

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CONSOLIDATED SUITS

CLAIM NO. ANUHCV2010/0156

BETWEEN:

EAST CARIBBEAN BAPTIST MISSION

Claimant

and

**CLICO INTERNATIONAL LIFE INSURANCE LTD
WILBUR HARRIGAN
(as Administrator of CLICO International Life Insurance Ltd)**

Defendant

CLAIM NO. ANUHCV2010/0152

BETWEEN:

**KENRICK GEORGE
(Deceased by his Personal Representative JERIANN GEROGÉ)**

Claimant

AND

**CLICO INTERNATIONAL LIFE INSURANCE LTD
WILBUR HARRIGAN
(as Administrator of CLICO International Life Insurance Ltd)**

Defendant

CLAIM NO. ANUHCV2010/0203

BETWEEN:

HENSWORTH JONAS

Claimant

and

**CLICO INTERNATIONAL LIFE INSURANCE LTD
WILBUR HARRIGAN
(as Administrator of CLICO International Life Insurance Ltd)**

Defendant

Appearances:

Ms. Andrea Smitten of Counsel for the Judgment Creditors
Mrs. Nelleen Rogers-Murdock of Counsel for the Defendants

2018: October 17th

2019: October 7th

ORAL JUDGMENT

- [1] **WILKINSON, J.:** The 3 claims above were consolidated by order because they arose out of similar circumstances and raised the same issues against the same Defendant, CLICO International Life Insurance Ltd. (CLICO), a company incorporated on 10th October 1986.
- [2] Claim ANUHCV2010/0156: On 8th March 2010, the Claimant, East Caribbean Baptist Mission (ECBM) filed its claim form and statement of claim. ECBM sought by way of relief the return of \$261,701.71 being money paid to CLICO for investment purposes plus costs. CLICO failed to file an acknowledgement of service within the prescribed time and on 17th May 2010, a default judgment in the sum of \$264,851.71 was entered in favour of ECBM.
- [3] Claim ANUHCV2010/0156: On 8th March 2010, the Claimant, Kenrick George (Mr. George)¹ filed his claim form and statement of claim. Mr. George sought by way of relief the return of \$974,907.43 being money paid to CLICO for investment purposes plus costs. CLICO failed to file an acknowledgement of service within the prescribed time and on 17th May 2010, a default judgment in the sum of \$978,057.43 was entered in favour of Mr. George.
- [4] Claim ANUHCV2010/0156: On 8th March 2010, the Claimant, Dr. Hensworth Jonas (Mr. Jonas) filed his claim form and statement of claim. Mr. Jonas sought by way of relief the return of \$163,258.67 being money paid to CLICO for investment purposes plus costs. CLICO failed to file an acknowledgement of service within the prescribed time and on 17th May 2010, a default judgment in the sum of \$166,408.67 was entered in favour of Mr. Jonas.
- [5] Colonial Life Insurance Company (Trinidad) Limited, a company incorporated on 17th January 1986, is the owner of a parcel of land registered: Registration Section Sutherlands Block 64 1792B Parcel 153 (Parcel 153). According to an appraisal of Parcel 153 conducted at 16th February 2011, by Mr. Elrie Farrell, it was at that date valued at \$1,829,520.00.
- [6] On 25th January 2011, an application to sell certain land of CLICO was filed pertaining to the 3 suits. Before the application could be heard, and it being approximately 17 months after the default judgments had been obtained, on 9th September 2011, by court order CLICO was placed into judicial management.

¹ Deceased 17th May 2013, and continued by his executrix, Ms. Jeri-Ann George)

- [7] On 17th October 2011, ECBM, Mr. George and Mr. Jonas filed an application seeking leave to enforce their judgment by way of and pursuant to their application for sale of Parcel 153 which was made on 25th January 2011, but not heard before CLICO was placed into judicial management. The application came on for hearing on 26th February 2014, and on 27th February 2014, Cottle J delivered his judgment and which is recorded in Mr. George's suit. He stated:

"[1] This is one of three actions against the Respondents. The others are claim ANUHCV2010/0203 and ANUHCV 2010/0156 where the Claimants are Hensworth Jonas and The East Caribbean Baptist Mission, respectively. The relevant facts which give rise to the litigation are the same in the three claims and so while this application was heard and considered with regard to one matter, all parties understand that the result of one claim will apply to the other claims as well.

...

[11] Having carefully considered both submissions and looked at the facts, I conclude that it is inequitable to visit the claimant with the consequences of the delay of the court. I considered this to amount to the kind of exceptional circumstances which merit the grant of leave. I order that leave be granted to the Claimant to proceed with his application for enforce his judgment by sale of the property of the First Defendant. As noted above, this reasoning will apply equally to the other matters involving the Respondents and the other two Claimants where the facts are identical."

- [8] On 26th March 2015, ECBM, Mr. George and Mr. Jonas filed their application for sale of Parcel 153. On 28th April 2015, Cottle J made an order that (i) notice be given to Colonial Life, (ii) leave was granted to the Claimants² to file affidavits if necessary, and (iii) the matter was adjourned to 4th June 2015. The application came on for hearing on 2nd July 2015, and in his judgment of 17th August 2015, Cottle J stated:

"[21] I begin by reminding myself of the long established principle that the mere fact that a person owns and controls a company is not by itself a justification for lifting the corporate veil. Indeed it is this distinction between a company and those who own and control it that remains the bedrock of company law. For the lifting of the veil, it is necessary to demonstrate some impropriety, some abuse of the company as a device to conceal wrongdoing. Both counsel in this case cite with approval the dicta of Sir Andrew Morritt in Trustor AB v. Small Bone (No.2) [2001] 1WLR 1777:-

'The court is entitled to pierce the corporate veil and recognize the receipt of the company as that of the individual(s) in control of it if the company was used as a device or façade to conceal the true facts thereby avoiding or concealing any liability to those individuals.'

[22] Counsel for the claimants say that this is exactly what has occurred in the present case. The submission is that the first defendant chose to register their property in the name of Colonial Life Insurance Company (Trinidad) Limited while considering it an "asset" of the first defendant as disclosed in the affidavit of Mr. Terrance Thornhill filed 15th

²² Should probably read "Defendants".

December 2010. Counsel adds that the Judicial Manager in his report to this court on 27th January 2012, also listed this property as an asset of the first defendant.

[23] In my view this is not sufficient to demonstrate the kind of culpability that would justify a lifting of the corporate veil. It appears that the first defendant is one of a group of corporate entities. There was an attempt to consolidate which would have resulted in the first defendant becoming the owner of the property in issue but this attempt was frustrated by the Supervisor of Insurance. Before the concerns of the Supervisor of Insurance could be addressed, the first defendant was placed under judicial management. In my respectful view this does not mean that the first defendants ~~are~~ (is) the true owners of the land or have any beneficial interest in it.

[24] My conclusion above is sufficient to dispose of this matter. It is only open to the Court to order the sale of real property if it is the property of the first defendant. The land register shows that the first defendant is not the proprietor and I decline the invitation of the claimants to pierce the corporate veil and declare the first defendant the beneficial owner of the parcel. The application is refused. In the circumstances of this case I do not consider that the claimants have acted unreasonably in bringing the present application in an effort to enforce the judgment they have obtained. I therefore make no order as to costs on this application....”

[9] Following Cottle J’s judgment of 17th August 2015, on 8th June 2016, Lanns J pursuant to section 61(4) of the **Insurance Act 1997** granted ECBM, Mr. George and Mr. Jonas leave to apply for an order for oral examination of Mr. Wilbur Harrigan, the court appointed administrator of CLICO as to the rights, title or interest of CLICO in the CLICO lands within the State of Antigua and Barbuda to pay the judgment debts owed to ECBM, Mr. George and Mr. Jonas.

[10] There was pursuant to Lanns J’s order before this Court on 24th April 2017, oral examination of Mr. Patrick Toppin, Judicial Manager for CLICO. He gave evidence which included a statement that CLICO had investment and development properties at April 2013, at Antigua with a value of EC\$1.9 million and which was held in the name of Colonial Life Insurance Company (Trinidad) Limited. An instructive extract from the oral examination reads:

“Ms. Smithen: I see references made to Statement of Financial Condition and Notes. So in that, regard I refer you to the document headed CLICO International Life Insurance Statement of Finance Condition. CLICO International Life Antigua Operation. If you look at the first page of that document – Investment and Development Properties – I see that at December 31, 2016, the amount of roughly \$1.9M and it says refer to note 6. So please take a look at note 6.

Mr. Toppin: Yes.

Ms. Smithen: Can you kindly read for the Court what Note 6 states?

Mr. Toppin: Sure. Investment Properties. There is an investment property located at Sutherland Development in the name of Colonial Life Insurance. The last valuation at April 2013 reflects a valuation of \$1.9M.

Ms. Smithen: So Mr. Toppin, do you accept that the Statement of Financial Condition includes all the assets owned by CLICO Antigua?

Mr. Toppin: To my knowledge, Yes. Can I just add one thing? That you need to bear in mind that this statement also includes some assets of Colonial Life.

Ms. Smithen: Can you repeat for my benefit and note taking?

Mr. Toppin: You have to take into consideration that the transfer from Colonial Life did not occur hence this particular property is stated to be in the name of Colonial Life.

The Court: So that Property ought not to part of the assets of CLICO?

Mr. Toppin: Madam, this is where the past is not necessarily reflected clearly. In the Books of CIL, the assets of Colonial Life have been included but are not registered to CIL. They are still registered to Colonial Life.

Ms. Smithen: For clarification then, on what basis is this property included in the List of Assets of CLICO Antigua? That aspect I am still not very clear on.

Mr. Toppin: I will give you a little bit of history so you can understand. When the Barbados Company CIL was established, the intention was that that company would take over the operations of Colonial Life in Barbados and Eastern Caribbean. The transfer required the technical approval of Supervisors/Superintendents of Insurance in all of the jurisdictions. And so, although it was recognized that, the fact that the transfer had not been approved is more of not really following through rather than a specific decision not to. During all that time CIL managed the operation as though it was its own. So the assets and liabilities of Colonial Life was part of the operations of CIL. (My emphasis)

Ms. Smithen: So for clarification, by saying CIL you are referring to CLICO Antigua, correct?

Mr. Toppin: Yes.

Ms. Smithen: So during all that time CLICO Antigua managed all the operations including the assets, including this property as CLICO's?

Mr. Toppin: Yes. That is correct.

Ms. Smithen: I have no further question."

- [11] ECBM, Ms. George (Executrix) and Mr. Jonas filed on 18th September 2017, what was in effect their second application for leave for an order to enforce their judgment by sale of Parcel 153. On 7th December 2017, the Court having considered all the circumstances of the case and that there was no bar to a second application, granted leave to file the second application for an order for sale of Parcel 153.

[12] On 31st January 2018, ECBM, Ms. George and Mr. Jonas filed their application for sale seeking the following orders:

(i) The Land in Antigua more particularly described as Registration Section: Sutherlands; Block No: 64 1792B; Parcel No: 153 be sold by public auction to satisfy the default judgments entered the 17th day May 2010, obtained in the 3 above-titled consolidated suits.

(ii) Costs of this application be borne by the Respondents.

The grounds of the application were –

(i) Part 55 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000.

(ii) There are outstanding default judgments entered on the 17th day of May, 2010 in each of the above titled consolidated suits and which remain largely unsatisfied.

(iii) The Applicants commenced enforcement proceedings in January 2011 via an application for order for sale but this previous application was not dealt with until over 3 years later. The Applicants are desirous of continuing with their enforcement proceedings which started long before the CLICO was placed under judicial management. In the circumstances and as Judgment Creditors, the Applicants take priority over other creditors of CLICO.

(iv) Upon the oral examination in Court of Mr. Patrick Toppin, judicial manager of CLICO on the 24th day of April 2017, he confirmed that CLICO managed the property in question as though it was its own even though it is registered in the name of Colonial Life Insurance Company (Trinidad) Ltd. Mr. Toppin further stated that the assets and liabilities of Colonial Life Insurance Company (Trinidad) Ltd were part of the operations of the CLICO. The property was therefore treated as and is therefore an asset of CLICO.

(v) The Land is entirely and without restriction beneficially owned by CLICO.

(a) On the 7th day of December 2017, the Court granted leave for the Applicants to file this application for an order for sale application.

(b) The proposed sale is just and equitable in all of the circumstances.

[13] The application was supported by the affidavit of Dr. Jonas. The Court adopts in their entirety the matters deposed to in the affidavit.

[14] On 6th April 2018, CLICO filed an affidavit in response to the application. The affidavit was deposed to by Ms. Fiona Murphy, Counsel who stated at paragraph 1 therein that “I have had conduct of this matter.” The Court takes the opportunity to remind Counsel that it is indeed very bad practice to swear an affidavit in a suit in which Counsel is instructed – see **Casimir v. Shillingford and Pinard** 10 WIR 269 – note the reasons stated therein by Lewis CJ.

[15] The Court adopts in their entirety the matters deposed to in Ms. Murphy's affidavit.

Findings and Analysis

[16] Before Cottle J. on the first application for sale, the issue was the lifting of the corporate veil. On the second application before this Court, the issue remains the same but the Court has been asked to assess and take account of the oral evidence of Mr. Toppin received on oral examination and which shows that in all the circumstances it has always been the position between Colonial Life Insurance (Trinidad) Limited and CLICO that Colonial Life Insurance (Trinidad) Limited was actually holding Parcel 153 for CLICO and a formal transfer was to be effected but for a certain turn of events.

[17] As before Cottle J, it is not to be disputed that CLICO and Colonial Life Insurance (Trinidad) Limited are separate and distinct companies. Further, the early principles on the corporate veil established in **Salomon v. A. Salomon & Co Ltd [1897] AC 22** still hold true today and were followed by Cottle J.

[18] In Cottle J's judgment, he records at paragraph 22, that Mr. Terrence Thornhill in his affidavit filed on 15th December 2010, deposed that Parcel 153 was always considered an asset of CLICO and further the Judicial Manager in his report of 27th January 2012, listed the property as that of CLICO. To update the evidence on the position, on 24th April 2017, Mr. Toppin, under oral examination said, and it bears repeating:

“Mr. Toppin: Madam, this is where the past is not necessarily reflected clearly. In the Books of CIL, the assets of Colonial Life have been included but are not registered to CIL. They are still registered to Colonial Life.

Ms. Smithen: For clarification then, on what basis is this property included in the List of Assets of CLICO Antigua? That aspect I am still not very clear on.

Mr. Toppin: I will give you a little bit of history so you can understand. When the Barbados Company CIL was established, the intention was that that company would take over the operations of Colonial Life in Barbados and Eastern Caribbean. The transfer required the technical approval of Supervisors/Superintendents of Insurance in all of the jurisdictions. And so, although it was recognized that, the fact that the transfer had not been approved is more of not really following through rather than a specific decision not to. During all that time CIL managed the operation as though it was its own. So the assets and liabilities of Colonial Life was part of the operations of CIL.”(My emphasis)

[19] In the circumstances of there being 2 separate companies, the only way that Parcel 153 could be considered an asset of CLICO is by way of formal transfer from Colonial Life Insurance Company (Trinidad) Limited to CLICO or by lifting the corporate veil of Colonial Life Insurance Company

(Trinidad) Limited if the evidence supports such a move and the Court makes an order deeming Parcel 153 available to satisfy the judgments.

- [20] The corporate veil of a company is lifted in limited instances and they include: (a) an abuse of the corporate form; (b) a group of companies which can be regarded as one because in reality they are not independent of each other either in human or commercial terms, (c) a group of companies – the concept of agency, a subsidiary is regarded as a holding agent; (d) illegality, fraud and improper conduct, and (e) the personal relationship company.
- [21] The Court believes that in the circumstances described by Mr. Toppin and earlier by Mr. Thornhill that there is no evidence of instances at (a), (d) and (e) which would allow the Court to lift the corporate veil of Colonial Life Insurance Company (Trinidad) Limited. However, from Mr. Toppin's evidence it appears that the instances of (b) and (c) apply.
- [22] It appears to the Court that if in all the circumstances the Judicial Manger, Mr. Toppin and before him, Mr. Thornhill hold the view that Parcel 153 is the property of CLICO, albeit at this stage, the beneficial owner, the Court could hold no less. It therefore appears to the Court that such being the Judicial Manager, Mr. Toppin's view, he could under a court's order take the necessary actions to settle any other debt aside or apart from that of ECBM, Mr. George and Mr. Jonas by sale of Parcel 153.
- [23] On the evidence before the Court, the Court does not see why it should not lift the corporate veil under the instances of (b) and (c) above to find that CLICO is the beneficial and true owner of Parcel 153. The Court declares that it finds CLICO to be the beneficial and true owner of Parcel 153.
- [24] The Court having declared CLICO to be the beneficial and true owner of Parcel 153, will grant ECBM, Ms. George and Mr. Jonas an order for sale of Parcel 153.
- [25] The Court apologizes for the delay in delivering this decision. As the Court previously notified Counsel for the Parties by memo dated 15th July 2019, it was awaiting sight of the Court of Appeal's digest for the Saint Lucia sitting at 8th – 12th April 2019, to see the reasons for the decision in **SLUHCAP2017/045 Clico International Life Insurance Ltd (Under Judicial Management) v. Deldrige Flavius**. The digest was published on 24th September 2019.
- [26] Court's order:
1. The land registered in the name of Colonial Life Insurance Company (Trinidad) Limited as Registration Section: Sutherlands, Block and Parcel 64 1792B 153 is to be sold by public auction to satisfy the judgments entered on 17th May 2010, in the 3 above-titled consolidated suits. Any remaining funds are to be delivered to the Judicial Manager.
 2. Costs to ECBM, Ms. George and Mr. Jonas in the sum of \$3,500.00 and same is to be deducted from the sale price of Parcel 153.

Rosalyn E. Wilkinson
High Court Judge