THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

CLAIM NO. : ANUHCV2009/0323

BETWEEN:

MARLON HO-TACK

Respondent/Applicant

-and-

BRITISH AMERICAN INSURANCE COMPANY LTD.
(In Judicial Management)

Applicant/ Respondent

-and-

CLEVELAND SEAFORTH (Judicial Manager)

Applicant/ Respondent

AND

CLAIM NO.: ANUHCV2009/0325

BETWEEN:

ALICE HO-TACK

Respondent/Applicant

-and-

BRITISH AMERICAN INSURANCE COMPANY LTD.
(In Judicial Management)

Applicant/ Respondent

-and-

CLEVELAND SEAFORTH (Judicial Manager)

Applicant/ Respondent

Appearances:

Dr. David Dorsett for the Applicants/Defendants
Mr. Hugh Marshall Jr. for the Respondent/Claimants

……..
2012: August 21
September 10
……..

RULING

[1] Thomas W.R. Astaphan J.: These are Applications, filed by the Applicants in both matters on 23rd February, 2010 and 20th August 2012, seeking (a) Leave for the hearing of Applications to set aside Default Judgments in both cases, entered on the 30th July, 2010, (b) by the Ho-Tacks for leave to bring Garnishee Proceedings against British American Insurance Company Ltd. (In Judicial Management) [hereinafter referred to as "British American"], and (c) A Stay of the Ho-Tack proceedings as against British American. Both sides in each case sought Leave. The Ho-Tacks, to bring Garnishee proceedings, and British American to make the Applications to set aside the Default Judgments.

[2] On application by Mr. Marshall for Leave, Dr. Dorsett consented to Leave being granted to the Ho-Tacks, in both cases, to bring Garnishee proceedings, but stated that the substantive Application will be resisted. After due consideration of all the circumstances of this case, including the fact that British American is under Judicial Management, Leave was granted by this Court pursuant to Section 61 (4) of *The Insurance Act*.

[3] On application by Dr. Dorsett for Leave, Mr. Marshall consented to the grant of Leave to bring Applications to set aside the Default Judgments, and the Court, after due consideration of all the circumstances of this case, including the fact that British American is under Judicial Management, granted Leave, pursuant to Section 61 (4) above.

[4] *The Facts*

(a) On 10th February, 2004, - at least initially, according to the Statement of Claim, and renewed on 10th January, 2008 according to the exhibited 'Schedule of Benefits' – the sum of EC$ 100,000.00 was deposited by Mrs. Ho-Tack with British American. The transaction was referred to in the documents as a " Flexible Premium Annuity II" and as a "…long term Retirement Annuity contract" and it was given the number "BTG004443": Per letter dated February 1st 2008 to Mrs. Ho–Tack from one Geraldine Ramdoo, Manager of British American.

(b) The contract stipulated that interest would be at the "…rate of 8.5% per annum on premiums of One Hundred Thousand Dollars ($100,000.00) for a period of five years".

(c) It is further stipulated therein that, if Mrs. Ho-Tack "…choose[s] to withdraw in whole or in part any funds prior to the stipulated period of five (5) years, your deposits plus accrued interest will be subject to the following charges…" A table sets out the surrender charges for withdrawals in each of Policy Years 1 to 5 as being 25%, 20%, 15%, 10%, 5%, and 0% respectively.

(d) In the contract it is provided that "At any time after this Policy comes into force and before annuity payments commence, this Policy may be surrendered for cash." The cash surrender value is set out in sub-paragraph (c) above.

(e) On 28th May, 2009 Mrs. Ho-Tack made demand to surrender her Policy for cash. Her Policy Term had not yet expired so she was subject to the requisite "charges for withdrawals" set out above. British American did not pay Mrs. Ho-Tack any money at all.

(f) On May 27, 2004 Mr. Ho-Tack deposited with British American the sum of US$ 200,000.00 (United States Currency two hundred thousand dollars) under an identical "Flexible Premium Annuity II – US" Policy.

(g) On 4th February, 2009 Mr. Ho-Tack made demand to surrender his Policy for cash. It too was subject to the same "withdrawal charges" as Mrs. Ho-Tack's Policy was. British American did not pay Mr. Ho-Tack any money at all. In the meantime Mr. Ho-Tack's Policy came to Term on 27th May 2009, and, no money having been paid prior to that date, the full surrender value is due and payable to him.

(h) On June 16th, 2009 Mr. and Mrs. Ho-Tack filed separate Claims against British American demanding the return of their monies together with contractual interest. These Claims were duly served on British American on 25th June, 2009.

(i) On 30th July, 2009, at either 11:00 a.m. or 1:00 p.m., - both Counsels at this hearing agreed that they were filed at 11:00 a.m. but, in appeal cases HCVP 2010/010, *Marlon Ho-Tack v British American Insurance Company Limited, (In Judicial Management) and Cleveland Seaforth* , and HCVP 2010/013, *British American Insurance Company Limited and Cleveland Seaforth v Marlon Ho-Tack and Alice Ho-Tack* [Eastern Caribbean Supreme Court Website], at page 6, paragraph 7, Madam Justice Edwards states: "On 30th July 2009, a Request for Entry of Judgment in Default of

Acknowledgement of Service was filed by Mr. and Ms. Ho-Tack's attorney-at-law at 1:00 p.m."- this time difference does not impact any of the issues in this case as it is undisputed that the Application to appoint a Judicial Manager was filed *after* the Request for the Default Judgments, - Requests for the entry of Judgment in Default of Acknowledgement of Service were filed in each Claim, and Judgments in Default were issued out of the Registry of the High Court of Antigua and Barbuda.

(j) Mr. Ho-Tack entered Default Judgment in the full face value of his Deposit in the Eastern Caribbean Currency equivalent of, including Costs, E.C $801,753.44, (the equivalent of U.S. $ 200,000.00 together with contractual interest and costs). Mrs. Ho-Tack entered Judgment in the full face value of her Deposit, including Costs, of E.C. $ 114,783.24.

(k) Later on the same day at 2:55p.m. an Application was filed for the Appointment of a Judicial Manager under the Insurance Act 2007.

[4] The following Statutory provisions and CPR rules are of importance to this case:

Section 61(4) of *The Insurance Act 2007*, states as follows:

> "(4) Where an application is made 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 unless the court directs otherwise."*[Italics supplied]

[5] Section 58 of the *Interpretation Act,* CAP 224 of the Laws of Antigua and Barbuda, states as follows:

> "(58) …..;
> "day" means a full day of twenty-four hours, and when used in relation to any act or omission or occurrence shall commence at the first moment of the day on which such act, omission or occurrence is done or happens after midnight of the previous day and shall end at the last moment of the day on which such act, omission or occurrence as aforesaid is done or happens before midnight of such last mentioned day as aforesaid;"

[6] *Civil Procedure Rules 2000*, 3.7 (2), 11.6 (2), 12.4, 13.2 (1) (a) and 13.3 (1) state as follows:

"3.7 (2) A document is filed on the day when it is received at the court office or, if it is received at a time when the court office is closed, on the next day on which the court office is open."

"11.6 (2) An application may be made orally if –

a. the court dispenses with the requirement for the application to be made in writing; or.."

"12.4 The court office at the request of the claimant must enter judgment for failure to file an acknowledgement of service if –

(a) the claimant proves service of the claim form and statement of claim;

(b) the defendant has not filed –

(i) an acknowledgement of service; or
(ii) …;

(c) the defendant has not satisfied in full the claim on which the claimant seeks judgment;

(d) the only claim is for a specified sum of money, apart from costs and interest, and the defendant has not filed an admission of liability to pay all of the money claimed together with a request for time to pay it;

(e) the period for filing an acknowledgement of service under rule 9.3 has expired; and

(f) (if necessary) the claimant has the permission of the court to enter judgment."

"13.2 (1) The court must set aside a judgment entered under Part 12 if judgment was wrongly entered because in the case of –

a) A failure to file an acknowledgement of service – any of the conditions in rule 12.4 was not satisfied; or
b) ….;

(2) The court may set aside judgment under this rule on or without an application."

"13.3 (1) If rule 13.2 does not apply, [as it does not in this case], the court may set aside a judgment entered under part 12 only if the defendant-

(a) applies to the court as soon as reasonably practicable after finding out that judgment had been entered;

(b) gives a good explanation for the failure to file an acknowledgement of service or a defence as the case may be; and

(c) has a real prospect of defending the claim."

[7] *THE ISSUES*

(i) Whether or not the definition of the word "day" in the *Interpretation Act*, when read together with Section 61 (4) of *The Insurance Act* and CPR 3.7 (2), voids the Default Judgments as is submitted by British American, on the basis that all things "…filed on a given day are deemed to have been filed at the first moment after mid-night of the preceding day… and therefore were filed concurrently."

(ii) Whether or not Mrs. Ho-Tack Default Judgment is bad, and therefore void, because it is entered for an incorrect amount, as submitted by British American.

(iii) The issues of Leave to commence this Application by British American, and to file Garnishee proceedings by the Ho-Tacks have been resolved by the parties consenting, each to the other's Application for Leave, *and this Court after due consideration,Granting them Leave to do so pursuant to Section 61 (4) of The Insurance Act.*

(iv) Whether or not the fact that Mr. Ho-Tack assigned the benefit of his Policy to RBTT Bank Caribbean Ltd. to secure a loan makes the Default Judgment against British American "illegal", as is submitted by British American, because British American "…cannot properly pay the Claimant…" the proceeds of that Judgment when the Claimant has, by contract, assigned the benefit of the Policy to RBTT Bank Caribbean Limited.

(v) Whether or not British American have met the requirements of CPR 13.3.

[8] Dr. Dorsett filed written submissions namely; "Applicant's Authority For Hearing To Set Aside Default Judgment" on the 21st August, 2010, and "Applicant's Supplemental Oral Submissions" on 23rd August, 2012. I have read those submissions and the Authorities set out therein, and I have given due consideration to all of them.

[9] At the hearing, Dr. Dorsett submitted the following, all of which I have duly considered:

(a) "The principal ground I am pursuing for the Default Judgment to be set aside is "exceptional circumstances"; the exceptional circumstances being that the judgment is contrary to law. The proposition is that when a judgment is contrary to law, it cannot stand. This was applied in ***Piggott v Buntin***[1]*,* in which I appeared." [In that case the Default Judgment was premised on a repealed Act, and there was therefore no legal basis for the Judgment at all.]

(b) Dr. Dorsett submitted that the conjoint effect of Section 61 (4) of The Insurance Act, Section 58 of the Interpretation Act and Part 3.7 (2) of CPR 2000 is this:

> "Anything done on that day [30th July, 2009], is deemed to have been done at the start of that day. So that, even though the Application (sic) [Request] for Default Judgment was filed at 11:00 a.m. on 30th July, 2009, [I have already dealt with the time of the filing], and the Application for a Judicial Manager to be appointed was filed at 2:55p.m. on 30th July,2009.." both are deemed to have occurred concurrently. Therefore, once the Application for the appointment of the Judicial Manager was filed the concurrent filing of the Request for Default Judgment was prohibited by Section 61 (4) of The Insurance Act, and was therefore wrongly entered, as it was contrary to Law, he submits.

(c) With respect to the viability of this submission, I quote from the Appeal case in this matter– Per EDWARDS, J.A. at paragraphs [29] to [31]

> "[29] Although the claims of Mr. and Mrs. Ho-Tack pre-dated the judicial management order, the claims and the default judgments were affected by section 61 (4) of the Insurance Act..; [Emphasis in original]
> [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 Mrs. 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*

[1] [Appeal No. 11 of 2008, 26th August, 2008]

> *application*. [Italics supplied]. 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 defendant/judgment debtor. Consequently, in order to proceed *after* [Italics supplied] obtaining their default judgments Mr. and Mrs. Ho-Tack were obligated to make an application to the judge in the judicial management proceedings."

[10] It is clear from that decision that the Court of Appeal took the view that the actual time of filing was the operative time, and not the Legal Fiction which Dr. Dorsett proposes that this Court adopts.

[11] Further, it would make utter chaos of the judicial system if every document filed, everything done on a given day, all filed and done at different times during that day, were deemed to have been filed and done concurrently. That could never have been the intention of any of the framers of Laws, Rules and Policies which govern such matters. Were that the case, every High Court Registry in the O.E.C.S would just date-stamp documents, leaving out the time of filing, because, regardless of time of filing, they would be deemed to have been filed and done concurrently – at the first moment after mid-night of the preceding day. This submission fails. I hold it to be the Law that documents are filed at the actual time when they are filed, unless the CPR 2000, or any other Law states otherwise.

[12] Dr. Dorsett further submits "That the Default Judgment [Mr. Ho-Tack's] is illegal because the Claimant is not the assignee of the policy which founded the cause of action upon which the Default Judgment issued. The Defendant cannot properly pay the Claimant." To do so would be to expose British American to liability to RBTT on the assignment. There is a letter in evidence from the Assignee which is critical to this submission, and I shall now set it out in full –

> "17 March 2009
>
> The Manager
> British American Insurance Co. Ltd
> Redcliffe Street
> St. John's
> Antigua

Dear Sir/Madam,

Re: Marlon Ho-Tack/Alice Ho-Tack
Plan Name: Flexible Premium Annuity II-US
Policy # BIU00142

The captioned policy is presently held as security for a loan facility with RBTT BANK CARIBBEAN LTD. The Clients have advised us of their intention to liquidate their loan facility from the proceeds of the above policy, due to changes in their financial position. As such they wish to cash surrender the captioned policy. Given that the policy is assigned to RBTT BANK CARIBBEAN LTD, (sic) we hereby grant permission for the policy to be surrendered, contingent upon, [emphasis in original], (sic) the proceeds of the policy being paid directly to RBTT BANK CARIBBEAN LTD.

Please note that these instructions should in no way prejudice the rights of RBTT BANK CARIBBEAN LTD under our assignment agreement.

Please indicate your agreement with our instructions and acknowledgement of receipt of the original policy by signing and returning the attached duplicate letter.

Yours truly

[signed]

Marlon Rawlins
Country Head
Cc Marlon Ho-Tack/Alice Ho-Tack"

[13] I do not see how Dr. Dorsett prays this assignment in aid of his case. The Assignee has given permission for the Policy to be surrendered. There is a condition attached to that permission. It is that the proceeds are to be paid to the Assignee to liquidate the loan. Having due Notice of the Assignment, British American is obliged to pay the proceeds of the Policy to RBTT BANK CARIBBEAN LTD., regardless of the stimulant of the payment: Policy surrender, or Judgment Debt pursuant to a Default Judgment.

[14] If Dr. Dorsett is submitting, inferentially, that RBTT should be a Party to this Claim, and as such should be the "Judgment Creditor" – the Party which obtained the Default Judgment - that submission would be misguided, and it would fail.

[15] RBTT has no contract with British American. There is no nexus between them. It is only if British American purported to pay the proceeds of the Policy directly to the Ho-Tacks, notwithstanding being given the Notice of the assignment of the benefits to RBTT, that there would be an engagement between RBTT and British American. That engagement would be undergirded by the Notice given to British American by RBTT, arising out of the assignment between the Ho-Tacks and RBTT.

[16] If British American is obliged to pay on the Default Judgment they are required to pay the proceeds, not to Marlon Ho-Tack, or Alice Ho-Tack, as the case may be, but to RBTT by virtue of the assignment and their being given Notice thereof. It must not be overlooked that *RBTT gave qualified permission for the surrender of the Policy.*

[17] It may well be the case that, under the assignment RBTT has the right to stand in the shoes of the Ho-Tacks vis-à-vis the Policy. If they do have that right, they have not exercised it and, having that right does not oblige them to be a Party to the Claim. They can choose to rely on the Notice given to British American as being sufficient to ensure that their assigned rights to the benefit of the proceeds of the Policy are protected. It has been their choice. This submission is without merit. In the factual circumstances of this case, the Default Judgment is not bad, in Law or otherwise, because of the assignment of the proceeds of the Policy. In paying the Judgment Debt, British American must pay the sum to RBTT. Such payment would satisfy the Judgment Debt given the assignment of that sum by the Ho-Tacks, or at least by Marlon Ho-Tack of his policy proceeds to RBTT.

[18] It is submitted by British American that: [the] "Default Judgment in favour of [Mrs. Ho-Tack] is for an amount lawfully due. [The Default Judgment is in the sum of $114,783.24.] …the relationship between the Applicant, [British American], and [Mrs. Ho-Tack] is a contractual one and any payment that is due to [Mrs. Ho-Tack] is one pursuant to contract." Mrs. Ho-Tack is not entitled to the full face value [100,000.00 plus accrued interest] of the Policy because she surrendered it in Year 2 of the 5 year Term, thereby subjecting it to a 20% Withdrawal charge. Thus, the Judgment

being entered for the wrong amount, is bad in Law: ***Muir v Jenks***[2], "in which it was held [that] Where a Plaintiff signs a Judgment in Default of appearance for a sum in excess of that which is due to him, the defendant is entitled to have that judgment set aside, *subject to the right of the plaintiff, in a proper case, to apply to have the amount of the judgment reduced*." [Italics supplied]. Dr. Dorsett conceded that "The Court does have the inherent jurisdiction to have any proper judgment correctly quantified arithmetically." He went on to say that: "This is not applicable in this case because we submit this Default Judgment is not proper."

[19] I accept Dr. Dorsett's concession of what the Law is, to be a true statement of the Law: ***Saint Christopher Club Ltd. v Saint Christopher Club Condominiums et. al***.[3]; Watson v Fernandes[4]. I do not accept his submission that this judgment "is not proper."

[20] Mr. Marshall's oral application to correctly quantify the Judgment Debt on the Default Judgment was granted: CPR 11.6 (2). It is fair, just and equitable that Mrs. Ho-Tack be permitted to correctly quantify the arithmetic's of her Judgment. It prejudices no one. British American knows exactly how much money is due to Mrs. Ho-Tack. The error is a mere technical error which can be safely corrected without harming any party.

[21] Dr. Dorsett did say that "Equity and fairplay, all legal technicalities aside, would suggest that if the request for payout of the policy and the request for the Default Judgments were made prior to the application for the appointment of the Judicial Manager, Equity, Justice and Fairplay would compel the 100% payout. I am not relying on any legality. Just plain old conscionable behavior would require this, before the application for the appointment of the Judicial Manager." Having already Held that the Default Judgments were properly filed prior to the Application for the appointment of the Judicial Manager, it is safe to assume that Dr. Dorset would not retreat from his quoted statement of his understanding of what the Law is, because that is a correct statement of the Law. Thus, the mere technical error as to quantum in Mrs. Ho-Tack's Default Judgment may be corrected. She ought not to be defeated by any technical error which does not prejudice RBTT. In

[2] [1913] 2 KB 412
[3] Civil Appeal No. 4 of 2007
[4] [2007] CCJ 1 AJ, at [39]

fact RBTT should be satisfied that the quantum is reduced to the actual amount due so that, in the event British American has to pay out the sum, it would be the correct sum due. It would be unconscionable for the Court to permit British American, or any other Judgment Debtor for that matter, to avoid liability on a Judgment Debt where there is an error in the amount entered on the judgment, and there is no evidence that that "error" was intentional.

[22] Dr. Dorsett further submits: It [the filing of the Application], was like the Flood; when the Flood abated, all things new, legally, procedurally and otherwise."

[23] With this I agree, subject to the following: (i) Nothing which occurred *before* "the Flood" is affected by "the Flood", and (ii) the Court has powers, even *after* "The Flood", under Section 61 (4) of *The Insurance Act* to permit actions, executions of writs, summonses and other processes to continue against a company under Judicial Management. In Dr. Dorsett's scenario the Court is "Noah's Ark."

[24] Dr. Dorsett continues: "CPR 2000 r. 26.1 (6) provides that in special circumstances on the application of a party, the court may dispense with compliance with any of these rules. It is respectfully submitted that the circumstances of the instance (sic) case are "special circumstances" to which the court should have regard and to the extent that it is consistent with the overriding objective dispense with compliance with the rules." The "special circumstances" to which Dr. Dorsett refers are (i) the fact that the Company is under Judicial Management, and (ii) the fact that the company is "…a ward of the court, and (iii) the fact that the company is protected by the Courts in accordance with *The Insurance Act*. Dr. Dorsett's submission continues: "It remains a ward of the court until such time that the statutory requirements that attend to judicial management as provided by the *Insurance Act 2007* are fulfilled. All actions against it are stayed as it is a protected creature. Special dispensations and leniencies, it is respectfully submitted, must be accorded it. It is respectfully submitted that these circumstances require an especial effort be made to ensure that justice is done to the Applicant Company whilst it is in judicial management so that it is not burdened with a judgment requiring it to payment (sic) monies to persons not entitled to same (as in the case of [Mr. Ho-Tack]) and that it not be required to pay to a person more than is lawfully due (as in the case of [Mrs. Ho-Tack])."

[25] It is precisely because British American is under Judicial Management – a "ward of the Court", as Dr. Dorsett puts it- that the Judicial Manager *must* comply with the requirements of the Law and the Rules of Court. It was submitted that since Section 61 (4) of The Insurance Act stays all proceedings against the Company, the Company is not obliged to file the Application to set aside the Default Judgments "...as soon as reasonably practicable after finding out that judgment had been entered." It is not to be "…burdened with a judgment requiring it to pay monies to persons not entitled…" It must be accorded "special dispensations and leniencies," says Dr. Dorsett.

[26] The Insurance Act provides the protection which a company under Judicial Management requires: Section 61 (4). That protection is that "…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 [prospective] with, *without the prior leave of the court unless the court directs otherwise*." [Italics supplied]

[27] The above, sets out the "special dispensations and leniencies" and freezes the "burden" of a pre-application judgment by staying its execution without court approval, or any post-application actions etc. from proceeding without the prior leave of the court. What British American submits ought to be the case is, in fact and in Law, the case. Any additional "special dispensations and leniencies" must be found in Statute. None is cited by British American which expands beyond Section 61. This Court declines with respect, the invitation to exercise judicial creativity to what is in its entirety a Statutory Regime. That "creativity" is the exclusive province of the Parliament of Antigua and Barbuda.

[28] I find as a fact, and I Hold that British American has failed to meet the conjunctive requirements of CPR 13.3. (i) They have not applied "…as soon as reasonably practicable after finding out that judgment had been entered"; they have given no "…good explanation for the failure to file an acknowledgement of service." Further, they have given no good reason for the delay in filing the application to set aside the Default Judgments. Their submission that because Section 61 (4) stays all actions etc. "…there was no compelling urgency for a setting side of the judgment[s]…" is grossly unacceptable.

[29] The Company is under Judicial Management by virtue of an Order of the Court. Paragraph [12], [13], and [14] of the Order state: "[12] Subject to the provisions of section 61 (4) of the Act, the said Judicial Manager may bring or defend any action or other legal proceedings which relate to the said property belonging to BAICO and which it is necessary to bring or defend for the purpose of effectually discharging his role as Judicial Manager. [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."

[30] CPR 13.3 sets out certain requirements with respect to the setting aside of Default Judgments. The requirements are conjunctive requirements. The Order appointing the Judicial Manager does not empower him to disregard the Rules of Court. The Insurance Act does not give him any such power. The Office of Judicial Manager is a Statutory Office. It is not born until the Court, by Order upon application by the proper party, breathes life into it. It is the Statute and the Order that defines the powers of that Office.

[31] Faced with two Default Judgments which pre-existed the application for the appointment of the Judicial Manager, it was incumbent upon the holder of that Office to do one of three things: (i) He could immediately upon becoming aware of their existence, make application to the Court to set them aside; or (ii) he could satisfy them; or (iii) if he felt that Section 61 (4) stayed further proceedings on them, and as in this case, believed that they were stayed or nullities under the theory unsuccessfully expounded by British American in this case, he could seek the Court's directions as to whether his interpretation of the Law and the Rules was correct, and as to how he should proceed. This, I am the considered opinion, is very necessary by virtue of the strict obligations put on a defaulted party to a Claim by CPR 13.3.

[32] In no event can the Judicial Manager just sit back and do nothing. He is an Officer of the Court. The Company is, as Dr. Dorsett put it, "…a ward of the Court." Outside of the management functions and other specific powers given to him by the Court, and by the Insurance Act –all of

which must be exercised in accordance with the Order and The Act - the Judicial Manager is, in my considered view, obliged to seek the Court's directions on any other matter which may impact the company.

[33] Section 61 (4) is clear: a party *can* proceed against a company under Judicial Management "…*with the prior leave of the court*…" There is no infinite, invariable monolithic bar to actions against the company. They are permissible with the prior leave of the court.

[34] It is *not* for the Judicial Manager to interpret section 61 (4) as he sees fit. It is *not* for the Judicial Manager to arbitrarily decide that British American need not apply to the Court to set aside the judgments on the basis of his interpretation of the Law. It is *not* for the Judicial Manager to decide that "…there was no compelling urgency for a setting aside of the judgment[s]…"

[35] It was precisely his *duty,* immediately upon having notice of the Default Judgments, to apply to the Court for Leave to set aside the Judgments. He Manages the Company under the directions of the Court, and in accordance with the terms of the Order appointing him to the Office of Judicial Manager. He *cannot* decide that he will ignore the Rules of Court and expect the Court to countenance such conduct. It was his *duty* to seek the Court's directions in the circumstances of this case where he held a particular view of what the effect of section 61 (4) was on the Default Judgments. He ought to have sought the Court's confirmation of, and directions on that view. Once he had done so, he would have acted prudently. He did not do so.

[36] I find as a fact, and Hold as a matter of Law, that there were no "exceptional circumstances " to justify British American not complying with CPR 13.3.

[37] Mr. Marshall submits that - "a judgment is only irregular under our CPR 2000 if it is within CPR 13.2. There is no suggestion that these judgments fall within [CPR] 13.2. In all other circumstances an Applicant who seeks to set aside a Judgment must come within [CPR] 13.3. The Court has rules. The Amendment to the Rules expressly has brought it into the Court's consciousness: "exceptional circumstances". But otherwise than that, in the absence of "exceptional circumstances" an applicant must come under [CPR] 13.3"

[38] Further, Mr. Marshall submits that there has been unreasonable delay on the part of British American in applying to set aside these Judgments. The sequence of events which drives this submission is as follows: -

(a) Claim Forms and Statements of Claims filed June 16, 2009;
(b) Request for Default Judgment filed at 11:00 a.m. according to the parties, or 1:00 p.m., according to the Court of Appeal, and Application for the appointment of a judicial Manager filed at 2:55 p.m. that day;
(c) On 25th November, 2009 the Ho-Tacks filed applications seeking garnishee orders against debts due and accruing to British American;
(d) The applications named the Judicial Manager as Garnishee;
(e) On January 6, 2010 the Judicial Manager filed an Affidavit requesting that the applications be dismissed by virtue of Section 61 (4) of *The Insurance Act;*
(f) On 23rd February, 2010 the Master dismissed the Judicial Manager's application;
(g) The Judicial Manager appealed;
(h) The Court of Appeal heard the appeal on September 14, 2010, and rendered its decision on August 12, 2011, then rendered an amended and reissued decision on April 16, 2012;
(i) On 20th August 2012, British American filed its applications which are the subject-matter of this Court's decision.

[39] For this delay British American has given no reasons, says Mr. Marshall. This is unreasonable he submits, because "It cannot be said whether or not the delay is reasonable or not because the applicant has given no explanation for the delay." British American did in fact give an explanation based upon their interpretation of Section 61 (4) which I have found to be wrong in Law and therefore that explanation is not accepted.

[40] In support of the foregoing submissions, that CPR 13.3 (1) is fatal to British American's applications, Mr. Marshall cites the case of ***Kenrick Thomas v RBTT Bank Caribbean Limited***[5], and *The Caribbean Civil Court Practice 2011*, LexisNexis, page 138 to 141.

[41] I accept Mr. Marshall's submissions as being correct in Law.

[42] For the reasons stated herein, It Is Ordered That:

(i) The Applications to set aside the Default Judgments are dismissed. The Default Judgments remain valid.

(ii) Mrs. Ho-Tack is granted Leave to amend the amount on her Default Judgment to the correct amount after the application of the 20% deduction for early surrender.

(iii) Leave is granted to the Ho-Tacks to bring Garnishee proceedings against British American based upon the Default Judgments. [The judgment sum being amended by first the reduction of the face value of the deposit by 20% from E.C. $ 100,000.00 to E.C.$ 80,000.00, then the addition thereto of the contractual interest and costs, in Mrs. Ho-Tack's case].

(iv) The Ho-Tacks are to have their Costs paid by British American, pursuant to CPR part 65.

[43] I wish to record my gratitude to Dr. Dorsett and Mr. Marshall for their invaluable contribution to the Court in this case, and there professional diligence to their clients' causes.

Thomas W.R. Astaphan
High Court Judge [Ag.]

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