

GRENADA

IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. GDAHCV2012/0347

BETWEEN:

MADONNA NELSON

Claimant

and

BRITISH AMERICAN INSURANCE COMPANY

Defendant

Appearances:

Mrs. Celia Edwards, Q.C. for Claimant
Mr. James Bristol for Defendant

2012: June 28
July 20

JUDGMENT

- [1] **ELLIS, J.:** By Notice of Application filed on 23rd February 2011, the Defendant seeks leave to appeal the judgement of Madam Justice Price Findlay dated 15th February 2011 wherein the learned Judge granted leave to the Claimant to file suit against the Defendant. The Defendant also seeks an order that execution of the said judgement be stayed pending the hearing of the appeal. The grounds of that application are set out in the body of the application which is supported by affidavit of Reuben M. John, Judicial Manager of the Defendant, filed on even date.
- [2] Paragraph 3 of the Affidavit states the grounds upon which the decision of the learned Judge is being appealed. *Inter alia*, the Defendant claims that:
1. In the exercise of her discretion the Judge failed to take into account a number of matters:

- i. That the Defendant is insolvent and was placed under judicial management by Court Order for that reason;
 - ii. That judicial management will allow the Defendant to reorganise its affairs which will benefit all creditors including the Claimant;
 - iii. That the Defendant's action may result in the forced liquidation of the Defendant which is not in the interests of the creditors as the plans to preserve the Defendant's business will be jeopardized;
 - iv. The Defendant's action may prejudice the financial interests of all creditors and will have serious financial implications for the Eastern Caribbean Currency Union;
 - v. That the Claimant's action may result in a flood of claims.
2. In the exercise of her discretion, the Judge considered matters which she ought not to have taken into account including:
 - i. That the Claimant is elderly and sick and needs the money;
 - ii. That the Claimant's position is unique compared to other policy holders;
 - iii. That the Claimant would have been advised by her lawyers that she risked receiving only 10 cents on each dollar invested despite which she was still willing to pursue her claim;
 3. That the Defendant has a realistic prospect of success on the appeal;
 4. The case raises issues of importance upon which further argument and a decision of the Court of Appeal would be a public advantage.

[3] The Claimant opposes this application and by affidavit in support filed on 26th October 2011 by Yvette Nelson, lawful attorney for the Claimant. Her grounds are set out at paragraph 5 of the Affidavit. She states that the learned Judge's decision was correct and that:

- i. That there were no allegations before the Court that the Defendant was unable to pay its debts or as to the reasons why the judicial manager was appointed;

- ii. That since the Defendant put before the Court evidence setting out a plan for reinvigorating the Defendant there is no evidence that anything was done in respect of that Plan;
- iii. No evidence was put before the Court to show what steps were taken to put anything in place to recoup or reorganise the assets of the Defendant Company;
- iv. No evidence was put before the Court to show that the action of the Claimant would lead to the premature liquidation of the Defendant or that it would affect the efforts to salvage the business of the Claimant;
- v. That there has been no flood of litigation since the filing of this action.

[4] The Claimant's Counsel also states that it was proper for the Judge to take into account the unique circumstances of this case. The Claimant's position is that she is not an ordinary creditor in that the contract which she entered into with the Defendant was void *ab initio* and it lay within the unique information of the Defendant to know that. In accepting the Claimant's money knowing that she did not meet the criteria under the annuity contract, the Defendant acted wrongfully and this created unique circumstances which the Court was entitled to take into account.

[5] The Claimant states that the Defendant has no realistic prospect of success in the circumstances. She states that no prejudice arises for the Defendant if the action is allowed to proceed because in the event that the Defendant is unable to satisfy the judgement there is recourse to the Rules and the substantive law to handle that situation.

[6] The Claimant also resists the application for stay and seeks a payment into Court of the sum of \$50,000.00 in the alternative. That sum represents amount paid by the Claimant under the contract of annuity made between the Claimant and the Defendant on 14th December 2007.

LEAVE TO APPEAL

- [7] It is settled law that permission to appeal will be given only where either:
1. The court considers that the appeal would have a realistic prospect of success; or
 2. There is some other compelling reason why the appeal should be heard.
- [8] Lord Woolf in **Swain v Hillman** [2001] 1 All E.R. 91 stated that a real prospect of success means that the prospect of success must be realistic rather than fanciful. The Court is not required to analyse whether the grounds of the proposed appeal will succeed but merely whether there is a real prospect of success.
- [9] The Claimant posits that the Defendant failed to put before the learned Judge any or sufficient evidence to demonstrate that the Defendant was unable to pay its debts or as to the reasons why the judicial manager was appointed. The Court is of the view that paragraphs 4 and 5 of the affidavit filed on 30th November 2010 and paragraphs 9, 10, 11 and 12 of the affidavit filed on 1st December 2009, detail the gravity of the situation.
- [10] The two deponents gave sworn testimony that:
- “4. The proposed course of action for salvaging the business of the Defendant as contained in my said affidavit would safeguard the interests of policyholders whereas, if the Defendant is to be liquidated, and its assets disposed of, its policyholders will receive approximately ten (10) cents for each dollar invested. This, in my judgment, will have serious financial implications for the East Caribbean Currency Union (ECCU) as many financial institutions have invested heavily in the Defendant.
 5. Should the Claimant be granted leave to proceed with her action resulting in a judgment then she will have a right to apply for a winding-up order against the Defendant and such winding-up will jeopardize the plans of the Eastern Caribbean Governments

through their Judicial Managers to preserve the business of the Defendant."

- "9. It is necessary to sell the said property insurance portfolio, among other reasons stated in the Report, to secure continuing re-insurance coverage for that portfolio and all policyholders therein. There are insufficient funds presently available to the BAICO to maintain such re-insurance coverage in the short-term and thus property insurance policyholders will be best served by transfer of such coverage to another existing insurance company that can provide adequate re-insurance coverage. It is further recommended that proceeds of the sale of the said property insurance portfolio be secured by the Eastern Caribbean Judicial Managers and the Administrator collectively to preserve same for transfer as an asset to the proposed new company. Further details of the proposed property portfolio sale are contained in the Report.
10. It is my professional opinion, based upon the knowledge obtained by me as Judicial Manager of the Branch, that the recommendation contained in the Report is the option most advantageous to the general interests of the policyholders of the BAICO, with particular reference to the Branch and other branches of BAICO within the Eastern Caribbean.
11. I have reviewed the other options in Section 44(1) (b) and (c) of the Act and it is further my professional opinion that any approach other than that recommended in the Report would ultimately result in the immediate winding up of BAICO such that policyholders and annuitants would immediately lose all insurance benefits and would ultimately recover approximately ten cents for each dollar due or becoming due to them by the Respondent company.

12. In comparison, the recommendations in the Report will provide policyholders and annuitants at a minimum with a real potential, in both the short-term and in the long-term, to recover a greater portion of any capital investments by way of existing investments, alternative instruments and/or equity; and would also provide for continued insurance coverage of all policyholders with the proposed new company and/or other existing insurance company.”

[11] Further, it is clear that the purpose of the moratorium imposed by paragraph 2 (d) of the Court Order dated 4th August 2009 is to give the court appointed judicial manager time to carry out his prescribed duties.

[12] In any event, in considering an application for leave to commence legal proceedings against a company under judicial management, a judge must consider if granting leave would be likely to impede the purpose of judicial management. If the answer is no and leave will not affect the purpose for which the administrative order was made, then leave should be given. A balancing exercise must be conducted; and the interests of the creditors and **in this case also the policyholders** must be weighed against the interests of the Claimant. The balance and the weight to be given to factors to be taken into account is the gravamen of the Defendant's appeal, and while the Court cannot say it will surely succeed on appeal, there is a real prospect of success.

[13] One of the central issues of dispute between the parties is whether the learned Judge was entitled to consider the Claimant's position as unique compared to other creditors/policyholders. The Claimant states that the contract of annuity is void *ab initio* having been obtained by fraud and that the payment made by the Claimant is held by the Defendant on trust for her. Assuming that the Claimant is able to make out her case, the declaration of a remedial constructive/implied trust in favour of the Claimant is one of the remedies which may be ordered.

Papamichael v National Westminster Bank PLC [2003] EWHC 164.

- [14] Whether in such circumstances a possible restitutory remedy is likely to fall within the category of an “exceptional claim” which would justify a lifting of the moratorium is arguable and given the state of the authorities on this point, the Court cannot conclude that the Defendant’s prospects are fanciful.
- [15] This leads the Court to the second limb in **Swain v Hillman**. The Courts have also shown that even hopeless appeals may be allowed to proceed where the area of law in question is the subject of considerable controversy. **Beedell v West Ferry Printers Ltd. (2001) The Times Apr, 2001.**
- [16] Counsel for Claimant agrees that local jurisprudence could well benefit from an appellate review and adjudication on the legal points which arise in this matter but states that this is not the time because the legal position in this case is so clear.
- [17] The Court believes however that there are compelling reasons why this appeal should be heard.
- i. There is no statute prescribing the factors to be taken into account when considering leave to file proceedings in such circumstances. It is clear that in the Eastern Caribbean there is a significant dearth in judicial authorities as regards the relevant legal issues which arise here.
 - ii. One of the main questions which will no doubt be fully ventilated in this appeal will be whether on the facts of this particular case, exceptional circumstances arose which gave rise to a remedial trust in favour of the Claimant and which would entitle the Claimant to exclude the sum due to it from the *pari passu* distribution among the Defendant’s creditors. This Court is not aware of any judicial or other authority in the region on the point. Whether a remedial trust would arise in the circumstances and whether this would constitute exceptional circumstances are matters which require clarification and edification by an appeal court.
 - iii. That the judicially managed Defendant in question is an insurer gives rise to its own peculiar considerations which also no doubt will be fully examined upon appeal.

iv. The Court cannot purport to ignore orders which have been made in relation to this very Defendant. There is no question that this Defendant has been put under judicial management in Grenada and that this has mirrored the position throughout the region. Indeed, this is a peculiar matter which has implications for a multiplicity of third party interests.

[18] For these reasons, the Court is of the view that the Defendant should be given leave to appeal the decision of Price Findlay J.

STAY OF PROCEEDINGS – CPR Part 62.19

[19] Whether this Court should exercise its discretion to grant a stay of execution of judgment pending the hearing of an appeal against the judgment depends upon all the circumstances of the case but the critical factor is the risk of injustice. **Hammond Suddard Solicitors v Agrichem International Holdings Ltd. 2011 EWCA Civ 1915.**

[20] The Court must consider what are the risks of the appeal being stifled if the stay is refused? If the stay is granted and the appeal fails, what are the risks that the Respondent will be unable to enforce the judgment? If a stay is refused and the appeal succeeds and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover?

[21] The Court is of the view that if a stay is not granted, it will have the effect of making any appeal nugatory. Further if the appeal fails, the Claimant would then be clear to initiate her action. Any prejudice which she suffered as a consequence of the delay could be recovered as part of her claim. The Court is satisfied that a stay of the judgement of Madam Justice Price Findlay should be granted.

PAYMENT INTO COURT - Part 26.1 (4) (d)

[22] Having considered the nature of the matter, the Court is also satisfied that this is not an appropriate case in which the Court should impose a condition under CPR Part 26.1 (4) (d), to order the payment of money into Court pending the hearing of

the appeal. The Court has considered the concerns of the Claimant. However there is no question that this Company is currently under judicial management. Imposing such a condition could, (given the Claimant's own concerns about liquidity of the Defendant) potentially impact the Company's status. In addition, given the stage of the proceeds (no Claim has actually been lawfully issued by the Claimant as yet) such a condition would, in the Court's view, be unduly oppressive.

[23] The Court therefore orders as follows:

1. The Defendant is hereby granted leave to appeal the judgment of Madam Justice Price Findlay dated 15th February 2011.
2. That the execution of the said judgment is stayed pending the hearing and determination of the appeal.
3. The Defendant shall file a Notice of Appeal on or before 28th July 2012 and shall duly prosecute the appeal failing which the stay will be automatically lifted.



Vicki Ann Ellis
High Court Judge