprehend that the valuation prepared by Cronberger involved using the very same "calculator" including the same discount rates, as that used by PWC, but produced a different value because of the different data as to price forecasts that existed at that time (and which were provided to Cronberger by the independent management of the Ammonia Businesses) and this confirms the extremely jaundiced lens through which they see all of the facts in the case – para 190. However, the court notes that Cronberger did not give evidence in the matter and is of the respectful view that David Cassidy expressing that view traverses the territory of inadmissible hearsay evidence which the court cannot entertain.

336. Proman says that the sale was not at a gross undervalue because the price:

336.1. Was based upon using the same discounted cash-flow model for valuing the shares in CLICO Energy that had been previously developed and applied by CLICO Energy's auditors, PWC;

336.2. Was based upon using the same discount rate that PWC had itself applied when it produced a valuation of the shares using this model in June 2008 (even though the economic conditions prevailing at the time of the PSA could have justified the use of a higher discount rate than that which was appropriate in June 2008, which in turn would have necessarily produced a lower valuation);

336.3. Was based upon using the latest price projections that had been provided by the management of CLICO Energy's ammonia businesses.

337. Their position was therefore allegedly corroborated by Dr. Till Reuter's "Fairness Opinion".

The Cronberger valuation

338. Despite the fact that it was suggested that the Cronberger used the Price Waterhouse Coopers developed spreadsheet model or calculator and input information into that spreadsheet as to the most recent price forecast that had been provided without changing any of the discount rates, Cronberger did not come to court to say that. No evidence was put before this court as to why he was unavailable as a witness. In fact, if as asserted by Proman, Cronberger was an independent managing director of the PETL, he was in the best place to come to give evidence on behalf of PETL and to explain its position in the whole transaction and to also explain why he provided information to the minority shareholder at the time without reference to the majority shareholder. He could have come to say exactly what he did rather than for David Cassidy to suggest how simple the exercise was in the manner in which he did in cross-examination[91]. That was for the court to find, respectfully, rather than for David Cassidy to opine. Cronberger's failure to attend to give evidence on the crucial role that he played in creating a valuation which Dr. Reuter used to discount and upon which Proman ultimately relied gives the court the impression that he did not want to come to give evidence and withstand the rigours of cross examination. The court can make such an adverse inference in light of the fact that it could reasonably have expected Cronberger to attend but, instead, he was shielded from giving evidence. No matter how many times it may be submitted that all he did was fill out a model that was previously accepted, it was for him to say that and for him to be questioned on it. It is quite likely that had he attended, he would not have been

[91] There was the allusion to it not being rocket science and that all that had to be done was plug in figures to a model

in a position to justify his findings or to substantiate his independence. Those are inferences the court can make in respect of such a crucial witness.

339. It was suggested on behalf of Proman that the fact that he had been engaged by Proman prior was not something that would affect his evidence in the same way as the claimant had put Robinson forward as an independent expert even though he had provided expert evidence in the MHTL arbitration. Respectfully, the analogy is not at all applicable. Robinson is an internationally acclaimed valuator who is the head of the valuations division in his company with an international reach. His reputation as an independent evaluator would obviously be of paramount importance to him with the obvious motivation to uphold his integrity.

340. On the other hand, Cronberger, who did not come to this court for it to properly assess him, may not have the same motivation especially when the court views that his role in PETL now seems subordinate to the shareholders will to the extent where they alone spoke for PETL. His eagerness to meet the January 30th deadline imposed by Joseph Cassidy pointed towards an underlying allegiance. His emails and actions clearly did not evince independence.

Dr. Reuter

341. Dr. Reuter, like Cronberger, did not trouble this court with any viva voce evidence of his own. It was suggested that he was an experienced and reputable expert and, apart from that statement being made by the Cassidys in their witness statements, the only other evidence in that regard was the statement made by Reuter himself in his fairness opinion of certain transactions that he was involved in. The extent of his own self-professed involvement in those transactions, however, was not independently established and was not known to this court nor was it tested due to his absence.

342. Nevertheless, Reuter took information given by Cronberger and applied two discounts to it:

342.1. He compared the June 2008 valuation of PETL in the sum of $242 million with the valuation as at December 2008 in the sum of $152 million[92] and found that there was *"only"* a 38% decrease in valuation[93]. On the other hand, in his email dated 30 January 2009 sent at 9:54 PM Swiss time, or 4:54 PM TT time, he said:

> *"I think it would be worth to have a further analysis of the business plan and apply different valuation methodologies."*

This statement was not repeated in his later "Valuation" which was only dated "February 2009". He was therefore expressing dissatisfaction in relation to this 38% decrease which he found required the employment of different methodologies. This was a crucial recognition which he failed to explore and investigate further. Nevertheless, he said:

> *"Most company valuations came down more than 50% since summer 2008 and further declines are expected. Therefore I do believe that the "fair value" of approximately 150 m is on the very high-end and fair value could also be in the range of USD 100 – 120 m"*

He did not identify what the "most company valuations" that he was referring to were. Were they the same sort of companies as PETL? That derived the income from dividends paid by other companies? There is no available answer to that question. Nevertheless, it seems that he just applied a generalized figure to deduct the $242 million June 2008 value by

[92] Dr. Reuter described it as 150 million rather than 152 million

[93] (242 – 150)/242 = 38. 0165 or, if rounded, amounts to 38%

roughly 50% to provide a range of $100 – 120 million. This is the science involved in the first discount applied.

342.2. The second discount was derived from the right of pre-emption. He said this right would make any disposal process difficult and inefficient and, after elaborating on that, he went on to say that:

> *"…we believe that there will be a limited appetite due to the pre-emption right, therefore limited competition and a further discount on the valuation. A realistic discount could be in the range of 20%."*

Consequently, the range of the value was discounted by 20% from 100 – 120 million to 80-100 million. Again, without any reference to any empirical studies or data, Reuter pulls a 20% discount out of his hat for the pre-emption right, after opining, without any established basis whatsoever, that there would be a limited appetite for these otherwise very lucrative shares.

343. These are the only two discounts he mentions and so there is no evidence of him considering fungibility or fire sale discounts.

344. One can therefore quite reasonably see that this opinion really would not have taken much time. Basically, Dr. Reuter just "eyeballed" two discounts and applied it to the last line of the first page of Cronberger's "CLICO ENERGY Valuation". He did say that he looked at the shareholders agreement as well and that is what influenced his view with respect to the second discount.

345. This is the scientific opinion that Proman took into account. Obviously, it seems as though all that was done after that is calculate 51% of 80 million (= approximately 41 million) and of 100 million (=51 million) and find the midpoint which is 46 million. However else it may be rationalized by Proman, this is what it basically boils down to.

346. Of course the court cannot fault Proman for taking an approach which is ostensibly backed by this type of science using the weight of a purported expert to give an opinion which they could point to. They had nothing to lose but everything to gain by pushing through a value which favoured them on whatever basis they wished. There was no push back from Duprey. The documentary trail, though, from the Cronberger valuation to Dr. Reuter's position is obviously very flimsy.

Robinson v Hill

347. It is for this reason, and bearing in mind that CLF was not represented in the negotiation of the sale price in any sense whatsoever other than for Duprey to say yes to an offer without any obvious sign of analysis and counter analysis that the court must look to see whether the claimants have crossed the evidential burden to prove that the sale price was at an undervalue.

348. The court got an opportunity to hear and see Mr. Robinson. The court got to see him stand up to cross examination to defend his work. The court also got to see his analyses and discussion of the differences between his valuation and the work done by Reuter and Hill. There is nothing substantial in the evidence that he gave which suggested any sort of incompetence, inefficiency or lack of credibility. In fact, he came across as a comfortable and knowledgeable expert in the field who, from the extent of his resume that he presented to the court, is highly regarded not only in his company but worldwide. Of course, he was retained by the claimants and therefore cannot say that he was an expert appointed by the court of its own accord. However, the manner in which he carried about himself and the nature and contents of his analytical and comprehensive reports shows that he put his mind to not only what he had to say about the topic but what the other voices had to say as well i.e. Dr. Reuter and Mr. Hill, and assisted the court as to how it should pay regard to those voices.

349. On the other hand, the court can understand the position that Proman was put in by reason of Mr. Hill's late withdrawal from the case. It did not mean that his valuation was of no worth to the court because it allowed the court to place Mr. Robinson's evidence and reports in a different context and perspective and to have the opportunity to have an alternate thought process revealed on paper.

350. However, the court is of the respectful view that Hill's failure to attend to rationalize and explain his report, which was signed by him and by his son, deprived this court of the opportunity to properly test the Hill report's veracity. It was suggested during the trial as mentioned that Alex Tittel be appointed to present the expert evidence in respect of the Hill Report on behalf of Hill Senior, but as also mentioned, that was not allowed by this court. Further, and in any event, the report was not signed by Tittel. In fact, he was accredited as a "Contributing Appraiser", whatever that means. James Michael Hill Junior, however, was a co-signer and co-author of the report but he did not attend to give evidence nor was any request made for him to do so.

351. This put the court on notice that the authors were not willing to attend for cross-examination but were instead proffering a contributor to the report. Since Tittel failed to establish his expertise in this area, that offer was rejected.

352. When a party presents a report from an expert in the circumstances that have prevailed in this matter and where the experts were not agreed as joint experts but who were obviously providing substantial competing and opposing valuations upon which both sides were vigorously clinging, then the failure of either of them to attend places the court in a very unenviable position to evaluate the strength or weaknesses of that defaulting expert's report. It also puts doubt in the court's mind as to the bona fides of the conclusions reached by the defaulting expert and causes the court to ask the question to itself – why does the expert not want to come forward to substantiate his/her opinion? One possible reason is that the

opinion may not stand up to scrutiny. In this case, the reason given by Hill is that because of his advanced age, he is unable to submit himself to the rigours of cross examination. That may be understandable. However, as mentioned, his son, the co-author of the report, could have been called instead rather than the attempt to call the contributing appraiser. That failure pushed the court's mind away from the defaulting valuer's opinion in so far as it conflicted with the expert who attended to stand up to scrutiny. It may have been helpful, however, had Hill or his son done a critique of Robinson's report at least to provide expert views and comments on the same. That was not done and the court was left to the valiant efforts of Senior Counsel for Proman to do so in submissions. Although commendable in terms of its analysis, those submissions were often seemingly based on expert positions, commentary or observations that were not before the court. It called for analyses which were beyond the remit of the court by way of the authorities before it and were in fact suggestive of expert behind the scenes, the benefit of which the court did not have. Certainly, Senior Counsel posed some very interesting questions and made some very telling comments and observations but, with the greatest respect to Senior Counsel, his expertise in the area was not established. The subtlety of the suggestions of what was reasonable or rational had to be judged by a person not versed in the field. This court was faced with a chasm of opinions. It is for that reason that the court relies on experts for assistance. And, that is what Robinson did – assist the court.

353. The court was therefore left with the tested evidence of Mr. Robinson and the untested opinions of:

353.1. Cronberger

353.2. Dr. Reuter

353.3. James Hill Sr.

353.4. James Hill Jr.

354. Robinson gave his critiques and justified them. He was questioned about it but not seriously shaken to the extent that made him an incredible witness. On the other hand, the untested authors of the reports on behalf of Proman were hidden from view. This is a specialized field of expertize with many areas of unresolved theories of looking into the future to value a company using forecasts. Doing the best that it can, this court is of the respectful view that it cannot resolve the academic arguments that the experts themselves have commented are unagreed.

355. As a result, on a balance of probabilities, the court is of the respectful view that Robinson's valuation is to be preferred and, accepting it, the court is of the respectful view that the claimants have proven that Proman purchased the PETL shares at a gross undervalue.

General comments otherwise

356. Having regard to all the circumstances, the court is of the respectful view that there was nothing in the circumstances to have compelled a sale of what Proman and Duprey said was a CLF asset in such a manner at that time. The subsidiaries that were in serious difficulty, according to the evidence, were CIB, CLICO and BA and the GORTT put both hands up forcefully to stand behind them. According to Duprey and Proman, incorrectly as this court has held, the shares were only CLF's to be considered. The more the court looks at it, though, this sale was not in the best interests of CLF at the time. Despite the crash of the prices in the ammonia business at the time, the forecasts that were before the court showed that apart from the crash in ammonia and methanol prices in December 2008, those prices were forecast to increase and therefore it made eminently greater sense for CLF to get a better price for the same asset by taking its time and negotiating the same using a measured and professional approach with proper forecasting to be able to

come up with a realistic value. The difficulty, however, was that the speed with which the transaction progressed did not allow for CLF to properly conduct any valuation especially since its Board was not aware of the transaction at the relevant time. Even though Proman has suggested that the speed was nothing out of the ordinary, the court begs to disagree. That speed was obviously designed to steal a march on the GORTT's steps to possibly get the shares in PETL although the court has already suggested that such a step would have been subject to the SHA and Proman would ultimately have been successful in retaining the shares subject only to the issue of price.

357. Therefore, obviously, with all of the business savvy persons who were involved in this transaction, the point of this sale at this time with such haste seemed to have been designed to ensure that Proman got it at the price that it wanted rather than at a fair market value ascertained in an arms-length transaction between two equal parties. The fact that Duprey did not even utter a squeak in opposition is testament to the fact that he was working with Proman to do just that. There is no evidence or trail of any other benefit to Duprey or Sakal in relation to this transaction and so the question arose as to what could be the motive for this sale. That is a question that Duprey himself refused to attend court to deal with and the only persons who could have done so was Duprey himself. He was the one to have come to court to say why he did not involve the CLF Board or why he instructed Sakal to keep the transaction secret until it was completed. Even though Sakal was not called and obviously knew what was going on with respect to the sale and had misgivings afterwards as mentioned, unless she was told about the details of the conversations between Duprey and Joseph Cassidy – conversations in Florida outside of the local situation where Duprey still lives and carries on his business as far as the court is aware – she could not really have assisted the court much more than what she said at the Colman Enquiry. Just as Nuñez-Teisheira recognized, hence her demand for Duprey to attend in person on

25 January 2009, this court also recognizes the same. That Duprey was the person to answer and explain why he chose to sell the valuable PETL shares without so much as a valuation of his own, or a scintilla of negotiation or even a shadow of a counteroffer. Instead, he chose not to attend court and, as a result, the transaction is left reeking of impropriety on his part with the obvious complicity of Proman as it, through Joseph Cassidy, steamrolled its way into ownership without any obstruction.

358. To say that there was fraud on the part of Joseph or David Cassidy, to my mind, however, would be a bridge too far. They were shrewd businessmen who were obviously looking for a deal and who were being facilitated by CLF's figurehead with whom they were closely familiar. He was pushing his own authority and they went along. However, they were aware of circumstances that had changed the entire dynamic and, instead, chose to proceed in their own business interest to get that deal. It may not have been their intention to keep the deal secret as Joseph Cassidy pointed out. However, this court accepts the fact that it was a secret to CLF and CLICO's Boards. Proman knew of CLICO's interest in the shares but obviously relied on what it viewed as a technicality in relation to ownership to cast the burden on Duprey to account for the proceeds of sale. This court has found that they were wrong to do so but that impropriety did not cross the boundaries of fraud despite Duprey's own questionable motives.

Final Thoughts and Findings

359. Therefore, having found that there was no actual or ostensible authority that Proman could rely upon in respect of Duprey, the court is of the respectful view that the sale was an unauthorized sale and that Proman knew this and also ought

to have known this but was wilfully blind to the clear red flags that were glaring at them and which they chose to ignore.

360. The court is satisfied on a balance of probabilities that the claimants have proven their case and Proman's defence fails. So too does Duprey's. Obviously, since the claimants were seeking declaratory relief, the second defendant PETL was required to be a party even though there was no substantive relief sought against it. Any relief in relation to the second defendant would be consequential upon this court making the order set out hereinafter to rectify the register accordingly. Even though the claimants sought relief for oppression as against PETL, this court is not minded to grant that relief having regard to the fact that the claimants have been successful in dealing with and proving their main thrust of their claim and therefore need not rely upon this alternative remedy.

361. As a result, the court does not feel it necessary to deal with the issues of negligence and oppression in so far as they relate to Proman.

362. If even, however, the court was wrong on the issue of Duprey's authority, the court is satisfied that the sale was at a gross undervalue for the reasons given in the preceding section.

363. However, with respect to Duprey, it is clear that he has breached section 99 of the Companies Act[94] by failing to act honestly and in good faith with a view to the best

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[94] "*99. (1) Every director and officer of a company shall in exercising his powers and discharging his duties—*

(a) act honestly and in good faith with a view to the best interests of the company; and

(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

(2) In determining what are the best interests of a company, a director shall have regard to the interests of the company's employees in general as well as to the interests of its shareholders.

(3) The duty imposed by subsection (2) on the directors of a company is owed by them to the company alone; and the duty is enforceable in the same way as any other fiduciary duty owed to a company by its directors."

interests of the claimant companies and in failing to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. So that apart from directly acting unlawfully as mentioned before, he has also acted in contravention of the provisions of the Companies Act.

364. The court has considered the authorities relied upon by both sides in relation to this claim and is satisfied that it should make an order for the return of the shares to CLF together with all benefits which have accrued to Proman over the period 4 February 2009 to date inclusive of interest with respect to these shares. Of course, the claimants would have to repay to Proman the said sum of $46 million US together with interest thereon from 10 February 2009 to date and they would be entitled to set-off from that sum such of the whole or portion of it that would be found due to the claimants in relation to benefits and interest accrued.

365. In considering the remedies open to the court, it was suggested by senior counsel for the claimants in their submissions in reply that the court should award exemplary or punitive damages[95]. However, exemplary damages ought to be specifically pleaded[96] and since it was not, the relief cannot be considered without the plea.

366. With respect to damages as against Proman, the restoration of the shares and the corresponding proceeds derived therefrom sufficiently compensates the claimants to put them in the position that they would have been had the transaction not been carried through. As a result, and in light of the fact that there was no plea for exemplary or punitive damages, no further damages have been

[95] ***Kuddus v Chief Constable of Leicestershire*** [2001] UKHL 29, at paragraph 51 per Lord Nicholls

[96] Part 8.5 (2); and ***Aron Torres v Point Lisas Industrial Port Development Corporation Limited*** C.A.CIV.84/2005

proven. Therefore the court will not award any further damages as against Proman.

367. With respect to Duprey, however, the court is minded to make an order for damages against Duprey in light of his flagrant impropriety and breach of his position of trust along with his duties under section 99 of the Act. In that regard, the court requires further assistance from the attorneys at law for the claimants and will deal with that issue separately.

368. The issue of the quantification of costs was raised by the claimants at the interlocutory stage by way of a budgeted costs application and it was agreed that the costs of the matter would be assessed at the end of the trial under Part 67.12 of the CPR.

The Orders

369. The court therefore makes the following order:

369.1. <u>Against Proman:</u>

369.1.1. The court declares that:

369.1.1.1. The purported Purchase and Sale Agreement in writing dated February 3, 2009 between CLF and Proman (hereinafter referred to as the PSA) is void;

369.1.1.2. Proman holds 51% of the total issued shares in PETL amounting to 84,986,145 ordinary shares as at the time of the PSA on constructive trust for CLF[97];

[97] At the hearing when the court gave its decision on 30 September 2021, the court opined that the shares should be returned to CLF and CLICO. However, upon a reconsideration of that point and bearing in mind the fact that there is no evidence of any actual transfer from CLF to CLICO in respect of that 17%, the order

369.1.2. It is ordered that:

369.1.2.1. Proman immediately restore or cause the restoration to CLF of the said 51% of the PETL shares;

369.1.2.2. Proman cause or procure the rectification of PETL's register of members in conformity with the order made herein upon the restoration of the said PETL shares to CLF;

369.1.3. It Is Further Ordered That

369.1.3.1. Proman provide an account of all dividends and/or distributions made by PETL in connection with the said PETL shares which are the subject of these proceedings from the date of acquisition of the same on or around 3 February 2009 to the date of restoration of the said shares to the claimants (hereinafter referred to as "the said Distributions") **by 1 November 2021**; and pay to CLF **by 1 December 2021** the said Distributions found due under that said account together with interest thereon at the rate of 2.5% per annum from the dates of the receipt of those sums to today's date and continuing thereafter at the statutory rate of interest until payment;

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must be for the return to the status quo that existed in February 2009. As a result, the court has revised the order accordingly and ordered the restoration to CLF.

369.1.3.2. The claimants repay to Proman the proceeds of the purported sale in the sum of USD $46,500,000 together with interest thereon at the rate of 2.5% per annum **by 1 December 2021** with the right to set-off as against that sum the said Distributions described in the account in the preceding sub-paragraph together with the interest thereon;

369.2. Against PETL

369.2.1. It is ordered that PETL rectify the register of members and annual returns of PETL in accordance with the orders made above.

369.3. Against Duprey:

369.3.1. It is declared that Duprey exercised his purported powers as chairman and director of the first and second claimants in a manner that was oppressive and/or unfairly prejudicial to the claimants and / or that unfairly disregarded the interests of the claimants;

369.3.2. It is also declared that Duprey acted contrary to the provisions of section 99 (1) of the Companies Act in that he:

369.3.2.1. Failed to act honestly and in good faith with a view to the best interests of the claimants;

369.3.2.2. Failed to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

369.3.3. The issue of damages as against Duprey is reserved for further assistance from the claimants. In that regard, the court directs

the attorneys at law for the claimants to notify the court by email of a schedule for the provision of further submissions in this regard by Friday, 1 October 2021.

369.4. <u>Against Proman and Duprey:</u>

370. Proman and Duprey will pay to the claimants the costs of the claim to be quantified pursuant to Part 67.12 of the CPR before the Registrar of the Supreme Court.

371. The orders made herein as against Proman are stayed until 12 November 2021.

/s/ D Rampersad J

Assisted by
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