

EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

HCVAP 2010/010

BETWEEN:

MARLON HO-TACK

Appellant/Judgment Creditor

and

[1] BRITISH AMERICAN INSURANCE COMPANY LIMITED
(IN JUDICIAL MANAGEMENT)

Judgment Debtor

[2] CLEVELAND SEAFORTH (JUDICIAL MANAGER)

Respondent/Garnishee

HCVAP 2010/013

BETWEEN:

[1] BRITISH AMERICAN INSURANCE COMPANY LIMITED
(IN JUDICIAL MANAGEMENT)

Judgment Debtor

[2] CLEVELAND SEAFORTH (JUDICIAL MANAGER)

Appellant/ Garnishee

and

[1] MARLON HO-TACK

[2] ALICE HO-TACK

Respondents/Judgment Creditors

Before:

The Hon. Mr. Hugh A. Rawlins

Chief Justice

The Hon. Mde. Ola Mae Edwards

Justice of Appeal

The Hon. Mr. Errol Thomas

Justice of Appeal [Ag.]

Appearances:

Mr. Hugh Marshall for Appellant/Judgment Creditor

Marlon Ho-Tack and Respondent/Judgment Creditor Alice Ho-Tack

Dr. David Dorsett for the Respondent/Appellant/Judgment Debtor British American Insurance Co. Ltd

2010: September 14;
2011: August 12.
Amended and re-issued:
2012: April 16

Civil Appeal - Insolvent Insurance Company judgment debtor - Appointment of judicial manager - Terms of order and section 61 (4) Insurance Act 2007 staying all actions and other processes against insolvent company - Default judgments obtained before judicial management order - Enforcing judgment after judgment debtor placed under judicial management - Judgment creditor's application for attachment of debts order naming judicial manager as garnishee dismissed by master - Judicial Manager's application to set aside default judgments - whether Judicial Manager's application to be made directly to the Judge and be heard in public - jurisdiction of master to hear the application - Section 217 Insurance Act 2007 - Section 11 Eastern Caribbean Supreme Court Act Cap. 143 - Applicability of English Insolvency Rules and Practice Directions made under the Insolvency Act 1986

On 5th May 2004, Mr. and Ms. Ho-Tack (the appellants/judgment creditors) each deposited money with British American Insurance Company Limited ("BAICO") (the judgment debtor) a company carrying on insurance business in Antigua. The contract between BAICO and the Ho-Tack's required the interest on the deposit to be at the rate of 9.25% annually; and they would be entitled to demand the return of their money together with the agreed interest upon giving notice. On 4th February 2009, the Ho-Tack's each made lawful demand for the principal unpaid sums deposited along with the accrued interest and repeated this demand on 17th March 2009. BAICO failed to respond. On 16th June 2009, Mr. and Ms. Ho-Tack each filed a claim against BAICO claiming the sums which they each deposited under contract or alternatively as money had and received for the benefit of each of them and their respective contractual interest. BAICO failed to file a timely acknowledgment of service or defence to the claims.

On 30th July 2009, the Superintendent of Insurance, filed an application for a part of BAICO to be placed under judicial management pursuant to section 61 of the Insurance Act. On 30th July 2009 a request for entry of judgment in default of acknowledgment of service was filed by Mr. and Ms. Ho-Tack at 1:00 p.m. On this same day a judgment in default of acknowledgment of service was entered by the Registrar on each of the claims. On 31st July 2009, Mr. Cleveland Seaforth was appointed as BAICO's Judicial Manager, whereby placing the affairs, business and property of BAICO in Antigua under judicial management.

On 25th November 2009, Mr. and Ms. Ho-Tack each made applications under Parts 50.3 and 50.4 of CPR 2000 for a provisional attachment of debt order against BAICO that all debts due and accruing from the garnishee to BAICO be attached to answer each judgment recovered against BAICO on 30th July 2009 in the High Court in the respective

sums, which remain unpaid. The applications named Mr. Seaforth as garnishee, and requested that the garnishee show cause why he should not be ordered to pay the said sum plus the costs of these proceedings. The Judicial Manager filed an affidavit sworn to on 6th January 2010 requesting that the application be dismissed by virtue of section 61(4) of the Act which states: "Where an application is made under this section for an order [appointing a judicial manager] in respect of a company, all actions and the execution of all writs, summonses and other processes against the company shall, by virtue of this section, be stayed and shall not be proceeded with, without the prior leave of the court unless the court directs." The Judicial Manager also made an application to set aside the default judgments obtained by Mr. and Ms. Ho-Tack.

On 23rd February 2010, the master dismissed the application of the Judicial Manager to set aside the two default judgments obtained against BAICO as well as the application of Mr. and Ms. Ho-Tack for an attachment of debt order. Mr. Ho-Tack appealed but withdrew his appeal during the hearing and by agreement no order as to costs was made. The Judicial Manager for BAICO appealed on several grounds, alleging that the master erred in dismissing the application to set aside the default judgments. The court at the hearing before Mr. Ho-Tack's appeal was withdrawn, raised the issue as to whether or not the master had the jurisdiction to hear the applications including BAICO's application to set aside the default judgments.

Held: allowing the appeal on the issue raised by the court, setting aside paragraph 2 of the master's order which dismissed the Judicial Manager's application to set aside the default judgments, and making no order as to costs.

1. That in the absence of any regulations for the effective implementation of Judicial Management of an insolvent insurance company made pursuant to section 217 of the Insurance Act 2007 of the Laws of Antigua and Barbuda, section 11 of the **Eastern Caribbean Supreme Court Act Cap.143** provides for the jurisdiction relating to judicial management of BAICO to be exercised as nearly as may be in conformity with the law and practice for the time being administered by the High Court of Justice in England.

Hugh C. Marshall Snr v Antigua Aggregates Limited and Others Civ. App. No. 23 of 1999 at paras 15-16 applied.

2. The regime or procedure which is employed legally to rehabilitate insolvent insurance companies in England is known as "Administration" which is comparable to the regime of Judicial Management under the **Insurance Act 2007**; and the statutory regime for administration of insolvent companies in England exists in the **Insolvency Act 1986 Schedule B1** and the new Part 2 of the **Insolvency Rules 1986** and the **Practice Direction for Insolvency Proceedings**.
3. Part Two paragraph 5 of that Practice Direction is applicable as it governs the DISTRIBUTION OF BUSINESS for the Companies Court and provides for applications relating to the administration of insolvent companies before and after

an administration order to be made directly to the Judge and unless otherwise ordered are to be heard in public.

4. There are Rules governing applications made during the currency or pendency of judicial management proceedings under the English **Insolvency Rules and Practice Directions**. The rules in **CPR 2000** do not apply to insolvency proceedings save for where other enactments specifically state that they should apply. Rule 7.2 to 7.9 provide for the specific form, content, making, filing and service of insolvency applications, and the application of BAICO's Judicial Manager like the applications of the Ho-Tacks was made in keeping with Part 11 of **CPR 2000**, when it ought to have been made by way of an "ordinary application" in Form 7.2 properly headed or titled in accordance with Rule 7.26 of the English **Insolvency Rules and Practice Direction**.
5. The application to set aside the default judgments, notwithstanding its procedural defects, formed part of the judicial management proceedings which a master had no jurisdiction to determine under the English **Insolvency Practice Direction** paragraph 5: Distribution of Business; and the learned master ought to have referred the application to be heard by a Judge in public.

JUDGMENT

- [1] **EDWARDS, J.A.:** These were 2 consolidated appeals before us arising from an order made by the master on 23rd February 2010. In that order the learned master dismissed the application of the Judicial Manager of British American Insurance Company Limited ("BAICO") for an order to set aside two default judgments obtained against BAICO:
- (i) the default judgment obtained on 30th July 2009 in Claim No. ANUHCV 2009/0323 by Marlon Ho-Tack (Mr. Ho-Tack); and
 - (ii) the default judgment obtained on 30th July 2009 in Claim No. ANUHCV 2009/0325 by Alice Ho-Tack (Ms. Ho-Tack).
- [2] In the same order the master also dismissed the application of Mr. Ho-Tack and Ms. Ho-Tack to attach all debts due and accruing from the Garnishee Judicial Manager of BAICO to Mr. and Ms. Ho-Tack to answer the debt outstanding in the default judgments.

- [3] The appellant, Mr. Ho-Tack's grounds of appeal alleged that the learned master erred in law in not ordering the respondent to pay the monies held by it to satisfy the judgment of the appellant; and failed to recognize the proprietary nature of the monies held in the Judicial Manager's hands and belonging to the appellant.
- [4] On 29th June 2010, the Court of Appeal ordered that the notice of appeal filed by BAICO should serve as a counter-notice in Civil Appeal No. 10 of 2010. During the hearing of the appeals Mr. Marshall obtained our leave to withdraw the notice of appeal, No. 10 of 2010 filed by Mr. Ho-Tack and which accordingly stands dismissed. No order as to costs was made on the agreement of Mr. Marshall and Dr. Dorsett.

Background Facts

- [5] On 5th May 2004, Mr. and Ms. Ho-Tack deposited US\$200,000.00 with BAICO which carries on insurance business at lower Redcliffe Street in St John's Antigua. The conditions of the contract between BAICO and Mr. and Ms. Ho-Tack were for the interest on the deposits to be at the rate of 9.25% annually; and they would be entitled to demand the return of his money together with the agreed interest upon giving notice. On 4th February 2009 they each made lawful demand for the principal unpaid sums deposited with accrued interest and repeated this demand on 17th March 2009. BAICO failed to respond. On 16th June 2009 Mr. and Ms. Ho-Tack filed the claim against BAICO claiming the sum they each deposited under contract or alternatively as money had and received for the benefit of each claimant and their respective contractual interest. BAICO failed to file a timely acknowledgment of service or defence to their claims.
- [6] On 30th July 2009 the Superintendent of Insurance, Mr. Trevor Mathurin, filed an application for a part of BAICO to be placed under Judicial Management pursuant to section 61 of the **Insurance Act**¹ ("the Act"). The time when this application was filed is unknown.

¹ No. 13 of 2007 of the Laws of Antigua and Barbuda.

[7] On 30th July 2009, a Request for Entry of Judgment in Default of Acknowledgment of Service was filed by Mr. and Ms. Ho-Tack's attorney-at-law at 1:00 pm. On this same day judgments in default of acknowledgment of service was entered by the Registrar on each claim in the following terms:

- (i) in respect of Mr. Ho-Tack's claim No. 323 of 2009 - "**IT IS THIS DAY ADJUDGED** that the Defendant do pay to the claimant the sum of eight hundred and one thousand seven hundred and fifty three dollars and forty-four cents Eastern Caribbean Currency (EC\$801,753.44)";
- (ii) in respect of Ms. Ho-Tack's claim No. 325 of 2009-"**IT IS THIS DAY ADJUDGED** that the Defendant do pay to the claimant the sum of one hundred and fourteen thousand seven hundred and eighty three dollars and twenty-four cents Eastern Caribbean Currency (EC\$114,783.24)";

The Judicial Management Order

[8] On 31st July 2009 Thomas J granted the Judicial Management application which appointed Mr. Cleveland Seaforth of KPMG as Judicial Manager.

[9] This order placed the affairs, business, and property of BAICO in Antigua under Judicial Management. There are three main procedures under the Act available for a company, which is having financial difficulty or is insolvent, while carrying on insurance business. That company may be:

- (i) subjected to regulatory directions from the Superintendent of Insurance in the exercise of the Superintendent's powers of intervention under sections 58 and 59 of the Act;
- (ii) placed under the judicial management of a judicial manager who acts under the direction of the court; and runs the company's business in the manner he deems most economic and beneficial to the interests

of the policy holders, creditors and members of the company so as to give the company a breathing space to recover where possible (sections 61 to 64); and/or

- (iii) placed in liquidation with a winding-up order being made for the whole or part of its business (sections 69 to 76).

[10] The terms of the order stays all actions, proceedings, and claims against BAICO, and empowers Mr. Seaforth, as Judicial Manager, to:

- (a) ascertain the assets of BAICO and take all steps necessary to obtain possession of such assets;
- (b) incur and pay for all reasonable expenses and disbursements in connection with the running, administration, and management of BAICO's records, affairs, and offices;
- (c) where appropriate, to retain or employ professionals or others to assist in running the affairs and business of BAICO and for the purposes of ascertaining and quantifying the assets, records, and liabilities of BAICO in the jurisdiction of Antigua or any other jurisdiction where BAICO conducted business or entered into contracts with third parties;
- (d) render invoices for their remuneration at their usual rates;
- (e) take all actions necessary to see, review, secure, and take possession of any books, papers, writings, documents, and records relating to BAICO that are located in the offices of its auditors or any other person and to bring the same under his control;
- (f) **take all actions necessary to see, review, secure, and take possession of the claims and financial records of BAICO** located in the offices of BAICO or any company affiliated with BAICO or any other person and to bring the same under his control;

- (g) open, operate, and maintain bank accounts in the name of the Judicial Manager or BAICO as may be necessary;
- (h) conduct such investigations and obtain such information as is necessary to locate, protect, secure, take possession of, collect, and get in the assets of BAICO and determine liabilities, or to enable the Judicial Management to proceed in a speedy and efficient manner;
- (i) do all such things as may be necessary or expedient for the protection of BAICO's property or assets;
- (j) **enter into commutations, settlements, and compromises with any creditors and any debtors of BAICO;**
- (k) employ and dismiss any employees of BAICO;
- (l) discharge rent, salaries of any employees of BAICO, and other current expenses of BAICO;
- (m) grant or accept a surrender of a lease or tenancy of any of the property of BAICO and take a lease or tenancy of any property required or convenient for the business of BAICO;
- (n) terminate, complete, or perfect as advise any contracts or transactions relating to the business of BAICO;
- (o) effect insurance in connection with the management and maintenance of the business, property, and assets of BAICO;
- (p) do all acts and execute in the name and on behalf of BAICO all deeds receipts or other documents;

- (q) rank and claim in the bankruptcy, liquidation, or insolvency of any person indebted to BAICO and receive dividends, and accede to trust deeds for the creditors of any such person;
- (r) **manage, adjust, and pay claims against BAICO and/or its policyholders** and enter into agreements with third parties for the provision of claims handling and related services to BAICO in relation to BAICO's business;
- (s) **carry on all or any portion of the business of BAICO so far as may be necessary to process claims against BAICO, to effect reinsurance recoveries, and to pay any class of creditor and any claims, settlements, and expenses in full;**
- (t) retain and employ barristers, attorneys, solicitors, or other lawyers in jurisdictions as the Judicial Manager sees fit for the purpose of advising and assisting the Judicial Manager in the execution of his powers or in any legal or arbitration proceedings;
- (u) **consider any legal or arbitration proceedings where ever situate in which BAICO either is a party or of which BAICO presently has conduct or which BAICO would, but for the Antigua proceeding, take conduct and pay all fees and expenses, give all instructions in connection therewith, and take such action as may be thought necessary to continue to prosecute or to defend such proceedings or to apply for a stay of such proceedings;**
- (v) consider and if thought advisable commence such actions as may be necessary to protect, recover, or obtain assets and/or monies belonging or due to BAICO and commence all other proceedings as may be necessary to have his appointment recognized and protect the assets of BAICO;

(w) borrow such money from time to time as he may consider necessary or desirable for the proper operation and functioning of BAICO's business including any monies borrowed or to be borrowed for expenses incurred by the Judicial Manager, subject to the approval of the Minister of Finance, while operating by virtue of his appointment under the order of appointment; and

(x) do all such things reasonably and properly incidental to the exercise of the foregoing powers.

The Applications Before the Master

[11] The application of BAICO's Judicial Manager which was filed on 18th February 2010 essentially sought to set aside these default judgments on the grounds that it was not until the week ended 12th February 2010 that the Judicial Manager had sight of the statements of claim and the documents attached to each statement of claim. These documents disclosed that Mr. and Ms. Ho-Tack were not entitled to the payment of the sums for which default judgment was entered under their individual contracts because: (1) Mr. Ho-Tack had assigned his right to payment to a third party; and (2) Ms. Ho-Tack was not entitled to the quantum entered in the judgment as a significant penalty is imposed by BAICO for her premature demand of her deposit under her contract before it became due. The default judgments were contrary to law in that the judgments compelled payment to a party not lawfully entitled to payment and payment of an amount not lawfully due. The application also prayed that the proceedings be stayed pursuant to section 61 (4) of the Insurance Act.

[12] BAICO contended that these were special circumstances requiring the master to set aside the judgments and that BAICO satisfied the criteria for setting aside default judgments under CPR 13.3(1). BAICO contended also that it had a defence to each claim which had real prospects of success.

- [13] The master also had before her the applications of Mr. and Ms. Ho-Tack made on the 25th November 2009 following the service of a copy of each default judgment on BAICO on the 11th August, 2009. The applications were made under Parts 50.3 and 50.4 of **Civil Procedure Rules 2000** (CPR 2000). Each application named the Judicial Manager Mr. Seaforth as garnishee. Each application sought to obtain a provisional attachment of debt order from the master that all debts due and accruing from the garnishee to BAICO be attached to answer each judgment recovered against BAICO on the 30th July 2009 in the High Court in the respective sums, which remain unpaid. The applications also requested that the garnishee Mr. Seaforth do show cause why he should not be ordered to pay the said sum plus the costs of these proceedings.
- [14] Each supporting affidavit identified Mr. Seaforth as the Judicial Manager within the meaning of section 62 of the Act and stated correctly the date of his appointment. The affiant deposed that the judgment debtor BIACO is an Insurance Company, on whose behalf the garnishee “holds the funds in proprietary to the Judgment Creditor” and BAICO has the means to satisfy the Judgment but has no intention of doing so.
- [15] The Judicial Manager was apparently served with the applications for the Provisional Order because he filed an Affidavit sworn to on 6th January 2010 in which he requested that the application be dismissed by virtue of section 61(4) of the Act. This sub-section provided that there was to be a stay of all writs and execution against BIACO unless the court gave leave.
- [16] In the absence of any written decision or reasons from the learned master the court can look only to BAICO’s notice of appeal and its grounds which disclose the appellant’s complaints about the master’s order. No affidavits of counsel were filed to assist the Court on the proceedings before the master.

The Grounds of Appeal

- [17] “1. The learned Master erred when she failed to set aside a default judgment

entered in favour of the 1st Respondent against the... [Appellant] when the said judgment is one that is contrary to law in that it is a judgment compelling a payment to the 1st Respondent which payment is manifestly contrary to the contractual agreement between the parties which governs the issue of payment, and in the circumstances the payment to the 1st Respondent being an illegal payment would constitute a fraud on the party to whom any payment is lawfully due, namely RBTT Caribbean Bank.

2. The learned Master erred when she failed to set aside a default judgment entered in favour of the 1st Respondent against the... [Appellant] when the said judgment is one that is contrary to law in that it is a judgment compelling a payment to the 2nd Respondent in an amount that is manifestly contrary to the contractual agreement between the parties which governs the issue of payment, and particular in circumstances where the 2nd Respondent has by her own documentary evidence submitted that any money due to her is 20% less than the quantum of the judgment obtained.
3. The learned Master erred when she held that the application to set aside the default judgment failed to satisfy CPR 2000 r.13.3(1).
4. The learned Master erred when she held that the application to set aside the default judgment, notwithstanding that there might have [been] a failure to satisfy CPR 2000 r.13.3(1), when the case at bar involved special circumstances and accordingly the default judgments should have been set aside pursuant to the court's powers under CPR 2000 r. 26(1)(6)."

[18] The appellant BAICO through its Judicial Manager, is seeking an order that the default judgments entered against the appellant be set aside; and that the appellant be allowed to file its defence to each claim within 14 days of the order; and for the matter thereafter to proceed in accordance with the **Insurance Act 2007** and CPR 2000.

[19] Having regard to the fact that the judicial management provisions in the 2007 Insurance Act are novel to the jurisdiction, and apparently present new and complex procedural challenges to legal practitioners in the absence of local rules, it is necessary and prudent to identify the applicable practice and procedure before considering the gravamen of Dr. Dorsette's written and oral arguments and Mr. Marshall's response.

The Law and Practice Governing Judicial Management

[20] At the hearing of the appeal we canvassed whether the master would have had the requisite jurisdiction to determine the application after the judgment debtor BAICO was placed under Judicial Management by the court. Learned counsel Mr. Marshall submitted that the master would have jurisdiction as a judge in Chambers because the request for default judgment was filed and default judgment entered on the same date that the application for the appointment of the Judicial Manager was filed, and before the Judicial Manager was appointed. As for which document was filed before the other, the request for default judgment discloses that it was filed at 1:00 pm, while Dr. Dorsette was unable to assist us with the information as to the time when the Judicial Management application was filed. However, this will not prevent the Court from determining whether the Master had jurisdiction, and whether she erred in dismissing the application of BAICO.

[21] The Act is silent as to the practice and procedure that must be applied for the making of the Judicial Management Order and subsequent applications after a Judicial Manager is appointed by the court. This is not the case for a winding up order under the Act. Section 69 of the Act prescribes for the winding up of an insurance company to proceed in accordance with the legislation for the time being in force with respect to companies, subject to sections 70 to 76 of the Act.

[22] Section 217 of the Act provides for the Minister responsible for the Financial Services Regulatory Commission to make Regulations for giving effect to the Act and for the effective implementation of the Act. The Minister should make such Regulations on the recommendation of the Board of the Directors of the Financial

Services Regulatory Commission. Apparently no regulations have been made for the effective implementation of Judicial Management of an insolvent insurance company under the Act.

[23] Consequently, we are guided by section 11 of the **Eastern Caribbean Supreme Court Act** Cap 143² which states that –

“The jurisdiction vested in the High Court in Civil proceedings, and in Probate, Divorce and Matrimonial causes, shall be exercised in accordance with the provisions of this Act and any other law in operation in Antigua and Barbuda and rules of court, and where no special provision is therein contained **such jurisdiction shall be exercised as nearly as may be in conformity with the law and practice administered for the time being in the High Court of Justice in England.**”

[24] We are also reminded by Singh JA in the **Antigua Aggregates** case that:

“[16] This provision did not mandate a total and slavish acceptance of the English Rules. It suggests that the jurisdiction should be exercised **as nearly as may be**, in conformity with the law and practice for the time being administered in the High Court of England. This, in my view, suggests, that only those rules, that could with convenience be used in Antigua should be adopted.”

[25] The regime or procedure which is employed legally to rehabilitate insolvent insurance companies in England is known as “Administration” which is comparable to the regime of Judicial Management under the Antigua **Insurance Act 2007**. Administration creates a statutory moratorium and allows the affairs, business and property of the company to be managed by an administrator. Applications for an administration Order under Part II of the **Insolvency Act 1986**, and petitions for approval by the court of schemes of arrangement are heard by a judge. Interim applications will also be heard by a judge. The statutory regime for administrations commencing on or after 15th September 2003, with certain exceptions is found in the **Insolvency Act 1986** Schedule B1 which should be

² See Hugh C. Marshall Snr and Antigua Aggregates Limited and Others: Antigua and Barbuda Civ. App. No. 23 of 1999 at paras 15 – 16 where Singh JA applied this provision in the absence of any provision governing the practice and procedure for winding-up petitions in Antigua; See also Funduro v Hamilton Smith & Wastell Antigua Civ. App No 31 of 2010 where a similar approach was adopted and The English Insolvency Rules 1986 as amended for removal of a Liquidator were applied.

read with the new Part 2 of the **Insolvency Rules 1986**. Administrations commenced before 15th September 2003 and administrations of certain insurers continue to be governed by Part II of the **Insolvency Act 1986**. An application to the court must be commenced by the prescribed form of application (i.e. Form 2.1B under the new regime) and must be supported by affidavit or witness statement in some cases. The **Insurers (Reorganisation and Winding Up) Regulations 2004** may also be applied in the course of the administration of certain insurance companies.

- [26] The Companies Court, which is a part of the Chancery Division, hears Applications in the High Court which are made under the English **Companies Act 1985**, the **Insurance Companies Act 1982**, and the **Insolvency Act 1986** in relation to Companies registered in England and Wales. Applications in insolvency relating to companies are governed by the English **Insolvency Rules and Practice Direction for Insolvency Proceedings**.³

³ The Practice Direction for Insolvency Proceedings [2007] BCC 842. Note that at the time of amending this judgment which had previously been delivered on the 11th August 2011, a new Practice Direction on Insolvency Proceedings was published on 29 February, 2012, and came into force in England and Wales on the 23rd February 2012. The New Practice Direction at paragraph 4 has introduced a change in the heading of all court documents filed in insolvency proceedings. When making an urgent application, it is necessary to complete a certificate setting out the reasons for the urgency (paragraph 9.1). Applications to extend an administration must be made at least one month before the end of the administration (paragraph 10.1). Paragraph 3 now governs the distribution of business of the Court and it states:

3. **"Distribution of business**

3.1 As a general rule all petitions and applications (except those listed in paragraphs 3.2 and 3.3 below) should be listed for initial hearing before a Registrar in accordance with rule 7.6A(2) and (3).

3.2 The following applications relating to insolvent companies should always be listed before a Judge:

- (1) applications for committal for contempt;
- (2) applications for an administration order;
- (3) applications for an injunction;
- (4) applications for the appointment of a provisional liquidator;
- (5) interim applications and applications for directions or case management after any proceedings have been referred or adjourned to the Judge (except where liberty to apply to the Registrar has been given).

3.3 The following applications relating to insolvent individuals should always be listed before a Judge:

- (1) applications for committal for contempt;
- (2) applications for an injunction;
- (3) interim applications and applications for directions or case management after any proceedings have been referred or adjourned to the Judge (except where liberty to apply to the Registrar has been given).

3.4 When deciding whether to hear proceedings or to refer or adjourn them to the Judge, the Registrar should have regard to the following factors:

- (1) the complexity of the proceedings;

[27] Part Two paragraph 5 of this Practice Direction was applicable at the date the master heard the applications. It deals with the distribution of business of the Companies Court. Paragraph 5 provides:

“5. DISTRIBUTION OF BUSINESS

5.1 The following applications shall be made direct to the Judge and, unless otherwise ordered, shall be heard in public:

- (1) Applications to commit any person to prison for contempt;
- (2) Applications for urgent interim relief (e.g. applications pursuant to s.127 of the Act prior to any winding up order being made);
- (3) Applications to restrain the presentation or advertisement of a petition to wind up; or
- (4) Applications for the appointment of a provisional liquidator;
- (5) **Petitions for administration orders or an interim order upon such a Petition;**
- (6) **Applications after an administration order has been made pursuant to s.14(3) of the Act (for directions) or s.18(3) of the Act (to vary or discharge the order);⁴**
- (7) **Petitions to discharge administration orders and to wind up;**
- (8) **Applications pursuant to s. 5(3) of the Act (to stay a winding up or discharge an administration order or for directions) where a voluntary arrangement has been approved; (my emphasis)**

5.2 ...

5.3 The following matters will also be heard in public:

- (1) Petitions to wind up;
- (2) Public examinations;

(2) whether the proceedings raise new or controversial points of law; or

(3) the likely date and length of the hearing;

(4) public interest in the proceedings.”

⁴ Section 14 (3) of the Insolvency Act 1986 as amended deals with cross border insolvency.

(3) All matters and applications heard by the Judge ... to be heard in private or so directed by the Judge to be heard."

The Jurisdiction of the Master

[28] The jurisdiction of the High Court in Antigua and Barbuda in Insolvency Proceedings is exercised only by a judge who may hear insolvency matters (i) in public or where directed in private; or (ii) in chambers, depending on the nature of the matter or application. Since the master exercises the authority and jurisdiction of a judge of the High Court sitting in chambers, the master has the authority to hear only those insolvency matters which may be heard by a judge in chambers. Having regard to the practice and procedure in England for administration in insolvency proceedings, it appears that the master has no jurisdiction to hear applications for judicial management orders, and applications arising from such orders relating to the judicial management proceedings.

[29] Although the claims of Mr. and Ms. Ho-Tack pre-dated the judicial management order, the claims and the default judgments were affected by section 61 (4) of the **Insurance Act** which states:

"Where an application is made under this section for an order in respect of a company, all actions and the execution of all writs, summonses and other processes against the company shall, by virtue of this section, be stayed and shall not be proceeded with, without the prior leave of the court." (My emphasis)

[30] BAICO's Judicial Manager did raise the matter of section 61(4) in the proceedings before the master and sought to apply it to Mr. and Ms. Ho-Tacks claims, default judgments, and applications while at the same time asking for the default judgments to be set aside.

[31] Once the application for judicial management was filed, the request for default judgment should come to a halt where it was filed after or at the same time as the application. Even where the default judgment was entered before the application for the appointment of a Judicial Manager was filed, the further proceedings in both claims would be frozen upon the application for the appointment of a Judicial

Manager being filed since the two claims were proceedings in which a company under judicial management is the defendant/judgment debtor. Consequently, in order to proceed after obtaining their default judgments Mr. and Ms. Ho-Tack were obligated to make an application to the Judge in the judicial management proceedings.

[32] Though BAICO's Judicial Manager was authorized by paragraph 12 of the order appointing him to "defend any action or other legal proceedings which relate to [BAICO's] property ...and which it is necessary to bring or defend for the purpose of effectually discharging his role as Judicial Manager" paragraph 12 of the order specifically stated that this was "Subject to the provisions of 61(4)". Paragraphs 13 and 14 of the appointment order states:

"[13] The Judicial Manager in carrying out his duties and responsibilities may apply for directions from this Honourable Court from time to time, including any application as may be required for the amendment of this Order.

[14] The Judicial Manager shall perform such other duties and carry out such other directives as the Court may from time to time order."

It must be noted also that section 62(6) of the **Insurance Act** states that "The court shall from time to time issue to the Judicial Manager directions regarding the powers and duties of the Judicial Manager as it considers necessary." ⁵

[33] So it would seem that the Judicial Manager also had to obtain directions and leave of the Judge to proceed as he did because without that leave his application would be an invitation to the respondents Mr. and Ms. Ho-Tack to flout the order and disobey section 61(4).

[34] The master dealt with the applications as if BAICO was not under judicial management. There are Rules governing applications made during the currency or pendency of judicial management proceedings under the English **Insolvency Rules** and **Practice Directions**. The rules in CPR 2000 do not apply to

⁵ Section 14 (3) of the English Insolvency Act states that "The administrator may apply to the court for directions in relation to any particular matter arising in connection with the carrying out of his functions."

insolvency proceedings save for where other enactments specifically state that they should apply. Rule 7.2 to 7.9 provide for the specific form, content, making, filing and service of insolvency applications.

[35] The application of BAICO's Judicial Manager like the applications of Mr. and Ms. Ho-Tack, was made in keeping with Part 11 of CPR 2000 when it ought to have been made by way of an "ordinary application" in Form 7.2 properly headed or titled in accordance with Rule 7.26 of the English **Insolvency Rules and Practice Direction**.⁶

[36] Moreover, there are different considerations apart from those under Part 13 of CPR 2000 that the Judge would have to take into account, bearing in mind the primary role of the Judicial Manager under the **Insurance Act**, the object of judicial management, and the safeguards built into the judicial management procedure for creditors of BAICO to prove BAICO's indebtedness to them.

[37] I note that Chapter 10 of the **Insolvency Rules 1986**, Section B establishes the machinery for proving the debt of a company in administration. Rule 2.72 states:

"SECTION B: MACHINERY OF PROVING A DEBT]
2.72.— Proving a debt

(1) A person claiming to be a creditor of the company and wishing to recover his debt in whole or in part must (subject to any order of the court to the contrary) submit his claim in writing to the administrator.

(2) A creditor who claims is referred to as "proving" for his debt and a document by which he seeks to establish his claim is his "proof".

(3) Subject to the next paragraph, a proof must –

(a) be made out by, or under the direction of, the creditor and authenticated by him or a person authorised in that behalf; and

(b) state the following matters–

(i) the creditor's name and address;

(ia) if the creditor is a company, its registered number;

(ii) the total amount of the creditor's claim (including value added tax) as at the date on which the company entered administration

⁶ See Footnote 10 and paragraph 4 of the new Practice Direction for how all documents are to be headed as from the 23rd February, 2012.

(or, if the company was in liquidation when it entered administration, the date on which it went into liquidation), less any payments made after that date in respect of the claim, any deduction under Rule 2.84 and any adjustment by way of set-off in accordance with Rule 2.85;

(iii) whether or not the claim includes outstanding uncapitalised interest;

(iv)-(v) ...

(vi) particulars of how and when the debt was incurred by the company;

(vii) particulars of any security held, the date on which it was given and the value which the creditor puts on it;

(viii) details of any reservation of title in respect of goods to which the debt refers; and

(ix) the name, address and authority of the person the proof (if other than the creditor himself).

(4) There shall be specified in the proof details of any documents by reference to which the debt can be substantiated; but (subject as follows) it is not essential that such document be attached to the proof or submitted with it.

(5) The administrator may call for any document or other evidence to be produced to him, where he thinks it necessary for the purpose of substantiating the whole or any part of the claim made in the proof."

[38] In **Re Atlantic Computer Systems plc**⁷ and **Innovate Logistics Limited (in administration)**⁸ the Court gave guidance concerning the other principles that the Judge should apply when considering whether to stay Mr and Ms Ho-Tack's subsisting judgments and claim or allow the Judicial Manager to proceed as prayed in BAICO's application.

[39] Despite the fact the fact that BAICO's application was irregularly brought by the Judicial Manager, Rule 7.55 of the English **Insolvency Rules 1986** states that "No insolvency proceedings shall be invalidated by any formal defect or by any irregularity, unless the court before which objection is made considers that substantial injustice has been caused by the defect or the irregularity, and that the injustice cannot be remedied by any order of the court."

⁷ [1992] Ch 505 at pages 542 to 544

⁸ [2008] EWCA Civ 1261

- [40] Consequently, I hold that the application to set aside the default judgments, notwithstanding its procedural defects, formed part of the judicial management proceedings which a master had no jurisdiction to determine under the English **Insolvency Practice Direction** paragraph 5: Distribution of Business. The learned master ought to have referred the application to be heard by a Judge in public. I therefore would allow the appeal not on the substantive grounds of appeal, but on the basis that the learned master had no jurisdiction to make the order that she did make.
- [41] Section 33 of the **Eastern Caribbean Supreme Court Act** Cap. 143 gives the Court of Appeal the power to confirm, vary, amend or set aside the master's order, or to make any order which should have been made as the nature of the case may require, or to make any order in such terms as the Court of Appeal thinks just, notwithstanding that the ground for allowing the appeal is not specified in the notice of appeal. The Court of Appeal in principle may exercise this power where the parties in the appeal had the opportunity to address the ground for allowing the appeal. As previously stated, the issue concerning the jurisdiction of the master was canvassed by us at the hearing of the appeal.
- [42] In the premises, the result would be that the appeal is allowed. Paragraph 2 of the master's order which dismissed the Judicial Manager's application to set aside the default judgments is set aside. The master made no order as to costs in the court below.

[43] Although the successful party is generally entitled to costs under CPR 64.6, I would make no order as to costs because of the conduct of the Judicial Manager in pursuing the application before the master outside of the judicial management proceedings and without the directions or the leave of the Judge.

Ola Mae Edwards
Justice of Appeal

I concur.

Sir Hugh A. Rawlins
Chief Justice

I concur.

Errol Thomas
Justice of Appeal [Ag.]