

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMERCIAL DIVISION

2018/COM/com/00056

2009/COM/com/00019

IN THE MATTER OF the Companies Act 1992

BETWEEN

CLICO LIFE INSURANCE COMPANY SURINAME S.V

Plaintiff

AND

CLICO (BAHAMAS) LIMITED

Defendant

Before Hon. Chief Justice Sir Ian R. Winder

Appearances: Damian Gomez KC with Moreno Hamilton for the Plaintiff
Stephen Smith KC with Marco Turnquest for the Defendant

22 February, 23 February 2022 and 9 September 2022

JUDGMENT

WINDER, CJ

This action relates to the claim of Clico Suriname, N.V. (Suriname) arising out of the liquidation of Clico Bahamas Limited (Clico Bahamas) (the Reversal application). Suriname seeks to reverse a rejection of its proof of claim by the Official Liquidator of Clico Bahamas (the Liquidator). In a separate action, which was heard together with the Reversal application, Suriname seeks declaratory relief with respect to the transactions which were the subject of its claim in the liquidation.

Background

1. The Agreed Statement of Facts provides:
 1. The Plaintiff, Clico Suriname is a company limited by shares, incorporated on October 26, 2002, in the District of Paramaribo Suriname, licensed by the Ministry of Trade and Commerce to conduct the business of life insurance in Suriname and regulated by the Central Bank of Suriname.
 2. The Defendant, Clico (Bahamas) Limited (in Liquidation) ("Clico Bahamas") is a company that was incorporated under the Companies Act of the Bahamas and licensed and regulated by the Insurance Commission of the Bahamas to carry on insurance business in the Commonwealth of The Bahamas.
 3. Clico Bahamas was formerly named British Fidelity Assurance Limited.
 4. On November 26, 2004, Clico Suriname wired US\$21,171.20, through Swiss Re Life & Health, to Ocean Bank Ltd, 200 NE Third Avenue, Fort Lauderdale, Florida, United States to be credited to Clico Bahamas' account, no 14140818105 ("the First Payment")
 5. On or about November 28, 2004, Clico Bahamas produced a document headed "Policy Page", that stated the following:

a. <u>Policy No.</u>	2000000031
b. Insured	Clico Suriname
c. Owner	Clico Suriname
d. Payor	Clico Suriname
e. Policy Effective Date	November 28, 2004
f. Issue Age	044
g. Sex	M

h. Premium	\$27,171.00
i. Payable	Annual
j. Maturity Expiry Date	01/2025
k. Form No.	EFPA
l. Coverage Description	Executive Premium Ann. Single
m. Initial Deposit	\$27,171
n. Annual Premium	\$27,171
o. Beneficiary	Insured's Estate.

6. Accompanying the "Policy Page" were:

- a. a document headed "Flexible Savings Annuity Plan General Provisions and Conditions", which set out the provisions and conditions applicable to an annuity payable by reference to the life of an annuitant ("GPC");
- b. a document headed "Benefit Calculations Information, which stated "the interest rate used in determining the Cash Value shall be determined by the Company Guaranteed Interest Rate 4%" and set out a Benefit Calculation Table identifying the fixed monthly annuity payments for males and females by reference to the age of the annuitant at retirement ("Benefit Calculation")
- c. a document headed "Executive Flexible Single Premium Annuity - Projection of Values from 2/11/2005 prepared for: Clico Suriname Male Age: 44 prepared by: British Fidelity Assurance 2/11/2005", which set out a table by reference to the age of the annuitant from 45 to 95 ("Projected Valuation") showing accumulated and surrender values at a "current rate of 5.75%" and at the guaranteed rate of 4%.

(the Policy Page, GPC, Benefit Calculation and Projected Valuation are together referred to as "the First Disputed Policy").

7. Clico Bahamas produced a document headed "Annual Report of Policy Values for the year ending March 27, 2009 Policy Number 002 2000000031" Insured: Clico Suriname, Owner: Clico Suriname" which recorded the "premium" received of US\$27,171 and set out on a monthly basis interest earned at a rate of 5.75% compounded monthly showing a "cash value" of US\$34,791.19.
8. On April 19, 2005, Clico Suriname sent a letter of instructions, under the signatures of R. Djoewan, Manager of Insurance Operations and Joyce Doelaharsori, Financial Controller of Clico Suriname at the time, authorizing De Surnaamsche Bank N.V. Global Transfer Service to wire transfer US\$3,000,000.00 to Ocean Bank Limited, 200 NE Third Avenue, Fort Lauderdale, Florida, United States, to be credited to Clico Bahamas' account number 141400818105 ("the Second Payment"). On April 25, 2005, Karen-Ann Gardier, the then Chief Operating Officer of Clico Bahamas sent an email to

Deloris Moncur and Kimberly Munroe confirming that Clico Bahamas had received US\$3,000,000.00 from Clico Suriname and requesting that "EFPA" be prepared and forwarded to Ms. Geeta Singh at Clico Guyana at an interest rate of 9% per annum.

9. On or about April 22, 2005, Clico Bahamas produced a document headed "Policy Page" that stated the following:

a. Policy No.	2000000034
b. Insured	Clico Suriname
c. Owner	Clico Suriname
d. Payor	Clico Suriname
e. Policy Effective Date	April 22, 2005
f. Issue Age	045
g. Sex	M
h. Premium	\$3,000.000
i. Payable	Annual
j. Maturity Expiry Date	04/2010
k. Form No.	EFPA
l. Coverage Description	Executive Flexible Annuity
m. Initial Deposit	\$3,000.000
n. Annual Premium	\$3,000.000
o. Beneficiary	Insured's Estate.

10. Accompanying the "Policy Page" were:

- a. The GPC;
- b. a Benefit Calculation Table;
- c. a Value Projection showing accumulated and surrender values for ages 45 to 95 at a "current rate of 9%" and at the guaranteed rate of 4%.

(the Policy Page, GPC, Benefit Calculation and Projected Valuation are together referred to as "the Second Disputed Policy").

11. Clico Bahamas produced a document headed "Annual Report of Policy Values for the year ending March 27, 2009, Policy Number 002 2000000034" Insured: Clico Suriname, Owner: Clico Suriname", which recorded the "premium" received of US\$3,000,000 and set out, on a monthly basis interest, earned at a rate of 9% compounded monthly showing a "cash value" of US\$4,260,591.
12. On September 21, 2005, Clico Suriname issued instructions to De Surinaamsche Bank N.V. Global Transfer Service to wire transfer US\$1,000,000 to Ocean Bank Limited, 200 NE Third Avenue, Fort Lauderdale, Florida, United States, for the credit of Clico Bahamas number

141400818105 ("the Third Payment"). On September 26, 2005, Ms. Roy-Ann Ford, in an email to Ms. Geeta Singh, confirmed that Clico Bahamas had received the payment of US\$1,000,000.

13. On or about April 22, 2005, Clico Bahamas produced a document headed "Policy Page" that stated the following:

a. Policy No.	2000000039
b. Insured	Clico Suriname
c. Owner	Clico Suriname
d. Payor	Clico Suriname
e. Policy Effective Date	September 23, 2005
f. Issue Age	045
g. Sex	M
h. Premium	\$1,000,000.00
i. Payable	Single
j. Maturity Expiry Date	09/2007
k. Form No.	EFPA
l. Coverage Description	Executive Premium Ann. Single
m. Initial Deposit	\$1,000,000
n. Annual Premium	\$1,000,000
o. Beneficiary	Insured's Estate.

14. Accompanying the "Policy Page" were:

- a. The GPC;
- b. a Benefit Calculation Table;
- c. a Value Projection showing accumulated and surrender values for ages 46 to 95 at a "current rate of 9%" and at the guaranteed rate of 4%.

(the Policy Page, GPC, Benefit Calculation and Projected Valuation together referred to as "the Third Disputed Policy").

15. Clico Bahamas produced a "Statement of Policy" showing "current cash values" for December 19, 2005, which stated *inter alia*:

a. Insured Name	Suriname Clico
b. Owner Name	Suriname Clico
c. Attain Age	045
d. Issue Age	045
e. DOB	1/01/1960
f. Insurance Amount	1,000,000

g. Extended Term	September 16, 2006
h. Net Cash Value	1,029,230.07
i. Surrender Value	1,029,230.07

16. Thereafter, Clico Suriname made the following additional payments ("the Additional Payments") to Clico Bahamas, in relation to the Third Disputed Policy on or around the dates set out below:

AMOUNT	EFFECTIVE DATE
\$13,354.00	November 15, 2005
\$500,000.00	March 14, 2006
\$364,409.00	April 24, 2006
\$150,000.00	November 24, 2006
\$300,000.00	January 29, 2007
\$750,000.00	March 19, 2007
\$500,000.00	June 12, 2007
\$500,000.00	October 1, 2007
\$500,000.00	November 28, 2007
\$1,000,000.00	January 7, 2008
\$1,000,000.00	January 31, 2008
\$1,000,000.00	February 14, 2008
\$1,200,000.00	April 18, 2008
\$1,000,000.00	May 30, 2008

17. Clico Bahamas' Annual Report of Policy Values for the year ending March 22, 2009 in relation to the Third Disputed Policy, recorded the payment of all the Additional Payments by Clico Suriname to Clico Bahamas from 23 September 2005, and the crediting of interest in relation to the payments.
18. By a wire instruction letter dated September 25, 2008, written by Ms. Singh-Knight on behalf of Clico Suriname, De Surinaamse Bank NV was instructed to transfer US\$1,500,000 to the account of Clico Bahamas.
19. In an email dated March 20, 2009, Mr. Avinash Rampersad, the Financial Accountant of Regional Finance of Clico Trinidad, confirmed that

US\$1,500,000 had been deposited in the account of Clico Bahamas at First Citizen Bank in Trinidad and Tobago ("the US\$1.5m Payment").

20. By a wire instruction letter dated September 25, 2008, written by Ms. Singh-Knight on behalf of Clico Suriname, De Surinaamse Bank NV was instructed to transfer US\$750,000 to the account of Clico Bahamas at First Citizens Bank Limited, Trinidad. The instruction described the payment as "Loan (short term)". In an email dated March 20, 2009, Mr. Avnisha Rampersad confirmed that the amount of US\$750,000 had been received by Clico Bahamas ("the US\$750,000 Payment").

21. At or around January 23, 2009, Clico Suriname produced a document headed "Memorandum of Agreement for loan of USD 750,000 by Clico Life Insurance Company Suriname NV to Clico Bahamas, hereinafter called POLICY HOLDER". The document stated:

"It is hereby agreed that the following conditions will apply:

1. The loan will be for a period of two (2) years effective January 26, 2009.
2. Interest of 10.5% per annum will be charged on the said loan.
3. The capital amount including compounded interest will be repaid by January 26, 2011
4. This is a "Short Term Loan" to CLICO Bahamas."

While the document provided for the signature of Clico Bahamas it remained unsigned.

22. Although Clico Suriname advanced US\$750,000 to Clico Bahamas no part of that sum has been repaid to Clico Suriname.

23. On or about January 24, 2009, the Supreme Court of the Commonwealth of The Bahamas appointed Mr. Craig A. Gomez of the accounting firm of Baker, Tilly Gomez, as the Provisional Liquidator of Clico Bahamas.

24. On or about March 2, 2009, Mr. Henry Elcock of Clico Suriname spoke to Mr. Gomez, the then Provisional Liquidator about Clico Suriname's claims in the winding up of Clico Bahamas. The conversation was confirmed in an email from Mr. Elcock to Mr. Gomez dated March 2, 2009, which stated: "We just spoke on the phone in connection with the deposits of Clico Suriname with Clico Bahamas."

25. On March 20, 2009, Ms. Kim Kamta Khemraj sent to Mr. Gomez a package of documents relating to the First, Second and Third Disputed Polices.

26. On April 7, 2009, The Supreme Court of the Commonwealth of the Bahamas granted an order to wind up Clico Bahamas on the ground that it was insolvent and appointed Mr. Craig A. Gomez as the Official Liquidator of Clico Bahamas.
27. On March 10, 2010, the Official Liquidator of Clico Bahamas filed a Notice of Rejection of Clico Suriname's claim.
28. On April 1, 2010, Clico Suriname filed a Summons and an Affidavit in the liquidation proceedings for the purpose of appealing the decision of the Liquidator's rejection of its proof and claim, and on June 3, 2010, the Liquidator of Clico Bahamas filed an Affidavit in the Liquidation proceedings.

2. Suriname claims in respect to five sets of transactions. In their submissions, Suriname describes its claim as relating to "the purchase of three (3) Flexible Savings Annuity Insurance Policy Plans, the attempted or aborted purchase of a fourth Flexible Savings Annuity Insurance Policy Plan and a loan of Seven Hundred and Fifty Thousand Dollars (US\$750,000) to Clico Bahamas."

Pleadings

3. There are two proceedings before the Court which were heard jointly.
4. On 5 October 2018 Suriname commenced its suit against Clico Bahamas seeking declaratory relief. A statement of claim subsequently filed by Suriname sought the following relief:
 - I. An Order or Declaration that by virtue of the approved insurance contracts between the Plaintiff and BACO and/or the Defendant, with respect to the First, Second and Third Annuity Policy Contracts, the Plaintiff became a policy holder of BACO and/or the Defendant and therefore subject to the winding up cost and expenses of the Defendant the Plaintiff as a secured creditor has a first priority on the assets of the Defendant and ranks above all unsecured creditors, pursuant to, inter alia, s.91 of the Insurance Act 2009 in the winding up of the Defendant.
 - II. Alternatively, an Order or Declaration that Clico Bahamas holds the sum of US\$3,965,077.19 or such other sum inclusive of interest as determined by this court representing premiums or monies paid by Clico Suriname to Clico Bahamas in connection with the Clico Bahamas Flexible annuity Plan policy number 2000000039 up to the maturity date of policy number 2000000039 on September 23, 2007, on trust for Clico Suriname or as an escrow agent or

constructive trustee or under a resulting trust to avoid the Defendant being unjustly enriched.

- III. Alternatively an Order or Declaration that the Defendant holds the sum of US\$6,200,000 or such other sum inclusive of interest as determined by this court, to have been mistakenly paid by the Plaintiff to the Defendant after the maturity date of the Third Annuity Policy Contract on September 23, 2007 on trust for the Plaintiff or as escrow agent or constructive trustee or under a resulting trust to avoid the Defendant being unjustly enriched.
- IV. An Order or Declaration that the Defendant holds the sum of US\$1,500,000 representing moneys that were paid by the Plaintiff to the Defendant on a mistake of fact or as money had and received for a consideration that has wholly failed or for an insurance contract that was never issued on trust for the Plaintiff as an escrow agent to avoid the Defendant being unjustly enriched.

5. On 1 April 2020 Suriname commenced the Reversal application by Summons, seeking to reverse a decision of the Official Liquidator of Clico Bahamas, Mr. Craig Gomez ("the Liquidator"), to reject a proof of debt lodged by Suriname in the sum of US\$18,734,202.97.

Evidence

6. At trial, Suriname called Sophiejen Setrodjermio and Robin Ferrier as witnesses in their case. Setrodjermio is a Director of Suriname, having been appointed in February 2021. Suriname had been placed in judicial administration since June 2009 following the collapse of its parent company, CL Financial and the suspension of its debts. Ferrier gave evidence as an expert in audit. Clico Bahamas called the Liquidator, Mr Craig Gomez as its only witness. None of the witnesses who gave evidence had any connection to or firsthand knowledge of the transactions under review. Setrodjermio confirmed as much in cross-examination, stating that she had no personal knowledge of any of the disputed policies.

Agreed Issues

7. The agreed issues in this case have been identified as follows:
 - a. Is the First Disputed Policy a policy of insurance such that Clico Suriname is a policyholder within the meaning of s. 91 of the Insurance Act 2009 in relation to any sums due thereunder?

If the First Disputed Policy is not a policy of insurance on what basis was the First Payment made?

- b. Does Clico Suriname have a restitutionary claim in relation to the First Payment? If so, what is the consequence?
- c. Is the Second Disputed Policy a policy of insurance such that Clico Suriname is a policyholder within the meaning of s. 91 of the Insurance Act 2009 in relation to any sums due thereunder?

If the Second Policy is not a policy of insurance on what basis was the Second Payment made?

- d. Does Clico Suriname have a restitutionary claim in relation to the Second Payment? If so, what is the consequence?
- e. Is the Third Disputed Policy a policy of insurance such that Clico Suriname is a policyholder within the meaning of s. 91 of the Insurance Act 2009 in relation to any sums due thereunder?

If the Third Policy is not a policy of insurance on what basis was the Third Payment made?

- f. Does Clico Suriname have a restitutionary claim in relation to the Third Payment? If so, what is the consequence?
- g. On what basis were the Additional Payments made by Clico Suriname to Clico Bahamas?
- h. What is the significance (if any) of the fact that certain of the Additional Payments were made after September 2007?
- i. Were any of the Additional Payments made under a mistake?
- j. If any of the Additional Payments were made under a mistake, what is the consequence?
- k. On what basis was the US\$1.5m Payment made by Clico Suriname and accepted by Clico Bahamas?
- l. Does Clico Suriname have a restitutionary claim in relation to the US\$1.5m Payment? If so, what is the consequence?
- m. On what basis was the US\$750,000 Payment made by Clico Suriname to Clico Bahamas?
- n. Was the Official Liquidator entitled to reject the claim made by Clico Suriname in the liquidation of Clico Bahamas?

- o. In what sum might Clico Suriname be entitled to submit a proof of debt in the liquidation of Clico Bahamas?
- p. Does Clico Suriname have priority over secured and/or ordinary unsecured creditors in relation to any claim (or part of a claim) made in the liquidation of Clico Bahamas?

Law, Analysis and Discussion

8. The First Disputed Policy was purported to be a "Flexible Savings Annuity Plan" naming Suriname as the annuitant. The Policy, numbered 2000000031 was established on 28 November 2004. Notwithstanding Suriname was an inanimate corporate entity the First Disputed Policy described the annuity payable by reference to the life of a natural male person aged 44. The annual premium for the First Disputed Policy was US\$27,171.20. Suriname paid US\$21,171.20 into Clico Bahamas' account towards the policy.

9. The Second Disputed Policy, numbered 2000000034, was purported to have been entered into naming Suriname as the owner. Suriname paid US\$3,000,000 into Clico Bahamas' account towards the policy on 19 April 2005. The Policy, was established on 22 April, 2005. Again, notwithstanding Suriname was an inanimate corporate entity the Second Disputed Policy described the premium payable by reference to the life of a natural male person aged 45. The annual premium for the Second Disputed Policy was US\$3,000,000.

10. The Third Disputed Policy, numbered 2000000039 was purported to have been entered into naming Suriname as the owner. Suriname paid US\$1,000,000 into Clico Bahamas' account towards the policy on 21 September 2005. The Policy was purportedly established on 23 September 2005. Again, notwithstanding Suriname was an inanimate corporate entity, the Third Disputed policy described the premium payable by reference to the life of a natural male person aged 45. The annual premium for the Third Disputed Policy was US\$1,000,000.

11. In relation to this Third Disputed Policy, Suriname made the following additional payments: \$13,354 on November 15, 2005; \$500,000 on March 14, 2006; \$364,409 on April 24, 2006; \$150,000 on November 24, 2006; \$300,000 on January 29, 2007; \$750,000 on March 19, 2007; \$500,000 on June 12, 2007; \$500,000 on October 1, 2007; \$500,000 on November 28, 2007; \$1,000,000 on January 7, 2008; \$1,000,000 January 31, 2008; \$1,000,000 February 14, 2008; \$1,200,000 April 18, 2008; and \$1,000,000 on May 30, 2008.

12. Two additional payments were transferred to Clico (Bahamas) by Suriname on 25 September 2008 in the sums of: US\$1,500,000; and US\$750,000. Suriname says¹ that the transfer of US\$1,500,000 Payment involved an attempt to purchase a fourth "Flexible Savings Annuity Plan" from Clico Bahamas. They say that the annuity insurance policy contract was never issued by Clico Bahamas to Suriname even though Clico Bahamas acknowledged receipt of the transfer. The notation made at the time of the transfer of the US\$750,000 Payment described the payment as "Loan (short term)". A subsequent memorandum of agreement was developed for the transfer of the US\$750,000 Payment in January 2009, outlining that the loan was for two (2) years effective January 26, 2009 at an interest rate of 10.5% per annum. The memorandum, which described Clico Bahamas as the policyholder, was not signed by Clico Bahamas.

13. Suriname's case is that the Official Liquidators was wrong to have rejected their claims. They asserts in their closing submissions that:

(1) Clico Suriname is a policy holder, (flexible saving annuity plan) and is within the statutory priority fund under s 91 of the Bahamian Insurance Act 2009 and stands in the same position as other policy holders of Clico Bahamas.

(2) Clico Suriname is a trust or fiduciary claimant on the basis that Clico Bahamas is holding the investments of Clico Suriname on Trust because of illegality, failure of consideration or failure of the funds sent by Clico Suriname to be applied for the purpose of issuing insurance contracts. Ironically if it is held that Clico Suriname is a beneficiary under a resulting trust by reason of the failure of the purpose for which the first four transactions payments were made it stands in a better position than a secured creditor in that the corpus of the resulting trust is not part of the Estate of Clico Bahamas. In such circumstances Clico Suriname's

¹ Suriname submissions paragraph 10

proprietary right supersedes the liquidation. The monies forming the corpus of the resulting trust ought without more to have been back to Clico Suriname.

(3) Clico Suriname is an unsecured creditor for the loan made by Clico Suriname to Clico Bahamas of Seven Hundred and Fifty Thousand Dollars (US\$750,00.00).

Whether the First, Second and Third Disputed Policies are policies of insurance for the purpose of Section 91 of the Insurance Act.

14. Section 91 of the Insurance Act provides:

"Priority of distribution of assets

91. Where the court makes a winding-up order in respect of a company, the priority of distribution of the assets of the company shall be in accordance with the Companies Act except that the policyholders of the company shall, after the cost and expenses of the winding up, have a first priority on the assets of the company and shall rank above all unsecured creditors"

The Insurance Act affords first priority to policyholders of an insurance company in liquidation, such that their claims fall to be considered after the costs and expenses of the winding up, and ahead of all unsecured creditors. Whilst Section 91 provides a priority to policyholders, it does not elevate them to the status of a secured creditor². It is therefore necessary to determine whether these are true policies of insurance and ultimately whether Suriname is a policyholder in order to consider the application of Section 91 of the Insurance Act.

15. Clico Bahamas rejects the suggestion that:

(1) the disputed policies are policies of insurance; or

(2) that Suriname is a valid policyholder; or

(3) that there is any evidence to support either contention.

According to Clico Bahamas, if the fundamental requirements for an insurance policy are missing, the mere fact that a purported agreement is treated as if it were a policy of insurance is nothing to the point.

² Contrary to paragraph 26 of Suriname's submissions and paragraph 21 of the Statement of Claim.

16. I am satisfied that the First, Second and Third Disputed Policies are not true policies of insurance. It should be enough to simply state that an annuity based upon the life of a fictitious individual who is clearly not the policyholder, is not an insurance policy within the meaning of the Insurance Act. Other cogent reasons why these disputed policies could not be entered into are developed later in this decision.

Whether the payments were made by Suriname under a mistake

17. By the Statement of Claim, Suriname asserts the alternative claim that it entered into the Third Disputed Policy mistakenly believing that it was a valid insurance product. Respectfully however, there is no evidence as to what Suriname did or did not believe. The only fact witness, Petrodjermino, accepted that she had no personal knowledge in relation to the Third Disputed Policy and that all she had been able to do was to produce the documents in the possession of Suriname.³ A review of the documents however, does not suggest that there was any error in entering into the policies as it was expressly explained (by Ms. Moncur of Clico Bahamas) to Ms. Doelahasori of Suriname that it was necessary to identify an actual human being as the life assured. I therefore accept Clico Bahamas' submission that *"[f]ar from it appearing that a mistake was made, it seems that there was a deliberate decision to proceed with a fictitious individual."*

Whether Clico Bahamas holds the funds as trustee for Suriname

18. According to the Closing submissions of Suriname:

15. In the alternative Clico Suriname submits that if Transactions 1 to 4 are not insurance policies at all this raises the question of whether the policies issued to Clico Bahamas in transactions 1 to 4 were invalid or void ab initio on the basis that there was a total failure of consideration by Clico Bahamas for the premiums that were paid by Clico Suriname. It is settled law that when money is transferred to another party to be used for a specific purpose and that purpose fails then the funds revert back to the transferor on the basis of a resulting trust (See *Barclays Bank v Quistclose* (1968) 3 ALL ER 651).

³ (see Transcript dated 22 February 2022 p. 8 (10))

...

17. It is submitted that in transactions 1 to 4 the intent of Clico Suriname was to enter into insurance contracts with Clico Bahamas. Assuming *arguendo* that the Liquidator is correct and there are no valid insurance contracts between Clico Suriname and Clico Bahamas then this must mean that Clico Bahamas holds the premiums that it received from Clico Suriname on trust on the basis that there was a failure of consideration or failure to achieve the objective or purpose for which monies were forwarded from Clico Suriname to Clico Bahamas.

...

19. In addition to the above cases there are other legal authorities that make it clear that a proprietary interest derived from the purchase price of a trust beneficiary claim will be sustained where:

(a) One party mistakenly makes the same payment twice (i.e policy number 000000039 or transaction 3) and it retains a proprietary interest in the Second payment which can be enforced against the payees' assets in a liquidation ahead of unsecured creditors: see *Chase Manhattan Bank N.A. v Israel British Bank (London) Ltd* (1981) Ch. 105, approved by the Judicial Committee of the Privy Council in *Goldcorp Exchange Ltd (In Receivership)* (1995) 1 A.C. 74 at 103.

(b) Where the transactions under which the moneys were paid were from the start ineffectual, or to the knowledge of the payee not performance at all could take place under the contract for which the payment formed the consideration a proprietary interest over the purchase price and its fruits can be sustained: see *Sinclair v Brougham* (1914) A.C. 398; and *Neste Oy v Lloyds Bank Pie* (1983) 2 Lloyd's Rep. 658.

20. In Transaction # 3 or policy number 000000039 the contract terminated on September 23, 2007, at which time Clico Bahamas was holding in trust. Escrow the amount of US\$3,965,077.19 inclusive of interest for the benefit of Clico Suriname. After that date, the additional premiums mistakenly paid by Clico Suriname to Clico Bahamas gives Clico Suriname a proprietary claim, in priority to unsecured creditors, for the return of both the funds being held in escrow, at the date of maturity of the contract, as well as the overpayments.

21. Transaction Number 4 which was based on written confirmation on behalf of Clico Bahamas that the fourth annuity insurance policy was never issued, was ineffectual from the start as no contract was consummated for which payment formed the consideration; thereby, creating a proprietary interest in Clico Suriname over the purchase price and its fruits.

19. This trustee claim is an alternative claim, should the court find that Suriname is not a policyholder and therefore Section 91 of the Insurance Act does not apply. Notwithstanding this submission being cast to include all 4 transactions, the claim here relates only to the Third Disputed Policy. The Prayers for relief at paragraphs II and III of the Statement of Claim were specific to the Third Disputed Claim. At trial, Counsel for Suriname accepted this position indicating, in his words, “that he was bound by his pleadings”⁴.

20. Suriname’s case is that the amount of the premia paid in relation to the Third Disputed Policy up to 23 September 2007 is held on trust for Suriname under a constructive trust or resulting trust to avoid Clico Bahamas being unjustly enriched. It is also said that Clico Bahamas is the escrow agent for Suriname.

21. At paragraph 24 of the Statement of Claim, Suriname avers that “if, which it does not admit, the insurance policies ... are illegal and void contracts due to the absence of the requisite permission of the Central Bank of The Bahamas ... Clico Bahamas is a constructive trustee for Suriname to avoid Clico Bahamas being unjustly enriched”. It is accepted that Clico Bahamas purportedly entered into the transactions without the requisite approvals of the Central Bank of The Bahamas, as required by the Exchange Control Act and Regulations. Section 5 of the Exchange Control Act provides:

5. Except with the permission of the Controller, no person shall do any of the following things in The Bahamas that is to say –

(a) make any payment to ... a person resident outside [the Bahamas]”.

...

Paragraph 1(1) of the Exchange Control Regulations provides:

“1(1) Except with the permission of the Controller, [of Exchange – the Central Bank of the Bahamas], no person, other than an authorised dealer, shall in The Bahamas, buy or borrow.. any foreign currency from... or sell or lend any .. foreign currency to, any person other than an authorised dealer.”

⁴ Transcript 22 February 2022, page 56

...

Whilst the transfers were without Central Bank approval I am not convinced that there is evidence that Suriname was aware of this specific impediment, notwithstanding that there may be some form of exchange control in Suriname's home country.⁵

22. In any event, Clico Bahamas disputes the assertion that this impediment mean that the moneys transferred were held upon trust. They say that Suriname has not identified any case where illegality gives rise to a constructive trust. They rely on the House of Lords' decision in *Boissevain v Weil [1950] AC 327*, which they say expressly deals with legislation in almost identical terms to the Exchange Control Regulations, which they say concludes that where the very act of borrowing is illegal, then the amount lent is irrecoverable as the Court would otherwise be giving effect to an illegal transaction. According to Clico Bahamas the imposition of a constructive trust ought to similarly be precluded as it too would give effect to the illegality.

23. Additionally the case of *Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1996] A.C. 669 at 71B*, per Lord Browne-Wilkinson:

“a claimant for restitution of moneys paid under an ultra vires, and therefore void, contract has a personal action at law to recover the moneys paid as on a total failure of consideration; he will not have an equitable proprietary claim which gives him either rights against third parties or priority in an insolvency; nor will he have a personal claim in equity, since the recipient is not a trustee.”

According to the House of Lords, the recipient of moneys under a contract subsequently held void for mistake or as being ultra vires does not hold that money on a resulting trust since that would give the claimant a proprietary interest in the money and produce injustice to third parties and commercial uncertainty.

24. In respect of the Additional Payments made in relation to the Third Disputed Policy after September 2007, Clico Bahamas argues that at all times prior to the liquidation, both

⁵ Setrodjemio gave evidence that there was exchange control in Suriname (see Transcript dated 22 February 2022 p. 33 {2-4}).

Suriname and Clico Bahamas treated the Additional Payments as being made in respect of, applying to, the Third Disputed Policy.

...

25. In the case of *Barclays Bank v Quistclose*, Rolls Razor Ltd borrowed money from *Quistclose Investments Ltd.* to pay dividends owed to its shareholders. The proceeds of the loan was deposited with Barclays Bank but before the dividends could be paid Rolls Razor went into liquidation. The House of Lord had to determine whether Barclays could set the sum that Rolls Razor borrowed from Quistclose against Rolls Razors' overdraft. It was held that a trust will arise when an asset is given for a specific purpose and if, for whatever reason, the purpose for the transfer fails, the transferor may take back the asset. It was further provided that where the debtor undertook to use the loan in a particular way and segregates the creditor's money from his general assets, and the debtor becomes insolvent, the creditor's money is refundable and is not available to pay the debtor's other creditors. On the facts of this case, as it related to the Third Disputed Policy and the additional funds paid into that policy, the specific purpose was a farce, being an annuity based on a fictitious annuitant. There was however no evidence of the segregation of the funds received, as Clico Bahamas appears to have treated with the funds as it saw fit, including lending it to related parties. In the circumstances, I am satisfied that no Quistclose trust or any other trust materialized.

26. Further, given that there was no intention to issue actual insurance policies, but simply to enter into contractual arrangements for Suriname to make interest-bearing deposits or loans to Clico Bahamas, no question of ultra vires arises.

What is the nature of the payments made by Suriname

27. I have determined that the funds are not properly moneys being paid into a policy of insurance, are not held on trust and were not paid under any mistake. For the purposes of the action and the liquidation, where funds were unquestionably paid into Clico Bahamas, it is necessary to determine the true nature of the payments by Suriname. In the absence of direct evidence the court is left to assess the material produced and where

necessary draw inferences. The position is further complicated by the fact that Suriname, which bears the burden of proof, has adduced no evidence to explain its intentions in entering into the transactions.

28. Clico Bahamas invites the Court to infer "that the purpose of entering into the Disputed Policies was to provide a façade, enabling Suriname surreptitiously to lend money to Clico Bahamas in a manner which was not apparent from Clico Bahamas' financial statements". They say that the advantage of adopting the façade, that the Disputed Policies were genuine life insurance policies, was that the borrowing made under those Disputed Policies did not appear as such in Clico Bahamas' audited financial statements.

29. I am prepared to find that these transfers from Suriname were indeed moneys sent to Clico Bahamas as short term loan investments.

30. These transfers were moneys paid on behalf of Suriname and not any individual client. This becomes evident when we look at the exchanges between the parties. By way of example, on Friday 22 April, Karen-Ann Gardier, Chief Operating Officer, after receiving transfers of \$3,000,000 and \$750,000, emailed Geeta Singh at Clico Guyana in the following terms:

Happy days are here again – the \$3m was received plus \$730,000. Who is the policyholder?

Geeta Singh responded:

Hi,

See I delivered!!! You owe me dinner 😊

The 730,000 is Clico Guyana – the 3M is Suriname. So you have to do two policies.

Regards,

Geeta

It is apparent from this exchange that although the term "policy" was used these were advances and unrelated to any annuity. The money was already transferred before any policy was to be established by Clico Bahamas.

31. This is also supported by the fact that Clico Bahamas was not required to make any payment to Suriname at any particular point or on the happening of any particular event (e.g. death) – there was no annuity to pay out because there was no actual annuitant. This was clearly another significant advantage for Clico Bahamas' viewpoint. It is perhaps this which is being adverted to in the January 2009 Emails when Ms. Singh says that there is no need to repay because the proposed US\$750,000 loan could be converted to an "EFPA".

32. Likewise, the US\$1.5m Payment is entirely consistent with Suriname making a loan to, or deposit with, Clico Bahamas. Neither Suriname nor Clico Bahamas intended that Suriname would be issued with an insurance policy. The true nature of the transaction being entered into were contractual arrangements pursuant to which Suriname made, and Clico Bahamas accepted, interest-bearing deposits. The documentation did not reflect, and was not intended to reflect that actual binding bargain between the parties (See *Chitty on Contracts (34th Ed.) paras. 4-213*).

33. There is also some merit in the submission of Clico Bahamas that the masking of the loans, as policies, gave some benefit to Clico Bahamas. Note 20 of the 2006 financial statements of Clico Bahamas showed that while by 31 December 2006 Clico Bahamas had borrowed over US\$5m from Suriname under the disputed policies, the only liability recorded was B\$27,156.

34. Further, it is clear that what was intended was that Clico Bahamas would have the benefit of the payments and be able to deal with them as it saw fit. There is nothing to suggest that the moneys paid over by Suriname were being held by Clico Bahamas for any purpose other than for its own use. In particular, nothing to suggest that it was being

held by Clico Bahamas as an escrow agent for Suriname, as alleged in the prayers in the Statement of Claim.

Whether the Proof of Debt Claim should have been rejected

35. Suriname had submitted a proof of debt in the sum of US\$18,734,202.97 which had been rejected by the Liquidator. The Summons asks the Court to reverse the rejection and to admit the proof in full. The proof of debt is said to be for all sums transferred to Clico Bahamas, together with interest. The calculations purports to incorporate the Projections of Values produced after each of the disputed policies were entered into.

36. Suriname submitted its proof of debt claim in the Liquidation at a time when the rules governing the submission of claims were Sections 50-54 of the Companies (Winding Up) Rules (1975) ("the Rules"), which provided:

50. In a winding-up by the Court every creditor shall subject as hereinafter provided prove his debt, unless the Judge in any particular winding-up shall give directions that any creditors or class of creditors shall be admitted without proof.
51. A debt may be proved in any winding-up by delivering or sending through the post to the Liquidator an affidavit verifying the debt.
52. An affidavit providing a debt may be made by the creditor himself or by some person authorised by or on behalf of the creditor. If made by a person so authorized, it shall state his authority and means of knowledge.
53. An affidavit providing a debt shall contain or refer to a statement of account showing the particulars of the debt, and shall specify the vouchers, if any, by which the same can be substantiated. The Liquidator to whom the proof is sent may at any time call for the production of the vouchers.
54. An affidavit proving a debt shall state whether the creditor is or is not a secured creditor.

37. Clico Bahamas submits, and I agree, that none of those requirements were complied with. The "proof of debt" was rejected by the Liquidator on the basis that no

insurance policies were ever issued; the payments were simply short-term investment and the proof of debt was not in the form required by the Rules.

38. I have indeed found that these were not policies of insurance issued to Suriname but attempts at short term loans. Notwithstanding the failure to secure the appropriate authorizations, in the context of the liquidation of Clico Bahamas and the judicial administration of Suriname, it would seem fair and just that the Liquidator admit the claims as unsecured loans to the amount only of the sums actually paid into Clico Bahamas, upon the submission of a proof of debt in proper form. This avoids any unjust enrichment of Clico Bahamas in the circumstances.

39. I will hear the parties on the issue of costs, by written submissions within 21 days of the date of this judgment. These submissions should run no more than 3 pages.

Dated the 24th day of April 2023

A handwritten signature in black ink, consisting of a stylized 'I' followed by a large, looped 'W'.

Sir Ian R. Winder

Chief Justice