IN THE CARIBBEAN COURT OF JUSTICE

Original Jurisdiction

CCJ Application No AGOJ2021/001

Between

Ellis Richards
Medical Benefits Board
Spencer Thomas
Others Listed in Appendices 1 to 4 **Claimants**

And

The State of Trinidad and Tobago **Defendant**

Caribbean Community Law– Chapter Eight of Treaty – Promotion of consumer interests in the Community – Consumer Protection – Redress for consumers – Whether Defendant's actions in bailing out policyholders of CLICO and BAT constituted a breach of Article 184(1)(j) – Revised Treaty of Chaguaramas, Article 184(1)(j).

Caribbean Community Law – Discrimination on the ground of nationality only –Whether Article 7 of the Revised Treaty of Chaguaramas is a stand-alone provision – Whether there was an objective and reasonable justification for the difference in treatment – Extraterritoriality – Whether the Defendant's legislation could allow it to assume control of BAICO – Whether Defendant's actions in bailing out policyholders of CLICO and BAT breached Article 7 of the Treaty – Revised Treaty of Chaguaramas, Article 7.

SUMMARY

The Claimants are nationals of Antigua and Barbuda, and Grenada, and were all policyholders of the Bahamian registered British American Insurance Company Limited ('BAICO'), a subsidiary of CL Financial ('CLF'), the financial conglomerate, resident in Trinidad and Tobago ('Defendant'). After the collapse of CLF in early 2009, the Defendant decided to rescue or 'bailout' CLF and its Trinidad and Tobago registered subsidiaries, CLICO Investment Bank ('CIB'), Colonial Life Insurance Company (Trinidad) Limited ('CLICO') and British American Insurance Company (Trinidad) Limited ('BAT'). The Defendant engaged in a series of measures including assumption of control of CLICO and BAT, provision of liquidity support, injection of funds and the purchase of the rights of some policyholders of CLICO and BAT to mitigate the effects of the collapse on

policyholders and the wider Trinidad and Tobago economy. In the process, policyholders of BAT were afforded relief for monies lost as a result of the collapse but policyholders of BAICO were not. The claim arose out of these actions taken by the Defendant.

The Claimants originally brought a claim alleging that the Defendant breached Articles 7, 36, 37, 38 and 184(1)(j) of the Revised Treaty of Chaguaramas ('RTC' or 'the Treaty'). In *Richards v The State of Trinidad and Tobago,* the Court concluded that on the facts the Defendant's intervention in and bailout of CLF and its Trinidadian subsidiaries were properly within the exception provided in Article 30(2), that is 'Activities in a Member State involving the exercise of governmental authority...'. This meant that the claims alleging breaches of Articles 36, 37 and 38 at the instance of BAICO policyholders were not justiciable by the Court and that as the impugned activities did not fall within the scope of Chapter Three of the RTC, the Claimants could not rely on them to ground a breach of Article 7.

There were two broad claims that remained to be adjudicated and they were examined in the present judgment under the headings: (i) Whether the Defendant's actions in bailing out CLICO and BAT constituted a breach of Article 184(1)(j)? and (ii) Whether the Defendant's actions in bailing out CLICO and BAT constituted a breach of Article 7?

The Court noted that Article 184 fell under Chapter Eight of the Treaty which is broadly titled, 'Competition Policy and Consumer Protection'. Rather than considering Article 184 in isolation, the Court referred to the surrounding provisions under Chapter Eight such as Article 169 which set out the objectives of the Community Competition Policy and Article 170 which delineated what is expected of the Community and Member States to achieve the objectives set out in Article 169. Interpreting the foregoing Articles in good faith and applying its ordinary meaning, the Court found that Chapter Eight of the RTC is concerned with encouraging a strong and vibrant Community market by the enactment by Member States of legislation and regulations prohibiting anti-competitive conduct, promoting fair competition, promoting the interests of consumers, protecting consumers and achieving harmonisation of competition policies throughout the Community. In the absence of such

legislation and regulations, a presumed failure to abide by Article 184 did not create liability for individual Member States of the Community.

Further, the allegations of breaches of Article 7 and Article 184(1)(j) both depended on whether the Claimants were consumers. The Court considered three preliminary issues to determine whether the Claimants all qualified as consumers to pursue the alleged breaches of the provisions of the Treaty, not all of which were fully argued by the parties. These issues concerned: (1) whether the definition of consumers is restricted to natural persons or whether it includes legal persons, (2) whether the Claimants qualify as recipients of goods and services within the meaning of the RTC and (3) whether the Claimants have satisfied the two limbs of Article 184(2) to be considered 'consumers'. As the matters were not fully argued by the parties, the Court discussed but did not decide on these issues.

The Court found that Article 184(1)(j) which required Member States to provide 'adequate and effective redress for consumers' cannot be read in isolation from its broader juridical or legal context. In determining the juridical character of Article 184(1)(j), an important first step was to appreciate that the provision must be placed in the broader context of competition policy and consumer protection law. It was also significant to consider the institutional arrangements that have been established as well as the nature of the language used to impose obligations.

The Court noted that the language used in Chapter Eight of the RTC, in general and specifically in Article 184, is not always conducive to allocating state liability for breach. Article 184 is concerned with the 'Promotion of Consumer Interests' which is not an auspicious start for identification of hard law. Member States are then obliged to 'promote the interests of consumers in the Community by appropriate measures'. It was not permissible to pluck a single provision from the list, for example, Article 184 (1)(j), and to give it a special legal status which the other provisions in Article 184(1) cannot bear. It was therefore not the intention of the framers of the RTC to ascribe state liability in respect of a particular action by a state outside an agreed regional framework.

The Claimants argued that a Member State cannot cite the peculiarities of its own legal order to avoid its obligations under international law, particularly the RTC. Further, the Claimants argued that the Defendant exercised emergency powers to prevent BAICO policyholders from enforcing rights to CLF assets on an equal footing with BAT policyholders. The Defendant rebutted that it would have been improper for its Parliament to amend the Central Bank Act, Chap 79:02 and to permit the exercise of emergency powers by the CBTT in respect of BAICO, a financial institution incorporated outside of the Defendant. The Court noted that this argument against extraterritorial regulation accorded with the submission of counsel for the Caribbean Community ('CARICOM') that legislation adopted by a Member State did not apply extraterritorially. And, as noted by CARICOM, the RTC does not contain language which obliges Member States to provide mechanisms to facilitate the extraterritorial reach of its legislative/political/judicial decisions to other Member States.

The Court agreed that the Defendant could not have assumed control of BAICO by way of amendments to its Central Bank Act to guarantee that BAICO policyholders and/or depositors were afforded remedies in the aftermath of CLF's collapse. To do so would have been to have acted in an extraterritorial manner that would have been, in the absence of regional agreement, contrary to the comity of CARICOM Member States.

The Court then considered whether there was a breach of Article 7 of the Treaty. The Court stated that Article 7 is not a free-standing provision whose breach may give rise to a claim at large. Any allegation of a breach of Article 7 must be accompanied by and must point to a treaty right in respect of which the claimant must prove discrimination in the enjoyment of that right, and further, any such discrimination must be based on nationality only. The Court referenced its remarks made to this effect in *Douglas v The Commonwealth of Dominica.* The Claimants submitted that the Court is not bound by its dicta in *Douglas* and that the dicta ought to be revisited after proper analysis and reference to authorities on the point. The Court accepted that, separate and apart from its power of revision contained in Article 219, it may revisit a previous decision where there are very clear grounds for doing so. However, this is not to be done lightly and without full argumentation from the parties involved and the Claimants had not provided any good reason to do so on this occasion.

Additionally, to establish discrimination under Article 7 the Claimants must have established (1) that they were treated worse or less favourably than persons whose circumstances are similar to theirs (the comparators), except for their and the comparators' nationality; and (2) that there was no objective and reasonable justification for the difference in treatment and (3) that the worse or less favourable treatment occurred in the context of activity that was within the scope of the RTC. The Court found that the circumstances of policyholders of CLICO, BAT and CIB were not similar to BAICO policyholders. This was due to the findings of the Court that the Defendant's actions formed part of a governmental bailout of private commercial entities with a view to preventing severe dislocation to its economy. The Court noted that if the Claimants' arguments were correct, it would mean that the Defendant would have been responsible for bailing out all BAICO policyholders in other Caribbean territories. The Court found that it could not have been within the contemplation of the framers of the RTC that the Member State in such circumstances, would be obliged to compensate all BAICO policyholders in all CARICOM states for all their loss and damage. The Court accepted that this is an objective and reasonable justification for the alleged difference in treatment of the companies.

The Court considered there was no obligation to extend any relief to institutions outside of the Defendant Member State and therefore, no right in the Claimants to obtain the relief they sought.

The Claim was dismissed, and the Parties were ordered to bear their own costs.

Cases referred to:

College of Optometrists of Ontario v Essilor Group Canada Inc [*Indexed as: College of Optometrists of Ontario v. EssilorGroup Canada Inc*] 145 OR (3d) 561; *Collins v Imtrat Handelsgesellschaft mbH* (Joined Cases C-92/92 and C-326/92) EU:C:1993:847, [1993] ECR I-5145; *Competence of the International Labour Organisation in regard to International Regulation of Conditions of the Labour of Persons Employed in Agriculture* (Advisory Opinion No 2) [1922] PCIJ Series B No 2; *Council of the European Union v Chrysostomides & Co LLC* (Joined Cases C-597/18 P, C-598/18 P, C- 603/18 P and C-604/18 P) EU:C:2020:390, (16 December 2020); *Douglas v The Commonwealth of Dominica* [2017] CCJ 1 (OJ), (2017) 90 WIR 251; *Hessen v Ricordi* (Case C-360/00) *EU:C:2002:346,* [2002] ECR I-5089; *Hummingbird Rice Mills Ltd v Suriname* [2012] CCJ

1 (OJ), (2012) 79 WIR 448; *Hummingbird Rice Mills Ltd v Suriname* [2012] CCJ 2 (OJ); *Karpik V Carnival Plc* (2023) Australian Law Reports 491;*Komisia za zashtita na potrebitelite v Kamenova* (Case C) 105/17 EU:C:2018:378, (31 May 2018); *Morrison v National Australia Bank* 561 US 247(2010); *Mostaza Claro v Centro Móvil Milenium SL* Case (C168/05) EU:C:2006:675, [2006] ECR I-10421; *Myrie v State of Barbados (No 2)* [2013] CCJ 3 (OJ), (2013) 83 WIR 104; *Myrie v State of Barbados* [2012] CCJ 3 (OJ), (2012) 81 WIR 232; *Petrie v Commission of the European Communities* (Case T-191/99) EU:T:2001:284, [2001] ECR II – 3677; *R v Secretary of State for Transport, ex p Factortame* (Joined Cases C-46/93 and C-48/93) EU:C:1996:79, [1996] ECR I-01029; *R (Fratila) v Secretary of State for Work and Pensions* [2021] UKSC 53, [2022] 3 All ER 1045; *Richards v The State of Trinidad and Tobago* [2023] CCJ 1 (OJ); *Rock Hard Cement Ltd v The State of Barbados* [2020] CCJ 2 (OJ); *Ryanair DAC v European Commission* (Case C-320/21P) EU:C:2023:712, (28 September 2023); *Ryanair DAC v European Commission* (Case T-388/20) EU:T:2021:196, (14 April 2021); *Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Providers* [2004] 2 SCR 427; *Tod's SpA v Heyraud SA* (Case C-28/04) EU:C:2005:418, [2005] ECR I-5781; *Tomlinson v State of Belize* [2016] CCJ 1 (OJ), (2016) 88 WIR 273; *Trinidad Cement Ltd v Co-operative Republic of Guyana* [2009] CCJ 1 (OJ), (2009) 74 WIR 302; *Trinidad Cement Limited v Co-operative Republic of Guyana (No 2)* [2009] CCJ 5 (OJ) ;75 WIR 327 at [27]; *United Policyholders Group v A-G of Trinidad and Tobago* [2016] UKPC 17, [2016] 4 LRC 433; *VB v BNP Paribas Personal Finance SA* (Joined Cases C-776/19 to C-782/19) EU:C:2021:470, (10 June 2021); *Zaera v Instituto Nacional de la Seguridad Social* (Case 126/86) EU:C:1987:395, [1987] ECR 03697.

Legislation referred to:

Antigua and Barbuda - Insurance Act 2007; **Bahamas -** Plan of Arrangement (British-American Insurance Company Limited) Act 2017; **Trinidad and Tobago** - Bankruptcy and Insolvency Act, Chap 9:70, Central Bank Act, Chap 79:02, Central Bank (Amendment) Act 2009, Companies Act, Chap 81:01, Financial Institutions Act 2008, Insurance Act, Chap 84:01, Insurance Act 1980.

Treaties and International Sources referred to:

Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C 115/47; Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy (adopted 5 July 2001, entered into force 4 February 2002) 2259 UNTS 293; Treaty Establishing the European Economic Community (adopted 25 March 1957, entered into force 1 January 1958) 4300 UNTS 298; Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

Other Sources referred to:

Berry D S, *Caribbean Integration Law* (Oxford University Press, 2014); Caribbean Court of Justice (Original Jurisdiction) Rules 2024; Iliescu M G, 'Recent Clarifications by the European Court of Justice on the Meaning of the Notion of Consumer' (2021) Law Annals Titu Maiorescu U 25; Lena Hornkohl, *The Extraterritorial Application of Statutes and Regulations in EU Law* (2022) MPILux Research Paper Series 2022 (1).

THE COURT,

composed of A Saunders, President and W Anderson, M Rajnauth-Lee, A Burgess and P Jamadar, Judges

having regard to the re-amended originating application filed at the Court on 12 July 2023, together with the annexures thereto, the amended defence of the State of Trinidad and Tobago filed on 11 April 2023 and the annexures thereto, the amended reply filed on 13 April 2023 and the annexures thereto, the amended rejoinder of the State of Trinidad and Tobago filed on 20 April 2023 and the annexures thereto, the written submissions of the Claimants filed on 8 January 2024, of the State of Trinidad and Tobago filed on 5 February 2024, of the reply of the Claimants filed on 19 February 2024, of the Caribbean Community filed on 21 February 2024, of the reply of the Claimants and Defendant thereto both filed on 11 March 2024 and to the public hearing held on 29 and 30 April 2024

and after considering the notes and oral observations of:

— **Ellis Richards, Medical Benefits Board, Spencer Thomas & Others**, by Mr Simon Davenport KC, appearing with Mr Carsten Zatschler SC, Dr Kenny Anthony, Mr Gregory Pantin, Professor Matthew Happold, Mr George Kirnon, Mr Miguel Vasquez, Attorneys-at-Law

— **the State of Trinidad and Tobago**, Ms Deborah Peake SC, appearing with Ms Tamara Toolsie, Mr Brent James, Mr Murvani Ojah Maharaj, Attorneys-at-Law

— **the Caribbean Community**, by Ms Lisa Shoman SC, appearing with Ms Radha Permanand and Mr O'Neil Francis, Attorneys-at-Law

issues on **22 October 2024** the following:

JUDGMENT

Introduction

[1] The Claimants are Antigua and Barbuda and Grenada nationals and were all policyholders of British American Insurance Company Limited ('BAICO'), a subsidiary of CL Financial ('CLF') the financial conglomerate, resident in the Defendant. At the time of the claim, each Claimant, or those they represent, were holders of an annuity and investment product issued by BAICO called an Executive Flexible Premium Annuity ('EFPA'). The Defendant is the Member State of Trinidad and Tobago and throughout this judgment is referred to either as 'Trinidad and Tobago', 'Defendant' or 'Government'.

[2] The claim arose out of actions taken by the Defendant in the aftermath of the collapse in 2009 of CLF and the decision of the Defendant to intervene and rescue three of CLF's Trinidad and Tobago insurance and financial subsidiaries, Colonial Life Insurance Company (Trinidad) Limited ('CLICO'), Clico Investment Bank ('CIB') and British American Insurance (Trinidad) Limited ('BAT') and protect the available funds of their policyholders and depositors.

[3] The Claimants originally brought a claim alleging that the Defendant breached Articles 7, 36, 37, 38 and 184(1)(j) of the Revised Treaty of Chaguaramas ('RTC' or 'Treaty').[1] Articles 36 to 38 are contained in Chapter Three of the RTC. Special Leave was granted after the Defendant, by letter to the Court dated 8 October 2021, indicated non-opposition to the Application for Special Leave but without prejudice to its contention that the Application and draft Originating Application were misconceived in fact and law and fell outside the operation of the RTC. The Defendant contended that the Court did not have jurisdiction. At the Case Management stage, the Court directed the parties to make submissions on two preliminary issues of law, namely:

i) Assuming, for the sake of argument, the truth of the matters pleaded by the Claimants in the Originating Application ('OA'), do the actions of the Defendant alleged by the Claimants fall outside the

[1] The Claimants applied for Special Leave to commence proceedings on 14 July 2021. Special Leave was granted on 11 October 2021.

scope of Chapter Three of the RTC because they fall within the meaning of Article 30(2) and (3)?

ii) If the answer to (i) above is yes, what are the consequences for these proceedings?

[4] After a hearing on these issues, the Court held in *Richards (No 1) v The State of Trinidad and Tobago*[2] that the Claimants' claim[3] with respect to breaches of Articles 36, 37, 38, and Article 7 (in so far as the latter related to Chapter Three of the RTC) should be dismissed. In so deciding, the Court considered jurisprudence emanating from the World Trade Organisation ('WTO') and the European Court of Justice ('ECJ') which both interpret and apply multilateral treaties with provisions to similar purpose and effect as Article 30(2) and (3) of the RTC.

[5] The Court concluded that on the facts of the case, the Defendant's intervention in and bailout of CLF and its subsidiaries were properly within the exception provided for in Article 30(2), that is 'Activities in a Member State involving the exercise of governmental authority...' This necessarily meant that the claims alleging breaches of Articles 36, 37 and 38 were not justiciable by the Court and that as the impugned activities did not fall within the scope of application of Chapter Three of the RTC the Claimants could not rely on them to ground a breach of Article 7.

[6] What therefore remains for final determination in these proceedings is whether the Claimants can establish a breach by the Defendant of Article 184(1)(j) and Article 7 of the RTC in so far as Article 7 is applicable.

Factual Background

[7] The parties agreed to certain facts ('Agreed Facts') which are set out in the Appendix to this judgment.

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[2] [2023] CCJ 1 (OJ).
[3] ibid.

[8] CLF was the largest privately held conglomerate in Trinidad and Tobago, operating in a wide diversity of fields. It owned and controlled over 30 companies with additional subsidiaries under many of those companies located in the Caribbean, United States of America ('USA'), Europe and the Middle East. CLF's 2007 Annual Report lists CLICO, BAICO, CIB and Republic Bank Limited ('RBL') as forming part of CLF's financial subsidiaries. The latter is the largest bank in Trinidad and Tobago. BAICO was incorporated in The Bahamas in 1920 and had branches throughout the Eastern Caribbean. BAICO held 99 per cent of BAT's issued shares.

[9] CLICO and BAT were registered under the Trinidad and Tobago Insurance Act, Chap 84:01 to carry out long-term insurance business in Trinidad and Tobago. CLICO was one of the largest financial institutions with a customer base of about 260,000 clients. BAT was far smaller with about 52,000 customers. CLICO and BAT sold traditional insurance policies and Short-Term Investment Products ('STIPs') to resident and non-resident individuals and groups. The STIPs offered by CLICO and BAT included an instrument called the Executive Flexible Premium Annuity ('EFPAs'), in respect of which the companies were required to establish and maintain statutory funds.

[10] The CLF's audited financial statements as of 31 December 2007[4] indicated that the CLF Group's assets stood in the region of TTD100 billion. This was approximately 70 per cent of Trinidad and Tobago's Gross Domestic Product ('GDP') in 2009. On 13 January 2009, CLF requested urgent liquidity support from the Central Bank of Trinidad and Tobago ('CBTT') due to the worsening economic crisis which was affecting CLF's ability to readily liquidate group assets to meet liabilities.

[11] On 31 January 2009, CBTT assumed control of CIB pursuant to s 44C and 44D of the Central Bank Act, Chap 79:02. CIB's licence to operate as a financial institution was revoked and third-party deposits were transferred to First Citizens Bank

[4] Record 'Annexure B to Re-Amended Originating Application', 260.

('FCB'). During August to September 2009, judicial managers were appointed to manage BAICO's affairs in various jurisdictions where it operated. BAICO was placed under judicial management in The Bahamas.

[12] Between 2009 and 2010, the Defendant injected funds into CLICO and BAT through cash and government bonds. The Defendant decided to proceed with partial payments of outstanding balances to some policyholders. Also, the Defendant decided to treat EFPA policyholders differently from traditional policyholders. It was intended that the Defendant would purchase certain rights of policyholders against CLICO and BAT in exchange for cash payments and the issue of bonds to the policyholders.

[13] On 27 March 2015, a further phase of resolution strategies for CLICO and BAT pursuant to s 44F of the Central Bank Act was announced. This included phased payments to STIP holders including the Government of Trinidad and Tobago (as assignee of rights of assenting STIP holders) and payment of other creditors. This was done through monetisation or transfer of assets in kind ('September 2010 Plan'). This September 2010 Plan was further revised so that *inter alia* EFPA investors would be allowed to exchange the last 10 years of government bonds for units in the CLICO Investment Fund ('CIF') sponsored by the Defendant ('Revised Plan').

Pleadings

Re-Amended Originating Application

[14] By the Re-Amended Originating Application, the Claimants sought a range of remedies including declaratory relief, an Order mandating the Defendant to treat the Claimants equitably by issuing them with units in the CIF on the same terms as

were offered to policyholders of BAT, or by providing an equivalent benefit; and an Order for damages or compensation and costs[5].

[15] The Claimants alleged that the regulatory scheme created to rescue BAT did not extend to also rescuing BAICO and had the effect of excluding BAICO's policyholders from the scope and benefits of the CLF rescue plan. This, it was said, culminated in active steps being taken by the Defendant to disadvantage BAICO's policyholders as compared with the policyholders of BAT. The Claimants further alleged that, with the knowledge that the business of BAT and BAICO were merged, as alleged by the Claimants, the Defendant caused the CBTT to take emergency control of CLF and ordered their segregation so that BAICO's policyholders were excluded. Further, it was alleged that during its intervention, the Government took control of CLF's assets and applied them to the benefit of CLICO and BAT, thus depriving CLF's other insurance subsidiary, BAICO, of the benefit of the support of CLF and its assets, even though CLF owed money to BAICO.

[16] The Claimants alleged that these actions, in preferring the policyholders of BAT over those of BAICO, were discriminatory and in breach of Article 7 of the RTC as the Claimants, who were policyholders of BAICO, were treated differently from policyholders of BAT based on their nationality. They also alleged that the regulatory scheme under which CLICO and BAICO operated in the Defendant was also discriminatory. In response to the Government's claim that the CBTT had no statutory basis to intervene in BAICO's affairs as BAICO was not registered as an insurance company under the Trinidad and Tobago Insurance Act, Chap 84:01, the Claimants stated that this alleged lack of statutory basis was a specious reason for the Defendant's conduct when considering that the Defendant had amended its legislation to intervene in CLICO and BAT.

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[5] Record 'Re-Amended Originating Application', 4625.

[17] The Claimants also proffered that the Defendant's intervention came within the scope of the application of the RTC as a measure taken by a Member State to provide redress for consumers as catered for in Article 184(1)(j). The absence of regulatory oversight over BAICO and the consequent failure by the Defendant to protect BAICO's policyholders therefore amounted to a failure to take appropriate measures to promote the interests of the consumers of the insurance services provided by BAICO, including through the provision of adequate and effective redress, contrary to Article 184(1)(j) of the RTC.

[18] With respect to the history and structure of BAICO and BAT, the Claimants indicated that BAICO was incorporated in The Bahamas in 1920 but when CLF purchased BAICO in 1998, BAICO's management and operations were essentially moved to Trinidad and Tobago. The Claimants averred that BAICO and BAT effectively operated as two arms of one Trinidad and Tobago business as BAICO operated out of the same premises as BAT and with the same management due to having entered into a service agreement with British American Management Services Limited ('BAMSL'), a company incorporated in Trinidad and Tobago and wholly owned by BAT.

[19] Due to the foregoing, the Claimants alleged that the Defendant's regulatory steps taken to the exclusion of BAICO policyholders breached Articles 7 and 184(1)(j).

The Amended Defence

[20] By its Amended Defence, the Defendant expressed that it had no knowledge of the Claimants, their alleged nationalities/citizenship and their alleged dealings with and/or policies held with BAICO. The Defendant's position was that the claim was misconceived, based on incomplete and/or inaccurate information and/or fails to disclose material facts. The Defendant denied every allegation of fact set out in the claim and put the Claimants to strict proof of any paragraph inconsistent with the Defence. The Defendant stated that its Insurance Act 1980 (as amended) conferred

on the Supervisor of Insurance the power to intervene in the affairs of a company registered under the Act where it was satisfied that this was needed to protect policyholders. In 2004, this power was transferred to the CBTT.

[21] The Defendant maintained that at no time was BAT amalgamated with the business of any other company nor was the business of another company transferred to BAT pursuant to ss 84 and 86 of the Insurance Act. Due to CLF's large involvement in the financial sector of the Defendant, any insolvency of CLF posed a real potential for systemic risk to the Defendant's financial system.

[22] The power conferred on the CBTT to assume control of companies pursuant to ss 44C and 44D of the Central Bank Act formed part of the laws of Trinidad and Tobago since February 1986. The Central Bank (Amendment) Act 2009 aligned the definition of 'institution' with that in the Financial Institutions Act 2008.

[23] A Memorandum of Understanding dated 30 January 2009 ('MOU') was agreed by the Defendant and CLF. By this MOU the Defendant agreed with CLF, acting on behalf of itself and as agent for its affiliates CLICO, CIB and BAT ('Identified Subsidiaries'), that it would provide support aimed at correcting the financial condition of the Identified Subsidiaries pursuant to CLF's request. One of the conditions of the MOU was that CBTT take control of the Identified Subsidiaries. Under the MOU, CLF also agreed to take certain steps to correct the financial condition of the Identified Subsidiaries.

[24] The Defendant stated that at no time did CBTT direct that BAT and BAICO be segregated as there was never an amalgamation or transfer of BAICO's business to BAT approved by the CBTT. The Defendant claimed that it did not take active steps to exclude BAICO's policyholders from benefitting from the bailout of CLF nor to disadvantage same. Instead, the steps taken followed a request from CLF for financial support for certain subsidiaries and that request was supported by the fact

that a collapse of CLICO, BAT and CIB would have a significant impact on the Defendant's financial system.

[25] The Defendant considered it important to avoid the demise of CLF to protect the Defendant's financial system. In this context, a Shareholders' Agreement was entered into (see Appendix to this judgment) given that neither the Defendant nor CBTT had any statutory power to act against CLF or its assets and the Defendant was of the view that CLF should be held accountable for public funds being expended.

[26] The Defendant pleaded that both residents and non-residents of Trinidad and Tobago were eligible to benefit under the September 2010 Plan referenced at [13] above, contrary to the allegations of the Claimants that this Plan was designed to benefit only residents of Trinidad and Tobago.

[27] Prior to 2009, the Defendant claims not to have had knowledge of the way BAT and/or BAICO arranged their respective internal affairs. BAICO had been registered as an external company in both Antigua and Barbuda and Grenada and was subject to regulation by the laws of those countries. BAICO, Antigua and Barbuda, was given notice of the Superintendent of Insurance's intervention into its affairs pursuant to the Antigua Insurance Act 2007 and was later placed under judicial management. Meanwhile, according to the Defendant, BAICO, Grenada, was placed under judicial management.

[28] The Defendant pointed out that on 7 November 2017, pursuant to The Bahamas Plan of Arrangement (British-American Insurance Company Limited) Act 2017, the Supreme Court of The Bahamas sanctioned a Plan of Arrangement between BAICO and its Plan Creditors for persons with claims against BAICO arising out of contracts issued by BAICO. Under the Plan of Arrangement, distributions were

made totalling 14 per cent. In Antigua and Barbuda and Grenada, legislation[6] was enacted to give effect to the Plan of Arrangement.

[29] The Defendant noted that the obligation imposed under Article 184(1)(j) of the RTC is a general one to promote the interests of consumers in the Community by appropriate measures. The Defendant averred that the term 'consumer' is limited to persons who do not receive the services 'in the course of business' carried out by them. Therefore, it was pleaded that Claimants such as the Medical Benefits Board ('MBB' or 'the Board') are excluded from the term because of evidence lead at the special leave stage that investments were made in BAICO 'in the course' of MBB's business operations.

[30] The Defendant stated that although it indicated willingness to provide liquidity support to the Organisation of Eastern Caribbean States ('OECS') Member States due to the economic crisis – and did so partially - it was not able to provide any further support because of the COVID-19 pandemic and depressed oil and gas prices which significantly impacted the Defendant's economy.

Claimants' Amended Reply

[31] The Claimants in their Amended Reply admitted that BAT was not a direct subsidiary of CLF having been wholly owned by BAICO. As such, the agreement to allot shares in BAT to the Defendant could only have been made by BAICO. Therefore, CLF represented to the Defendant that it was acting on behalf of BAICO in its negotiation of the MOU.

[32] The Claimants denied the Defendant's assertion that CLF did not request liquidity support for BAICO as CLF requested support for the CLF Group, not identifying

[6] Plan of Arrangement (BAICO and CLICO) Act 2015was enacted on 4 March 2015 in Antigua and Barbuda; Plan of Arrangement (BAICO and CLICO) Act 2015 was enacted on 24 September 2015 in Grenada.

any specific subsidiary[7]. In fact, the Claimants averred that the CBTT expressly identified BAICO as a factor in the decision to intervene.

[33] The Claimants stated that the segregation of BAT and BAICO was recorded on the minutes of the BAICO Board meeting on 24 April 2009[8] and the Claimants averred that such a direction did not depend on a prior amalgamation or transfer of the companies approved by CBTT and that they had not pleaded that there was such an amalgamation.

[34] The Claimants stated that the Defendant's original plan of intervention was geared towards saving Trinidad and Tobago policyholders only and the Defendant's intervention in BAT and not BAICO was effectively a decision to save Trinidadian clients of BAT given that the number of non-resident BAT clients was *de minimis* compared to its resident client portfolio. The September 2010 Plan, referenced at [13] above, reversed the effect of the original plan and expanded to include non-resident clients of CLICO but still excluded BAICO clients.

[35] The Claimants further contended that BAMSL was not an independent contractor as it was staffed by employees of BAT; it did not invoice BAICO or BAT for services rendered; it was a wholly owned subsidiary of BAT, and such ownership was transferred to BAICO in February 2009.

[36] The Claimants admitted that prior to the Plan of Arrangement referenced at [28] above, there was a proposal by BAICO's judicial manager to have BAICO transferred to a new company funded by the Government of The Bahamas. However, the Government withdrew financial support.

[37] The Claimants denied that BAICO held most assets in the OECS Member States and averred that BAICO's assets included shares in BAT, obligations owed to it by

[7] Record, 'Copy of letter dated 13 January 2009 from CLF to Governor of CBTT, 3773-3775.
[8] Record, 'Board Meeting Minutes of BA International held on 24 April 2009, Originating Application, Annexure I', 5099-5109.

CLF, and assets in the ownership of CLF and other companies in the CLF Group to which BAICO's funds had contributed.

Defendant's Amended Rejoinder

[38] The Defendant alleged that the Amended Reply failed to identify what the Claimants alleged to be the intervention in regulation of the supply of insurance services within the scope of the application of the RTC.

[39] The Defendant relied on the MOU which expressly pinpointed three subsidiaries whose policyholders and creditors CLF identified as requiring protection. In agreeing to the MOU, CLF produced the Board resolutions of those three companies as evidence of this authority to make this request. CLF did not warrant that it was acting on behalf of BAICO and BAICO's Board resolution was not produced in this regard.

Issues for Consideration

[40] There are two broad issues that arise on the claim that the Defendant breached the RTC's Article 184(1)(j) and Article 7 in so far as that Article was applicable. The issues may be examined under the following broad headings:

i. Whether the Defendant's actions in providing bailout assistance to the policyholders of CLICO and BAT but not the policyholders of BAICO constituted a breach of Article 184(1)(j)?

ii. Whether the Defendant's actions in providing bailout assistance to the policyholders of CLICO and BAT but not the policyholders of BAICO constituted a breach of Article 7?

Submissions

Claimants' Submissions

[41] The Claimants submitted that Article 184(1)(j) of the RTC protects the rights of the Claimants, all of whom are 'consumers' within the meaning of the Article. The Claimants reasoned that they were not provided with adequate or effective redress and that their rights of redress were intentionally curtailed by the Defendant.

[42] Most of the Claimants are natural persons, many of whom are pensioners having invested their life savings. The others are juridical persons and they all qualify as 'consumers' within the meaning of Article 184. According to the Claimants, the definition of 'consumer' in Article 184(2)(b) of the RTC covers 'any person...carrying on activities otherwise than 'for gain or reward' including statutory corporations and the provision also covers juridical persons acting outside the area of their business expertise as the end user of products or services.' The Medical Benefits Board is a statutory corporation established by an Act of Parliament of Antigua and Barbuda. Its activities are governed by Statutory Instrument. It is not carrying out its activities for profit. Thus, as the Medical Benefits Board does not carry on a business for the purpose of the RTC and as defined in Article 1 of the RTC and as it did not receive the services in question 'in the course of a business', it qualifies as a 'consumer'.

[43] As to the breaches of Articles 7 and 184(1)(j) of the RTC, the Claimants claimed that they were discriminated against in the carrying out of their cross-border economic activity in breach of Article 7 because of the way the Defendant's rescue of BAT policyholders was conducted. There was a difference in treatment in that BAICO and its policyholders were in fact not bailed out by the Defendant. This ultimately resulted in nationals of Trinidad and Tobago receiving more favourable treatment than nationals of other Member States. The Claimants submitted that, on the facts, BAICO and its policyholders were in all material respects in a comparable

situation to BAT and its policyholders and thus should have been bailed out on the same terms.[9] Additionally, BAICO assets were used to fund the intervention and rescue by the Defendant. Therefore, the Claimants proffered that BAICO was comparable due to its contribution to the group funds.[10] As BAICO was in a comparable situation to BAT in all relevant regards, the exclusion of BAICO and its policyholders from the rescue plan organised by the Defendant was discriminatory. As BAICO and its policyholders were principally nationals of other Member States whereas BAT and its policyholders were principally nationals of the Defendant, BAICO and its policyholders were discriminated against based on nationality contrary to Article 7.

[44] The Claimants alleged that Article 184(1)(j) along with Article 7 were breached by the Defendant when it failed to take appropriate measures to protect the Claimants' interests as consumers, by providing them with adequate and effective redress. The allegation is that the Defendant failed to take steps to provide BAICO and its policyholders with remedies and to ensure that CLF funds were used to reimburse the Claimants. It was also alleged that the Defendant took active steps to exclude the BAICO policyholders from the possibility of obtaining remedies, specifically curtailing the application of domestic remedies that normally would have been available.

[45] The Claimants alleged that the Defendant breached Article 184(1)(j) and Article 7 by firstly, providing redress by way of the British American ('BA') Rescue Plan but extending the benefits of that redress only to its nationals and secondly, by sequestrating substantially all of the assets of the CLF group for the benefit of CIB, CLICO and BAT at the expense of CLF and other companies in the Group, thus limiting redress available to BAICO policyholders. It was submitted that the Defendant used its leverage over CLF as a domestic company to ensure that the remedies normally operating to forestall a run on a debtor company and provide a

[9] The Claimants cite several circumstances to support this contention at paras 56 (a)-(b) of their Submissions.
[10] The Claimants rely on various circumstances in para 56(c) of their Submissions to support this contention.

framework for an orderly settlement of claims were skewed in favour of its own interests and those of its nationals. The Defendant artificially and retrospectively curtailed the remedies available to policyholders outside of Trinidad and Tobago by expanding the effects of the CBTT's emergency powers to bar all claims against CBTT arising out of its acts or omissions. At a minimum, such claims could have included debt collection, actions under the Companies Act, Chap 81:01, winding-up orders and/or other claims under the Bankruptcy and Insolvency Act, Chap 9:70 to recover outstanding amounts due.

Defendant's Submissions

[46] The Defendant submitted that the Claimants cited no authority which deals with State actions in the same nature as those carried out by the Defendant, nor have they assisted on the critical issue of whether a State is to be compelled to extend benefits to persons outside of its territory where the benefits were advanced as a means of State aid in the context of a major financial crisis.

[47] The Defendant reiterated the position of this Court that what Article 7 prohibited is discrimination on the grounds of nationality *only* and that its application is restricted to 'the scope of application of the Treaty'. The Defendant contended that the allegation that cross-border activity constituted by investment of capital and cross-border provision and purchase of financial services falls within the scope of application of the RTC is incorrect. The Defendant argued that by analogy with European Union ('EU') jurisprudence, the question was whether the Defendant's bailout actions fall within the *ratione materiae* of the RTC. The Defendant posited that even if the Claimants could establish that the Defendant's actions indirectly engaged the Claimants' rights to move capital and to provide services in the CARICOM Single Market and Economy ('CSME') and that this fell within the scope of application of the Treaty, Article 43 of the RTC expressly permits Member States in the event of external financial difficulties or threat thereof, to 'adopt or maintain restrictions to address such difficulties'. These restrictions expressly

include restrictions on the right of establishment, on the right to provide services, on the right to move capital and payments and transfers for transactions connected therewith. The Defendant further contended that even if the Court were to find that provisions on which the Claimants rely confer upon them rights, the Claimants have failed to establish that there was any discrimination based on nationality *only*, any such allegation being contrary to the evidence of Suzette Lee Chee[11], witness for the Defendant, discussed below.

[48] In addition, the Defendant submitted there is no evidence that BAICO was in a comparable situation to BAT or that BAICO's circumstances were known to the Defendant prior to the CBTT's assumption of control of BAT, thereby creating an obligation on the Defendant to include BAICO in the bailout. The Defendant relied on *Council of the European Union v Chrysostomides & Co LLC*[12] in this regard.

[49] The Defendant further submitted that Article 184(1)(j) of the RTC did not expressly or by implication create a 'right' to redress for consumers, or even a right to State aid. This was because the RTC had not intended for Article 184(1)(j) to create such a right, rather the Treaty created a roadmap of what it contemplated Member States must do to achieve the objective of '… the promotion of consumer welfare and protection of consumer interests', including the provision of adequate and effective remedies. The following case was cited as supportive of this argument: *Permanent Court of International Justice, 1922 Advisory Opinion on the Competence of the ILO to Regulate Agricultural Labour.*[13] The Defendant also relied on *Petrie v Commission of the European Communities*[14] and *Zaera v Instituto Nacional de la Seguridad Social.*[15]

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[11] Record, 'Witness Statement of Suzette Lee Chee', paras 104to105.
[12] Joined Cases C-597/18 P, C-598/18 P, C- 603/18 P and C-604/18 P *Council of the European Union v Chrysostomides & Co LLC* EU:C:2020:390, (16 December 2020), paras 202-203.
[13] *Competence of the ILO in regard to International Regulation of Conditions of the Labour of Persons Employed in Agriculture* (Advisory Opinion No 2) (1922) PCIJ Ser B No 2.
[14] Case T-191/99 *Petrie v Commission of the European Communities* EU:T:2001:284, [2001] ECR II – 3677.
[15] Case 126/86 *Zaera v Instituto Nacional de la Seguridad Social* EU:C:1987:395, [1987] ECR 03697.

[50] Finally, as to the definition of 'consumer', the Defendant contended that it was wrong for the Claimants to read into the definition a qualification that where a person receives services in the course of activity carried on for gain or reward or in the course of which goods or services are produced, it falls within the definition of 'consumer' if it is acting outside its area of business expertise as the 'end user' of the services. Rather, the Defendant submitted that to avail themselves of the alleged protection of Article 184(1)(j) of the RTC, the Claimants would have to establish that they did *not* receive financial or investment services from BAICO in the course of businesses carried on by them.

Claimants' Reply Submissions

[51] In their reply, the Claimants disputed the Defendant's reliance on the State aid case law of the EU. The Claimants argued that the *Ryanair cases* demonstrate that the State aid provisions of the Treaty on the Functioning of the European Union ('TFEU') provide stricter *lex specialis* and displace the general prohibition on grounds of nationality contained in Article 18 of the TFEU. By contrast, the RTC does not contain any specific provisions on State aid and therefore, the general prohibition of discrimination on grounds of nationality was not displaced. Further, the Claimants repeated that the Defendant's intervention was not limited to providing State aid but also included measures leading to the utilisation of CLF's sequestered assets to cover liabilities of CLICO and BAT, as well as curtailing remedies that would have otherwise been available to the Claimants.

[52] The Claimants submitted that it did not avail the Defendant of showing that there may have been some non-nationals who benefited from the bailout or that the discriminatory inclusion of BAICO assets may have had its roots in a suggestion to CBTT from CLF. The European Commission's *Communication* cited by the Defendant underlines that the principle of non-discrimination on the grounds of nationality remains fully applicable, even in situations of crisis. The Defendant should have treated all CLF subsidiaries in the same way.

[53] Regarding the existence of a right to a remedy under Article 184(1)(j), the Claimants averred that where there is a right infringed, there should be a remedy provided by the law. The remedies, in fact, must be the same for all nationals of Member States. Further, given a choice, domestic courts and the Court itself should, so far as possible, interpret national remedies to achieve the result sought by the RTC and consequently comply with the general undertaking on implementation enshrined in Article 9 of the RTC.

Amicus Curiae/CARICOM's Submissions

[54] By letter dated 10 November 2023, the Office of General Counsel of CARICOM was asked by the Court to make submissions on two issues, namely:

i. What was the nature and extent of liability that a Member State incurs, if any was intended, if evidence is adduced that that Member State has not 'promote[d] the interests of consumers in the Community by appropriate measure that provide adequate and effective redress for consumers' as per Article 184(1)(j)?

ii. What, considering Article 184(1)(j), and bearing in mind Article 7, are the circumstances in which a Member State may be under an obligation to take appropriate measures that provide adequate and effective redress for consumers who are nationals of other Member States even if the Member State was under an obligation to provide adequate and effective redress for consumers who are its nationals?

[55] CARICOM asserted that there was absence of a clear articulation of the nature and extent of the liability of Member States under Article 184(1)(j). Reference was made to the absence of a formal framework or any schedule for implementation of these obligations and the lack of a supranational authority of the Community. All financial institutions in Member States are subject to the national legal requirements of the respective jurisdictions in which they are incorporated. There are also no cross-border insolvency mechanisms for corporations or financial institutions in CARICOM.

[56] Specifically, as to question 1, CARICOM stated that an obligation to take 'appropriate measures' under the RTC can create an obligation which gives rise to correlative rights citing the cases of *Rock Hard Cement Ltd v The State of Barbados*[16]*;* and *Trinidad Cement Ltd v Co-operative Republic of Guyana*[17]. CARICOM cited Article 9 as an example which confers a benefit and therefore creates a correlative right for nationals to enjoy the benefit of the implementation of the Member States' obligation, notwithstanding that the provision only requires Member States to 'take all appropriate measures' without specifying the measures. Further, the obligation expressed in Article 184(1)(j) is an obligation imposed on all Member States collectively.

[57] It was the view of CARICOM that the Claimants had to establish that Article 184(1)(j) meant that adequate and effective redress must apply to all consumers regardless of the particular circumstances in which consumers find themselves, and that the framers of the RTC intended that Member States bear such an obligation even when the Member States' actions are 'activities conducted by a public entity for the account of, or with the guarantee or using the financial resources of the government.' The nature and extent of the liability must be consonant with the nature and extent of the breach of the obligation: *R v Secretary of State for Transport, ex p Factortame.*[18]

[58] Specifically, as to question 2, the Community submitted that Article 184 must be read in conjunction with Article 185. Those consumer interests which Member States are obliged to promote in Article 184 are particularised and must be protected by legislation that all Member States are obligated to enact pursuant to Article 185. This is a collective obligation. The RTC does not contain language which obliges Member States to provide mechanisms to facilitate the extraterritorial reach of its

[16] [2020] CCJ 2 (OJ) at [43].
[17] [2009] CCJ 1 (OJ), (2009) 74 WIR 302.
[18] Joined Cases C-46/93 and C-48/93 *R v Secretary of State for Transport, ex p Factortame* EU:C:1996:79, [1996] ECR I-01029.

legislative/political/judicial decisions and actions from one Member State to another. To do this would be a derogation of the doctrine of sovereignty.

[59] With respect to the discrimination argument, the Community submitted that the Claimants must adduce evidence for assessment by the Court to determine whether there has been any alleged discrimination on the grounds of nationality *only.* In this regard, the Community cited the Court's decision in *Myrie v State of Barbados (No 2)*[19].

Claimants' Reply to CARICOM's Submissions[20]

[60] The Claimants agreed with the Community that this Court has jurisdiction to determine the existence and extent of State liability. The Claimants further agreed that an obligation to take appropriate measures creates an obligation giving rise to correlative rights and that the principles enunciated in *R v Secretary of State for Transport, ex p Factortame,* constitute the correct approach.

[61] The Claimants referenced the notion of the quantum of damages to be awarded and averred that the case law of the ECJ had evolved since *R v Secretary of State for Transport, ex p Factortame.* Thus, to the extent that it is not possible to extend the same remedies as those provided to policyholders of BAT to the Claimants, the Claimants should be indemnified for the losses they sustained.

[62] The Claimants broadly agreed with the Community that Article 184 was an obligation awaiting specificity and that Article 184 must be read in conjunction with Article 185. The interests identified in Article 184 are particularised and must be protected by legislation that Member States are obligated to enact pursuant to Article 185.

[19] [2013] CCJ 3 (OJ), (2013) 83 WIR 104.
[20] Record, 'Claimants' Submissions in Reply to the Submissions of the Caribbean Community', 11381-11392.

[63] Lastly, with respect to the Community's submission about the extraterritorial application of domestic legislation, the Claimants submitted that the Community misunderstood the way in which the Claimants' case arose and was pleaded. The case for the Claimants was that the Defendant provided what it considered an appropriate remedy for the purposes of Article 184(1)(j) to deal with the failure of the CLF group, a financial conglomerate established within the Defendant's territory. The Claimants' contention was that the Defendant should have provided a similar remedy to all CLF subsidiaries.

Defendant's Submissions in Reply to CARICOM

[64] The Defendant agreed with the Community that Article 184 lacked specificity and was not in clear terms, which could give rise to liability on the part of the Member States and that all financial institutions in Member States are subject to domestic legal requirements in order to be licensed in the jurisdictions in which they operate. However, the Defendant did not accept CARICOM's submission that Article 9 was clear and unconditional so as to create specific obligations on Member States.

The Evidence at Trial

[65] The Claimants and Defendant filed Notices of their List of Witnesses on 2 August 2023 pursuant to the Order of the Court dated 27 July 2023. On 20 November 2023 both parties filed Notices indicating the witnesses each party intended to cross-examine. The Claimants indicated that one of the Defendant's two witnesses, Ms Suzette Lee Chee, would be cross-examined. The Defendant indicated its intention to cross-examine all five witnesses of the Claimants. The information elicited from the witnesses at trial is summarised briefly.

Claimants' Witnesses

i. *Ellis Richards – A National of Antigua and Barbuda and Holder of an EFPA*

[66] Mr Richards gave evidence that BAICO's insurance agent made representations to him that the policies sold by BAICO were protected by the statutory fund held in Trinidad and Tobago but admitted that there is no document which indicated that there was such a guarantee. Mr Richards asserted that the premiums paid were under the control of the CLF Group and that payments could not be made without BAT's permission. When it was suggested to Mr Richards that BAT and BAICO were different legal entities, Mr Richards responded that he was unsure of the internal workings of the company, so he could not answer. Mr Richards also did not know that BAICO was not registered to conduct business in Trinidad and Tobago. Mr Richards confirmed that he knew that in 2009, the Statutory Fund in Antigua and Barbuda was in a deficit. He indicated that no redress was sought from the judicial managers of BAICO Antigua as he was advised against seeking relief from the Regulator. Mr Richards confirmed that after the collapse of BAICO he received 14.5 per cent of his investment.

ii. *Spencer Thomas – Grenadian National and Holder of EFPA Policy*

[67] Mr Thomas indicated that he was also told by an agent (of BAICO) that his investment would be protected by the Statutory Fund of BAT, however, he never received documentary evidence of this guarantee. Counsel for the Defendant suggested to the witness that he had no knowledge of the workings of BAICO. Mr Thomas replied that he knew some things, not everything, based on representations made by the agent and information gathered from the local media. Mr Thomas also indicated that he was unaware that the Grenada Authority for the Regulation of Financial Institutions ('GARFIN') took steps to assist policyholders and further that he did not consider seeking redress in Grenada against the Regulator, the directors of BAICO or even the Insurance agent.

iii. *La Verne Francis-Browne – Representative/Chief Financial Officer of the Medical Benefits Board of Antigua and Barbuda*

[68] Ms Francis-Browne indicated that the funds of the Medical Benefits Board of Antigua and Barbuda that are invested are used to meet the commitments of the Board. Ms Francis-Browne confirmed that the Board scrutinises the financial investments before investing. However, Ms Francis-Browne indicated that she saw nothing in the minutes of the Board which indicated that the Board would have made an inquiry into the status of the Statutory Fund in Antigua and Barbuda. Ms Francis-Browne answered in the negative when asked whether she accepted that it was not prudent to invest such large sums in BAICO. The witness did not accept that BAICO and BAT were two separate companies and indicated that BAICO was an outpost for BAT. When Counsel for the Defendant suggested to Ms Francis-Browne that she had no personal knowledge of the statements in her witness statement, Ms Francis-Browne indicated that she had knowledge of the documents in the appendices.

iv. *Jean Green-Thompson – Insolvency Practitioner KPMG Restructuring Ltd, Bahamas; Appointed as a Joint Judicial Manager of BA International by Further Order of the Supreme Court of the Commonwealth of The Bahamas.*

[69] Mrs Green-Thompson indicated that as judicial manager of BAICO, it is her job to act in the best interest of policyholders. The witness confirmed that BAICO entered into an agreement with BAICO, Grenada to begin proceedings with a third party and that proceedings against CLF were commenced in Trinidad and Tobago. Mrs Greene-Thompson affirmed that BAICO and BAT are separate companies. The witness attested to the fact that in 2008, the Insurance Regulator of The Bahamas imposed restrictions on BAICO to insulate BAICO from further loss and that in 2009, the Grenadian Regulator imposed restrictions on BAICO, Grenada. Mrs Green-Thompson indicated that she was aware of proceedings in the United States

of America which resulted in a judgment[21] awarding relief to BAICO in the sum of USD 22 million in favour of policyholders.

[70] The Bench posed the question to Mrs Green-Thompson as to what happens in cross-border insolvency cases without reference to the RTC, specifically, and what procedures are available to stakeholders to receive some protection in the event of cross-border insolvency. The witness replied that this case is peculiar in that the assets and liabilities are spread across jurisdictions, therefore, treating the estate as one enables policyholders to see better returns. The witness referred to the Plan of Arrangement which was adopted and the legislation that was implemented prior to its adoption, which allowed for harmonisation across jurisdictions. Mrs Green-Thompson indicated that prior to this, there was no mechanism to ensure a distribution in this way. It was also indicated that there is ongoing litigation to recoup the sums awarded by various courts and that it is not unusual that individuals will continue to seek redress via litigation.

v. *Glenn Otway – Agency Manager, BAICO, Grenada*

[71] Mr Otway gave evidence that he was aware of the Insurance Act of Grenada and the requirement of a Statutory Fund. However, Mr Otway stated his understanding that the Statutory Fund was meant to cover liabilities. For example, if he invested $1,000, the Fund would cover this. The witness also knew that the Fund was in a deficit.

Defendant's Witnesses

i. *Murvani Ojah Maharaj – Instructing Attorney for the Defendant*

[21] Record, 'Witness Statement of Jean Green Thompson', 9304. The Judicial Manager of BAICO, Bahamas sought recognition of the judicial management in the United States of America to give full effect to the judicial management in order to protect any existing or potential assets of BAICO in the United States of America. Judge Kimball of the United States Bankruptcy Court granted relief to BAICO having found that the evidence did not support a finding that BAICO's centre of business was in the Bahamas.

[72] Mr Maharaj tendered the *travaux préparatoires* with respect to Chapter Eight into evidence. There was no cross- examination of this witness.

ii. *Suzette Lee Chee – Permanent Secretary of the Ministry of Finance of Trinidad and Tobago*

[73] Ms Lee Chee gave evidence that she was aware of the comingling of assets among the CLF Group and that there were directors of BAT who were also directors of subsidiaries and other companies in the CLF Group. The witness could not speak to whether nearly all BAICO's operations had been taken over by subsidiaries in Trinidad and Tobago. Ms Lee Chee indicated that she could not speak to BAICO's administrative functions taking place in Trinidad and Tobago but stated that she knew that BAICO's operations were subject to a service agreement with BAMSL which operated out of Trinidad and Tobago. Ms Lee Chee could not speak to the details of the service arrangement but knew that premiums were not paid to bank accounts in Trinidad and Tobago, but to bank accounts in the respective jurisdictions. Ms Lee Chee stated that she only knew of information relating to CLICO, BAT, and CLF. Ms Lee Chee indicated that she did not have knowledge of the details of the operations of BAMSL to allow her to confirm or deny that BAICO and BAT operated as one company.

[74] When it was put to the witness that assets of BAICO were sold to satisfy the shortfall of the Trinidad and Tobago Statutory Fund, Ms Lee Chee distinguished the sale and 'shedding' of the assets. She agreed that BAICO's funds were used to 'prop up' the Trinidad and Tobago Statutory Fund.

Further Request of the CCJ

[75] By letter dated 14 June 2024, the Bench requested from CARICOM the following documents:

i. The Model Consumer Protection Bill 2016 ('MCP Bill') approved by the Legal Affairs Committee of CARICOM ('LAC').

ii. The Decision by the Council for Trade and Economic Development ('COTED') in 2016 urging Member States to pass legislation implementing the MCP Bill.

iii. The Draft Policy on a Special Resolution Regime for Financial Institutions.

iv. The Draft Harmonized Financial Consumer Protection Framework.

[76] On 20 June 2024, the General Counsel of CARICOM, forwarded the following documents for the Bench's attention:

i. Model Consumer Protection Bill approved by the 21st Meeting of the LAC, 26 September 2016.

ii. Extract of the 43rd Meeting of Council of Trade and Economic Development (COTED) held 14-18 November 2016 in Guyana, in which the COTED welcomed the approval of the Model Bill at the 21st Meeting of the Legal Affairs Committee (LAC) and urged Member States to enact Consumer Protection legislation, guided by the Model Bill, within two years (by November 2018).

[77] The above documents were forwarded to all parties on 26 June 2024 for comments, if any, on the documents' relevance to the instant case. Comments were submitted by the Defendant and the Claimants dated 15 July 2024 and 20 August 2024, respectively.

Analysis of Issues

A. Was there a Breach of Article 184(1)(j)?

The Treaty Context

[78] Article 184 falls within Part Two of Chapter Eight of the RTC. Chapter Eight is titled 'Competition Policy and Consumer Protection'. Part One is titled 'Rules of Competition'. Article 169 which falls within Part One is titled 'Objectives of

Community Competition Policy' and it sheds light on the objective of the Chapter by setting out the following:

ARTICLE 169

Objectives of Community Competition Policy

1. The goal of the Community Competition Policy shall be to ensure that the benefits expected from the establishment of the CSME are not frustrated by anti-competitive business conduct.

2. In fulfilment of the goal set out in paragraph 1 of this Article, the Community shall pursue the following objectives:

   (a) the promotion and maintenance of competition and enhancement of economic efficiency in production, trade and commerce;

   (b) subject to this Treaty, the prohibition of anti-competitive business conduct which prevents, restricts or distorts competition or which constitutes the abuse of a dominant position in the market; and

   (c) the promotion of consumer welfare and protection of consumer interests.

[79] Article 170(1) elucidates what is expected of the Community and Member States to achieve the objectives set out in Article 169. It reads as follows:

1. In order to achieve the objectives of the Community Competition Policy,

   (a) the Community shall:

      (i) subject to Articles 164, 177, 178 and 179 of this Treaty, establish appropriate norms and institutional arrangements to prohibit and penalise anti-competitive business conduct; and

      (ii) establish and maintain information systems to enable enterprises and consumers to be kept informed about the operation of markets within the CSME;

(b) the Member States shall:

(i) take the necessary legislative measures to ensure consistency and compliance with the rules of competition and provide penalties for anti-competitive business conduct;

(ii) provide for the dissemination of relevant information to facilitate consumer choice;

(iii) establish and maintain institutional arrangements and administrative procedures to enforce competition laws; and

(iv) take effective measures to ensure access by nationals of other Member States to competent enforcement authorities including the courts on an equitable, transparent and non-discriminatory basis.

[80] Article 184 is broadly titled 'Promotion of Consumer Interests in the Community'. It is the first Article under Part Two of Chapter Eight which is dedicated to 'Consumer Protection'. By this provision, Member States are obligated to promote the interests of consumers in the Community by appropriate measures that:

a) provide for the production and supply of goods and the provision of services to ensure the protection of life, health and safety of consumers;

b) ensure that goods supplied and services provided in the CSME satisfy regulations, standards, codes and licensing requirements established or approved by competent bodies in the Community;

c) provide, where the regulations, standards, codes and licensing requirements referred to in paragraph (b) do not exist, for their establishment and implementation;

d) encourage high levels of ethical conduct for those engaged in the production and distribution of goods and services to consumers;

e) encourage fair and effective competition in order to provide consumers with greater choice among goods and services at lowest cost;

f) promote the provision of adequate information to consumers to enable the making of informed choices;

g) ensure the availability of adequate information and education programmes for consumers and suppliers;

h) protect consumers by prohibiting discrimination against producers and suppliers of goods produced in the Community and against service providers who are nationals of other Member States of the Community;

i) encourage the development of independent consumer organisations;

j) provide adequate and effective redress for consumers.

[81] Article 31(1) of the *Vienna Convention on the Law of Treaties* states that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' In considering the above Articles and in applying the ordinary meaning, it can be said that Chapter Eight of the RTC is concerned with encouraging a strong and vibrant Community market by the enactment by Member States of legislation and regulations prohibiting anti-competitive conduct, promoting fair competition, promoting the interests of consumers, protecting consumers and achieving harmonisation of competition policies throughout the Community. Establishment of appropriate institutional arrangements is also encouraged.

The Meaning of 'Consumers' as Used in Article 184 of the RTC

[82] The allegations of breaches of Article 7 and Article 184(1)(j) both depend on the notion that the Claimants are consumers. Article 7 is said to have been breached because the Defendant's actions resulted in treatment of the Claimants as consumers which was discriminatory as compared to the treatment given to other consumers within the jurisdiction of the Defendant. The Article 184(1)(j) claim is founded on the notion that the Defendant failed to promote the interests of the

Claimants as consumers by failing to provide adequate and effective remedies for the Claimants as consumers.

[83] The RTC contains a specific definition of 'consumer'. Article 184(2) specifies that for the purposes of Part Two (within which Article 184(1)(j) falls), 'consumer' means:

> … any person:
>
> (a) to whom goods or services are supplied or intended to be supplied in the course of business carried on by a supplier or potential supplier; and
>
> (b) who does not receive the goods or services in the course of a business carried on by him.

[84] There are three preliminary issues related to the question of whether the Claimants all qualify as consumers to pursue the alleged breaches of the provisions of the Treaty, not all of which were fully argued by the parties.

[85] The first preliminary issue concerns whether the definition of consumers is restricted to natural persons or whether it includes legal persons. The situation in EU law is interesting. Under that law, for the purposes of the Union a consumer is a natural person who is acting outside the scope of an economic activity (trade, business, craft, liberal profession). Emphasis is placed on the requirement that a consumer acts *outside* the scope of a business. Under EU law, the notion of consumer does *not extend* to legal persons, even if they have a non-business character such as not-for-profit associations. The Court of Justice has regularly held that the EU definitions must not be given a wider interpretation. See, for example, the Court of First Chamber in *Mostaza Claro v Centro Móvil Milenium SL;*[22] the Opinion of Advocate General Szpunar in *Komisia za zashtita na potrebitelite v*

[22] Case C168/05 *Mostaza Claro v Centro Móvil Milenium SL* EU:C:2006:675, [2006] ECR I-10421, paras 25,36.

Kamenova;[23] the judgment of the Court of Justice (First Chamber) in *Joined Cases C-776/19 to C-782/19*[24].

[86] Whilst 'consumer' is confined to 'natural persons' in the EU, the definition in Article 184(2) of the RTC could conceivably be wider. That definition refers to 'any person' rather than 'natural persons'. The term 'person' under the RTC can include natural as well as legal persons. This is at its clearest in Article 222 where it basically stated that persons of a Contracting Party may be 'natural or juridical'. The notion of 'person' was considered in the foundational case of *Trinidad Cement Ltd v Co-operative Republic of Guyana*[25] and given a broad interpretation, albeit in the context of the threshold question of the standing provision in Article 222.

[87] On the other hand, there are three indications to the contrary. First, the RTC definition of 'consumer' suggests that the term person could be taken as a reference to natural persons. This is evident from the last word of the definition which refers to receipt of goods and services by 'him'.

[88] Second, the definition which appears in the Treaty was essentially the same definition adopted by the 18th Meeting of the Inter-Governmental Task Force[26] ('IGTF') whose work was preparatory to the adoption of the provisions in the RTC. The 25th Meeting of the IGTF heard a suggestion[27] that the term 'consumer' should be redefined to link the consumer with the 'household' and to capture the concept of the 'end user' of products. This suggestion was not explicitly incorporated in the definition in Article 184(2), but it does appear to emphasise the very important aspect of protection of the ordinary household consumer.

[89] Third, it remains the case that several provisions in Article 184 do not sit comfortably with the notion of the consumer as a legal person. The most obvious

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[23] Case C-105/17 *Komisia za zashtita na potrebitelite v Kamenova* EU:C:2018:378 (31 May 2018), paras55 57.
[24] Joined Cases C-776/19 to C-782/19 *VB v BNP Paribas Personal Finance SA* EU:C:2021:470, (10 June 2021).
[25] *Trinidad Cement Ltd* (n 17).
[26] Held at the Grenadian Hotel, St George's Grenada on 14-18 December 1998.
[27] Record, 'Affidavit of Murvani Ojah Maharaj, Annexure MOM1, Travaux Préparatoires', para 67.

is Article 184(1)(a) which, it will be recalled, requires Member States to promote the interests of consumers by appropriate measures that: 'provide for the production and supply of goods and the provision of services *to ensure the protection of life, health and safety of consumers*' (emphasis added). The provision of adequate information to enable consumers to make more informed choices (Article 184(1)(f)), and the availability of adequate information and educational programmes for consumers (Article 184(1)(g)) are also problematic for the proposition that consumers may be legal persons.

[90] As the matter was not ventilated by the parties, the Court does not take a definitive position at this time on whether legal persons may be considered to be consumers in the definition.

[91] The second preliminary issue relating to the definition of consumer concerns whether the Claimants qualify as recipients of goods and services within the meaning of the RTC. Specifically, a question arises as to whether the Claimants are to be treated as consumers, given that there could be concerns as to whether the EFPAs supplied to them by BAICO were 'goods or services' as defined in the Treaty. In this regard, Article 1 of the RTC states as follows:

> 'goods' means all kinds of property other than real property, money, securities or choses in action;…
>
> 'services' means services provided against remuneration other than wages in an approved sector and 'the provision of services' means the supply of services ...

[92] The parties did not raise this matter as an issue in this case. The Court therefore does not express a definitive view on it.

[93] There is a third preliminary issue of relevance to the definition of 'consumer'. The Claimants must satisfy the two limbs of Article 184(2) to be considered 'consumers', that is: (a) the Claimants must be the recipients or intended recipients

of goods or services supplied in the course of business; and (b) must not receive those goods or services in the course of the Claimants' own business.

[94] Article 1 of the RTC defines 'business' as '... any activity carried on for gain or reward or in the course of which goods or services are produced, manufactured or supplied as the case may be'. Therefore, in the language appropriate to this litigation, in order to qualify as a 'consumer' under Article 184(1)(j), the Claimants must establish that:

i. They were supplied or were intended to be supplied with financial services from BAICO, in the course of business carried on by BAICO; and

ii. They did not receive investment/financial services from BAICO in the course of a business carried on by the Claimants, specifically in the course of an activity carried on by them for gain or reward or in the course of which they produced, manufactured or supplied goods or services.

[95] An argument raised during the litigation was that at the time of the alleged breach of Article 7 and Article 184(1)(j), the financial collapse had already occurred, the relevant companies had gone or were going into liquidation, and the business of BAICO selling insurance policies had come to an end. It could therefore be argued that there was no longer the supply or intended supply of financial services for which the Claimants could be considered consumers. In fact, it is the very act of 'bailout' of policyholders from their financial predicament that forms the basis of the claim.

[96] The Court considers that this would be altogether too narrow a definition to give to the notion of 'consumer'. The fact that a supervening event temporarily or even permanently halts the supply of goods or services does not mean that the characteristics of a person as a consumer immediately prior to the supervening event erases the nature of that person as a consumer. The person may remain a consumer notwithstanding. Indeed, it may be that it is in the face of such a change

of circumstances that the person most acutely requires the law of consumer protection.

[97] Support for this proposition may be derived from recent decisions of the Court of Justice of the European Union. Iliescu records cases in which it was discovered after loans had matured and had been fully repaid, that certain clauses in the loan contract had been abusive. The financial institution argued that at the time the action was brought, the person concerned was no longer a consumer, given that, at that time, relations between the parties to the credit agreement in question had ceased, and that contract had been terminated by its full performance:[28]

> The Court considers it necessary to specify that uniform rules of law as regards the unfair terms provided for in the Directive must apply to "all contracts" between 'professionals' and 'consumers' as defined in Article 2 (b) and (c) thereof, and according to Article 2 (b), "consumer" means any natural person who, under contracts covered by this Directive, is acting for purposes which are outside his trade. Following its reasoning, the Court points out that the definition of 'consumer' in Article 2 (b) of Directive 93/13 *does not contain any element enabling the determination of when a contractor ceases to be a consumer within its meaning* and it is therefore no longer possible to rely on the protection afforded to it by this Directive.
>
> In accordance with the Opinion of the Advocate General, The Court will state that the performance of the contract in question does not retroactively alter the fact that, at the time of the conclusion of that contract, the consumer was in this inferior situation. In those circumstances, the limitation of the protection afforded to the consumer by Directive 93/13 only during the performance of the contract in question, in the sense that the full performance of this contract precludes any possibility for the consumer to avail himself of this protection, it cannot be reconciled with the system of protection established by this Directive. Such a limitation would be inadmissible, in particular in the case of contracts which are performed immediately after or at the time of their conclusion, since that would not allow consumers a reasonable period to challenge the unfair terms which may be used in such contracts. An additional argument put forward by the Advocate General is that Directive 93/13 requires Member States, as is clear

[28] See generally Mihaela Georgiana Iliescu, 'Recent Clarifications by the European Court of Justice on the Meaning of the Notion of Consumer' (2021) Law Annals Titu Maiorescu U 25, 28.

> from Article 7 (1) in conjunction with recital 24 in the preamble thereto, *to provide for appropriate and effective means "to prevent the continued use of unfair terms in consumer contracts"*. Such means must have a deterrent effect on professionals, and the interpretation that that directive ceases to apply after the performance of a contract is likely to be detrimental to the achievement of its long-term objective (footnotes omitted).
>
> In the light of all the foregoing considerations, the Court concludes that the concept of 'consumer' in Article 2 (b) of Directive 93/13 must be interpreted as meaning that, *the fact that a contract is performed in full does not preclude a party to that contract from being classified as a "consumer" within the meaning of that provision* (emphasis added).

The Juridical or Legal Character of Article 184(1)(j)

[98] Article 184(1)(j) requiring the provision of 'adequate and effective redress for consumers' cannot be read in isolation from its broader juridical or legal context. This provision is the last in a long list of measures which Member States are obliged to take to promote consumer interest in the Community. Article 184 is one of three Articles (Articles 184, 185 and 186) which make up Part Two of Chapter 8. Part One comprises fifteen Articles on Competition Policy (Articles 168 - 183). Among other things, Part One establishes a Competition Commission to carry out the goal of the Community Competition Policy which is to ensure that the benefits expected from the CSME are not frustrated by anti-competitive business conduct. However, the Commission also has important functions to perform specifically in relation to the protection of consumer interest, as shall appear.

[99] The disproportionate treatment of consumer protection and competition policy does not mean that the former is subsumed in the latter. The *travaux préparatoires* make this clear[29]. The United Nations Conference on Trade and Development ('UNCTAD') specialist, Mr Dhangee was invited to the discussion of the draft of the provision for Consumer Protection during the Twenty-Sixth Meeting of the Inter-Governmental Task Force in November 1999. During this meeting, Mr Dhangee outlined Protocol IX – Competition Policy and noted that the aim is not

[29] Record, 'Witness Statement of Murvani Ojah Maharaj', 7543 – 7544.

to achieve perfect competition but to fit the realistic circumstances of various markets. Meanwhile, the Consultant commented on Part VI – Consumer Protection, expressing the view that this Part appeared to be quite detailed, and he suggested open-ended provisions. He also suggested that the UN Guidelines on Consumer Protection might be relevant. This is also evidence of the separate treatment of the two provisions in the RTC, even during the developmental stage.

[100] Nevertheless, in considering the juridical character of Article 184(1)(j), an important first step is to appreciate that it must be placed in the broader context of competition policy and consumer protection law. Part One of Chapter Eight on Rules of Competition contains many references to consumer protection. In ensuring the objectives of Community Competition Policy, the Community shall pursue 'the promotion of consumer welfare and the protection of consumer interests'[30]. In the implementation of Community Competition Policy, Member States are obliged to 'provide for the dissemination of relevant information to facilitate consumer choice'.[31] In discharging its functions, the Competition Commission must 'provide support to the Member States in promoting and protecting consumer welfare'[32] and 'develop and disseminate information about competition policy, and consumer protection policy'.[33]

[101] Part Two on Consumer Protection also has references to competition. Member States are obliged to promote the interests of consumers by encouraging 'fair and effective competition in order to provide consumers with greater choices among goods and services at lowest cost'.[34] Member States must prohibit unfair trading practices.[35] As pointed out earlier, the Competition Commission has vital functions to perform in relation to consumer protection.[36]

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[30] The Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy (adopted 5 July 2001, entered into force 4 February 2002) 2259 UNTS 293, art 169(2)(c).
[31] ibid art 170(1)(b)(ii).
[32] ibid art 173(2)(f).
[33] ibid art 173(2)(h).
[34] ibid art 184(1)(e).
[35] ibid art 185(c).
[36] ibid art 186.

[102] It follows that the Rules of Competition and Consumer Protection are not to be kept in watertight compartments but are to be seen as overlapping and complementary. Each affects and reinforces the other. The two regimes have the common objective of ensuring that the benefits expected from the establishment of the CSME are not frustrated.

[103] It is also significant to consider the institutional arrangements that have been established as well as the nature of the language used to impose obligations. The three main entities that are identified as being responsible for carrying out the obligations of Chapter Eight are Member States, the Competition Commission, and the Council for Trade and Economic Development ('COTED'). The language used is primarily hortatory or aspirational but there are provisions which are seemingly prescriptive.

Institutional Arrangements

[104] CARICOM Member States are under the primary obligation to promote consumer interests in the Community[37] and to protect consumer interests in the Community[38]. It is noteworthy that the obligation in Article 184(1)(j) to provide 'adequate and effective redress' comes at the end of a list of 10 wide-ranging measures to be taken to promote consumer interests. These measures include the enactment of harmonised legislation.

[105] The Competition Commission has important functions detailed in Part Two of Chapter Eight to support promotion of consumer welfare and protection of consumer interests. The Commission must draw to the attention of COTED business conduct by enterprises which adversely impact consumer welfare and collaborate with competent organs of the Community to promote consumer education and consumer welfare. Most important for present purposes, the Commission must promote and take measures to enhance consumer education and

[37] ibid art 184(1).
[38] ibid art 185.

consumer welfare. A key obligation of the Commission is to make recommendations to COTED for the enactment of legislation by the Member States for the effective enforcement of the rights of consumers.[39] It is therefore logical to assume that the RTC anticipates that national legislation will be the ultimate guarantee of consumer rights.

[106] COTED is not under any specific obligation in Part Two of Chapter Eight. However, the scheme of action envisioned by the provisions in Part Two contemplates an important role for that body. COTED is to receive recommendations from the Commission upon a raft of consumer protection measures, including, importantly, the enactment of legislation by Member States to protect consumer rights. A timetable is envisioned for this activity. According to Article 170(5):

> Within 24 months of the entry into force of this Treaty, the Member States shall notify COTED of existing legislation, agreements and administrative practices inconsistent with the provisions of this Chapter. Within 36 months of entry into force of this Treaty, COTED shall establish a programme providing for the repeal of such legislation, and termination of agreements and administrative practices.

[107] Within the broader context of Chapter Eight, COTED may request an investigation where it has reason to believe that business conduct by an enterprise in the CSME prejudices trade and prevents, restricts or distorts competition within the CSME and has or is likely to have cross-border effects.[40] COTED has express powers to 'develop and establish appropriate policies and rules of competition within the Community including special rules for particular sectors.'[41] These obligations are entirely consistent with the first institutional function of COTED which is to promote the development and oversee the operation of the CSME which includes ensuring the benefits of the CSME to consumers.

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[39] ibid art 186(1)(l).
[40] ibid art 175(2).
[41] ibid art 182.

[108] The institutional architecture contemplates separate but coordinated action by Member States, the Commission and COTED to bring about the protection of consumer interests. This protection is to be secured through the adoption of appropriate measures and enactment of harmonised and effective legislation according to the specified timetable. This is clearly a collective responsibility. Where these measures and legislative provisions have passed through the collective process contemplated by the RTC, any failure to take the measures or enact the legislation may, unless there be exculpatory explanation, constitute a breach by the defaulting Member State or the Commission or COTED depending on the circumstances of the case. However, in the absence of regional agreement on the measures and the legislative framework it becomes difficult to affix liability to a specific Member State for failing to carry out a particular obligation in Article 184.

Nature of the Treaty Language

[109] In examining the nature of the language used in Article 184(1)(j) of the RTC, the Court reminds itself of the customary rule of international law embodied in Article 31(1) of the *Vienna Convention on the Law of Treaties* previously set out above at [81]. The language used in Chapter Eight of the RTC in general and in Article 184 in particular is not always conducive to allocating state liability for breach. Article 184 is concerned with the 'Promotion of Consumer Interests' which is not necessarily an auspicious start for identification of hard law. Member States are then obliged to '*promote* the interests of consumers in the Community by *appropriate* measures' (emphasis added). Among the 10 measures specified are some which 'ensure' that goods and services satisfy requisite standards, 'protect consumers' and which 'provide' adequate and effective relief. However, equally, there are provisions written in entirely hortatory or 'soft' law language. Thus under Article 184(1):

> The Member States shall *promote* the interests of consumers in the Community by *appropriate* measures that: …

(d) *encourage* high levels of ethical conduct for those engaged in the production and distribution of goods and services to consumers;

(e) *encourage* fair and effective competition in order to provide consumers with greater choice among goods and services at lowest cost;

(f) *promote* the provision of adequate information to consumers to enable the making of informed choices;

(g) ensure the *availability of adequate information and education programmes* for consumers and suppliers; …

(i) *encourage* the development of independent consumer organisations;… (emphasis added).

[110] The provisions cited from Article 184(1) are written in aspirational or hortatory language. Taken by themselves or in isolation it is difficult to ascribe an intention to impose state liability in respect of a specific provision. This is not to say that as 'soft law' these provisions are devoid of legal meaning. Rather it is to say that the entire scheme for regulation of competition and consumer protection forms a single ecosystem which is to be promoted and protected by agreed regional measures and legislation. It is therefore not permissible to pluck a single provision from the list, say Article 184(1)(j), and to give it a special legal status which the other provisions in Article 184(1) cannot bear. It was not the intention of the framers of the RTC to ascribe national liability in respect of a particular action by a state outside an agreed regional framework. Whether an action may be sustained against the Member States, the Commission and the Community for breach of the timetable for implementation or unreasonable and undue delay in carrying out the relevant obligations of the RTC was not raised in these proceedings.

[111] As indicated, the Bench requested from CARICOM the Model Consumer Protection Bill introduced before the Legal Affairs Committee on 26 September 2016 and related documents. CARICOM provided this together with Explanatory Notes and an extract from the 43rd Meeting of the Council for Trade and Economic Development. These documents were sent to the parties for their comments.

[112] The Defendant responded timeously, indicating that the financial collapse giving rise to the issues in this case took place seven years prior to COTED's urging of Member States to enact consumer legislation. The Defendant also indicated that even if, at the time of the financial collapse, legislation in line with the Model Bill had been in force, it would not have assisted the Claimants because the Model Bill contemplated actions by consumers against suppliers of goods and services (not an international claim against a Member State). The Defendant also noted that the definition of 'goods', like its counterpart in the RTC, excludes choses in action. The definition of 'services' includes financial and insurance services, however, cl 123 excludes financial contracts from application of that section.

[113] The Claimants replied some five weeks after the deadline date set by the Court for submission of comments. The Claimants summarised the Bill as one which set out a framework for key consumer protection rights in relation to the supply of goods and services. The Claimants commented that the Bill establishes the duties and obligations of suppliers, administrative and legal frameworks for identification of violations involving the supply of goods or services, the physical and financial security of consumers, unfair trade practices and transactions and unfair contract terms. Where rights have been identified, the Bill also provides for consumers and suppliers to be heard, for consumer redress and for supplier defence.

[114] The Claimants maintained that the Bill emphasises and further supports their position that Article 184(1)(j) creates an actionable right and cause of action to ground a claim for breach of the RTC. Nevertheless, the Claimants noted that the remedies and/or cause of action they have relied on are not provided for or contained in the Bill. The Claimants indicated that the Community and Member States are already bound in international law by their RTC obligations, even if domestic regulations to enable the regime at a national level are deficient and/or non-existent. Essentially, the Claimants found that the content of the model Bill would not affect the outcome of the case because there was still a disparity in the

treatment relative to affording remedies offered by the Defendant to its policyholders as contrasted with the Claimants.

[115] The Court agrees with the general thrust of the submission of the parties that the documents supplied by CARICOM are not dispositive of the issues in this case. The documents do, however, strengthen the conclusion that the framers of the RTC intended for Member States to adopt harmonised legislation for the protection of consumers. The Court takes this opportunity to reiterate COTED's imploration for Member States to adopt legislation appropriate for this purpose, a model of which already exists. The Court reminds Member States of their obligations under the RTC. The instant case highlights the importance of the Chapter Eight provisions which were intended to protect consumers to ensure the continued stability and viability of the CARICOM economic market. It is imperative that Member States heed the call to take the steps envisioned by the framers of the RTC to give life to these provisions of the Treaty.

Provision of 'Adequate and Effective Redress for Consumers'

[116] The question as to what constitutes 'adequate and effective redress for consumers' is in the first place one for the determination of the Community. As indicated earlier, there are ongoing efforts by the COTED and CARICOM Council for Finance and Planning ('COFAP') to identify appropriate measures and legislation. As in the EU, any regional agreement on this subject constitutes the baseline of Community obligation. National states may go further and grant even greater protection to consumers on a non-discriminatory basis.

[117] In the absence of Community standards, the Claimants have presented the ingenious argument that assuming redress is due to a consumer of another state, the measures adopted by a Defendant State to make good or minimise losses experienced by policyholders with institutions regulated by that State can comprise

the requisite redress. Accordingly, as the argument goes, there is no need in this case to enquire as to what the Community standard may otherwise have been.

[118] The Court rejects this view for two reasons. First, there is no certainty that here, the bailout measures accorded by the Defendant State are necessarily the redress contemplated by the RTC. It is possible that the regional standard contemplates the provision of other remedies such as the possibility of civil and/or criminal proceedings against those responsible for overseeing the collapse of the financial institutions involved. Alternatively, or in addition, it may be that regional redress involves financial sector cooperation initiatives particularly for institutions with cross-border operations. These initiatives could include harmonised regulation and the establishment of insurance deposit schemes to provide relief in the event of financial difficulties. It would be unusual (but entirely up to the Member States) for the Community to impose on individual Member States and for the latter to assume the obligation of extending bailouts to policyholders of institutions regulated by them to other nationals of the Community.

[119] Second, this Court decided in *Richards v The State of Trinidad and Tobago* [42] that the bailout measures taken by the Defendant State constituted activities in a Member State involving the exercise of governmental authority and were therefore, in accordance with Article 30(2) of the RTC, excluded from the operation of Chapter Three. Admittedly, Chapter Three is concerned with the liberalisation of restrictions on the right of establishment, the right to provide services and the right to move capital in the Community. However, there is a direct correlation between that ruling and the current argument. The effect of the ruling in *Richards (No 1)* was that the Defendant State was not obliged to extend its bailout of policyholders with companies regulated by its Central Bank to other Community nationals who held policies with other companies regulated in other jurisdictions of the Community. It would therefore be entirely contrary to and inconsistent with this ruling to hold that the specific bailout measures adopted could ground liability for

[42] *Richard*s (n 2).

failure to provide effective or adequate redress by the Defendant State to the Claimants. To put the matter another way, to argue for the use of the specific bailout measures adopted as the measure of the entitlement of the Claimants would rob the exemption given in Article 30(2) of any real effect.

Article 184 (1)(j) and Correlative Rights

[120] It was stated by this Court in *Trinidad Cement Ltd v Co-operative Republic of Guyana*[43] that:

> Rights and benefits under the RTC are not always expressly conferred although some of them are, for example the rights referred to in arts 32 and 46. Many of the rights, however, are to be derived or inferred from correlative obligations imposed upon the contracting parties. Unless specifically otherwise indicated, the obligations set out in the RTC are imposed on member states (or a class of member states) collectively. Where an obligation is thus imposed, it is capable of yielding a correlative right that enures directly to the benefit of private entities throughout the entire Community.

[121] The CCJ followed the foregoing in the case of *Rock Hard Cement Ltd v The State of Barbados*[44] wherein it held that Article 26 of the RTC imposes correlative obligations on the Community and Member States. Further, in *Tomlinson v State of Belize*[45], the CCJ held that the obligations on Member States flowing from the 2007 Conference Decision were 'sufficiently clear, precise and legally complete' to give rise to a right under Article 240 of the RTC.

[122] The Permanent Court of International Justice, *1922 Advisory Opinion on the Competence of the ILO to Regulate Agricultural Labour*[46] confirms that a treaty's meaning is not to be determined merely upon particular phrases, which if detached from context, may be interpreted in more than one sense. Further, *Petrie v Commission of the European Communities* considered whether Article 255 of the

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[43] *Trinidad Cement Ltd* (n 17) at [32].
[44] *Rock Hard Cement Ltd* (n 16) at [43].
[45] [2016] CCJ 1 (OJ), (2016) 88 WIR 273.
[46] *Competence of the I L O* (n 13).

Treaty Establishing the European Community ('EC Treaty') and Article 1 of the Treaty on the European Union ('EU Treaty') conferred a right of access to documents generated by the European Commission, and it was thus held:[47]

> Contrary to the applicants' contention, Article 1, second paragraph, EU and Article 255 EC are not directly applicable. In this regard, as is clear from the judgment in Case 26/62 Van Gend en Loos [1963] ECR 1, *the criteria for deciding whether a Treaty provision is directly applicable are that the rule should be clear and unconditional, in the sense that its implementation must not be subject to any substantive condition, and that its implementation must not depend on the adoption of subsequent measures which either the Community institutions or the Member States may take in the exercise of a discretionary power of assessment.*
>
> In this case, Article 1, second paragraph, EU is not clear in the sense required by the case-law cited. It is likewise obvious that Article 255 EC is, by virtue of paragraphs 2 and 3 thereof, not unconditional and that its implementation is dependent on the adoption of subsequent measures. The determination of general principles and limits which, on grounds of public or private interest, govern exercise of the right of access to documents is a matter entrusted to the Council in the exercise of its legislative discretion (emphasis added).

[123] Thus, this Court disagrees with the Claimants' approach that the starting point is determining whether the activities of the Claimants fell within the scope of the RTC[48]. The authorities above have clearly set out that it must first be determined whether the provisions are sufficiently clear, precise and legally complete to impose obligations on the Community and Member States to yield a correlative right. If obligations have not been imposed, then a breach is not possible.

[124] Taking this as the starting point, CARICOM's submissions[49] state clearly that Article 184 is an obligation awaiting specificity to be realised. In applying the case of *Petrie*[50]**,** wherein it was held that a treaty provision was not directly applicable if its implementation relies on adoption of subsequent measures which the Member

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[47] *Petrie* (n 14) paras 34-35.
[48] Record, 'Claimants' Written Submissions', para 16.
[49] Record, 'Amicus Curiae Submissions', para 2.
[50] *Petrie* (n 14).

States may take in the exercise of a discretionary power of assessment, CARICOM's submission could impliedly indicate that Article 184 does not impose an obligation on Member States that creates a correlative right. The Claimants' 'rights' under Article 184 would therefore seem to be inchoate given the lack of specificity of the provision and the need for adoption of more specific measures or decisions of the Organs and Bodies which would create enforceable obligations.

[125] The case of *R v Secretary of State for Transport, ex p Factortame*, has been proposed as persuasive authority for how this Court should approach the present case.[51] This case was a referral to the ECJ pursuant to Article 177 of the European Economic Community ('EEC') Treaty for a preliminary ruling on the interpretation of the principle of liability of the State for damages incurred by individuals flowing from breaches of Community law attributable to the State. The ECJ considered whether a breach consisting of a failure to adapt a national statute to higher ranking rules of Community law is captured by the principle that Member States are obliged to pay compensation for damage suffered by an individual as a result of breaches of Community law attributable to the State. The ECJ states at para 23:

> In this case, it is undisputed that the Community provisions at issue, namely Article 30 of the Treaty... have direct effect in the sense that they confer on individuals rights upon which they are entitled to rely directly before the national courts. Breach of such provisions may give rise to reparation.

[126] The ECJ also commented that the conditions under which liability gives rise to a right to reparation depend on the nature of the breach of Community law giving rise to loss or damage. The Court stated at para 43:

> The system of rules which the court has worked out with regard to Article 215 of the Treaty, particularly in relation to liability for legislative measures, takes into account, inter alia, the complexity of the situations to be regulated, difficulties in the application or interpretation of the texts and,

[51] *Secretary of State for Transport, ex p Factortame* (n 18).

more particularly, the margin of discretion available to the author of the act in question.

[127] Further at para 51 it was held:

> ... Community law confers a right to reparation where three conditions are met: *the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties* (emphasis added).

[128] This Court has pronounced upon the conditions to be met for the award of damages. In *Trinidad Cement Limited v Co-operative Republic of Guyana (No 2)* the Court held that a party will have to demonstrate that the provision alleged to be breached 'was intended to benefit that person, that such breach is serious, that there is substantial loss and that there is a causal link between the breach by the state and the loss or damage to that person.'[52] In this case the Court has found that an obligation on the Member State has not been created by Article 184(1)(j) such as to confer correlative rights on the Claimants. The Claimants, in their Reply submissions, aver that the principles enunciated in *R v Secretary of State for Transport, ex p Factortame*, at para 81 represent the correct framework relating to evaluating damages. However, the first condition to be met to determine whether a right to reparation has been conferred has not been satisfied for the foregoing reasons and as such, the question of determining the extent of reparations does not arise.

[129] The Court holds that the Claimants have not successfully proven that an obligation under Article 184 of the RTC has been created by the term 'appropriate measures'. The Court agrees with the Defendant that the wording of Article 184 is too broad to create the kind of obligation on Member States contended for by the Claimants. The Court fails to see how the bailout can constitute 'redress' as contemplated by the framers of the RTC, particularly because, as noted by the Defendant, the

[52] [2009] CCJ 5 (OJ); 75 WIR 327 at [27].

domestic laws do not give a right, even to its nationals, to benefit from a government bailout.[53.]

Extraterritoriality

[130] The Defendant avers that it would be wholly improper for the Defendant's legislature to purport to legislate in respect of financial institutions outside of the Defendant. The Defendant further submitted that it would have been improper for its Parliament to amend the Central Bank Act and to permit the exercise of emergency powers by the CBTT in respect of BAICO, a financial institution incorporated outside of the Defendant. The Defendant noted the lack of evidence that BAICO was registered or licenced to carry on insurance business or operate as a financial institution in the Defendant.[54] Further, there is a presumption in domestic law that legislation is generally not intended to have extraterritorial effect and authority over subjects of another country, which reflects the requirements of international law that one state should not by exercise of jurisdiction infringe the sovereignty of another state in breach of rules of international law.[55]

[131] In response, the Claimants argued that a Member State cannot cite the peculiarities of its own legal order to avoid its obligations under international law, particularly the RTC. Further, the Claimants argue that the Defendant exercised emergency powers to prevent BAICO policyholders to enforce rights to CLF assets on equal footing with BAT policyholders.

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[53] *United Policyholders Group v A-G of Trinidad and Tobago* [2016] UKPC 17, [2016] 4 LRC 433.
[54] Suzette Lee Chee (n 11), [128-134].
[55] *Morrison v National Australia Bank* 561 US 247(2010); *Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Providers* [2004] 2 SCR 427; *College of Optometrists of Ontario v Essilor Group Canada Inc* [*Indexed as: College of Optometrists of Ontario v. EssilorGroup Canada Inc*] 145 OR (3d) 561; *Karpik V Carnival Plc* (2023) Australian Law Reports 491; Lena Hornkohl, *The Extraterritorial Application of Statutes and Regulations in EU Law* (2022) MPILux Research Paper Series 2022 (1).

[132] The Court notes that this argument against extraterritorial regulation accords with the submission of CARICOM that legislation adopted by a Member State does not apply extraterritorially. And, as noted by CARICOM, the RTC does not contain language which obliges Member States to provide mechanisms to facilitate the extraterritorial reach of its legislative/political/judicial decisions to other Member States.

[133] The Court agrees that the Defendant could not have assumed control of BAICO by way of amendments to the Central Bank Act to guarantee that BAICO policyholders and/or depositors were afforded remedies in the aftermath of CLF's collapse. To do so would have been to have acted in an extraterritorial manner that would have been, in the absence of regional agreement, contrary to the comity of CARICOM Member States.

[134] For the sake of completeness, the Court finds that there is no evidence that the Defendant exercised emergency powers to prevent BAICO policyholders from enforcing rights to CLF assets on an equal footing with BAT policyholders.

B. **Was there a Breach of Article 7?**

[135] Article 7 is a fundamental or foundational principle of the RTC and has been the subject of judicial clarification by the Court. Article 7 provides as follows:

> ***Non-Discrimination***
>
> 1. Within the scope of application of this Treaty and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality only shall be prohibited.
>
> 2. The Community Council shall, after consultation with the competent Organs, establish rules to prohibit any such discrimination.

[136] The Court has emphatically stated that Article 7 is not a free-standing provision whose breach may give rise to a claim at large. Any allegation of a breach of Article 7 must be accompanied by and must point to a treaty right in respect of which the

claimant must prove discrimination in the enjoyment of that right, and that discrimination must be based on nationality only: *Douglas v The Commonwealth of Dominica*[56] at [15] and [16].

[137] Article 7 was adopted to ensure that the rights enuring expressly or by necessary implication upon persons of the Community were not thwarted because of discrimination on basis of nationality. Article 7 therefore does not confer an inherent substantive right but rather provides the rule by which the framers of the Treaty intended to ensure that rights granted, whether expressly or impliedly, were not distorted by discriminatory actions by one Contracting Party against the nationals of another Contracting Party. This explains why the Article appears within the Chapter dealing with the principles against which the remainder of the Treaty is to be interpreted and understood; and that its application is restricted to the 'scope of application of [the] Treaty'.

[138] The Court in *Douglas* cited the case of *Myrie v The State of Barbados (No 2)*[57] where the Court considered the issue of discrimination on grounds of nationality. In *Myrie (No 2)*, the Court said at [84]:[58]

> Within the scope of application of the Treaty Article 7 RTC prohibits discrimination on grounds of nationality. Ms Myrie alleges that she was treated by Barbados in the way that she was only because of her Jamaican nationality. Given the apparent lack of any specific rules in this area (see Article 7.2 RTC), the Court must address this claim from the standpoint of relevant principles of international law. Discrimination in the context of Caribbean Community law occurs where, within the scope of application of the Treaty, the facts of the case disclose treatment that is worse or less favourable than is accorded to a person whose circumstances are similar to those of the complainant except for their and the complainant's nationality, with no objective and reasonable justification for the difference in treatment. Differentiated treatment is not necessarily less favourable treatment. Invariably, though not always, discrimination must be inferred and so, where a claimant establishes facts, including for example the presentation of statistical evidence or a proven pattern of conduct, that raise a *prima facie*

[56] [2017] CCJ 1 (OJ), (2017) 90 WIR 251 at [15] - [16].
[57] *Myrie* (n 19).
[58] ibid at [84] (footnotes omitted).

> case that the defendant State is engaged in discriminating on grounds of nationality, the burden shifts to that State to disprove the discrimination. If there is no or no satisfactory explanation for the treatment then it is reasonable to infer discrimination on that basis.

[139] The Claimants have submitted that the Court is not bound by its dicta in *Douglas.* They argued that the dicta were obiter and did not bind this Court. They also contended that the dicta ought to be revisited after proper analysis and reference to authorities on the point.

[140] The Court accepts that, separate and apart from its power of revision contained in Article 219, it may revisit a previous decision where there are very clear grounds for doing so. However, this is not to be done lightly and without the fullest argumentation from the parties involved. It must be remembered that Article 221 of the RTC provides that judgments of the Court shall constitute legally binding precedents for parties in the proceedings before it.[59] On the application of Article 221, the Court has stated that:[60]

> [20] The court's interpretation of art 221 as embracing a system of binding precedent for all member states and the Community is supported by the views of those closely associated with the drafting of the Revised Treaty. For example, former Justice of the Court, Duke Pollard states:
>
> 'Article 221 of the Revised Treaty stipulates that judgments of the Court shall constitute legally binding precedents for parties in proceedings before the Court unless such judgments have been revised in accordance with Article 219. This provision constitutes, in the present submission, an important innovation in traditional international law which applies the principle of *jurisprudence constant*, that speaks to the tendency of international tribunals to follow previous decisions on an issue, but establishes no requirement to do so. By requiring the CCJ to apply the doctrine of *stare decisis* in arriving at judgments, however, competent decision-makers of CARICOM were concerned to ensure certainty in the applicable norms, stability of expectations on the part of economic actors and predictability of outcomes for investment decisions by investors. It is contemplated that the doctrine of *stare decisis* would be applied flexibly. In

[59] Revised Treaty of Chaguaramas (n 31) art 221.
[60] *Myrie v State of Barbados* [2012] CCJ 3 (OJ), (2012) 81 WIR 232 at [20] - [21] (footnote omitted).

effect, competent decision-makers sought to ensure that the Court would promote dynamic stability in the applicable law and not espouse the petrification of relevant norms'.

[141] The Court's case law has already demonstrated that its approach to Article 221 is consistent with the above views. One of the reasons why States were invited to make submissions on the relevant issues before the Court in *Trinidad Cement Ltd v The State of the Co-operative Republic of Guyana*[61] was the recognition that the Court's resolution of the issues would bind *all* Member States.

[142] This Court has made its determination on the interpretation of the prohibition on non-discrimination under Article 7 as it relates to the scope of application of the RTC. In previous cases Member States have been invited to make submissions on relevant issues. No Member State has questioned the meaning and scope of Article 7 as interpreted by the Court. The Court's prior decisions on the interpretation and application of the principle of non-discrimination stand as a matter of certainty and thus stability for economic actors and investors, such as the Claimants, within CARICOM.

[143] The Claimants further argue they are entitled to rely on Article 7 since they were involved in cross-border economic activities and these activities fell within the scope of application of the RTC. It must be noted that the Court in *Richards (No 1)*[62] decided that on the facts as pleaded by the Claimants, the Defendant's actions were to be considered '[A]ctivities in a Member State involving the exercise of governmental authority…conducted neither on a commercial basis nor in competition with one or more enterprises' as defined in Article 30(2) and 30(3). Accordingly, those actions of the Defendant fell outside the scope of Chapter Three of the RTC. Consequently, there could be no breach of Article 7 with respect to the enjoyment of the rights under Chapter Three arising from actions outside the scope of that Chapter. It would be curious if despite this judgment, the Claimants were now allowed to rely on the provisions of Chapter Three to establish a breach of the

[61] *Trinidad Cement Ltd* (n 17).
[62] *Richards (No 1)* (n 2) at [41].

RTC, to invoke Article 7, in support of the argument that they have been discriminated against.

[144] Furthermore, to invoke Article 222 of the RTC, and to have *locus standi* to commence an originating application before the Court, a person must make out an arguable case that a right or benefit conferred by or under the RTC on a Contracting Party shall enure to the benefit of such a person directly. In addition, that person must also make out an arguable case that they have been prejudiced in respect of the enjoyment of the right or benefit. These provisions make it clear that to obtain the leave of the Court, the person seeking such leave must establish an arguable case that there has been a breach of a right or benefit and that they have been prejudiced in respect of that right or benefit.

[145] Drawing attention to these provisions is not meant to reopen the issue of Article 222 standing. What is intended is the provision of clarity that Article 7 does not exist as a substantive right or benefit, but rather as a fundamental principle of the RTC that is to be applied to such substantive rights which are conferred by or under the RTC. The person alleging a breach of a right or benefit within the scope of application of the RTC must therefore identify the right or benefit which is alleged to have been breached, and to which the principle of non-discrimination contained in Article 7 applies. As this Court said in *Douglas*, the purpose of the adoption of Article 7 is to ensure that the rights enuring expressly or by necessary implication upon persons of the Community are not thwarted because of discrimination based on nationality only.

[146] The case of *R (Fratila) v Secretary of State for Work and Pensions*[63] is useful in this context. The United Kingdom ('UK') Supreme Court heard the claimant's challenge to certain domestic UK Social Security Regulations. The claimant contended that the Regulations breached Article 18 of the Treaty on the Functioning of the European Union ('TFEU') which prohibits discrimination on the ground of

[63] [2021] UKSC 53, [2022] 3 All ER 1045.

nationality within the scope of application of the Treaties. On the other hand, the Secretary of State argued that Article 18 TFEU did not apply to domestic law, but only applied to a claimant who had an EU law right of residence, and that a right of residence that arose from domestic law was not sufficient to invoke Article 18 TFEU. The UK Supreme Court upheld the submission of the Secretary of State based on jurisprudence from the CJEU. It held that every EU citizen may rely on the prohibition on grounds of nationality only to situations governed by EU law with respect to which the TFEU does not lay down specific rules on non-discrimination.

[147] The Claimants relied on the case of *Collins*[64] for the fact that the ECJ held that the principle of non-discrimination applied to copyrights and related rights although these were not specifically referred to in the Treaty. The ECJ determined that musical works incorporated into phonograms constitute goods which are traded and so are governed by the provisions of Community law dealing with trading of goods and services. This Court has not made a definitive finding on whether the insurance policies which the Claimants purchased are goods to be governed by the articles of the RTC that attract protection for consumers. In the instant case the Claimants' contention that their purchase of certain insurance policies from BAICO should have attracted the 'redress' afforded by Community law and as such their exclusion from the 'redress' given by the Defendant was discriminatory on the ground of nationality only, cannot withstand the finding of this Court that such redress is inapplicable to the Claimants' circumstances. As a corollary, Article 7 is also inapplicable.

[148] The Court finds support for its position that Article 7 is not a stand-alone provision in David S Berry, *Caribbean Integration Law*[65]. Professor Berry points out that Article 7(1) is expressly limited, beginning with the phrase '[w]ithin the scope of application of this Treaty.' He posits that the phrase highlights the fact that the right

[64] Joined Cases C-92/92 and C-326/92 *Collins v Imtrat Handelsgesellschaft mbH* EU:C:1993:847, [1993] ECR I-5145, confirmed in Case C-360/00 *Hessen v Ricordi* EU:C:2002:346, [2002] ECR I-5089, para 24 and Case C-28/04 *Tod's SpA v Heyraud SA* EU:C:2005:418, [2005] ECR I-5781, para 22.
[65] David S Berry, *Caribbean Integration Law* (Oxford University Press, 2014) 226.

of non-discrimination only applies to matters falling within the scope of the RTC. Accordingly, before there can be any determination of discrimination under Article 7, the right existing under the RTC, the exercise of which is being impaired, must be identified. In other words, Article 7(1) is not free standing or open ended.

[149] Professor Berry also notes that Article 7(1) contains the word 'only' in the phrase 'discrimination on grounds of nationality only'. He points out that this is an unusual phrase and is not parallelled in the text of treaties of other regional organisations. For example, Article 18 TFEU prohibits 'discrimination on grounds of nationality', whilst Article 7 of the RTC prohibits 'discrimination on grounds of nationality only.' This distinction is important and must be recognised.

[150] The Court concludes that the Claimants have not presented any convincing reason for the Court to revisit its decision in *Douglas* that Article 7 of the RTC is not standalone. Accordingly, the Claimants would have to prove that there was a breach of a right or benefit conferred on them under Article 184(1)(j) to rely on Article 7. Additionally, to prove that they have been discriminated against on the basis of nationality only, the Claimants must establish (1) that they were treated worse or less favourably than persons whose circumstances are similar to theirs (the comparators), except for their and the comparators' nationality; and (2) that there was no objective and reasonable justification for the difference in treatment and (3) that the worse or less favourable treatment occurred in the context of activity that was within the scope of the RTC.

(1) *Were the Claimants Similarly Circumstanced?*

[151] For the Claimants to establish a case of discrimination under Article 7, in accordance with the test in *Myrie (No 2)*, the facts must first disclose that the circumstances of the policyholders of CLICO, CIB and BAT were similar to that of the BAICO policyholders except for their and the latter's nationalities. The

Claimants must then establish that they were treated worse or less favourably by the Defendant.

[152] The Defendant placed reliance on the judgment of the Joined Cases of *Council of the European Union v Chrysostomides & Co LLC*[66] in considering whether the Claimants had established comparability. The Grand Chamber of the CJEU was asked to adjudicate on an appeal in which the applicants had sought compensation for damages allegedly suffered by them because of certain decisions taken by the European Central Bank relating to the grant of financial assistance, and in particular, emergency liquidity assistance, to the Republic of Cyprus. As part of the measures implemented, the Government of Cyprus directed the sale of two bank branches which were established in Greece, while also providing for the recapitalisation of one of the banks at the expense of its unsecured depositors, shareholders and bondholders. These measures caused a substantial reduction in the value of the applicants' deposits, shares and bonds. The applicants pleaded that they were discriminated against vis-à-vis the depositors and shareholders of other Member States whose currency was the euro which benefitted from financial assistance.

[153] The Grand Chamber endorsed the finding of the General Court that there had been no discrimination, noting at paras 202-203, that the measures to which the grant of financial assistance by the European Stability Mechanism ('ESM') might be subject in order to resolve the financial difficulties encountered by a Member State facing the need to recapitalise its banking system were likely to vary significantly from case to case, depending on a range of circumstances other than the size of the assistance in relation to the size of that State's economy. The Grand Chamber agreed with the General Court that those factors might include:

i. the economic situation of the recipient State;

ii. the prospects of the banks concerned becoming economically viable

[66] *Council of the European Union* (n 12), para 188.

again,

iii. the reasons which led to the difficulties encountered by them, including, where appropriate,

a. the excessive size of the banking sector of the recipient State in relation to its national economy,

b. the development of the international economic environment or an increased likelihood of future ESM interventions (or interventions of other international organisations, bodies and institutions of the European Union or States) in support of other States in difficulty which could require a preventive limitation of amounts dedicated to each intervention.

[154] While the facts and issues in *Chrysostomides* are different when compared to the instant case, the approach of the Grand Chamber has assisted the Court in considering the wide range of factors that can be considered in order to determine whether at the time of the bailout, the circumstances of the policyholders of CLICO, CIB and BAT were similar to BAICO policyholders, except for nationality. The Court has already recognised that the actions of the Defendant formed part of a governmental bailout of private commercial entities within the Defendant's jurisdiction to prevent severe economic dislocation to its economy. Further, the rescue and intervention by the Defendant of the financially troubled CLICO and BAT, provision of liquidity support, injection of public funds and the purchase of the rights of some policyholders of CLICO and BAT, were carried out with the clear aim of containing systemic risks to the economy of Trinidad and Tobago and were part of a decision by the Defendant to safeguard its economy. The purpose of the bailout and the serious risk posed to the economy of Trinidad and Tobago without the bailout, because of the sheer size and impact of these private companies, must be borne in mind. When these factors are taken into account, the Court does not agree that the circumstances of the policyholders of CLICO, CIB and BAT were similar to BAICO policyholders.

(2) *Was there an Objective and Reasonable Justification for the Difference in Treatment?*

[155] As to whether there was an objective and reasonable justification for the difference in treatment, it is undisputed that should the Claimants' arguments be correct, it would have meant that the Defendant would have been responsible for bailing out all the policyholders, not only in Antigua and Barbuda and in Grenada, but all those BAICO policyholders from other territories in the Caribbean where BAICO policies were sold. According to the *Opinion on Recognition of Foreign Proceedings*[67] annexed to the Witness Statement of Jean Green-Thompson, BAICO has/had branch operations in 14 jurisdictions: Anguilla, Antigua and Barbuda, Bermuda, The Cayman Islands, Curacao, Dominica, Grenada, Guyana, Montserrat, Panama, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines and The Turks and Caicos Islands. BAICO also operated through subsidiaries in a further five territories: Aruba, Barbados, the British Virgin Islands, Curacao, and Trinidad and Tobago. It could not have been within the contemplation of the framers of the RTC that the Member State, in such circumstances, would be obliged to compensate all BAICO policyholders in all CARICOM states for all their loss and damage. The Court accepts that this is an objective and reasonable justification for the alleged difference in treatment of the companies.

[156] In addition, the Defendant has helpfully referred to recent European Union jurisprudence which has assisted the Court in assessing the objectivity and reasonableness of the treatment meted out to the Claimants. In *Ryanair DAC v European Commission*[68] and *Ryanair DAC v European Commission*[69], Ryanair, an airline established in Ireland, challenged the decisions of the European Commission to permit Member States of the EU to grant State aid during the COVID-19 pandemic in the form of a State guarantee on loans to certain airlines which were either incorporated in that Member State or considered important to secure connectivity to the Member State, to the exclusion of Ryanair. Ryanair contended that the decisions did not satisfy the conditions in the TFEU for the grant of State

[67] Record, 'Witness Statement of Jean Green-Thompson', 9327.
[68] Case T-388/20 *Ryanair DAC v European Commission* EU:T:2021:196, (14 April 2021).
[69] Case C-320/21 P *Ryanair DAC v European Commission* EU:C:2023:712, (28 September 2023).

aid, but also that they infringed the principles of non-discrimination and the freedom to provide services and the freedom of establishment.

[157] The General Court examined the objective of State aid to Finnair which was to ensure that Finnair had sufficient liquidity to maintain its viability and air services while the COVID-19 pandemic seriously disrupted the whole of the Finnish economy, and to prevent its possible failure from further disrupting that economy. To Ryanair's claim that the favourable treatment given to Finnair was neither necessary nor proportionate, the General Court held that the grant of the State guarantee to Finnair only was necessary, to pursue this objective taking into consideration that (1) Finnair likely faced the risk of insolvency due to the sudden erosion of its business caused by the COVID-19 pandemic; (2) that Finnair's insolvency would, in turn, contribute to the severe impact on the Finnish economy, including its supply chain security; (3) having an air transport network which functions correctly was instrumental for the economy of the country as a whole, and its potential disappearance would have harsh consequences for many regions and (4) the Finnish authorities' conclusion that, in view of its importance for the Finnish economy, Finnair's insolvency would further aggravate the current serious disturbance in the country's economy. Granting aid to all airlines operating in Finland on the basis of their market share would essentially reduce the amount of aid granted to Finnair, their liquidity needs would not be covered and therefore serious repercussions for the Finnish economy would result.

[158] Like the Claimants in this case, Ryanair contended that if a Member State decided to adopt support measures under the provisions of the TFEU which permitted State aid, it would be obliged to do so in respect of all undertakings which suffered damage. The General Court rejected Ryanair's arguments, stating that it was no way apparent from the wording of Article 107(2)(b) TFEU, read in light of the objective of that provision, that only aid granted to all the undertakings affected by the damage caused, in particular, by an exceptional occurrence may be declared to be compatible with the internal market within the meaning of that provision. Even

if it is granted only to one undertaking, aid may, as appropriate, be intended to make good that damage, and in full compliance with EU law, fulfil the objective expressly referred to in that provision. A contrary interpretation of that Article would deprive the provision of much of its effectiveness.

(3) *Was this Treatment an Activity Within the Scope of the RTC?*

[159] Earlier in this judgment [143] this Court noted that *Richards (No 1)*[70] decided that the relevant actions of the Defendant fell outside the scope of Chapter Three of the RTC. It therefore follows that there could be no breach of Article 7 with respect to the enjoyment of the rights under Chapter Three arising from actions outside the scope of that Chapter. There is therefore no need to discuss this issue further in the present context.

[160] The Court concludes that the Claimants' claim which relies on a breach of Article 184(1)(j) and Article 7 of the RTC must fail.

Conclusion

[161] The Court concludes that the Claimants' claim which relies on a breach of Article 184(1)(j) and Article 7 of the RTC must fail.

[162] Having so stated, it must be said that the Court is sensitive to the tremendous losses sustained by the Claimants and all those who were affected by the CLF implosion. These losses not only were a consequence of a global financial collapse but also stemmed from regulatory weaknesses. It is hoped that the necessary mechanisms have been put in place by all Member States to avoid or at least ameliorate the consequences of a similar catastrophe in the future. The Defendant offered to and did, in fact, assist in stemming losses sustained by BAICO policyholders. This is

[70] *Richards* (n 2) at [41].

commendable and it is only regrettable that more assistance could not have been provided.

Costs

[163] In *Hummingbird Rice Mills Ltd v Suriname*[71] the Claimant was successful on only one claim against the First Defendant, Suriname, and failed on the claims against the Second Defendant, CARICOM. The Court ordered[72] Suriname to pay 50 per cent of the Claimant's costs and in relation to CARICOM, the Court relied on r 30.1(3)[73] in ordering that the CARICOM and the Claimant bear their own costs. The Court stated:[74]

> What does or does not amount to exceptional circumstances is to be determined on a case by case basis. At this nursery stage of the development of Caribbean Community law, it is important that the burden of establishing the basic principles underpinning the Single Market should not weigh too heavily and disproportionately on private entities and thus discourage the bringing of important issues of economic integration law before the Court.

[164] This Court considers that the instant claim allowed important issues to be ventilated involving provisions of the RTC that had never before been the subject of litigation. The claim brought front and center the issue of competition policy and more so consumer protection and permitted the Court to remind and urge Member States to implement their obligation to enact harmonised consumer protection legislation. The case permitted the exposure of gaps and vulnerable areas within the legal infrastructure which must be addressed with alacrity if the full benefits of the CSME are to be realised. The case permitted the Court the opportunity to echo the mandate of COTED for Member States to adopt the Draft Legislation contemplated in the 42nd and 43rd meetings of COTED. In addition, it must be acknowledged

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[71] [2012] CCJ 1 (OJ), (2012) 79 WIR 448.
[72] *Hummingbird Rice Mills Ltd v Suriname* [2012] CCJ 2 (OJ).
[73] Now Caribbean Court of Justice (Original Jurisdiction) Rules 2024 r 29.1(3).
[74] *Hummingbird Rice Mills Ltd* (n 72) at [6].

that this case is an exceptional one in which many of the Claimants who are natural persons have already suffered severe financial losses and hardships. Accordingly, the Court finds that r 29.1(3) of the Original Jurisdiction Rules 2024 is applicable and that parties should bear their own costs.

Disposition

[165] The Claim is dismissed. The parties shall bear their own costs.

/s/ A Saunders

Mr Justice A Saunders (President)

/s/ W Anderson

Mr Justice Anderson

/s/ M Rajnauth-Lee

Mme. Justice Rajnauth-Lee

/s/ A Burgess

Mr Justice Burgess

/s/ P Jamadar

Mr Justice Jamadar

APPENDIX

STATEMENT OF AGREED FACTS

The parties

1. According to the Amended Originating Application, the Claimants comprise citizens of Antigua and Barbuda, citizens of Grenada, institutions established and recognised within Antigua and Barbuda pursuant to the laws of Antigua and Barbuda, and institutions established and recognized within Grenada pursuant to the laws of Grenada, who held annuity and investment products issued by British American Insurance Company Limited ("**BAICO**"), a company incorporated in the Bahamas, called the Executive Flexible Premium Annuity ("**EFPA**").

2. The Defendant is the Republic of Trinidad and Tobago.

3. The Caribbean Community (**"CARICOM**") is established by Article 2 of the Revised Treaty of Chaguaramas ("**RTC**") and is recognised as successor to the Caribbean Community and Common Market. Antigua and Barbuda, Grenada and Trinidad and Tobago are all Member States of CARICOM and are parties to the RTC.

Background to the claim

4. The Claim arises out of the financial collapse in 2009 of the Trinidadian conglomerate CL Financial Ltd ("**CLF**") and the decision of the Government of the Republic of Trinidad and Tobago ("**GORTT**") to rescue certain of CLF's insurance and financial subsidiaries, including Colonial Life Insurance Company Limited ("**CLICO**") and British American Insurance Company (Trinidad) Limited ("**BAT**").

5. CLF, CLICO and BAT are limited liability companies incorporated in Trinidad and Tobago.

6. CLF was the largest privately held conglomerate in Trinidad and Tobago and one of the largest in the Caribbean. It is the parent company of the CL Financial Group of Companies which operated in a wide and diverse field. The CLF Group provided the following services inter alia: banking and financial, manufacturing, trading, retail and distribution, general and life insurance, medical, forestry and agriculture, real estate development, energy and petrochemicals, marine, media and communication. In early 2009, the CLF Group owned or controlled over 30 companies plus numerous additional subsidiaries under many of those companies, located in the Caribbean, the USA, Europe and the Middle East.

7. The financial services sector was a significant part of the CLF Group's operations. Its 2007 Annual Report lists 16 principal financial subsidiaries of the CLF Group including CLICO, BAICO, CIB, and Republic Bank Limited, the largest bank in Trinidad and Tobago.

8. BAICO was incorporated in the Bahamas in 1920. BAICO had branches or agencies in a number of Eastern Caribbean countries.

9. BAT is not a subsidiary of CLF as 99% of its issued shares are held by BAICO.

10. By a services agreement dated 1 December 2005, between British American Management Services Limited ("**BAMSL**") and BAICO, BAMSL, a limited liability company incorporated in Trinidad and Tobago, was engaged by BAICO to provide certain administrative, financial management and other services to BAICO and its subsidiaries.

The regulation of insurance services in Trinidad and Tobago and the operations of CLICO and BAT

11. At all material times CLICO and BAT were registered under the Insurance Act to carry on long-term insurance business in Trinidad and Tobago.

12. CLICO was one of the largest financial institutions in Trinidad and Tobago, with a customer base of around 260,000 clients, representing approximately 20% of the population of Trinidad and Tobago, and including more than 15,000 pensioners and around 100 credit unions. BAT had a far smaller client base, with approximately 52,000 persons.

13. Over time, both CLICO and BAT sold traditional insurance policies (life insurance, pensions and health insurance), as well as a range of Short Term Investment Products ("**STIPs**") which were sold to resident as well as non-resident individuals and groups. For regulatory purposes, STIPs were structured so as to fall within the legislative provisions governing life insurance contracts, in respect of which the companies were required to establish and maintain statutory funds. In economic terms, STIPS shared many features with high-return investment products since they offered investors short maturities and annual returns of up to 12%. Among the STIPs offered by CLICO and BAT was the Executive Flexible Premium Annuity series ("**EFPAs**")[1].

Material chronology of events

14. According to the CLF Group's audited financial statements as at 31 December 2007 (Annexure B to the Claim, page 260 of the Record), the CLF Group's assets stood in the region of TT$100 billion. 43% of this related to companies operating in the financial services sector. TT$100 billion was broadly equivalent to 70% of Trinidad and Tobago's Gross Domestic Product ("**GDP**") in 2009.

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[1] Executive Flexible Premium Annuity, Executive Single Premium Annuity, Group Advanced Protection or Guaranteed Annuity Advanced Protection Policy issued by CLICO and Executive Flexible Premium Annuity, Single Premium Annuity, Corporate Savings Contract and Flexible Premium Annuity II issued by BAT.

15. In January 2009, CLF's financial and insurance subsidiaries were faced with a run of withdrawals from depositors and policyholders which they were unable to pay. As a consequence, CLF approached GORTT for financial assistance and GORTT responded to CLF's request for assistance.

16. On 7 January 2009, the Governor of CBTT, the Inspector and Deputy Inspector of Financial Institutions held a meeting with Mr Lawrence Duprey, CLF's Executive Chairman, at the request of CBTT at which the Governor expressed concerns held by CBTT and the Inspector of Financial Institutions about the business operations of CLICO and CIB.

17. Thereafter, on 13 January 2009, a follow-up meeting was convened at the request of one of CLF's advisors and CLF presented CBTT with a copy of a letter dated 13 January 2009. In that letter signed by CLF's Group Executive Chairman, Mr Lawrence Duprey, CLF indicated to CBTT that:
    a. the global financial crisis was affecting the availability of liquidity in certain parts of the financial system in Trinidad and Tobago;
    b. CLF had been disproportionately affected by this and many customers were calling on their reserve cash positions;
    c. all Group companies had been able to deal with their obligations to customers to date but CLF wished to develop a comprehensive contingency plan to meet any further developments;
    d. Group assets could not be readily liquidated without incurring significant loss in value;
    e. CLF was in the process of realigning the Group's asset-liability structure, including the merger of certain entities within the Group with strategic partners and/or sale of certain assets in order to raise liquidity;
    f. however, given that these initiatives would take some time, if the

financial crisis deepened in the local market, CLF might need urgent liquidity support to be made available to the Group;

18. it would like to discuss the approach of CBTT toward supporting the financial sector and by extension the CLF Group if conditions were to deteriorate. The parties are agreed as to the terms of the MOU exhibited as F to the Amended Originating Application.

19. On 31 January 2009, CBTT assumed control of CIB pursuant to sections 44C and 44D of the Central Bank Act, Chap. 79:02 of the Laws of Trinidad and Tobago and CIB's licence to operate as a financial institution was revoked. Its third-party deposits were transferred to First Citizens Bank Limited ("**FCB**") with promissory notes provided by CBTT to FCB as consideration for the transfer. CBTT's control of CIB came to an end on 17 October 2011 when CIB was, by Order of the High Court, placed into compulsory liquidation.

20. By Legal Notices Nos. 32 and 33 of 2009 dated 13 February 2009, the CBTT announced that it was taking control of CLICO and BAT pursuant to section 44D of the Central Bank Act. CBTT appointed a new Board of Directors and Chief Executive Officer at CLICO and appointed a manager at BAT who was seconded from CBTT. CLICO and BAT remained under the control of CBTT.

21. By an agreement made on 12 June 2009, between GORTT, CLF, the Directors of CLF and a majority of the shareholders of CLF ("**the Shareholders' Agreement**"), it was agreed that a new board of directors would be appointed to CLF to take over the management and control of the assets of CLF in order to execute the actions contemplated by the MOU.

22. In the course of August and September 2009, judicial managers were appointed to manage BAICO's affairs in the various jurisdictions in which it sold insurance policies.

23. By Order of the Supreme Court of Bahamas dated 8 September 2009, BAICO was placed under judicial management pursuant to section 77(1)(b) of the Bahamian Insurance Act 2005 and Mr Juan Lopez of KPMG Restructuring Limited was appointed as Judicial Manager.

24. On 17 June 2011, BAICO acting through its Judicial Manager in the Bahamas sued CLF in the High Court of Trinidad and Tobago in respect of a debt claim of US$39,575,000 together with interest from 1 January 2000 payable under promissory notes issued to BAICO by CLF ("**the BAICO Claim**") at the time CLF purchased BAICO.

25. On 7 November 2017, the Supreme Court of the Bahamas sanctioned a Plan of Arrangement made between BAICO and its Plan Creditors, pursuant to the Bahamian Plan of Arrangement (British-American Insurance Company Limited) Act, 2017, for persons with claims against BAICO arising out of insurance contracts issued by BAICO, other than claims arising out of Excluded Business as defined by the Plan ("**the Plan of Arrangement**").

Steps taken by GORTT vis-à-vis CLICO and BAT

26. In the course of 2009 and 2010, GORTT injected funds into CLICO and BAT in the form of cash and government bonds.

27. GORTT solicited professional legal, financial and accounting advice and in August 2010 took the decision to (i) proceed with an initial partial payment of some policyholders and the deferral of remaining liability for repayment over a longer term; and (ii) separate EFPA policyholders from traditional policyholders and sell the traditional insurance portfolios of CLICO and BAT to a suitable purchaser at a price consistent with independent valuations. This was announced in September

2010 by then Minister of Finance and former Governor of CBTT, Winston Dookeran ("**the September 2010 Plan**").

28. Under the September 2010 Plan, it was intended that GORTT would purchase certain rights of EFPA policyholders against CLICO and BAT in exchange for payments and the issue of bonds to them. The policyholders who accepted GORTT's offer under the September 2010 Plan, and later the Revised Plan as defined below, were referred to as "**assenting STIP holders**."

29. After the announcement of the September 2010 Plan, implementation was delayed to allow GORTT to receive representations from those likely to be affected. The feedback received over this period, as well as GORTT's continuous efforts to achieve a better result for EFPA policyholders resulted in several amendments to the September 2010 Plan, detailed below and referred to compositely as "**the Revised Plan**":

    (a) First, in November 2010, GORTT announced the creation of a separate fund to protect credit unions which held STIPs – credit unions being an integral component of the domestic financial system with a large number of small account holders;
    (b) In December 2010, Cabinet agreed to the establishment of a special 'window' to provide relief to persons in circumstances where access to the necessities of life was compromised as a result of the denial of access to the proceeds of their policies with CLICO and BAT;
    (c) In April 2011, Cabinet agreed that the payment of outstanding balances to CLICO and BAT policyholders should be effected via the issuance of 20 non-interest bearing bonds of varying maturities from 1 to 20 years each bearing the same date of issue; and
    (d) In August 2011, Cabinet agreed further that EFPA investors would be permitted to exchange the last 10 years of the government bonds for units in an equity based investment fund to be sponsored by GORTT. This was

referred to initially as "NEL2" and later as CLICO Investment Fund or "**CIF**".

30. In September 2011, the Trinidad and Tobago Parliament enacted the Purchase of Certain Rights and Validation Act, No. 17 of 2011 to give effect to the Revised Plan.

31. The Revised Plan was the subject of judicial review and constitutional challenge in the domestic courts of Trinidad and Tobago, in which certain Trinidad and Tobago policyholders of CLICO contended that GORTT had given assurances that they would be repaid all sums due under their policies, that they had a substantive legitimate expectation that they would be so paid, and that GORTT should be ordered to comply with the assurances. The Judicial Committee of the Privy Council ruled on this challenge in **United Policyholders Group v The Attorney General of Trinidad and Tobago** [2016] UKPC 17 [2016] 1 WLR 3383.

32. On 27 March 2015, CBTT, pursuant to its obligations under section 44F of the Central Bank Act, and following consultation with the Minister of Finance, announced a further phase of the plan in the resolution strategies for CLICO and BAT ("**the 2015 Resolution Plan**").

33. The 2015 Resolution Plan involved the following key elements:

    a. The sale of the "traditional insurance portfolios" of CLICO and BAT to suitable purchasers at prices consistent with independent valuation;
    b. Phased payments to STIP holders including GORTT (as assignee of the rights of STIP holders who had accepted its offer) from the monetization of assets or transfer of assets in kind;
    c. Monetization of assets or transfer of assets in kind to repay other creditors including GORTT.

Further details are set out in a media release by CBTT dated 27 March 2015.

34. By an instrument dated 17 November 2010, GORTT appointed Sir Anthony Colman Q.C. as sole Commissioner to inquire into, among other things, the causes of the failure of CLICO and BAT. The Colman Commission of Enquiry delivered its report to GORTT in 2016.

DATED the 26th day of May 2023.

Miguel Vasquez
Attorney at Law for the Claimants

Murvani Ojah Maharaj
Attorney at Law for the Defendant

AGREEMENT

BETWEEN

CL FINANCIAL LIMITED ("CLF")

AND

THE GOVERNMENT OF THE REPUBLIC OF TRINIDAD AND TOBAGO ("GORTT")

AND

THE DIRECTORS OF CL FINANCIAL LIMITED ("PRESENT DIRECTORS")

AND

THE MAJORITY SHAREHOLDERS OF CL FINANCIAL LIMITED ("THE MAJORITY SHAREHOLDERS")

DATED AS AT THE ____ DAY OF JUNE 2009

BETWEEN

CL FINANCIAL LIMITED ("CLF")

AND

THE GOVERNMENT OF THE REPUBLIC OF TRINIDAD AND TOBAGO

("GORTT")

AND

THE DIRECTORS OF CL FINANCIAL LIMITED ("PRESENT DIRECTORS")

AND

THE MAJORITY SHAREHOLDERS OF CL FINANCIAL LIMITED

("THE MAJORITY SHAREHOLDERS")

AGREEMENT

REPUBLIC OF TRINIDAD AND TOBAGO:

AGREEMENT

THIS AGREEMENT ("Agreement") is made the ___ day of June, 2009, by and among:

1) **CL FINANCIAL LIMITED**, a company incorporated under the Laws of Trinidad and Tobago having its registered office situate at 41-43 St, Vincent Street, Port of Spain, in the Island of Trinidad (hereinafter called "CLF") of the FIRST PART;

2) **THE GOVERNMENT OF THE REPUBLIC OF TRINIDAD AND TOBAGO** acting through the Minister of Finance, whose office is situate at Eric Williams Plaza, 1 St Vincent Street, in the said City of Port of Spain in the said Island of Trinidad ("GORTT") or, as appropriate, "a Nominating Party") of the SECOND PART;

3) **THE DIRECTORS OF CLF** whose names are listed in Schedule A hereto (hereinafter collectively called "the Present Directors" and individually "a Present Director") of the THIRD PART; and

4) **THE MAJORITY SHAREHOLDERS OF CLF** (hereinafter called "the Majority Shareholders" or, as appropriate, collectively called "a Nominating Party") of the FOURTH PART.

WHEREAS:

A. By a written Memorandum of Understanding made the 30th day of January 2009 (hereinafter referred to as "the MOU") GORTT of the One Part and CLF acting for itself and as agent for its affiliates including Colonial Life Insurance Company (Trinidad) Limited (hereinafter referred to as "CLICO"), CLICO Investment Bank Limited (hereinafter referred to as "CIB"), and British American Insurance Company (Trinidad) Limited (hereinafter referred to as "BA" of the Other Part agreed as their stated understanding, *inter alia*, that certain steps be taken to correct the financial condition of CLICO, CIB and BA in order to protect the interest of depositors, policy holders, creditors

and shareholders of these institutions.

B. CLF is a holding body corporate (within the meaning of the Companies Act Chap.81:01 of the Laws of Trinidad and Tobago ("the Act")) which holds interests in various subsidiary companies and which includes, without limitation, 100% shareholding in CLICO and CIB and 82% shareholding in BA.

C. The Parties have agreed to enter into this Agreement for the purpose of regulating and formalising their relationship with each other and certain aspects of the affairs of and their dealings with CLF harmonious with the implementation of the MOU.

D. CLF and its Majority Shareholders agree with each other to comply with the terms and conditions of this Agreement.

E. The CLF Board of Directors ("the Board") was appointed at the last Annual General Meeting.

F. Since the date of the last AGM 5 persons have resigned or been removed from the Board with the result that there are currently 7 vacancies on the Board.

G. The existing Board of CLF has made certain disclosures in accordance with the MOU and will make further disclosures from time to time of the financial position of CLF as requested.

H. By a Claim Form filed on the 25th day of February 2009 the Central Bank of Trinidad and Tobago (a statutory corporation established under section 3 of the Central Bank Act Chap. 79:02) (hereinafter referred to as "CBTT") and CLICO as Claimants initiated High Court action C.V.2009-00651 (hereinafter referred to as "the said Court Action") against CLF. By the said Court Action the Claimants claims against the Defendant, inter alia, a declaration that in negotiating and/or concluding the sale of 17% of the shares of Clico Energy Company Limited (hereinafter referred to as "the said Sale" or "the Sale") evidenced to the Claimants by a letter of the Defendant dated the 17th February 2009, that without prior reference and/or notice to the Claimants and in the circumstances then obtaining the Defendant (a) committed an act that was unsafe or unsound practice and/or (b) committed an act that may directly or indirectly be prejudicial to the interest of the policyholders of CLICO having regard to the factors therein alleged. The Claimants further claim a declaration that they are entitled to all such inquiry and account in respect of the fair value of the said shares.

I. The purpose of this Agreement is that a new Board of Directors will, forthwith upon execution of this Agreement take over the management and control of the Assets of CLF

in order to execute the actions contemplated by the MOU and thus:

1. Correct the financial condition of CLICO, CIB and BA and mitigate the systemic risk that failure of these companies will pose and also to satisfy certain obligations of CIB;
2. Protect the interest of policy holders of CLICO, and BA and the third party depositors of CIB;
3. Ensure that debts of the CLF group are managed and as appropriate satisfied; and
4. Cause CLF to repay once obligations have been met such sums expended by GORTT in furtherance of the matters set out at 1 to 3 above after which the GORTT will exit participation in CLF under this Agreement and the GORTT Directors will resign and participate in their replacement as directors.

J. The Majority Shareholders, who for the purposes of this Agreement represents at least 66.16% of all voting and other rights of Shareholders agree to execute and carry into effect this Agreement and its terms.

NOW THEREFORE THIS AGREEMENT WITNESSES that in consideration of the respective covenants and agreements of the Parties contained herein and for other good and valuable consideration including the valuable consideration set out in the MOU (the receipt and sufficiency of which are hereby acknowledged by each of the Parties), **IT IS HEREBY AGREED** as follows:-

1. DEFINITIONS AND INTERPRETATION

In this Agreement (which expression shall be deemed to include the Schedules hereto):

1.1 Unless there be something in the subject or context inconsistent therewith the following expressions have the following meanings:-

"The Act" - means the Companies Act Chap. 81:01 and any amendments and any re-enactment or replacement thereof for the time being in force.

"Agreement" - means this Agreement dated the [ ] day of June 2009, as hereafter amended from time to time in accordance with the provisions hereof;

"Articles" - means the Articles of Continuance of CLF as of the date hereof, as are set forth in Schedule "C" hereto attached.

“the Articles” - means the Articles of Continuance, as amended from time to time in accordance with the terms of this Agreement and the Companies Act.

“By-Laws” means the By-Laws of CLF as of the date hereof, as are set forth in Schedule “D” hereto attached.

“Chairman” - means the Chairman of the Board of CLF appointed following the signing of this Agreement and holding such position from time to time during the pendency of this Agreement.

“Consultants” - means one or more advisors or consultants which the new Board in its sole discretion determines to appoint.

“Director” - means any Director of CLF appointed at any time following the signing of this Agreement and holding such post during the pendency of this Agreement.

“Majority Shareholders” - means the Shareholders whose names are listed in Schedule B hereto.

“Officer” - means the Chairman, Managing Director, other Directors and Corporate Secretary appointed as a result of this Agreement.

“Parties”, “Party” - means the Parties to this Agreement and their successors and permitted assigns.

“Person” means any individual, partnership, corporation, limited liability company, unlimited liability company, association, joint stock company, trust, joint venture, unincorporated organisation, or any other entity.

“Purpose Statement” means recital J hereof.

“Shareholder”, “Shareholders” - means the Parties whose names, at the time in question appear on the share register of CLF as the owner of any Shares but excluding any person who ceases to be a registered holder of any Shares of CLF during the pendency of this Agreement.

“Shares” - means the ordinary shares of CLF of which the issued number is

7,500,000.

“Special Majority” - means a vote of at least five (5) directors of the new Board of CLF are required for a decision to be binding.

“Trinidad” means the Republic of Trinidad and Tobago.

1.2 Reference to any statute or statutory provision includes a reference to that statute or statutory provision as from time to time amended, extended or re-enacted.

1.3 Words and phrases the definitions of which are contained or referred to in the Companies Act as defined shall be construed as having the meaning thereby attributed to them but excluding any statutory modification thereof not in force on the date of this Agreement.

1.4 Words and phrases the definitions of which are contained or referred to in the By Laws shall be construed as having the meaning thereby attributed to them.

1.5 Where words and phrases the definition of which appear both in the Act as defined and in the By Laws the definition in the By Laws shall be preferred.

1.6 Words importing the singular include the plural, words importing any gender include every gender, and words importing persons include bodies corporate and unincorporate; and (in each case) vice versa;

1.7 Reference to clauses and other provisions are references to clauses and other provisions of this Agreement and any reference to a sub-provision is, unless otherwise stated, a reference to a sub-provision of the provision in which the reference appears.

1.8 All warranties, representations, indemnities, covenants, agreements and obligations given or entered into by more than one person are given or entered into severally unless otherwise specified.

2. THE PRESENT BOARD OF DIRECTORS

2.1 APPOINTMENT OF NEW DIRECTORS BY FILLING OF EXISTING VACANCIES

2.1.1 By resolution in writing made in accordance with section 86(1) of the Act and substantially in the form annexed hereto as Schedule "E" the Present Directors, in exercise of their powers under section 77 of the Act ("the section 77 Appointment")

shall immediately following the execution of this Agreement, appoint to the Board of Directors of CLF the persons nominated by GORTT and the persons appointed by the Majority Shareholders, such appointments to take effect from the date of such resolution but no later than the date of this Agreement.

2.2 APPOINTMENT OF NEW CLF DIRECTORS

2.2.1 In the event that the casual vacancies contemplated to be filled at Clause 2.1.1 are all not so available, any of the new Directors shall appoint the outstanding CLF directors to be appointed by way of a section 77 Appointment forthwith so as to be in compliance with Clause 3.1.1 hereof.

2.3 RESIGNATIONS OF PRESENT DIRECTORS

2.3.1 The Present Directors shall procure that a meeting of Directors of the Company is duly convened and held immediately following the execution of this Agreement ("the Meeting") at which the matters provided for in clauses 2.3.2, 2.3.3, 2.3.4 and 2.4 below shall be effected.

2.3.2 Each Present Director shall resign in writing such resignation to be effective as of the date and time of the Meeting.

2.3.3 The Present Directors resigning under clause 2.3.2 above, shall together with his resignation deliver to CLF or to its order at the Meeting or within a reasonable time thereafter (being not more than 14 days) all notes, memoranda, books documents, papers (including copies), materials, keys, passwords, computer disks and other property of CLF or relating to any matter within the scope of the business or concerning any of the dealings or affairs of CLF or its subsidiaries then in his possession or which are or were last under his power or control to the extent that such director is reasonably able to provide such material in such a way as might be required in the event of a liquidation by a liquidator.

2.3.4 Notwithstanding the resignation of a Present Director in accordance with clause 2.3.2 above, that director shall, if requested by the New Board, use his best endeavours to provide to the New Board all and any further information within his knowledge or control regarding the identification, location and state of CLF Assets.

The Present Directors shall be expected to assist in the smooth transition of corporate management into the hands of the new Directors.

2.3.5 Any Present Director who resigns upon the making of this Agreement, whether or not reappointed shall be entitled in the ordinary course to receive such accumulated office holder or employment rights as he would usually expect to receive provided that such payment would not otherwise be in breach of the purpose of this Agreement.

2.4 OTHER MATTERS

At the Meeting, in accordance with the draft resolution attached hereto in Schedule F the following additional matter shall also be resolved:

(a) The resignations of the Present Directors from the Board of CLF shall be accepted;

(b) The Present Directors shall be removed and shall assist in procuring their replacement as authorised signatories on all CLF and CLF subsidiary controlled bank accounts of such Present Directors by at least one GORTT Director;

(c) By section 77 Appointment, the persons nominated by the Majority Shareholders shall be appointed to the Board of CLF, such appointments to take effect from the date of the Meeting.

3. THE NEW BOARD OF DIIRECTORS

3.1 CONSTITUTION OF THE NEW BOARD OF DIRECTORS

3.1.1 From and after the Meeting Date and at all times while this Agreement remains in force the Board shall consist of SEVEN (7) directors (subject to 4.1.1 below) who shall in the first instance be appointed for a fixed term of two (2) years and (subject as otherwise expressly provided in this Agreement) each Nominating Party shall be entitled to have appointed and to have removed up to the respective number of directors specified in the following provisions of this Clause.

3.1.2 The Majority Shareholders shall appoint, remove and replace such four (4) persons as GORTT shall from time to time nominate in writing as Directors of CLF and such persons upon election shall be known as “GORTT Directors”.

3.1.3 The Majority Shareholders shall have the right to nominate in writing three (3) directors for election to the Board of Directors of CLF from time to time or and such persons upon election shall be known as “CLF Shareholder Directors” (and whom together with the GORTT Directors shall from time to time be collectively called the “Appointed Directors”) which nomination shall be accepted by the Board.

3.1.4 Each Director elected pursuant to the agreement in Clause 3.1.1 above shall only be removed as a Director by the written request of the Nominating Party who nominated such Director for election as a Director to the Secretary of CLF and such Nominating Party shall also have the right to nominate a Director to replace such removed Director, which nominee shall be forthwith elected by the Majority Shareholders or by Section 77 Appointment.

3.1.5 The Present Directors and any Appointed Directors shall exercise their voting rights (at a meeting or by resolution in writing) to ratify the election, removal and replacement of “GORTT” Directors and “CLF Shareholder Directors" as the case may be on a timely basis in accordance with the written requests of GORIT and the Shareholders respectively under this Agreement.

3.1.6 Each Nominating Party agrees not to nominate any person to hold office as a Director save as provided in Clauses 3.1.1 to 3.1.5 above.

3.1.7 THE CHAIRMAN

3.1.7.1 The Chairman of CLF shall be appointed from among the directors of the Board nominated by GORTT.

3.1.7.2 The Chairman shall have an original and a casting vote.

3.2 REMOVAL AND REPLACMENT OF DIRECTORS AND DIRECTORSHIPS OF SUBSIDIARIES

3.2.1 For any cause deemed appropriate by the Board, a director may be removed from office by a special majority by the remaining directors of the Board. Causes that precipitate such action include but are not limited to,

3.2.1.1 Violation of the Purpose Statement, or relevant national or international laws that impact CLF's ability to conduct business;

3.2.1.2 Non-performance of the duties of their office;

3.2.1.3 It is open to the Board to examine the composition of the Boards of subsidiaries and in that regard to continue the appointment of any Present Director to the Board of subsidiaries of which he was a director pursuant to the advice so to do given by a sub-committee of the Board which sub-committee shall be drawn from two (2) GORTT directors and one (1) CLF appointed director and which shall be quorate with a membership of two (2) and which shall be empowered to make decisions by a simple majority.

3.3 TERMINATED DIRECTOR

3.3.1 If during the term of his appointment an Appointed Director dies, resigns, is removed from office, ceases to - be qualified as or otherwise ceases to be a Director of CLF ("Terminated Director"), then at the written request of the Nominating Party who nominated such Terminated Director for election as an Appointed Director, the Terminated Director shall be replaced as an Appointed Director by an appointee of the Nominating Party by instrument in writing to the Secretary of CLF and the Shareholders by resolution of the shareholders (at a meeting or in writing) held at the expiry of the Terminated Director's term shall ratify the appointment of the nominee.

3.4 MEETINGS OF DIRECTORS

3.4.1 The quorum for a meeting of the Board shall be four (4) Directors provided that there is at least one director present representing each of GORTT and the Shareholders.

3.4.2 The Directors may participate in a meeting of the Board by means of a conference telephone or any communication equipment that allows all persons participating in the meeting to hear and speak to each other. A person so participating shall be deemed to be present in person at the meeting and shall be entitled to vote or be counted in a quorum accordingly. In the case of decisions to be taken the resolutions agreed upon shall only be valid if adopted in manner provided in clause 3.4.3 below.

3.4.3 The Board may without convening a meeting of the Board at which the Directors are personally present, adopt a resolution if it is in writing contained in a letter or facsimile transmission signed by all the Directors and by a majority, or by a Special Majority as required) adopting the said resolution and shall be valid and effectual as a resolution duly passed at a meeting of the Board on such matter.

3.5 ACTIONS REQUIRING A SPECIAL MAJORITY OF THE DIRECTORS

3.5.1 The following matters shall require a Special Majority vote at a meeting of the Board; 3.5.1.1 Any remuneration or any other emoluments to officers of CLF;

3.5.1.2 Any remuneration to be paid to a Consultant appointed under this Agreement;

3.5.1.3 Any restructuring of the capital of CLF.

3.6 GOVERNANCE

3.6.1 The members of the Board are expected to maintain the highest levels of corporate governance.

3.7 INDEMNIFICATION

3.7.1 Subject to the provisions of this Agreement and to the extent permitted by law, every Present and New Director of CLF shall be entitled to the indemnities which arise under the Act from the proper and lawful execution of the duties of his office.

4. ACTIVITY AND CONDUCT OF THE NEW BOARD

4.1 MANAGING DIRECTOR AND SECRETARY

4.1.1 The New Board may appoint a Managing Director and upon such appointment the Managing Director shall carry out the day to day management of the business of CLF and report to the New Board with respect to same. If the Managing Director is not appointed from among those appointed to the New Board pursuant to Clauses 3.1.1 to 3.1.5 above, the expressed maximum number of Directors provided for by Clause 3.1.1 shall be varied to permit eight (8) directors to be appointed and the Managing Director shall be the eighth Director.

4.1.2 The Corporate Secretary of CLF shall be appointed by the New Board in accordance with the By-Laws.

4.3 APPOINTMENT OF CONSULTANT

4.3.1 The Board shall have the power in its sole discretion to appoint any Consultant or adviser that it believes is necessary and consistent with the purpose of this Agreement.

4.4 ACCOUNTING AND REPORTING

The Parties shall procure that:

4.4.1 The New Board of CLF shall establish an escrow account into which the proceeds of any and all sales of assets of CLF in furtherance of the MOU or otherwise as necessary shall be deposited ("the Escrow Account").

4.4.2 The New Board of CLF shall ensure that at all times there are maintained accurate and complete accounting and other financial records in accordance with the requirements of all applicable laws and generally accepted accounting principles as applicable in Trinidad.

4.4.3 The New Board shall ensure that monthly management accounts containing standard information to include details of assets, liabilities, profit and loss and cash flows and a summary of the current business activity shall be prepared and dispatched by CLF to the Parties within a reasonable time after their preparation at the end of the relevant month in question.

4.4.4 Each Party other than the Present Directors as directors and its respective authorised representatives shall be allowed access at all reasonable times to examine books and records of CLF which would otherwise be available to the Majority Shareholders.

4.4.5 The New Board shall ensure that an annual report of CLF is prepared and is prepared and dispatched to the Shareholders in manner consistent with standard corporate practice.

5. CLF'S BUSINESS

5. l Each of the Parties to this Agreement covenants to, and the Board once constituted and each of the Directors shall, use best endeavours to promote and develop the business of CLF in accordance with the Purpose Statement and the Shareholders shall accept that the exercise of their powers in relation to CLF shall be as determined by the Board during the pendency of this Agreement.

6. PROMAN/CLICO ENERGY

6.1 REVERSAL OF SHARE SALE

6.1.1 The Present Directors shall use their best endeavours to procure the reversal of the Sale.

6.2 SETTLEMENT OF COURT ACTION

6.2.1 GORTT agrees that if reversal of the Sale referred to at Clause 6.1.1 herein is agreed with Proman, they shall use their best endeavours to procure the discontinuance of the said Court Action.

7. FORBEARANCE RESTRAINT AND RESOLUTION

7.1 The Majority Shareholders during the pendency of this Agreement agree to forbear from taking any action which they might have been entitled to take but for this Agreement.

7.2 Within one hundred and eighty (180) days of the execution of this Agreement, or such further time as the Parties may reasonably require, the Parties will procure from the Central Bank of Trinidad and Tobago ("CBTT") a report of the calculation of the deficit in the Statutory Funds of CLICO and BA and any other indebtedness arising as a result of the MOU.

7.3 The Parties shall use their best efforts in assisting the New Board to restructure the repayment of loans and other debt from creditors in such a way as to maximise return to creditors as far as is reasonably practicable.

8. COVENANTS OF THE SHAREHOLDERS

8.1 The Majority Shareholders understand and agree that it is in the best interests of the shareholders or debenture holders, creditors, directors and officers of CLF that this Agreement be entered into and that CLF use all reasonable and proper means to effect the terms of this Agreement.

8.2 The Majority Shareholders shall:-

(a) exercise all voting rights and powers available to it in relation to CLF so as to give full effect to the terms of this Agreement, the MOU or any other agreement or arrangement entered into pursuant to this Agreement;

(b) procure that all third-parties directly or indirectly under its control refrain from acting in a manner which hinders or prevents CLF from carrying on

its business in a proper and reasonable manner and in accordance with the terms of this Agreement;

(c) act in good faith and reasonably in its business dealings with CLF;

(d) generally use its best endeavours to promote the objects and purposes of this Agreement and the MOU;

(e) do nothing to undermine this Agreement or the MOU; and,

(f) ratify this Agreement at any general meeting of CLF called for that purpose and in furtherance of this obligation shall execute and deliver perfected proxy forms in accordance with By-Law 74 authorising a named proxy-holder to vote in favour of such ratification.

8.3 During the pendency of this Agreement the Majority Shareholders shall not without the consent of the New Board, such consent not to be unreasonably withheld:

(a) grant, declare, create, sell, transfer or otherwise dispose of any right or interest in any shares of CLF it being expressly agreed and understood that this Agreement shall be binding on the Parties hereto and their respective successors and permitted assigns as to which such successor and assigns shall enter into direct covenants with the other parties to this Agreement (in a manner reasonably acceptable to each of them) to observe and perform this Agreement and it shall upon entry into such covenant be treated as a Shareholder for the proposes of this Agreement; and

(b) enter into any agreement in respect of the votes attached to any shares of CLF;

8.4 The Majority Shareholders shall continue so far as they are able to do so to support the appointment of any and all such directors as GORTT shall from time to time in their sole discretion determine to have appointed up to the limit of four (4) directors including the Chairman.

8.5 CLF shall not accept for registration in its Register of Members and other relevant books of record any transfer of shares by the Shareholders not made in accordance with the provisions of this Agreement and the Articles and By-Laws.

8.6 Any transfer of shares by the Shareholders attempted to be made other than in accordance with the provisions of this Agreement shall be void and of no effect.

9. TERMINATION AND REPAYMENT

9.1 CLF will repay to GORTT all such sums as GORTT shall have expended and invested in furtherance of the MOU and this Agreement as punctually as GORTT shall reasonably determine having given due consideration to any representation by CLF as to timing such repayment including such sums as have been advanced by CBTT for meeting liabilities of certain CIB depositors subsequent to intervention by CBTT.

9.2 This Agreement shall continue in full force and effect until the third (3rd) anniversary its signing, unless the objectives are achieved at a time prior to that date whereupon shall terminate forthwith, or unless repayment at Clause 9.1 hereof shall have occurred.

10. REPRESENTATIONS AND WARRANTIES

10. 1 Each Party as the case may be if such Party is a company hereby represents to the other Parties hereto that:

10.1.1 On and as of the date of this Agreement it is a corporation or company (as the case may be) duly organised, validly existing and in good standing under the laws of the jurisdiction of its organisation.

10.1.2 It has full corporate or company power and authority to enter into and perform this Agreement.

10.1.3 All actions necessary to authorise the execution and delivery of this Agreement and the performance of its obligations hereunder have been duly taken.

10.1.4 This Agreement has been duly executed and delivered by a duly authorised officer or other representative of such Party and constitutes the legal, valid and binding obligation of such Party enforceable in accordance with its terms.

10.1.5 No consent or approval of any other Person is required in connection with the execution, delivery and performance of this Agreement by such Party or otherwise agreement has been obtained as required by the terms of any governing statute applying to such Party.

10.1.6 The execution, delivery and performance of this Agreement does not violate the organisational documents of such Party or any other material agreement to which such Party is a signatory or by which it is bound.

10.1.7 If it has not, on or before the date of this Agreement, delivered to GORTT a resolution of its Board of Directors substantially in the form annexed hereto as Annex 1, it will deliver such a resolution to GORTT within 14 days of the date of execution hereof

10.2 Any individual person signing this Agreement warrants that he has the authority personally to sign this Agreement and to be bound by its terms either in a personal capacity or on behalf of the Party for whom the individual person is signing as the capacity in which person represents.

11. MISCELLANEOUS

11.1 ACKNOWLEDGEMENT BY CLF

11.1.1 CLF, by its execution hereof hereby acknowledges that it has actual notice of the terms of this Agreement, consents thereto and hereby covenants with each of the Majority Shareholders that it will at all times during the continuance hereof give or cause to be given such notices, execute or cause to be executed such deeds, transfers and documents and do or cause to be done all such acts, matters and things as may from time to time be necessary or conducive to the carrying out of the terms and intent hereof.

11.2 CONFLICT WITH ARTICLES OR BY-LAWS

11.2.1 In the event of any ambiguity or discrepancy between the provisions of this Agreement and the Articles or the By-Laws then it is the intention that the provisions of this Agreement, as between the Parties hereto only, shall prevail and accordingly the Majority Shareholders shall each exercise all voting and other rights and powers available to them so as to give effect to the provisions of this Agreement and shall further if necessary procure any required amendment to the Articles or the By-Laws.

11.3 PARTIES TO PROCURE COMPLIANCE

11.3.1 Each of the Nominating Parties agrees that in respect of each of their respective Appointed Directors, they shall execute and do all such acts and things, give and confer all such powers and authorities that each Director would have been required to execute do, give and confer had he been a party to this Agreement and had covenanted in the same terms as the Party which appointed him as a Director so as to ensure that the provisions set out in this Agreement are duly observed and given full force and effect and that all actions required of the Directors under this Agreement and the Articles and By laws are carried out in a timely manner (subject to the Appointed Directors' fiduciary duties).

11.4 NOTICES

11.4.1 All notices, demands, consents or other documents to be given or provided by the Parties in connection with this Agreement shall be in writing and shall be effective at the date of receipt upon delivery or sending by facsimile in the following manner:-

11.4.1.1 By delivery of same to the registered office of CLF in the case of CLF, to the Office of the Finance Minister in the case of the Ministry of Finance, and to the address of any Shareholder or Director as provided by such person from time to time in writing to CLF for the attention of the Secretary.

11.4.1.2 As of the date of execution of this Agreement, all notices, demands, consents or other documents under this agreement shall be delivered to the Parties at the addresses as hereinbefore stated.

11.5 ENTIRE AGREEMENT

11.5.1 This Agreement and the MOU shall constitute the entire agreement among the Parties hereto relating to the subject matter hereof and it shall supersede any prior agreement among any of the Parties with respect thereto.

11.6 BINDING EFFECT

11.6.1 This Agreement shall be binding on the Parties hereto and their respective successors and permitted assigns; provided that none of the Parties to this Agreement shall be entitled to assign this Agreement or any of its rights and obligations under this Agreement except as herein expressly provided.

11.7 WAIVERS

11.7.1 No failure by any Party hereto to insist on the strict performance of any covenant, agreement, term or condition of this Agreement, or to exercise any right or remedy, consequent upon the breach thereof, shall constitute a waiver of any such breach or any subsequent breach of such covenant, agreement, term or condition.

11.7.2 No waiver of any breach shall affect or alter this Agreement, but each and every covenant, agreement, term and condition of this Agreement shall continue in full force and effect with respect to any other then existing or subsequent breach thereof.

11.8 HEADINGS

11.8.1 Headings of clauses and sub-clauses are for convenience of reference only and are not intended to define, limit or describe the scope or intent of any of the provisions of this Agreement.

11.9 EFFECTIVENESS AND COUNTERPART

11.9.1 This Agreement may be executed in one or more counterparts, each of which shall for all purposes be deemed to be an original and all of which shall constitute the same instrument, but only one of which need be produced. If more Shareholders wish to become parties to this Agreement so as to add to the number of Majority Shareholders subsequent to the date of this Agreement, such Shareholders may become such parties by delivering a duly executed counterpart signature page to GORTT and the New Board of CLF.

11.10 AMENDMENTS

11.10.1 This Agreement shall not be amended without the written consent of the Parties save that the written consent of the Present Directors need not be obtained unless the amendment affects their rights or obligations under this Agreement

11.11 NO PARTNERSHIP

11.11.1 Nothing in this Agreement shall be deemed to constitute a partnership between the Parties hereto nor constitute any Party the agent of any other Party for any purpose

11.12 CONFIDENTIAL

11.12.1 The Parties undertake with each other that they will not at any time hereafter use or divulge or communicate with any Person other than to Officers or employees whose province it is to know the same or on the instructions of the Directors, or as may be required by law or to its bankers, any confidential information concerning the business, accounts, finance or contractual arrangements or other dealings, transactions or affairs of CLF which may come to their knowledge and they shall use their best endeavours to prevent the publication or disclosure of any confidential information concerning such matters.

11.13 SEVERANCE

11.13.1 If any provision of this Agreement shall be found by a court of competent jurisdiction to be invalid or unenforceable, the invalidity or enforceability of any such provision shall not affect the validity or enforceability of the remaining, provisions of this Agreement so that all provisions not affected by such invalidity or enforceability shall remain in full force and effect.

11.14 SURVIVAL

11.14.1 The terms and provisions of Clauses 11.11, 11.12 and 11.13 and any term expressed to so survive shall continue to be binding upon the Parties after termination of this Agreement and termination shall not release any Party from any liability it may have to the other Parties as a result of such Party's breach of this Agreement prior to termination.

11.15 PARTIES BOUND

11.15.1 CLF and its Majority Shareholders undertake with each of the other Parties to be bound by and comply with the terms and conditions of this Agreement in so far as the same relate to CLF and or its Majority Shareholders and to act in all respects as contemplated by this Agreement.

11.15.2 The Parties undertake with each other to exercise their powers in relation to CLF so as to ensure that CLF fully and promptly observes, performs and complies with its obligations under this Agreement.

11.15.3 Each Party undertakes with each of the other Parties hereto that whilst it remains a party to this Agreement it will not (except as is expressly provided for in this Agreement) agree to cast any of the voting rights exercisable in respect of any of the Shares held by it in accordance with the directions, or subject to the consent of, any other person (including another Shareholder).

11.16 GOVERNING LAW

11.16.1 This Agreement shall be governed by and construed in accordance with the laws of Trinidad and the Parties hereto submit to the exclusive jurisdiction of the Trinidad courts in respect of any dispute or matter arising out of or connection with this Agreement.

IN WITNESS WHEREOF this Agreement has been entered into by the duly authorised representative of CL Financial Limited the day and year first hereinabove written and the within named Honourable Minister of Finance has signed for and on behalf of the Government of Trinidad and Tobago on the day of June 2009 and the within named Lawrence Andre Duprey has signed the same on the 2nd day of June 2009 and the within named Michael Carballo has signed the same on the 1st day of June 2009 and the within

named Roger Duprey has signed the same on the 1st day of June 2009 and the within named Clinton Rambaransingh has signed the same on the 3rd day of June 2009 and the duly authorised representative of the trustees of the British American Insurance Company Limited Pension Plan has signed the same on the 2nd day of June 2009 and the duly authorised representative of CL Duprey Investment Trust Limited has signed the same on the day of June 2009 and the duly authorised representative of Dalco Capital Management Company Limited has signed the same on the 1 day of June 2009 and the within named Michael Anthony Fifi has signed the same on the 1st of June 2009 and the within named Lionel Nurse has signed the same on the 4th day of June 2009 and the within named Leroy Coleridge Parris has signed the same on the 3rd day of June 2009 and the within named Quintin Jones has signed the same on the 1st day of June 2009 and the within named Paula Jones has signed the same on the 1st day of June 2009 and the within named [MERVYN ASSAM] has signed the same on the 4th day of June 2009 and the within named [RAMCHAND RAMNARINE] has signed the same on the 9th day of June 2009 and the within named [ALVIN THOMAS] has signed the same on the 9TH day of June 2009 and the within named [ROBERT NG CHOW] has signed the same on the 10TH day of June 2009 and the within named [.....} has signed the same on the ..... day June 2009 and the within named [.....] has signed the same on the ..... day June 2009.

SIGNED by LAWRENCE ANDRE) /s/ L.A Duprey

DUPREY being the duly authorised)

representative of **CL FINANCIAL**)

LIMITED in the presence of:)

Viviana Lee

[redacted]

[redacted]

And of me,

LEDGER L KELLER

NOTARY PUBLIC

SIGNED for and on behalf of the)

GOVERNMENT OF THE REPUBLIC OF) /s/ Conrad Enill

TRINIDAD AND TOBAGO BY THE)

MINISTER OF FINANCE in the presence)

of: /s/ Leroy Mayers

LEROY MAYERS

[redacted]

SIGNED by **LAWRENCE ANDRÉ DUPREY**)

(Director of CL Financial Limited)) /s/ L.A Duprey

in the presence of:)

Viviana Lee

[redacted]

And of me,

LEDGER L KELLER

NOTARY PUBLIC

SIGNED by **MICHAEL CARBALLO**)

(Director of CL Financial Limited)) /s/ Michael Carballo

in the presence of:)

/s/ Tia Jones

TIA JONES

[redacted]

SIGNED by **ROGER DUPREY**)

(Director of CL Financial Limited)) /s/ Roger Duprey

in the presence of:)

/s/ Keisha Phillip

KEISHA PHILLIP

[redacted]

SIGNED by **CLINTON RAMBARANSINGH**)

(Director of CL Financial Limited)) /s/ C. B Rambaransingh

in the presence of:)

/s/ Richard Ramdial

RICHARD RAMDIAL

[redacted]

[redacted]

SIGNED by **LEROY COLERIDGE PARRIS**)

(Director of CL Financial Limited)) /s/ Leroy Coleridge Parris

in the presence of:)

/s/ Carlos John

CARLOS L. R JOHN

[redacted]

[redacted]

[redacted]

[redacted]

SIGNED by Robert Fullerton being the duly)

authorised representative of the trustees of the) /s/ Robert Fullerton

BRITISH AMERICAN INSURANCE)

COMPANY LIMITED EMPLOYEE PENSION)

PLAN (Shareholder of CL Financial Limited) in)

the presence of:)

Viviana Lee

[redacted]

[redacted]

And of me,

LEDGER L KELLER

NOTARY PUBLIC

SIGNED by ROGER DUPREY being the duly)

authorised representative of **CL DUPREY**) /s/ Roger Duprey

INVESTMENT TRUST LIMITED)

(Shareholder of CL Financial Limited) in the)

presence of:)

/s/ Keisha Phillip

KEISHA PHILLIP

[redacted]

SIGNED by JACQUELINE FROST being the duly)

authorised representative of **DALCO CAPITAL**) /s/ Jacqueline Frost

MANAGEMENT COMPANY LIMITED)

(Shareholder of CL Financial Limited in the)

presence of:)

/s/ Keisha Phillip

KEISHA PHILLIP

[redacted]

SIGNED by **ROGER DUPREY**)

(Shareholder of CL Financial Limited)) /s/ Roger Duprey

in the presence of:)

/s/ Keisha Phillip

KEISHA PHILLIP

[redacted]

SIGNED by **MICHAEL ANTHONY FIFI**)

(Shareholder of CL Financial Limited)) /s/ Michael Anthony Fifi

in the presence of:)

/s/ Makia Gonsalves

MAKIA GONSALVES

[redacted]

SIGNED by **LIONEL NURSE**)

(Shareholder of CL Financial Limited)) /s/ Lionel Nurse

in the presence of:)

/s/ Myrna M Nurse

[redacted]

SIGNED by **LEROY COLERIDGE PARRIS**)

(Shareholder of CL Financial Limited)) /s/ Leroy Coleridge Parris

in the presence of:)

/s/ Carlos John

CARLOS L. R JOHN

[redacted]

[redacted]

[redacted]

SIGNED by **QUENTIN JONES**)

(Shareholder of CL Financial Limited)) /s/ Quentin Jones

in the presence of:)

R Jones

[redacted]

[redacted]

SIGNED by **PAULA JONES**)

(Shareholder of CL Financial Limited)) /s/ Paula Jones

in the presence of:)

/s/ Keisha Phillip

KEISHA PHILLIP

[redacted]

SIGNED by **MERVYN ASSAM**)

(Shareholder of CL Financial Limited)) /s/ Mervyn Assam

in the presence of:)

/s/ Jessica Andrews

JESSICA ANDREWS

[redacted]

[redacted]

SIGNED by **RAMCHAND RAMNARINE**)

(Shareholder of CL Financial Limited)) /s/ Ramchand Ramnarine

in the presence of:)

[Address not identifiable]

[redacted]

[redacted]

SIGNED by **ALVIN H. THOMAS**)
(Shareholder of CL Financial Limited)) /s/ **Alvin H. Thomas**
in the presence of:)
/s/ Roxanne Husbands
ROXANNE HUSBANDS
[redacted]

SIGNED by)
(Shareholder of CL Financial Limited))
in the presence of:)

SIGNED by **ROBERT NG CHOW**)
(Shareholder of CL Financial Limited)) /s/ Robert Ng Chow
in the presence of:)
xxxxx
[redacted]

[redacted]

SIGNED by)
(Shareholder of CL Financial Limited))
in the presence of:)

SCHEDULE 'A'

"the Present Directors"

Name	Address	Occupation
Lawrence Andre Duprey	[redacted]	Executive
Roger Duprey	[redacted]	Financial Consultant
Clinton Rambaransingh	[redacted]	Director, Industrial Plant Services Limited
Leroy Coleridge Parris	[redacted]	President - Clico Holdings (Barbados) Holdings Limited
Michael Carballo	[redacted]	Chartered Accountant

SCHEDULE 'B'

"the Majority Shareholders"

Name	Address	Number of Shares	Folio in Share Register of CLF
British American Insurance Company Limited Employees Pension Plan	[redacted]	1,066,312	462
CL Duprey Investment Trust Limited	[redacted]	1,634,335	310
Dalco Capital Management Company Limited	[redacted]	1,947,833	281
Roger Duprey	[redacted]	972	294
Michael Anthony Fifi	[redacted]	25,804	13

Lionel Nurse	[redacted]	43,430	41
Leroy Coleridge Parris	[redacted]	8,750	64
Quintin and Paula Jones	[redacted]	234,201	456
	TOTAL	**4,961,637**	

SCHEDULE 'C'

"the Articles of Continuance"

SCHEDULE "E"

WRITTEN RESOLUTION OF THE DIRECTORS OF

CL FINANCIAL LIMITED

The undersigned, being the directors of **CL FINANCIAL LIMITED ("the Company")** pursuant to **Section 86 of the Companies Act, Ch. 81:01 ("the Act")** by their signatures hereby pass the following resolutions:

WHEREAS:

(a) There are currently. 7 vacancies on the Board of Directors of the Company;

(b) It is in the best interests of the Company that the remaining directors exercise their powers under s.77 of the Act to fill these vacancies;

(c) Section 86(1) of the Act, provides that when a resolution in writing is signed by all the directors entitled to vote on that resolution at a meeting of directors or committee of directors:

(i) the resolution is deemed to be as valid as if it had been passed at a meeting of directors or a committee of directors; and,
(ii) the resolution is deemed to satisfy all the requirements of this Act relating to meetings of directors or committees of directors.

NOW THEREFORE BE IT RESOLVED that the following resolutions be and are hereby

passed:-

1. The following persons be and are hereby appointed to the Board of Directors to hold office for a term of two (2) years such appointments to take effect from the date of this resolution:-

Name	Address	Occupation
GORTT Director		
GORTT Director		
GORTT Director		
GORTT Director		
CLF Director		
CLF Director		
CLF Director		

2. Any director or the Secretary (each an "Authorised Signatory") of the Company is hereby authorised and directed, for and on behalf of the Company to execute and deliver all documents, agreements, instruments or notices, with or without corporate seal affixed, and to perform all other acts that such Authorised Signatory may deem necessary or advisable to give effect to this resolution, including, without limitation, the execution and delivery of a Notice of Directors in prescribed form to the Registrar under the Act, such determination to be conclusively evidenced by the execution and delivery of any such document, agreements, instrument, or notice and the performance of any such act.

Dated the day of June, 2009.

.....

(Signature of present director)

Lawrence Andre Duprey

.....

(Signature of present director)

Roger Duprey

.....

(Signature of present director)

Leroy Coleridge Parris

.....

(Signature of present director)

Clinton Rambaransingh

.....

(Signature of present director)

Michael Carballo

SCHEDULE 'F'

Resolution required under clause 2.4

WRITTEN RESOLUTION OF THE DIRECTORS OF

CL FINANCIAL LIMITED

The undersigned, being the directors of **CL FINANCIAL LIMITED ("the Company")** pursuant to **Section 86 of the Companies Act, Ch. 81:01 ("the Act")** by their signatures hereby pass the following resolutions:

WHEREAS:

(a) The following persons ("the Resigning Directors") have resigned as Directors of the Company creating vacancies on the Board of Directors of the Company:

Name	Address	Occupation

(b) It is in the best interests of the Company that the remaining directors accept such resignations ("the Resignations") and exercise their powers under s.77 of the Act to fill these vacancies;

(c) **Section 86(1)** of **the Act**, provides that when a resolution in writing is signed by all the directors entitled to vote on that resolution at a meeting of directors or committee of directors:

(i) the resolution is deemed to be as valid as if it had been passed at a meeting of directors or a committee of directors; and,

(ii) the resolution is deemed to satisfy all the requirements of this Act relating to meetings of directors or committees of directors.

NOW THEREFORE BE IT RESOLVED that the following resolutions be and are hereby passed:-

1. The Resignations be and are hereby accepted and the Resigning Directors shall be removed as authorised signatories on all accounts of the Company and its subsidiaries.

2. The following persons be and are hereby appointed to the Board of Directors to hold office for a term of _____, such appointments to take effect from the date of this resolution:-

Name	Address	Occupation

3. Any director or the Secretary (each an "Authorised Signatory") of the Company is hereby authorised and directed, for and on behalf of the Company, to execute and deliver all documents, agreements, instruments or notices, with or without corporate seal affixed, and to perform all other acts that such Authorised Signatory may deem necessary or advisable to give effect to this resolution, including, without limitation, the execution and delivery of a Notice of Change of Directors in prescribed form to the Registrar under the Act, such determination to be conclusively evidenced by the execution and delivery of any such document, agreement, instrument, or notice and the performance of any such act.

Dated the day of _____, 200___.

....

(name of GORTT director) *(name of GORTT director)*

.....

(name of GORTT director)

.....

(name of GORTT director)

.....

(name of CLF director)

Annex A

WRITTEN RESOLUTION IN LIEU OF MEETING OF THE DIRECTORS OF

[*NAME OF MAJORITY SHAREHOLDER*] **LIMITED**

(the "Company")

The undersigned, being the directors of [*NAME OF MAJORITY SHAREHOLDER*] **("the Company")** pursuant to **Section 86** of **the Companies Act, Ch. 81:01** ("**the Act**") by their signatures hereby pass the following resolutions:

WHEREAS:

1. The Company is a shareholder of CLF.

2. The Company is desirous of entering into a certain agreement ("the Agreement") to be executed by and among **CL FINANCIAL LIMITED** a company incorporated under the Laws of Trinidad and Tobago (hereinafter called "CLF") of the First Part, **THE GOVERNMENT OF THE REPUBLIC OF TRINIDAD AND TOBAGO** (hereinafter called "GORTT") of the Second Part, **THE DIRECTORS OF CLF** of the third part and certain other **SHAREHOLDERS OF CLF** of the Fourth Part for the purpose of regulating and formalising the relationship of the Parties with respect to certain aspects of the affairs of CLF harmonious with the implementation of a certain Memorandum of Understanding made the 30th day of January 2009 (hereinafter referred to as "the MOU") between GORTT of the One Part and CLF acting for itself and as agent for its affiliates of the Other Part, a copy of which is attached hereto, wherein the Company agreed that it shall, *inter alia*:

   (a) exercise all voting rights and powers available to it in relation to CLF so as to give full effect to the terms of this Agreement, the MOU or any other agreement or arrangement entered into pursuant to this Agreement;
   (b) procure that all third-parties directly or indirectly under its control refrain from acting in a manner which hinders or prevents CLF from carrying on its business in a proper and reasonable manner and in accordance with the terms of this Agreement;
   (c) act in good faith and reasonably in its business dealings with CLF;
   (d) generally use its best endeavours to promote the objects and purposes of this Agreement and the MOU;

(e) do nothing to undermine this Agreement or the MOU;
(f) ratify this Agreement at any general meeting of CLF called for that purpose and in furtherance of this obligation shall execute **and** deliver perfected proxy forms in accordance with By-Law 74 authorising a **named** proxy-holder to vote in favour of such ratification; and
(g) continue so far as it is able to do so to support the appointment to the Board of CLF of any and all such directors as GORTT shall from time to time in their sole discretion determine to have appointed up to the limit of four (4) directors including the Chairman.

3. The Company further agreed in the Agreement that during the pendency of the Agreement it shall not without the consent of certain parties:

(a) grant, declare, create, sell, transfer or otherwise dispose of any right or interest in any shares of CLF it being expressly agreed and understood that this Agreement shall be binding on the Parties hereto and their respective successors and permitted assigns as to which such successor and assigns shall enter into direct covenants with the other parties to this Agreement (in a manner reasonably acceptable to each of them) to observe and perform this Agreement and it shall upon entry into such covenant be treated as a Shareholder for the purposes of this Agreement; and

(b) enter into any agreement in respect of the votes attached to any shares of CLF;

4. **Section 86(1)** of **the Act**, provides that when a resolution in writing is signed by all the directors entitled to vote on that resolution at a meeting of directors or committee of directors:

(i) the resolution is deemed to be as valid as if it had been passed at a meeting of directors or a committee of directors; and,
(ii) the resolution is deemed to satisfy all the requirements of this Act relating to meetings of directors or committees of directors.

NOW THEREFORE BE IT RESOLVED that the following resolutions be and are hereby passed:-

1. The Company be and is hereby authorized to execute and enter into the Agreement and [*name of approved signatory*] is authorised to execute the Agreement for and on behalf of the Company;

2. The Company be and is hereby authorized to perform the various covenants representations or whatsoever otherwise made by the Company under the terms of the Agreement in order to give full effect to the Agreement.

3. [*name of approved signatory*] be and he/she is hereby authorized to do all such further things and execute all additional instruments and documents necessary or desirable to carry out and give effect to the foregoing.

Dated the day of _____, 200___.

.....	.....
(name of director)	*(name of director)*
.....	.....
(name of director)	*(name of director)*